NORTH CAROLINA REPORTS

VOLUME 354

SUPREME COURT OF NORTH CAROLINA

17 AUGUST 2001

18 DECEMBER 2001

RALEIGH
2002

CITE THIS VOLUME
354 N.C.

This volume is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.

TABLE OF CONTENTS

THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice
I. BEVERLY LAKE, JR.

Associate Justices

SARAH PARKER
ROBERT F. ORR
MARK D. MARTIN
GEORGE L. WAINWRIGHT, JR.
ROBERT H. EDMUNDS, JR.
G. K. BUTTERFIELD

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

Former Justices

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

Clerk
CHRISTIE SPEIR CAMERON

Librarian
THOMAS P. DAVIS

ADMINISTRATIVE OFFICE OF THE COURTS

Director
JOHN KENNEDY

Assistant Director
DAVID F. HOKE

APPELLATE DIVISION REPORTER
RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTERS
H. JAMES HUTCHESON
KIMBERLY WOODELL SIEREDZKI

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	Halifax
6B	CY A. GRANT, SR.	Windsor
7A	QUENTIN T. SUMNER	Rocky Mount
7B	MILTON (TOBY) FITCH	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	JERRY BRASWELL	Goldsboro
	Third Division	
9	ROBERT H. HOBGOOD	Louisburg
	HENRY W. HIGHT, JR.	Henderson
9A	W. OSMOND SMITH III	Yanceyville
10	DONALD W. STEPHENS	Raleigh
	NARLEY L. CASHWELL	Raleigh
	STAFFORD G. BULLOCK	Raleigh
	ABRAHAM P. JONES	Raleigh
	HOWARD E. MANNING, JR.	Raleigh
	EVELYN W. HILL	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	Robert F. Floyd, Jr.	Lumberton
	Gary L. Locklear[1]	Pembroke
	Fifth Division	
17A	Melzer A. Morgan, Jr.	Wentworth
	Peter M. McHugh	Reidsville
17B	Clarence W. Carter	King
	A. Moses Massey	King
18	W. Douglas Albright	Greensboro
	Catherine C. Eagles	Greensboro
	Henry E. Frye, Jr.	Greensboro
	Lindsay R. Davis, Jr.	Greensboro
	John O. Craig III	Greensboro
19B	Russell G. Walker, Jr.	Asheboro
	James M. Webb	Whispering Pines
21	Judson D. DeRamus, Jr.	Winston-Salem
	William Z. Wood, Jr.	Winston-Salem
	L. Todd Burke	Winston-Salem
	Ronald E. Spivey	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	Sanford L. Steelman, Jr.	Weddington
	Susan C. Taylor	Monroe
22	Mark E. Klass	Lexington
	Kimberly S. Taylor	Hiddenite
	Christopher Collier	Mooresville

DISTRICT	JUDGES	ADDRESS
	Seventh Division	
25A	CLAUDE S. SITTON	Morganton
	BEVERLY T. BEAL	Lenoir
25B	TIMOTHY S. KINCAID	Hickory
	DANIEL R. GREEN, JR.[2]	Hickory
26	SHIRLEY L. FULTON	Charlotte
	ROBERT P. JOHNSTON	Charlotte
	MARCUS L. JOHNSON	Charlotte
	W. ROBERT BELL	Charlotte
	RICHARD D. BONER	Charlotte
	J. GENTRY CAUDILL	Charlotte
	ALBERT DIAZ	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
RICHARD L. DOUGHTON	Sparta
THOMAS D. HAIGWOOD	Greenville
CLARENCE E. HORTON, JR.	Kannapolis
JACK W. JENKINS	Raleigh
JOHN R. JOLLY, JR.	Raleigh
CHARLES C. LAMM, JR.	Boone
OLA M. LEWIS	Southport
RIPLEY E. RAND[3]	Raleigh
BEN F. TENNILLE	Greensboro
CARL L. TILGHMAN	Beaufort
GARY TRAWICK, JR.	Burgaw
JAMES R. VOSBURGH	Washington

EMERGENCY JUDGES

NAPOLEON BAREFOOT, SR.	Wilmington
HENRY V. BARNETTE, JR.	Raleigh
ANTHONY M. BRANNON	Durham

DISTRICT	JUDGES	ADDRESS
	ROBERT M. BURROUGHS	Charlotte
	GILES R. CLARK	Elizabethtown
	C. PRESTON CORNELIUS	Mooresville
	JAMES C. DAVIS	Concord
	ROBERT L. FARMER	Raleigh
	WILLIAM H. FREEMAN	Winston-Salem
	HOWARD R. GREESON, JR.[4]	Greensboro
	DONALD M. JACOBS	Goldsboro
	ROBERT W. KIRBY	Cherryville
	JAMES E. LANNING	Charlotte
	ROBERT D. LEWIS	Asheville
	JAMES D. LLEWELLYN	Kinston
	JERRY CASH MARTIN	King
	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

C. WALTER ALLEN	Fairview
HARVEY A. LUPTON	Winston-Salem
LESTER P. MARTIN, JR.	Mocksville
HOLLIS M. OWENS, JR.	Rutherfordton

SPECIAL EMERGENCY JUDGES

MARVIN K. GRAY	Charlotte
HOWARD R. GREESON, JR.	High Point
JOHN B. LEWIS, JR.	Farmville
DONALD L. SMITH	Raleigh

1. Appointed and sworn in 29 April 2002 to replace Dexter Brooks who died 5 March 2002.
2. Appointed and sworn in 1 May 2002 to replace L. Oliver Noble, Jr. who retired 1 February 2002.
3. Appointed and sworn in 26 April 2002.
4. Appointed and sworn in 1 February 2002.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	GRAFTON G. BEAMAN (Chief)	Elizabeth City
	C. CHRISTOPHER BEAN	Edenton
	J. CARLTON COLE	Hertford
	EDGAR L. BARNES	Manteo
	AMBER MALARNEY	Wanchese
2	JAMES W. HARDISON (Chief)	Williamston
	SAMUEL G. GRIMES	Washington
	MICHAEL A. PAUL	Washington
	REGINA ROGERS PARKER	Washington
3A	DAVID A. LEECH (Chief)	Greenville
	PATRICIA GWYNETT HILBURN	Greenville
	JOSEPH A. BLICK, JR.	Greenville
	G. GALEN BRADDY	Greenville
	CHARLES M. VINCENT	Greenville
3B	JERRY F. WADDELL (Chief)	New Bern
	CHERYL LYNN SPENCER	New Bern
	KENNETH F. CROW	New Bern
	PAUL M. QUINN	New Bern
	KAREN A. ALEXANDER	New Bern
4	LEONARD W. THAGARD (Chief)[1]	Clinton
	WAYNE G. KIMBLE, JR.	Jacksonville
	PAUL A. HARDISON	Jacksonville
	WILLIAM M. CAMERON III	Richlands
	LOUIS F. FOY, JR.	Pollocksville
	SARAH COWEN SEATON	Jacksonville
	CAROL A. JONES	Kenansville
	HENRY L. STEVENS IV	Kenansville
5	JOHN J. CARROLL III (Chief)	Wilmington
	JOHN W. SMITH	Wilmington
	ELTON G. TUCKER	Wilmington
	J. H. CORPENING II	Wilmington
	SHELLY S. HOLT	Wilmington
	REBECCA W. BLACKMORE	Wilmington
	JAMES H. FAISON III	Wilmington
6A	HAROLD PAUL MCCOY, JR. (Chief)	Halifax
	ALMA L. HINTON	Halifax
6B	ALFRED W. KWASIKPUI (Chief)	Jackson
	THOMAS R. J. NEWBERN	Aulander
	WILLIAM ROBERT LEWIS II	Winton
7	JOHN L. WHITLEY (Chief)	Wilson
	JOSEPH JOHN HARPER, JR.	Tarboro
	JOHN M. BRITT	Tarboro
	PELL C. COOPER	Nashville

DISTRICT	JUDGES	ADDRESS
	ROBERT A. EVANS	Rocky Mount
	WILLIAM G. STEWART	Wilson
	WILLIAM CHARLES FARRIS	Wilson
8	JOSEPH E. SETZER, JR. (Chief)	Goldsboro
	DAVID B. BRANTLEY	Goldsboro
	JAMES W. COPELAND, JR.	Goldsboro
	LONNIE W. CARRAWAY	Goldsboro
	R. LESLIE TURNER	Kinston
	ROSE VAUGHN WILLIAMS	Goldsboro
9	CHARLES W. WILKINSON, JR. (Chief)	Oxford
	J. LARRY SENTER	Franklinton
	H. WELDON LLOYD, JR.	Henderson
	DANIEL FREDERICK FINCH	Oxford
	J. HENRY BANKS	Henderson
	GAREY M. BALLANCE	Pelham
9A	MARK E. GALLOWAY (Chief)	Roxboro
	L. MICHAEL GENTRY	Pelham
10	JOYCE A. HAMILTON (Chief)	Raleigh
	JAMES R. FULLWOOD	Raleigh
	ANNE B. SALISBURY	Raleigh
	WILLIAM C. LAWTON	Raleigh
	MICHAEL R. MORGAN	Raleigh
	ROBERT BLACKWELL RADER	Raleigh
	PAUL G. GESSNER	Raleigh
	ANN MARIE CALABRIA	Raleigh
	ALICE C. STUBBS	Raleigh
	KRISTIN H. RUTH	Raleigh
	CRAIG CROOM	Raleigh
	KRIS D. BAILEY	Raleigh
	JENNIFER M. GREEN	Raleigh
	MONICA M. BOUSMAN	Raleigh
	JANE POWELL GRAY	Raleigh
11	EDWARD H. MCCORMICK (Chief)	Lillington
	T. YATES DOBSON, JR.	Smithfield
	ALBERT A. CORBETT, JR.	Smithfield
	FRANK F. LANIER	Buies Creek
	MARCIA K. STEWART	Smithfield
	JACQUELYN L. LEE	Sanford
	JIMMY L. LOVE, JR.	Sanford
	ADDIE M. HARRIS RAWLS[2]	Clayton
12	A. ELIZABETH KEEVER (Chief)	Fayetteville
	JOHN S. HAIR, JR.	Fayetteville
	ROBERT J. STIEHL III	Fayetteville
	EDWARD A. PONE	Fayetteville
	C. EDWARD DONALDSON	Fayetteville

DISTRICT	JUDGES	ADDRESS
	KIMBRELL KELLY TUCKER	Fayetteville
	JOHN W. DICKSON	Fayetteville
	CHERI BEASLEY	Fayetteville
	DOUGALD CLARK, JR.	Fayetteville
13	JERRY A. JOLLY (Chief)	Tabor City
	NAPOLEON B. BAREFOOT, JR.	Supply
	THOMAS V. ALDRIDGE, JR.	Whiteville
	NANCY C. PHILLIPS	Elizabethtown
	DOUGLAS B. SASSER	Whiteville
	MARION R. WARREN	Southport
14	KENNETH C. TITUS (Chief)	Durham
	RICHARD G. CHANEY	Durham
	ELAINE M. O'NEAL	Durham
	CRAIG B. BROWN	Durham
	ANN E. MCKOWN	Durham
	MARCIA H. MOREY	Durham
15A	J. KENT WASHBURN (Chief)	Graham
	ERNEST J. HARVIEL	Graham
	BRADLEY REID ALLEN, SR.	Graham
	JAMES K. ROBERSON	Graham
15B	JOSEPH M. BUCKNER (Chief)	Hillsborough
	ALONZO BROWN COLEMAN, JR.	Hillsborough
	CHARLES T. L. ANDERSON	Hillsborough
	M. PATRICIA DEVINE	Hillsborough
16A	WARREN L. PATE (Chief)	Raeford
	WILLIAM G. MCILWAIN	Wagram
	RICHARD T. BROWN	Laurinburg
16B	J. STANLEY CARMICAL (Chief)[3]	Lumberton
	HERBERT L. RICHARDSON	Lumberton
	JOHN B. CARTER, JR.	Lumberton
	WILLIAM JEFFREY MOORE	Pembroke
17A	RICHARD W. STONE (Chief)	Wentworth
	FREDRICK B. WILKINS, JR.	Wentworth
17B	OTIS M. OLIVER (Chief)	Dobson
	CHARLES MITCHELL NEAVES, JR.	Elkin
	SPENCER GRAY KEY, JR.	Elkin
18	LAWRENCE MCSWAIN (Chief)	Greensboro
	WILLIAM L. DAISY	Greensboro
	THOMAS G. FOSTER, JR.	Greensboro
	JOSEPH E. TURNER	Greensboro
	WENDY M. ENOCHS	Greensboro
	SUSAN ELIZABETH BRAY	Greensboro
	PATRICE A. HINNANT	Greensboro
	A. ROBINSON HASSELL	Greensboro
	H. THOMAS JARRELL, JR.	High Point

DISTRICT	JUDGES	ADDRESS
	Susan R. Burch	Greensboro
	Theresa H. Vincent	Greensboro
	William K. Hunter	Greensboro
19A	William M. Hamby, Jr. (Chief)	Concord
	Donna G. Hedgepeth Johnson	Concord
	Michael Knox	Concord
	Martin B. McGee	Concord
19B	William M. Neely (Chief)	Asheboro
	Vance B. Long	Asheboro
	Michael A. Sabiston	Troy
	Jayrene Russell Maness	Carthage
	Lee W. Gavin	Asheboro
	Lillian B. Jordan	Asheboro
19C	Charles E. Brown (Chief)	Salisbury
	Ted A. Blanton	Salisbury
	William C. Kluttz, Jr.	Salisbury
	Beth Spencer Dixon	Salisbury
20	Tanya T. Wallace (Chief)	Rockingham
	Joseph J. Williams	Monroe
	Christopher W. Bragg	Monroe
	Kevin M. Bridges	Albemarle
	Lisa D. Thacker	Wadesboro
	Hunt Gwyn	Monroe
	Ripley E. Brewer[4]	Albemarle
21	William B. Reingold (Chief)	Winston-Salem
	Roland H. Hayes	Winston-Salem
	Chester C. Davis	Winston-Salem
	William Thomas Graham, Jr.	Winston-Salem
	Victoria Lane Roemer	Winston-Salem
	Laurie L. Hutchins	Winston-Salem
	Lisa V. L. Menefee	Winston-Salem
	Lawrence J. Fine	Winston-Salem
22	Samuel Cathey (Chief)	Statesville
	James M. Honeycutt	Lexington
	Jimmy L. Myers	Mocksville
	Martin J. Gottholm	Statesville
	Mark S. Culler	Mocksville
	Wayne L. Michael	Lexington
	L. Dale Graham	Taylorsville
	Julia Shuping Gullett	Mooresville
	Theodore S. Royster, Jr.	Lexington
23	Edgar B. Gregory (Chief)	Wilkesboro
	David V. Byrd	Wilkesboro
	Jeanie Reavis Houston	Wilkesboro
	Mitchell L. McLean	Wilkesboro

DISTRICT	JUDGES	ADDRESS
24	ALEXANDER LYERLY (Chief)	Banner Elk
	WILLIAM A. LEAVELL III	Bakersville
	KYLE D. AUSTIN	Pineola
	BRUCE BURRY BRIGGS	Mars Hill
25	JONATHAN L. JONES (Chief)	Valdese
	ROBERT E. HODGES	Nebo
	ROBERT M. BRADY	Lenoir
	GREGORY R. HAYES	Hickory
	DAVID ABERNETHY	Hickory
	L. SUZANNE OWSLEY	Hickory
	C. THOMAS EDWARDS	Morganton
	BUFORD A. CHERRY	Hickory
26	YVONNE M. EVANS (Chief)	Charlotte
	RESA L. HARRIS	Charlotte
	H. WILLIAM CONSTANGY	Charlotte
	JANE V. HARPER	Charlotte
	FRITZ Y. MERCER, JR.	Charlotte
	PHILLIP F. HOWERTON, JR.	Charlotte
	DAVID S. CAYER	Charlotte
	ERIC L. LEVINSON	Charlotte
	ELIZABETH M. CURRENCE	Charlotte
	RICKYE MCKOY-MITCHELL	Charlotte
	LISA C. BELL	Charlotte
	LOUIS A. TROSCH, JR.	Charlotte
	REGAN A. MILLER	Charlotte
	NANCY BLACK NORELLI	Charlotte
	HUGH B. LEWIS	Charlotte
	Avril U. Sisk	Charlotte
	NATHANIEL P. PROCTOR	Charlotte
27A	DENNIS J. REDWING (Chief)	Gastonia
	JOYCE A. BROWN	Belmont
	ANGELA G. HOYLE	Gastonia
	JOHN K. GREENLEE	Gastonia
	JAMES A. JACKSON	Gastonia
	RALPH C. GINGLES, JR.	Gastonia
27B	LARRY JAMES WILSON (Chief)	Shelby
	ANNA F. FOSTER	Shelby
	K. DEAN BLACK	Denver
	CHARLES A. HORN, SR.	Shelby
28	EARL JUSTICE FOWLER, JR. (Chief)	Asheville
	PETER L. RODA	Asheville
	GARY S. CASH	Asheville
	SHIRLEY H. BROWN	Asheville
	REBECCA B. KNIGHT	Asheville
	MARVIN P. POPE, JR.	Asheville

DISTRICT	JUDGES	ADDRESS
29	ROBERT S. CILLEY (Chief)	Pisgah Forest
	MARK E. POWELL	Hendersonville
	DAVID KENNEDY FOX	Hendersonville
	LAURA J. BRIDGES	Hendersonville
	C. RANDY POOL	Marion
	C. DAWN SKERRETT	Cedar Mountain
30	JOHN J. SNOW, JR. (Chief)	Murphy
	DANNY E. DAVIS	Waynesville
	STEVEN J. BRYANT	Bryson City
	RICHLYN D. HOLT	Waynesville
	BRADLEY B. LETTS	Sylva

EMERGENCY JUDGES

ABNER ALEXANDER	Winston-Salem
CLAUDE W. ALLEN, JR.	Oxford
PHILIP W. ALLEN	Reidsville
E. BURT AYCOCK, JR.	Greenville
SARAH P. BAILEY	Rocky Mount
LOWRY M. BETTS	Pittsboro
DONALD L. BOONE	High Point
DAPHENE L. CANTRELL	Charlotte
SOL G. CHERRY	Fayetteville
WILLIAM A. CHRISTIAN	Sanford
SPENCER B. ENNIS	Graham
J. PATRICK EXUM	Kinston
J. KEATON FONVIELLE	Shelby
STEPHEN F. FRANKS[5]	Hendersonville
GEORGE T. FULLER	Lexington
RODNEY R. GOODMAN	Kinston
ADAM C. GRANT, JR.	Concord
LAWRENCE HAMMOND, JR.	Asheboro
ROBERT L. HARRELL	Asheville
JAMES A. HARRILL, JR.	Winston-Salem
PATTIE S. HARRISON	Roxboro
ROBERT W. JOHNSON	Statesville
ROBERT K. KEIGER	Winston-Salem
JACK E. KLASS	Lexington
C. JEROME LEONARD, JR.	Charlotte
EDMUND LOWE	High Point
JAMES E. MARTIN	Ayden
J. BRUCE MORTON	Greensboro
DONALD W. OVERBY	Raleigh
L. W. PAYNE, JR.	Raleigh
STANLEY PEELE	Chapel Hill

DISTRICT	JUDGES	ADDRESS
	MARGARET L. SHARPE	Winston-Salem
	RUSSELL SHERRILL III	Raleigh
	CATHERINE C. STEVENS	Gastonia

RETIRED/RECALLED JUDGES

WILLIAM A. CREECH	Raleigh
ROBERT T. GASH	Brevard
HARLEY B. GASTON, JR.	Gastonia
WALTER P. HENDERSON	Trenton
ELTON C. PRIDGEN	Smithfield
SAMUEL M. TATE	Morganton

1. Appointed Chief Judge 1 April 2002 to replace Wayne G. Kimble, Jr. who resigned as Chief Judge.
2. Appointed and sworn in 25 January 2002 to replace Robert Anderson who died 21 November 2001.
3. Appointed and sworn in 30 April 2002 as Chief Judge to replace Gary L. Locklear who was appointed and sworn in 29 April 2002 to the Superior Court.
4. Appointed and sworn in 25 April 2002 to replace Susan C. Taylor who was appointed to the Superior Court.
5. Resigned 8 February 2002.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
ROY COOPER

Chief of Staff
JULIA S. WHITE

Deputy Chief of Staff
KRISTI J. HYMAN

Director of Administrative Services
STEPHEN C. BRYANT

Deputy Attorney General for Policy and Planning
KELLY CHAMBERS

General Counsel
J. B. KELLY
THOMAS WALKER

Chief Deputy Attorney General
EDWIN M. SPEAS, JR.

Senior Deputy Attorneys General

WILLIAM N. FARRELL, JR.
JAMES COMAN
ANN REED DUNN
REGINALD L. WATKINS
JAMES C. GULICK
DANIEL C. OAKLEY
GRAYSON G. KELLEY
JOSHUA H. STEIN

Special Deputy Attorneys General

STEVEN M. ARBOGAST
HAROLD F. ASKINS
ISAAC T. AVERY III
JONATHAN P. BABB
DAVID R. BLACKWELL
ROBERT J. BLUM
GEORGE W. BOYLAN
CHRISTOPHER P. BREWER
JUDITH R. BULLOCK
MABEL Y. BULLOCK
JILL L. CHEEK
KATHRYN J. COOPER
JOHN R. CORNE
ROBERT O. CRAWFORD III
FRANCIS W. CRAWLEY
GAIL E. DAWSON
ROY A. GILES, JR.
NORMA S. HARRELL
WILLIAM P. HART
ROBERT T. HARGETT
RALF F. HASKELL
J. ALLEN JERNIGAN
DOUGLAS A. JOHNSTON
ROBERT M. LODGE
JOHN F. MADDREY
T. LANE MALLONEE, JR.
GAYL M. MANTHEI
ALANA D. MARQUIS
ELIZABETH L. MCKAY
DANIEL MCLAWHORN
BARRY S. MCNEILL
STACI MEYER
THOMAS R. MILLER
WILLIAM R. MILLER
THOMAS F. MOFFITT
THOMAS W. MOORE
G. PATRICK MURPHY
CHARLES J. MURRAY
LARS F. NANCE
SUSAN K. NICHOLS
TERESA PELL
ALEXANDER M. PETERS
ELLEN B. SCOUTEN
RICHARD E. SLIPSKY
TIARE B. SMILEY
JAMES PEELER SMITH
VALERIE B. SPALDING
W. DALE TALBERT
VICTORIA L. VOIGHT
JOHN H. WATTERS
EDWIN W. WELCH
JAMES A. WELLONS
THEODORE R. WILLIAMS
THOMAS J. ZIKO

Assistant Attorneys General

DANIEL D. ADDISON
DAVID J. ADINOLFI II
MERRIE ALCOKE
JOHN J. ALDRIDGE III
JAMES P. ALLEN
KEVIN ANDERSON
STEVEN A. ARMSTRONG
KATHLEEN BALDWIN
GRADY L. BALENTINE, JR.
JOHN P. BARKLEY
JOHN G. BARNWELL, JR.
VALERIE L. BATEMAN
MARC D. BERNSTEIN
BRIAN L. BLANKENSHIP
WILLIAM H. BORDEN
HAROLD D. BOWMAN
RICHARD H. BRADFORD
LISA K. BRADLEY
CHRISTOPHER BROOKS
STEVEN F. BRYANT
HILDA BURNETT-BAKER
GWENDOLYN W. BURRELL
SONYA CALLOWAY
MARY ANGELA CHAMBERS
LEONIDAS CHESTNUT
LAUREN M. CLEMMONS
JOHN CONGLETON

LISA G. CORBETT
ALLISON S. CORUM
JILL F. CRAMER
LAURA E. CRUMPLER
WILLIAM B. CRUMPLER
JOAN M. CUNNINGHAM
ROBERT M. CURRAN
TRACY C. CURTNER
NEIL C. DALTON
CLARENCE J. DELFORGE III
KIMBERLY W. DUFFLEY
BRENDA EADDY
KATHLEE EDWARDS
JEFFREY R. EDWARDS
DAVID L. ELLIOTT
TAWANDA ETHERIDGE
JUNE S. FERRELL
BERTHA L. FIELDS
LISA B. FINKELSTEIN
WILLIAM W. FINLATOR, JR.
MARGARET A. FORCE
NANCY L. FREEMAN
VIRGINIA L. FULLER
EDWIN L. GAVIN II
ROBERT R. GELBLUM
JANE A. GILCHRIST
MICHAEL DAVID GORDON
GARY R. GOVERT
ANGEL E. GRAY
LEONARD G. GREEN
KIMBERLY GUNTER
MARY E. GUZMAN
PATRICIA BLY HALL
RICHARD HARRISON
JANE T. HAUTIN
E. BURKE HAYWOOD
DAVID G. HEETER
JOSEPH E. HERRIN
JILL B. HICKEY
CLINTON C. HICKS
JAMES D. HILL
ALEXANDER HIGHTOWER
KAY L. MILLER HOBART
CHARLES H. HOBGOOD
JAMES C. HOLLOWAY
KIMBERLY HUNT
GEORGE K. HURST
DANIEL S. JOHNSON
STEWART L. JOHNSON
LINDA J. KIMBELL
CLARA KING
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
JENNIE W. MAU
WILLIAM MCBLIFF
J. BRUCE MCKINNEY
MICHELLE B. MCPHERSON
SARAH Y. MEACHAM
THOMAS G. MEACHAM, JR.
MARY S. MERCER
ANNE M. MIDDLETON
DIANE G. MILLER
WILLIAM R. MILLER
EMERY E. MILLIKEN
DAVID R. MINGES
THOMAS H. MOORE
ROBERT C. MONTGOMERY
DENNIS P. MYERS
DEBORAH L. NEWTON
BART NHIJY-OBI
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
THOMAS J. PITMAN
DIANE M. POMPER
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
NANCY E. SCOTT
BARBARA A. SHAW
BUREN R. SHIELDS III
CHRIS Z. SINHA
BELINDA A. SMITH
DOLORES O. SMITH
DONNA D. SMITH
JANETTE M. SOLES
RICHARD G. SOWERBY, JR.
D. DAVID STEINBOCK, JR.
DIANE W. STEVENS
WILLIAM STEWART, JR.
MARY ANN STONE
LASHAWN L. STRANGE
ELIZABETH N. STRICKLAND
KIP D. STURGIS
JOHN C. SULLIVAN
SUEANNA P. SUMPTER
FRANK SWINDELL, JR.
MELISSA H. TAYLOR
SYLVIA H. THIBAUT
KATHRYN J. THOMAS
JANE R. THOMPSON
MARY P. THOMPSON
DOUGLAS THOREN
JUDITH L. TILLMAN
MELISSA L. TRIPPE
RICHARD JAMES VOTTA
ANN B. WALL
SHARON WALLACE-SMITH
KATHLEEN M. WAYLETT
MARGARET L. WEAVER
ELIZABETH J. WEESE
TERESA L. WHITE
CLAUD R. WHITENER III
MARY D. WINSTEAD
DONNA B. WOJCIK
THOMAS B. WOOD
THOMAS WOODWARD
HARRIET F. WORLEY
AMY L. YONOWITZ
CLAUDE N. 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	KRISTY MCMILLAN NEWTON	Raeford
16B	L. JOHNSON BRITT III	Lumberton
17A	BELINDA J. FOSTER	Wentworth
17B	CLIFFORD R. BOWMAN	Dobson
18	STUART ALBRIGHT	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	DONALD C. HICKS III	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

CASES REPORTED

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

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

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

PETITIONS TO REHEAR

GENERAL STATUTES CITED

RULES OF EVIDENCE CITED

CONSTITUTION OF UNITED STATES CITED

CONSTITUTION OF NORTH CAROLINA CITED

Rule No.	
10	State v. Fair, 131
10(b)(1)	State v. Ward, 231 State v. Wilson, 493
10(c)(4)	State v. Ward, 231

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 1st day of February 2002, and said persons have been issued certificates of this Board:

Jeffrey B. Andrus ..... Applied from the State of New York
Richard Kevin Brown ..... Applied from the District of Columbia
George P. Conway ..... Applied from the State of New York
Richard Lee Edwards ..... Applied from the District of Columbia
William C. Field ..... Applied from the State of West Virginia
Marvin D. Genzer ..... Applied from the State of New York
Deborah Kusenda Hayes ..... Applied from the State of Tennessee
Stephen Royce Jackson ..... Applied from the State of Virginia
Vikram Kapil ..... Applied from the State of Virginia
John Carlton Lovett ..... Applied from the State of Oklahoma
James Francis McKenzie ..... Applied from the State of West Virginia
Bradley Clayton Morris ..... Applied from the State of Indiana
Laura Leigh Ratchford ..... Applied from the State of Virginia
Barbara Allen Samples ..... Applied from the State of West Virginia
Marie Cosgrove Shea ..... Applied from the State of New York
Richard Michael Smith ..... Applied from the State of Pennsylvania
Gerald F. Stack ..... Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 7th day of March, 2002.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 15th day of March 2002, and said persons have been issued certificates of this Board:

William Taylor Belcher ..... Applied from the State of West Virginia
Jeffrey Robert Capwell ..... Applied from the State of Virginia
Brian Keith Cary ..... Applied from the State of Virginia
Bruce McCoy Steen ..... Applied from the State of Virginia

Given over my hand and seal of the Board of Law Examiners this the 15th day of March, 2002.

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 23 day of March 2002 and said persons have been issued license certificates.

LICENSED ATTORNEYS

FEBRUARY 2002 NORTH CAROLINA BAR EXAMINATION

Leah Austin Abbey ..... Monroe
Robert Harald Arzonetti ..... Greensboro
Andrew Dale Atherton ..... Greensboro
Isabel Lin Barbarin ..... Chapel Hill
Heather Anne Benjamin ..... Chapel Hill
Brandy Danielle Berry-Yount ..... Charleston, South Carolina
Robert J. Bierbaum ..... Pinehurst
Valerie Gail Blackwelder ..... Chapel Hill
Charles Dameron Blackwell, II ..... Graham
Tanya Nicole Blake-Mitchell ..... Durham
Joseph M. Bochicchio ..... Matthews
Robert Paul Boone, III ..... Raleigh
Wyatt Martin Booth ..... Kitty Hawk
Victoria Kate Bost ..... Salisbury
Sally G. Boswell ..... Charlotte
Carena R. Brantley ..... Durham
Jason Alan Brenner ..... Chapel Hill
Carrie Renee Broder ..... Raleigh
Katharine B. Buchanan ..... Blacksburg, Virginia
Laura Considine Budzichowski ..... Ann Arbor, Michigan
Robert Christopher Cabaniss ..... Apex
William John Cathcart, Jr. ..... Raleigh
Patricia L. Chisholm ..... Raleigh
Scott A. Conklin ..... Alexandria, Virginia
Michael William Connelly ..... Durham
Brian L. Crawford ..... Hillsborough
Tanya Louise Davis ..... Asheville
Jacqueline Patricia DeSantis ..... Misenheimer
Jamie M. Dowd ..... Raleigh
Eric Walter Dratwa ..... Raleigh
Christopher Thomas Dunnagan ..... Burlington
Jessica Lynn Elliott ..... Cary
Alyscia G. Ellis ..... Durham
Charles Ali Everage ..... Montgomery, Alabama
Morey Alenia Everett ..... Bath
Gregory Franklin Fawcett, II ..... Charlotte
Rebecca M. Fiechtl ..... Charlotte
Anne Fleeson ..... Winston-Salem
Heather Holden Freeman ..... Raleigh
Rachel Alexis Fuerst ..... Atlanta, Georgia
Daniel R. Fulkerson ..... Boone
Jared Edgar Gardner ..... Charlotte
Nicole L. Gardner ..... Charlotte
Susanna Gabriella Garza ..... Charlotte
Michael Downing Gaynor ..... Nashville
Calley Gerber ..... Raleigh
Carolyn Ann Gordon ..... Etowah
Lisa Robin Gordon ..... Durham
Pamela K. Graham ..... Burbank, California

Lawrence P. Grayson, II ..... Charlotte
Laura Cude Greene ..... Concord
E. Franklin Haignere ..... Raleigh
Wade Hampton Hargrove, III ..... Wilmington
Brian Richard Harwell ..... Mooresville
Joshua Paul Hillin ..... Shallotte
Jennifer Lea James Soto ..... Charlotte
Mark Weston Johnson ..... Charlotte
William James Johnson ..... Columbia, South Carolina
Edgar Wyles Johnson, Jr. ..... Buies Creek
Jeffrey Allen Jones ..... Greensboro
Greta Katz ..... Chapel Hill
Robin Nicole Knight ..... Morrisville
Patricia Jane Koch ..... Davidson
Kevin Douglas Kornegay ..... Durham
Kristine-Marie Kuzenski ..... Apex
Clifford McQueen Luhn ..... Durham
Susan M. Lynch ..... Pinehurst
Caryn Brooke Madison ..... Greenville
Marc Peter Madonia ..... Cary
Alissa J. Magenheim ..... Greensboro
Valerie Paige Mahoney ..... Charlotte
Mark Mangiarelli ..... Charlotte
David A. Matthews ..... Charlotte
Neneh Mbye ..... Charlotte
David L. McGuire ..... Millers Creek
Matthew Jeremy Mesmer ..... Alexandria, Virginia
Sara Jane Miller ..... Winston-Salem
Moshera Hussein Mohamed ..... Raleigh
Allison Adams Murphy ..... Charlotte
Carolyn Bernadette O'Garro-Moore ..... Rocky Mount
Claudia Jeanne Pamperin ..... Indian Trail
Michael Crawford Park ..... Charlotte
Gregory Neal Pate ..... Wake Forest
Jennifer C. Polley-Abramson ..... Raleigh
Joshua Lee Price ..... Raleigh
Jenny Lynn Pruitt ..... Winston-Salem
Misty Dawn Randall ..... Polkton
Amy Carole Reeder ..... Charlotte
Lesley Allyn Renwrick ..... Jamestown
Dexter Anthony Richardson ..... Durham
Jayson Christopher Riddle ..... Charlotte
Jennifer Ashley Ring ..... Decatur, Georgia
Andy Patrick Roberts ..... Currie
Monica Nicole Robinson ..... Roanoke, Virginia
Margaret Natalie Rosenfeld ..... Raleigh
J. Harrison Rushton ..... Charlotte
Breanna Whitesel Rutledge ..... Durham
Jason Stewart Shade ..... Pinehurst
Kaumil Kirtkumar Shah ..... Charlotte
Amy Cowardin Shea ..... Havelock

Elizabeth S. Syger ..... Raleigh
Keith L. Thornton ..... Charlotte
Layla Jeannine Traylor ..... Raleigh
Blake W. Trimble ..... Hickory
Mitchell A. Tuchman ..... Durham
Su Pong U ..... Whiteville
Carlos D. Watson ..... Charlotte
Sierra B. Weaver ..... Carrboro
Ashley Lyn Westerlund ..... Smithfield
Lisa Michelle Wilkins ..... Charlotte
Elizabeth Cherokee Williamson ..... Raleigh
Monica Denine Wilson ..... Durham
Theresa Michelle Wright ..... Oxford
Hong Zhou ..... Raleigh
Eric Michael David Zion ..... Atlanta, Georgia

Given over my hand and seal of the Board of Law Examiners this the 15th day of April, 2002.

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 5th day of April 2002 and said persons have been issued license certificates.

FEBRUARY 2002 NORTH CAROLINA BAR EXAMINATION

Kimberly Helen Grim Adams ..... Fletcher
Ryan Brent Addison ..... Clemmons
Arthur Kevin Bartlett ..... Charlotte
Lee Arthur Caplan ..... Chapel Hill
Robert D. Church ..... Lusby, Maryland
Kevin Patrick Collins ..... Columbus, Ohio
Christopher Dail Congleton ..... Ayden
Michael H. Domesick ..... Charlotte
Jennifer Lynne Donahue ..... Raleigh
Joanna Sears Flanagan ..... Davidson
Matthew J. Ginsburg ..... Charlotte
J. Brandon Graham ..... Charlotte
David Joseph Green ..... Durham
Travis Shane Greene ..... Spindale
Kristin Lea Hart ..... Beaufort
David Richard Helenbrook ..... Charlotte
Arnold J. Hoffmann ..... Huntersville
Gretchen E. Hollar ..... Winston-Salem
Currie Tee Howell ..... Coats
Linda D. Jellum ..... Wilmington
Rona Karacaova ..... Charlotte

Michael David Lehr ..... Raleigh
Jason S. McCarter ..... Atlanta, Georgia
Kevin Anthony McGinnis ..... Chicago, Illinois
Elizabeth Anne Michael ..... North Melbourne, Vic, Australia
Jason S. Miller ..... Charlotte
William Brock Mitchell ..... Elizabeth City
LaRocha Maurice Moore ..... Charlotte
Bernhard Mueller ..... Holly Springs
Jeffrey James Owen ..... Ashville
Arlen Rebecca Percival ..... Cary
Eric Pristell ..... Durham
Shamieka Lacher Rhinehart ..... Durham
Staci E. Rosche ..... Charlotte
A. Bikash Roy ..... Apex
Andrew Scheinman ..... Raleigh
Jason H. Scott ..... Charlotte
Barbara Lynn Stewart ..... Greensboro
Jennifer Marie Stokley ..... Charlotte
Cindy Goddard Strope ..... Jacksonville
Walter Davis Tenney ..... Raleigh
George Ollie Winborne ..... Durham

Given over my hand and seal of the Board of Law Examiners this the 22nd day of April, 2002.

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 5th day of April 2002 and said persons have been issued license certificates.

JULY 2001 NORTH CAROLINA BAR EXAMINATION

Natasha Annette Adams ..... Semora
Angus Quentin Long ..... Asheville
Maria Rivera ..... Raleigh

Given over my hand and seal of the Board of Law Examiners this the 22nd day of April, 2002.

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 19 day of April 2002 and said persons have been issued license certificates.

FEBRUARY 2002 NORTH CAROLINA BAR EXAMINATION

Arlene L. Velasquez-Colon . . . . . .Wake Forest
David Michael Harmon . . . . . .Charlotte
John Robert Smerznak, Jr. . . . . .Matthews

Given over my hand and seal of the Board of Law Examiners this the 29th day of April, 2002.

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 were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 26th day of April 2002, and said person has been issued a certificate of this Board:

Barbara S. Blackman . . . . . .Applied from the States of Indiana and Colorado

Given over my hand and seal of the Board of Law Examiners this the 16th day of May, 2002.

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 3rd day of May 2002 and said person has been issued a license certificate.

FEBRUARY 2002 NORTH CAROLINA BAR EXAMINATION

Shari Sims-Musa . . . . . .Pineville

Given over my hand and seal of the Board of Law Examiners this the 13th day of May, 2002.

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

STATE OF NORTH CAROLINA v. ANTHONY MAURICE BONE

No. 281A99

(Filed 17 August 2001)

1. **Search and Seizure— defendant's shoes—confession—plain view doctrine—exigent circumstances—search incident to lawful arrest**

Although the trial court improperly concluded a magistrate had probable cause to issue a search warrant to seize defendant's shoes in a first-degree burglary and capital first-degree murder trial, other proper grounds were available to uphold the seizure including: (1) the plain view doctrine coupled with exigent circumstances when defendant could discard or disfigure the shoes once he had knowledge of the detective's interest in the shoes; and (2) the search was incident to a lawful arrest when the detective had probable cause to arrest defendant based on an anonymous tip that the detective was able to corroborate, the detective independently had reason to believe the murderer wore "Chuck Taylor" shoes, and the detective found defendant wearing this type of shoe when he went to speak with him.

2. **Confessions and Incriminating Statements— voluntariness—alleged misstatements and false promise by detective**

The trial court did not err in a first-degree burglary and capital first-degree murder trial by denying defendant's motion to

suppress his confession even though defendant contends it was involuntary when it was induced by alleged misstatements and a false promise by a detective, because: (1) the detective's representations that shoe prints were just like fingerprints and that defendant's shoes matched those impressions found at the murder scene were exaggerations, but not outright fabrications; (2) although the detective made no promises to defendant in exchange for a confession during defendant's initial interview but told defendant he might receive a lesser sentence if he confessed, the detective made no commitment and defendant made no statement in response to this suggestion; and (3) defendant asked to speak to an officer only after he was formally arrested where he was given his Miranda rights and signed a written waiver.

3. Sentencing— capital—consideration of mitigating circumstances—erroneous instruction—harmless error

Any error by the trial court during a capital sentencing proceeding by its instruction in Issue Three that each juror may consider any mitigating circumstance that the "jury" rather than "juror" determined to exist by a preponderance of the evidence in Issue Two did not preclude an individual juror from considering mitigating evidence that such juror alone found in Issue Two and was harmless where the jury was clearly instructed for each of the mitigating circumstances submitted in Issue Two that only one or more of the jurors was required to find that the mitigating circumstance existed and that it was deemed mitigating.

4. Sentencing— capital—mitigating circumstances—no significant history of prior criminal activity

The trial court did not commit prejudicial error during a capital sentencing proceeding by submitting to the jury the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance that defendant has no significant history of prior criminal activity even though defendant neither requested nor objected to the submission of this circumstance and defendant had four prior convictions for violent felonies, because: (1) there are no extraordinary facts that make any error by the trial court in giving this instruction prejudicial to defendant; (2) it is not error to submit the (f)(1) mitigating circumstance where a defendant's prior convictions are also used to support the submission of the N.C.G.S. § 15A-2000 (e)(3) aggravating circumstance that defendant has been previously convicted of a felony involving the use or threat of violence to the person; and (3) it is inconceivable that the jury would have

returned a different verdict if the (f)(1) mitigating circumstance had not been submitted to the jury.

5. Sentencing— capital—death penalty proportionate

The trial court did not err by imposing the death sentence in a first-degree murder case, because: (1) defendant was convicted under the theory of premeditation and deliberation as well as the theory of felony murder; (2) defendant had a history of prior violent felony convictions; (3) defendant's actions at the scene of the robbery were consistent with an intentional killing; (4) the murder took place at the elderly victim's home; (5) the jury found the N.C.G.S. § 15A-2000 (e)(3) and (e)(5) aggravating circumstances, each of which is alone sufficient to support a death sentence; (6) defendant took no steps to seek help for the victim; and (7) the fact that defendant's IQ fell in the borderline range does not affect this conclusion.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Steelman, J., on 5 February 1999 in Superior Court, Guilford County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 14 March 2001. On 1 September 2000, the Supreme Court allowed defendant's motion to bypass the North Carolina Court of Appeals as to additional judgments.

Roy A. Cooper, Attorney General, by William P. Hart, Special Deputy Attorney General, and Robert C. Montgomery, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Benjamin Dowling-Sendor, Assistant Appellate Defender, for defendant-appellant.

EDMUNDS, Justice.

Defendant Anthony Maurice Bone was convicted for the first-degree murder of Ethel McCracken based upon theories of premeditation and deliberation and of felony murder. He also was convicted of two counts of first-degree burglary. On 5 February 1999, following a capital sentencing proceeding, the jury recommended a sentence of death for the murder, and the trial court entered judgment accordingly. The trial court also imposed two consecutive terms of imprisonment of 146 months to 185 months for the burglary convictions.

At trial, the State's evidence showed that on the morning of 24 August 1997, a family friend found eighty-eight-year-old Ms. McCracken dead in her apartment at 703 Rockett Street in Greensboro, North Carolina. She was wearing a nightgown and lying face down on her bed. Her feet had been bound with curtains, and curtain material had been stuffed into her mouth. Her hands, legs, and face were bloody. Two pocketbooks found on the floor of the living room had been emptied, and a third was discovered open on the dining room table. The screen on the kitchen window had been cut.

A police dog followed a scent from Ms. McCracken's apartment to the rear of a nearby apartment building where Wesley Crompton resided. That morning, Mr. Crompton had reported a burglary after he awoke to find the screen of his bathroom window cut and the contents of his wallet scattered on his bathroom floor. Police found a flashlight, a savings account card bearing Ms. McCracken's name, and a pair of knit gloves behind Mr. Crompton's apartment.

Agents of the North Carolina State Bureau of Investigation used a dye known as "Coomassie Blue" to stain Ms. McCracken's bedroom floor. This dye allows field forensic examiners to develop latent fingerprint and shoe print impressions left in blood on a hard or reflective surface. The dye raised shoe prints that were twelve and a half inches long and four inches wide. A Greensboro Police Department crime scene technician photographed the shoe prints and removed the tiles on which the prints had been impressed. Around 26 August 1997, Detective Robin Saul of the Greensboro Police Department showed a photograph of a shoe print from Ms. McCracken's house to the manager of a sporting goods store in Greensboro and asked him to identify the type of shoe that could have made the print. The manager recognized the print pattern as having been made by a Converse shoe. Detective Saul and the manager then compared the photograph to a Converse Model 961 "Chuck Taylor" athletic shoe in the store and determined that such a "Chuck Taylor" shoe made the print on Ms. McCracken's bedroom floor. The store manager allowed Detective Saul to borrow a "Chuck Taylor" shoe.

Police began surveillance operations in high-crime areas around the victims' neighborhood. In early October 1997, the Greensboro Police Department received an anonymous tip from a caller who identified defendant as the murderer. When Detective Saul pursued this lead, he found defendant wearing a pair of "Chuck Taylor" shoes.

As detailed below, Detective Saul subsequently arrested defendant and seized his shoes.

SBI Special Agent Joyce Petzka testified that the shoes seized from defendant were consistent in sole design and size with the shoe prints found at the murder scene. The seized shoes had additional wear that was not present in the impressions taken at the scene, but Agent Petzka testified that such differences were consistent with defendant's shoes having been worn for approximately six weeks after the murder.

The forensic pathologist who performed the autopsy of Ms. McCracken testified that the primary cause of death was the fracture of her cervical spine, which most likely resulted from someone pulling her neck back. There was also some element of strangulation. In addition, Ms. McCracken suffered broken ribs, and the pathologist testified that he found blood below her right ear, in the right ear itself, and in front of the left ear.

The State introduced into evidence a statement made by defendant when he was arrested. Defendant told Detective Saul that on the night of 23 August 1997, he cut the screen covering an open window of an apartment on Rockett Street. Once inside, he encountered the victim in her bedroom. Defendant ripped a curtain off the wall, rolled the victim onto her stomach, and tied her hands behind her back. To prevent her from getting up or making noise, defendant put his hands on the victim's neck, then gagged her. After searching the apartment for money, defendant noticed the victim was bleeding. He exited the apartment through the back door, taking a flashlight with him. Defendant walked to another apartment, which he entered by raising a window. Finding an old man sleeping in a chair in the living room and a wallet containing eight or nine dollars, defendant took the money to buy crack cocaine.

Defendant testified in his own behalf and denied breaking into any apartment and denied killing Ms. McCracken. Defendant also presented the testimony of psychologist Claudia Coleman. Her testimony will be discussed in detail below.

GUILT-INNOCENCE PHASE

Defendant's only assignments of error in the guilt-innocence phase of his trial pertain to the trial court's denial of his motion to suppress his confession. He contends that the confession was obtained in violation of the Fourth Amendment to the United

States Constitution; Article I, Section 20 of the North Carolina Constitution; and article 11 of chapter 15A of the North Carolina General Statutes.

Detective Saul's investigation indicated that the murderer was wearing Converse "Chuck Taylor" athletic shoes. In early October, an anonymous caller reported that defendant had committed the crime. At trial, Detective Saul gave the following account of this tip:

> [T]he nature of the call is a homicide. The location Rockett Street. . . . [T]he caller reports that Tony Bone, black male, late 20s, climbed in an open window, punched an elderly female in the face so hard her ears bled, got only $5 out of the crime. He works for a moving company in Greensboro, and lives in Trinity, North Carolina. Suspect is married and recently released from prison.

Detective Saul was able to verify almost all of the information in the tip before he approached defendant. He learned that defendant was married and worked at Allied Moving in Greensboro. A criminal history check revealed defendant had been released from prison approximately a year before Ms. McCracken's murder. The cut screen found by investigators at the scene indicated the killer gained access to her apartment through a window. Detective Saul knew that while the primary cause of death was a broken neck, the victim was found with blood on her face. The only incorrect information provided by the anonymous caller was that defendant lived in Trinity, North Carolina. Defendant actually lived with his wife in Liberty, North Carolina; however, both Liberty and Trinity are small communities in northern Randolph County.

In response to the tip, on 8 October 1997, Detective Saul undertook surveillance of Allied Moving's place of business. After observing defendant entering the workplace, Detective Saul asked to speak with him. When defendant came out onto a loading dock to meet the detective, he was wearing Converse "Chuck Taylor" athletic shoes. Detective Saul asked defendant if he would accompany him downtown to speak about an undisclosed matter. Defendant agreed and rode to the Greensboro Police Department with a uniformed officer, while Detective Saul drove his own unmarked police car.

Once inside an interview room at the Criminal Investigations Division of the Greensboro Police Department, Detective Saul advised defendant that he was investigating the murder of Ms.

McCracken. He stated that he needed defendant's assistance and asked if he could examine defendant's shoes. Defendant refused, so Detective Saul determined to seek a search warrant. When he went to find a magistrate, Detective Saul left defendant in the interview room with the door closed but unlocked. Unknown to defendant, the uniformed officer who had driven him to the interview was "left there with [defendant] outside the room." Detective Saul returned after approximately one hour and twenty minutes to serve the search warrant on defendant, who then surrendered his shoes.

Detective Saul again left the now-unshod defendant in the interview room with the door closed and immediately took the shoes to the Greensboro Police Laboratory where he compared defendant's shoes to the photographs of the shoe impressions found at the murder scene. Detective Saul believed the shoes and shoe prints were similar. After nearly two hours, Detective Saul returned to the interview room and advised defendant of his *Miranda* rights. Defendant verbally waived his rights but refused to sign a waiver form. During the ensuing interrogation, which lasted approximately an hour and a half, Detective Saul told defendant that he believed defendant killed the victim, adding that shoe prints are "just like" fingerprints and that defendant's sneakers "matched" the shoe prints. Defendant made no incriminating statements.

Detective Saul formally placed defendant under arrest and arranged for him to be taken before a magistrate so an arrest warrant could be issued. Subsequently, the uniformed officer who served the arrest warrant on defendant notified Detective Saul that defendant wanted to speak with him. Detective Saul again advised defendant of his *Miranda* rights, and defendant signed a written waiver. Defendant then confessed to the murder and burglaries. Defendant now argues that the trial court's denial of his motion to suppress his confession was error because his confession was induced by an unconstitutional seizure of his shoes, by an arrest without probable cause, and by an improper interrogation conducted by Detective Saul. We address these contentions *seriatim*.

The scope of review of the denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Defendant does not challenge the findings of fact made by the trial

court in its order; instead, he questions whether those findings of fact support legally correct conclusions of law. Based upon its findings of fact, the trial court made alternative conclusions of law supporting the seizure of defendant's shoes. After a careful review of the record, we conclude that one conclusion of law made by the trial court was erroneous but that the second was sound. We additionally conclude that further grounds, not articulated by the trial court, also justify the seizure. "The question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable. The crucial inquiry for this Court is admissibility and whether the ultimate ruling was supported by the evidence." *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (citation omitted), *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987).

[1] As its first ground for concluding that the seizure of defendant's shoes was lawful, the trial court found that the magistrate had probable cause to issue the search warrant on the basis of the application and affidavit submitted by Detective Saul. After reviewing the contents of the affidavit as recited in the transcript of the motion to suppress, we cannot agree; indeed, the State does not argue on appeal that the magistrate had probable cause to issue a search warrant based upon the application and affidavit. The affidavit does little more than provide a conclusory statement that defendant had been developed as a suspect and that his shoes match the pattern found at the murder scene. Although, as we discuss below, probable cause existed to arrest defendant at the time Detective Saul asked to examine defendant's shoes, this probable cause was not evident in the application and affidavit submitted to the magistrate.

As its second ground for upholding the seizure, the trial court reasoned that "Detective Saul was authorized to seize Defendant's shoes without a search warrant, under the plain view doctrine. No search was involved since the shoes were in plain view." We agree that the seizure was justified under the plain view doctrine, coupled with exigent circumstances. In North Carolina, a seizure is lawful under this doctrine when the officer was in a place he or she had a right to be at the time the evidence was discovered, it is immediately obvious that the items observed are evidence of a crime, and the discovery is inadvertent. *State v. Mickey*, 347 N.C. 508, 495 S.E.2d 669, *cert. denied*, 525 U.S. 853, 142 L. Ed. 2d 106 (1998). Here, Detective Saul was entirely within his rights when he asked to see defendant at his place of employment. When he observed that defendant was wearing "Chuck Taylor" shoes, Detective Saul realized that they were

evidence because the perpetrator of the crime had worn such shoes. The discovery was inadvertent because Detective Saul had no reason to know that defendant would be wearing "Chuck Taylor" shoes when he asked to speak to him. Finally, there is an element of exigent circumstance in the seizure. Because, as we hold below, defendant was arrested only at the moment Detective Saul seized his shoes, up until that point defendant was free to leave the Greensboro Police Department. Armed with his new knowledge of the investigator's interest in the shoes, he could have discarded them or tampered with the tread. *See Harjo v. State*, 882 P.2d 1067 (Okla. Crim. App. 1994), *cert. denied*, 514 U.S. 1131, 131 L. Ed. 2d 1007 (1995). In *Harjo*, the defendant broke into the home of an elderly victim, strangled her, and stole her car. Distinctive shoeprints left by the perpetrator at the scene matched the tread of the shoes the defendant was wearing when questioned. The Oklahoma court held that the police had probable cause to believe that the shoes were evidence of a crime, and because the defendant could discard or disfigure the shoes, exigent circumstances existed to justify an immediate seizure.

We agree with the analysis in *Harjo*. Detective Saul had two choices when defendant refused to hand over the shoes voluntarily—either seize them anyway or apply for a search warrant. We do not second-guess Detective Saul's decision to seek out a neutral and detached magistrate. His decision to do so did not vitiate the exigency of the circumstances. Accordingly, in the case at bar, Detective Saul properly seized the shoes pursuant to the plain view doctrine.

Detective Saul's actions in seizing defendant's shoes also may be justified as a search incident to a lawful arrest. As a general rule, "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v. Municipal Court*, 387 U.S. 523, 528-29, 18 L. Ed. 2d 930, 935 (1967). One such exception to the warrant requirement is the right of an arresting officer to search his arrestee as an incident of the arrest. *Chimel v. California*, 395 U.S. 752, 23 L. Ed. 2d 685 (1969); *State v. Hardy*, 299 N.C. 445, 263 S.E.2d 711 (1980). " 'In the course of [a] search [incident to arrest], the officer may lawfully take from the person arrested any property which such person has about him and which is connected with the crime charged or which may be required as evidence thereof.' " *State v. Harris*, 279 N.C. 307, 310, 182 S.E.2d 364, 366-67 (1971) (quoting *State v. Roberts*, 276 N.C. 98, 102, 171 S.E.2d 440, 443

(1970)). "Further, a search may be made before an actual arrest and still be justified as a search incident to arrest, if, as here, the arrest is made contemporaneously with the search." *State v. Brooks*, 337 N.C. 132, 145, 446 S.E.2d 579, 587 (1994) (citing, *inter alia*, *Rawlings v. Kentucky*, 448 U.S. 98, 65 L. Ed. 2d 633 (1980)).

Accordingly, we must consider whether Detective Saul had probable cause to arrest defendant before seizing his shoes. Although Detective Saul testified at the suppression hearing that he did not believe he had probable cause to arrest defendant before he seized his shoes,

> [Detective Saul's] subjective opinion is not material. Nor are the courts bound by an officer's mistaken legal conclusion as to the existence or non-existence of probable cause or *reasonable* grounds for his actions. The search or seizure is valid when the objective facts known to the officer meet the standard required.

State v. Peck, 305 N.C. 734, 741, 291 S.E.2d 637, 641-42 (1982); *see also Scott v. United States*, 436 U.S. 128, 56 L. Ed. 2d 168 (1978).

> "Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. . . . To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith."

Harris, 279 N.C. at 311, 182 S.E.2d at 367 (quoting 5 Am. Jur. 2d *Arrests* § 44 (1962)) (alteration in original). Probable cause "deal[s] with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175, 93 L. Ed. 1879, 1890 (1949).

The record establishes that Detective Saul had probable cause to arrest defendant before he seized defendant's shoes. In making an arrest, an officer "may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge." *Jones v. United States*, 362 U.S. 257, 269, 4 L. Ed. 2d 697, 707 (1960), *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83, 65 L. Ed. 2d 619 (1980). This rule applies to anonymous informants as well as informants who

have supplied reliable information in the past. *Illinois v. Gates*, 462 U.S. 213, 244, 76 L. Ed. 2d 527, 552 (1983). Detective Saul was able to corroborate almost all of the information in the anonymous tip, including defendant's name, age, race, marital status, criminal status, and area of employment, as well as the street on which the victim lived. Detective Saul also knew that the murderer had entered through a window in the victim's house and that the victim was found with blood on her face; the anonymous tipster reported that the murderer had climbed in an open window and had hit the victim so hard she bled from her ears. These indicia of reliability gave credibility to the anonymous tipster. *See State v. Hughes*, 353 N.C. 200, 539 S.E.2d 625 (2000). In addition to the tip, Detective Saul independently had reason to believe the murderer wore "Chuck Taylor" shoes. When he went to speak with defendant, Detective Saul found him wearing "Chuck Taylor" shoes, providing sufficient probable cause to arrest defendant.

As noted previously, "a search may be made before an actual arrest and still be justified as a search incident to arrest, if, as here, the arrest is made contemporaneously with the search." *Brooks*, 337 N.C. at 145, 446 S.E.2d at 587 (citing *Rawlings*, 448 U.S. 98, 65 L. Ed. 2d 633). Although defendant was not formally arrested until after Detective Saul had compared defendant's shoes to the shoe-impression photographs, "[a] formal declaration of arrest by the officer is not a prerequisite to the making of an arrest." *State v. Tippett*, 270 N.C. 588, 596, 155 S.E.2d 269, 275 (1967); *see also State v. Jackson*, 280 N.C. 122, 185 S.E.2d 202 (1971). Here, defendant voluntarily agreed to be driven to the Criminal Investigations Division in Greensboro. Detective Saul told defendant he was not under arrest, and we have noted that an individual's voluntary agreement to accompany law enforcement officers to a place customarily used for interrogation does not constitute an arrest. *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986). However, Detective Saul's subsequent actions amounted to an arrest. When defendant refused to allow Detective Saul to examine his shoes, Detective Saul left defendant waiting in a windowless interrogation room with the door closed. He arranged for a uniformed police officer to remain outside the interrogation room while he obtained a search warrant. When Detective Saul returned, he seized defendant's shoes and left him in the same room with the door closed and the officer outside.

> We have held that "[w]hen a law enforcement officer, by word or actions, indicates that an individual must remain in the officer's

> presence . . . , the person is for all practical purposes under arrest if there is a substantial imposition of the officer's will over the person's liberty."

State v. Zuniga, 312 N.C. 251, 260, 322 S.E.2d 140, 145 (1984) (quoting *State v. Sanders*, 295 N.C. 361, 376, 245 S.E.2d 674, 684 (1978)) (first alteration in original) (defendant was under arrest when detained at a Knoxville, Tennessee bus station pending arrival of North Carolina law enforcement officers, even though defendant was not formally placed under arrest until he returned to North Carolina the next day). Stranded without shoes, away from work and his hometown, defendant suffered "a restraint on freedom of movement of the degree associated with a formal arrest." *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). We emphasize that the taking of defendant's shoes was qualitatively different from a seizure of other pieces of personalty such as a watch, glasses, or even some garments because, as a practical matter, defendant could not walk out barefoot or wearing only socks. Taking defendant's shoes effectively immobilized him. *See United States v. Beck*, 140 F.3d 1129, 1136 (8th Cir. 1998) ("[A]ny doubts that Beck had that he was free to drive away were extinguished when, after refusing consent to a search of his automobile, Officer Taylor ordered Beck to get out of his automobile and to stand on the side of the road."); *United States v. Gordon*, 917 F. Supp. 485, 488 (W.D. Tex. 1996) (where driver stopped in Louisiana on trip from Texas to Florida, detention of vehicle is detention of driver "because the detention relieved him of his sole means of transportation").

Based on the detention triggered by the seizure of defendant's shoes coupled with Detective Saul's preexisting probable cause, we conclude that defendant was not merely detained but was placed under arrest at the moment Detective Saul seized his shoes. Because the arrest was contemporaneous with the seizure, it was justified as a search incident to arrest. " 'In the course of [a] search [incident to arrest], the officer may lawfully take from the person arrested any property which such person has about him and which is connected with the crime charged or which may be required as evidence thereof.' " *Harris*, 279 N.C. at 310, 182 S.E.2d at 366-67 (quoting *Roberts*, 276 N.C. at 102, 171 S.E.2d at 443).

In determining that the seizure of defendant's shoes was lawful as a search incident to arrest, we necessarily hold that defendant's arrest was supported by probable cause. Therefore, we conclude that

defendant's confession was not obtained through an illegal seizure or arrest. This assignment of error is overruled.

[2] We next address whether the trial court erred in denying defendant's motion to suppress his confession based upon defendant's contention that it was not voluntary because it was induced by misstatements and a false promise made by Detective Saul. After Detective Saul returned from comparing defendant's shoes to the photographs of shoe impressions, he advised defendant of his *Miranda* rights, then questioned him for an hour and a half. During the questioning, he told defendant that his shoes "matched" the tread of the shoe prints found at the murder scene and that shoe prints were "just like" fingerprints. Detective Saul also told defendant he might get a lesser sentence if he would confess. Defendant made no incriminating statements during this interrogation. It was only after defendant was formally arrested that he asked to speak with Detective Saul and subsequently gave a confession.

A confession is admissible if it "was given voluntarily and understandingly." *State v. Schneider*, 306 N.C. 351, 355, 293 S.E.2d 157, 160 (1982). "Whether a confession is voluntary is a question of law fully reviewable on appeal." *State v. Greene*, 332 N.C. 565, 579-80, 422 S.E.2d 730, 738 (1992). Lies or trickery used by the police "are not to be condoned by the courts, but standing alone, . . . they are not sufficient to render defendant's confession inadmissible." *State v. Jackson*, 308 N.C. 549, 582, 304 S.E.2d 134, 152 (1983). "The admissibility of the confession must be decided by viewing the totality of the circumstances, one of which may be whether the means employed were calculated to procure an untrue confession." *Id.* at 574, 304 S.E.2d at 148. Other factors to be considered are "the defendant's mental capacity; whether the defendant was in custody at the time the confession was made; and the presence of psychological coercion, physical torture, threats, or promises." *Greene*, 332 N.C. at 579, 422 S.E.2d at 738.

We agree with the trial court's conclusion of law that defendant's confession was voluntary. Detective Saul's representations that shoe prints were "just like" fingerprints and that defendant's shoes "matched" those impressions found at the murder scene were exaggerations based upon his quick comparison of the photographed print with the shoes recovered from defendant rather than a proper forensic examination. The State's expert at trial was careful to clarify that shoe prints are not equivalent to fingerprints. Nevertheless, because she also testified that the shoe prints found at the scene

were consistent in size and design with the shoes seized from defendant, Detective Saul's statements to defendant were incorrect in degree but were not outright fabrications. Although Detective Saul made no promises to defendant in exchange for a confession during this initial interview, he did tell defendant that he *might* receive a lesser sentence if he confessed. However, Detective Saul made no commitment, and defendant made no statement in response to this suggestion.

Only after defendant was formally arrested did he ask another officer for an opportunity to speak further with Detective Saul. At his request for something to eat, defendant was provided coffee and crackers. Detective Saul gave defendant his *Miranda* rights for a second time, and defendant signed a written waiver. Defendant was coherent and told Detective Saul that he could read. He signed and initialed his written statement. Accordingly, we hold that the trial court correctly considered the totality of circumstances and determined on the basis of competent evidence that defendant's confession was voluntary and not triggered by any improper police conduct. *See, e.g., State v. Corley*, 310 N.C. 40, 47, 311 S.E.2d 540, 544 (1984) (under totality of circumstances test, statement by officer to the defendant that " 'things would be a lot easier on him if he went ahead and told the truth' " did not render the defendant's statement involuntary). This assignment of error is overruled.

CAPITAL SENTENCING PROCEEDING

[3] Defendant raises two issues pertaining to his sentence. He first contends that the instruction on Issue Three, weighing mitigating circumstances against aggravating circumstances, unconstitutionally prohibited an individual juror from considering mitigating circumstances found in Issue Two by the individual juror but not by the unanimous jury. The record shows that the trial court correctly instructed jurors that they need not be unanimous to find particular mitigating circumstances under Issue Two. *McKoy v. United States*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). However, when instructing jurors as to the weighing of these circumstances under Issue Three, the trial court stated: "When deciding this issue, each juror may consider any mitigating circumstance or circumstances that *the jury* determined to exist by a preponderance of the evidence in issue two." (Emphasis added.) The pattern jury instruction, which has been approved by this Court, *State v. Lee*, 335 N.C. 244, 439 S.E.2d 547, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994), reads: "When deciding this issue, each juror may consider any mitigating circum-

stance or circumstances that *he or she* determined to exist by a preponderance of the evidence in Issue Two." N.C.P.I.—Crim. 150.10 (1990) (emphasis added).

Although the instruction was erroneous, the error was harmless. An instruction containing an identical mistake was given in *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), where twenty mitigating circumstances were submitted to the jury pursuant to Issue Two. As here, the trial court instructed that " '[w]hen deciding this issue, each juror may consider any mitigating circumstance or circumstances that the *jury* determined to exist by a preponderance of the evidence in Issue Two.' " *Id.* at 122, 443 S.E.2d at 328 (alteration in original). We held that any error was harmless beyond a reasonable doubt.

> The jury was clearly and unambiguously instructed for each of the twenty mitigating circumstances submitted in Issue Two that only one or more of the jurors was required to find that the mitigating circumstance existed and that it was deemed mitigating. Thus, in order for the "jury" to find the existence of a mitigating circumstance, it was expressly clear that only one juror was required to find that circumstance. The jurors were then instructed in Issue Three that "[i]f you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances." No individual juror was therefore precluded in Issue Three from considering mitigating evidence that the juror alone found in Issue Two.

Id. at 123, 443 S.E.2d at 328.

In the case at bar, the trial court instructed the jury on twenty-two mitigating circumstances employing the same language used in *Robinson* on Issues Two and Three. While the pattern jury instruction should have been used, we conclude that the trial court's error was harmless beyond a reasonable doubt.

[4] Defendant next argues the trial court committed prejudicial error by submitting to the jury the mitigating circumstance contained in N.C.G.S. § 15A-2000(f)(1), that defendant has no significant history of prior criminal activity. The record indicates that defendant neither requested nor objected to the submission of this circumstance.

In capital cases, "the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances . . . which may

be supported by the evidence." N.C.G.S. § 15A-2000(b) (1999). In determining whether to submit the (f)(1) circumstance, the court must consider "whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity." *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1998). "[T]he [trial court's] focus should be on whether the criminal activity is such as to influence the jury's sentencing recommendation." *State v. Greene*, 351 N.C. 562, 569, 528 S.E.2d 575, 580, *cert. denied*, 531 U.S. 1041, 148 L. Ed. 2d 543 (2000). In the case at bar, the evidence showed that defendant had four prior convictions for violent felonies. The oldest was a 1986 conviction for common law robbery, followed by three convictions in 1990 for robbery with a dangerous weapon, second-degree kidnaping, and assault on a law enforcement officer, all stemming from a single incident.

Although defendant argues that no rational juror could have found that he had no significant criminal history, we previously have held that submission of the (f)(1) circumstance is not necessarily error where a defendant had prior felony convictions. In *State v. Geddie*, 345 N.C. 73, 478 S.E.2d 146 (1996), *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 43 (1997), the defendant had committed two felonies fifteen and ten years before the instant offense, while a third felony was an attempt committed five years before the instant offense. We held that there was sufficient evidence to support the submission of the (f)(1) mitigating circumstance. *Id.* at 102, 478 S.E.2d at 161. In *State v. Smith*, 347 N.C. 453, 496 S.E.2d 357, *cert. denied*, 525 U.S. 845, 142 L. Ed. 2d 91 (1998), the defendant had prior convictions for breaking and entering, larceny, and arson, in addition to a history of illegal drug use. The trial court gave the (f)(1) instruction over defendant's objection. In accordance with *Walker*, we held that "the trial court did not err to defendant's prejudice by submitting the (f)(1) mitigating circumstance." *Id.* at 470, 496 S.E.2d at 367. Moreover, even if submission of the (f)(1) circumstance was error here, we have held that "[a]bsent extraordinary facts . . . , the erroneous submission of a mitigating circumstance is harmless." *State v. Walker*, 343 N.C. 216, 223, 469 S.E.2d 919, 923, *cert. denied*, 519 U.S. 901, 136 L. Ed. 2d 180 (1996).

In the case at bar, we discern no extraordinary facts that make any error by the trial court in giving this instruction prejudicial to defendant. Additionally, as defendant concedes, it is not error to submit the (f)(1) mitigating circumstance where a defendant's prior convictions are also used to support the submission of the (e)(3)

aggravating circumstance that "defendant had been previously convicted of a felony involving the use or threat of violence to the person." N.C.G.S. § 15A-2000(e)(3); *see also State v. Blakeney*, 352 N.C. 287, 531 S.E.2d 799 (2000), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001). Similarly, we are not persuaded by defendant's argument that submitting the (f)(1) circumstance violated his federal constitutional right to counsel under the Sixth Amendment. *Smith*, 347 N.C. at 470, 496 S.E.2d at 367. Under the circumstances of this case, it is inconceivable that the jury would have returned a different verdict if the (f)(1) mitigating circumstance had not been submitted to the jury. *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises five issues that he concedes have been previously decided contrary to his position by this Court. Defendant contends the statutory short-form murder indictment insufficiently charged the elements of first-degree murder and failed to specify the aggravating circumstances upon which the State would rely. However, this Court consistently has held that the short-form murder indictment is adequate to charge first-degree murder. *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, —— U.S. ——, 148 L. Ed. 2d 797 (2001). Defendant contends the trial court erred by denying his motion for allocution. We have held that a criminal defendant does not have such a right. *State v. Green*, 336 N.C. 142, 443 S.E.2d 14, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). Defendant argues the trial court committed plain error by using the term "satisfy" in its instructions to the jury to define a defendant's burden of persuasion for mitigating circumstances. This Court has held such an instruction proper. *State v. Payne*, 337 N.C. 505, 448 S.E.2d 93 (1994), *cert. denied*, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995). Defendant argues the trial court erred by allowing the jury to refuse to give effect to nonstatutory mitigating evidence if the jury deemed the evidence not to have mitigating value. This Court has rejected defendant's argument. *Id.* Finally, defendant argues that the trial court erred by instructing the jurors on Issues Three and Four that each juror "may" consider mitigating circumstances found in Issue Two. This argument was rejected in *Lee*, 335 N.C. 244, 439 S.E.2d 547.

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 his case. We

have considered these issues and find no compelling reason to depart from our prior holdings. These assignments of error are overruled.

PROPORTIONALITY REVIEW

[5] Finally, we must determine: (1) whether the record supports the aggravating circumstances found by the jury; (2) whether the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2). Here, the jury found four aggravating circumstances pursuant to N.C.G.S. § 15A-2000(e)(3) and one aggravating circumstance pursuant to N.C.G.S. § 15A-2000(e)(5). As to the (e)(3) circumstances, the jury found that defendant had previously been convicted of common law robbery, assault on a law enforcement officer, second-degree kidnaping, and armed robbery, all of which are felonies involving the use or threat of violence to the person of another. As to the (e)(5) circumstance, the jury found that defendant committed the instant murder while in the commission of first-degree burglary. Our review of the record, transcripts, and briefs satisfies us that there was ample evidence to support both the submission of the aggravating circumstances to the jury and the finding of these circumstances by the jury. Our review also has failed to reveal any evidence that defendant's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

We now consider the proportionality of defendant's sentence. In addition to the statutory aggravating circumstances discussed above, the court also submitted twenty-two mitigating circumstances, of which one or more jurors found seven: (1) defendant was under the influence of a mental or emotional disturbance; (2) defendant was suffering from a mental condition insufficient to constitute a defense but which significantly reduced his culpability; (3) defendant acknowledged wrongdoing at an early stage in the process; (4) defendant expressed remorse at an early stage and has a support system in the community;[1] (5) defendant was under the influence of cocaine to a significant degree at the time of the offense; (6) defendant did not plan to kill Ms. McCracken at the time he broke

1. We note that the circumstance of defendant's support system was submitted to the jury in two different numbered sections of the verdict sheet. The jury found such a support system in one section and failed to find such a support system in the other section. Out of an abundance of caution, we will assume that the jury made the finding favorable to defendant.

into her apartment; and (7) defendant suffered emotional abuse as a child.

In our proportionality review, we compare the case at bar with other cases in which we have found the death sentence to be disproportionate. *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). 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, *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).

Of these seven, we address in detail those most analogous to the case at bar. In *Benson*, 323 N.C. 318, 372 S.E.2d 517, a robbery-murder case, the defendant held up the victim at a bank, firing a shotgun blast that injured the victim in the legs. The victim later died from cardiac arrest resulting from loss of blood. The murder conviction was based upon felony murder only, and the single aggravating circumstance found was that the murder was committed for pecuniary gain, (e)(6). The jury found as a mitigating circumstance that the defendant was under the influence of a mental or emotional disturbance, (f)(2); that the defendant had no significant history of prior criminal activity, (f)(1); that the defendant confessed, cooperated, and pled guilty during trial; and that the defendant had been abandoned by his mother at an early stage. We also noted that because he shot at the victim's legs, the defendant apparently did not intend to kill the victim. In the case at bar, defendant was also found to have been under the influence of a mental or emotional disturbance. However, unlike the defendant in *Benson*, defendant here was convicted under the theory of premeditation and deliberation as well as the theory of felony murder, he had a history of prior violent felony convictions, his actions at the scene of the robbery were consistent with an intentional killing, and the murder took place in the victim's home.

In *Stokes*, the defendant and three accomplices conspired to rob a businessman at his office. During the robbery, the victim was fatally beaten. The defendant was found guilty under the theory of felony murder and was sentenced to death. We found no error in the guilt-

innocence phase but ordered a new sentencing hearing. *State v. Stokes*, 308 N.C. 634, 304 S.E.2d 184 (1983), At that hearing, the defendant presented evidence that he had been diagnosed as being borderline mentally retarded with a full-scale IQ of 70. The jury found as mitigating circumstances that the defendant had no significant history of prior criminal activity, (f)(1); that the murder was committed while the defendant was under the influence of a mental or emotional disturbance, (f)(2); that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired (f)(6); and that the defendant was seventeen years old at the time of the offense, (f)(7). The jury also found the catchall circumstance and seven nonstatutory mitigating circumstances. The jury found as an aggravating circumstance that the murder was especially heinous, atrocious, or cruel, (e)(9). Noting also that the codefendants had not received the death penalty and that the defendant's degree of culpability was contested in the evidence, we held Stokes' death sentence to be disproportionate. *Stokes*, 319 N.C. 1, 352 S.E.2d 653. In the case at bar, as in *Stokes*, defendant was found to have been under the influence of a mental or emotional disturbance. Also, as will be discussed below, defendant in the case at bar has a diminished IQ. However, unlike the defendant in *Stokes*, defendant here was convicted on the theory of premeditation and deliberation in addition to felony murder; the jury did not find that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired; and defendant, who was approximately thirty-six years old at the time of the offense, had a significant history of prior violent felonies and killed the victim in her home rather than at a place of employment.

In *Young*, 312 N.C. 669, 325 S.E.2d 181, the defendant and two others who had been drinking all evening went to the victim's home for the ostensible purpose of purchasing liquor. Once inside, however, the defendant stabbed the victim, then instructed one of the others to "finish [the victim]." The defendant and the others then stole valuables from the victim's home. The defendant was convicted of first-degree murder, apparently on the theory of premeditation and deliberation. The jury found as aggravating circumstances that the murder was committed during the commission of a robbery or burglary, (e)(5), and that it was committed for pecuniary gain, (e)(6). The mitigating circumstances submitted were the defendant's age of nineteen and the catchall mitigating circumstance. The jury found one or more unspecified mitigating circumstances, but found them insuffi-

cient to outweigh the aggravating circumstances, and recommended a sentence of death. After reviewing similar cases, we concluded that Young's behavior was not as egregious as that of other defendants who had received the death penalty and held that the death sentence was disproportionate.

We have also examined the remaining cases cited above where the death penalty was determined to be disproportionate and have determined that none are substantially similar to the case at bar. As part of our review, we also compare the instant case with cases where the death penalty has been found proportionate. *McCollum*, 334 N.C. 208, 433 S.E.2d 144. Although we consider all the cases in the pool of similar cases, we are not required to cite all those cases every time we undertake this responsibility. *State v. Peterson*, 350 N.C. 518, 516 S.E.2d 131 (1999), *cert. denied*, 528 U.S. 1164, 145 L. Ed. 2d 1087 (2000). Nevertheless, several recent robbery-murder cases are pertinent, as discussed below.

In *State v. Meyer*, 353 N.C. 92, 540 S.E.2d 1 (2000), the defendant and another broke into the home of an elderly couple. The defendant stabbed each victim fatally, while his codefendant also stabbed one of the victims. The defendant pled guilty to both murders (the theory of each murder was not specified). At the defendant's sentencing hearing, the jury found the following aggravating circumstances as to each victim: the murder was committed during the course of a robbery, (e)(5); the murder was committed during the course of a burglary, (e)(5); the murder was especially heinous, atrocious, or cruel, (e)(9); and the murder 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, (e)(11). The only mitigating circumstance found by the jury was that the defendant had no significant criminal history, (f)(1). In our opinion, we observed that among the statutory aggravating circumstances, (e)(3) (prior history of violent felonies), (e)(5) (capital felony committed while defendant was in commission of burglary, among other offenses), (e)(9) (capital felony was especially heinous, atrocious, or cruel), and (e)(11) (course of conduct) have been held sufficient to support a death sentence even when standing alone. *Id.* at 120, 540 S.E.2d at 18 (citing *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)). We also noted that the victims were killed in their home. We concluded that the death sentences were not disproportionate.

In *State v. Roseboro*, 351 N.C. 536, 528 S.E.2d 1, *cert. denied*, 531 U.S. 1019, 148 L. Ed. 2d 498 (2000), the defendant was convicted of first-degree murder based on theories of premeditation and deliberation and of felony murder. He was also convicted of first-degree rape, first-degree burglary, felony larceny, and possession of stolen property. A codefendant initially broke into the victim's home. He was joined later by the defendant, who suffocated the victim and raped her as she lay dying or shortly after death. The defendant presented evidence that he had borderline intelligence and suffered from personality disorder and chronic substance dependence disorder. The jury found as aggravating circumstances that the murder was committed during the commission of a burglary, (e)(5), and that the murder was committed during the commission of a rape, (e)(5). The jury found as mitigating circumstances that the defendant's capacity to appreciate the criminality of his conduct and to conform to the requirements of the law was impaired, (f)(6), and that the defendant aided in the apprehension of another capital felon, (f)(8). We concluded that the death sentence was proportionate.

In *State v. Thomas*, 350 N.C. 315, 514 S.E.2d 486, *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999), the defendant broke into the victim's home. After binding and gagging the victim, the defendant stabbed him thirty-six times, then stole the victim's wallet, clothing, and automobile. The defendant was convicted of first-degree murder based on premeditation and deliberation and on felony murder. The jury found as aggravating circumstances that the defendant had a history of prior violent felonies, (e)(3); that the murder occurred during the commission of a burglary, (e)(5); and that the murder was especially heinous, atrocious, or cruel, (e)(9). The jury found four unspecified mitigating circumstances. In our proportionality review, we observed that we had found no death sentence disproportionate where the (e)(3) aggravating circumstance had been found. We also noted that a finding of first-degree murder based on theories of premeditation and deliberation and of felony murder is significant. *Id.* at 365, 514 S.E.2d at 517; *accord State v. Harris*, 338 N.C. 129, 161, 449 S.E.2d 371, 387 (1994) (a finding of premeditation and deliberation evinces " 'a more calculated and cold-blooded crime' ") (quoting *Lee*, 355 N.C. at 297, 439 S.E.2d at 575), *cert. denied*, 514 U.S. 1100, 131 L. Ed. 2d 752 (1995). We concluded that the death penalty was proportionate.

In *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44, *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), a codefendant who needed money enlisted two others into a robbery scheme. (The appeals of the three codefendants were all addressed in this case.) The three broke into the victims' home; shot the two victims fatally; then stole money, jewelry, and firearms. The defendants used the proceeds of the crime to purchase drugs. All three defendants were found guilty of first-degree murder based on premeditation and deliberation and on felony murder. After a capital sentencing proceeding, the jury recommended life for one codefendant and death for the other two. For purposes of this analysis, we focus on the defendants who received death sentences. The jury found the same aggravating circumstances for each defendant: each had a prior record of violent felonies, (e)(3); the murders were committed for pecuniary gain, (e)(6); the murders were especially heinous, atrocious, or cruel, (e)(9); and the murders were part of a course of conduct that included the commission by the defendant of other crimes of violence against another person, (e)(11). The jury found ten mitigating circumstances as to one defendant and no mitigating circumstances as to the other defendant. We concluded that the death sentence for each defendant was not disproportionate.

In *State v. Adams*, 347 N.C. 43, 490 S.E.2d 220 (1997), *cert. denied*, 522 U.S. 1096, 139 L. Ed. 2d 878 (1998), the defendant broke into the home of the seventy-year-old female victim to steal money for a marijuana purchase. When the victim awoke, the defendant fatally stabbed her and fled, taking $38.00. Shortly thereafter, the defendant turned himself in and confessed. Evidence was presented to show that the defendant had a borderline personality with dependent and histrionic traits and was marijuana-dependent. He was convicted of first-degree murder on the basis of premeditation and deliberation and of felony murder. The jury found as aggravating circumstances that the murder was committed to effect the defendant's escape, (e)(4); that the murder was committed in commission of an armed robbery, (e)(5); and that the murder was especially heinous, atrocious, or cruel, (e)(9). The opinion does not state what, if any, mitigating circumstances were found, but we did note that there was no evidence that the defendant was unable to appreciate the criminality of his conduct. We concluded that the death penalty was not disproportionate.

Finally, in *State v. Chandler*, 342 N.C. 742, 467 S.E.2d 636, *cert. denied*, 519 U.S. 875, 136 L. Ed. 2d 133 (1996), the defendant, who apparently was looking for marijuana, cut a door screen to gain access to the victim's house. While inside, he killed the victim, a

ninety-year-old widow, by means of a massive blow to the head. The defendant was convicted of first-degree murder on the basis of felony murder, with first-degree burglary as the underlying felony. The sole aggravating circumstance found by the jury was that the murder was committed for pecuniary gain, (e)(6). The jury rejected the defendant's proposed mitigating circumstance that the defendant suffered from an impaired capacity to appreciate the criminality of his conduct, (f)(6). In conducting our proportionality review, we noted the defendant did not seek medical help for the victim. In addition, the defendant's efforts to fabricate an alibi showed a lack of remorse. We also observed that the murder took place in the victim's home and stated that such a killing particulary shocks the conscience because it constitutes a violation of " 'an especially private place, one in which a person has a right to be secure.' " *Id.* at 763, 467 S.E.2d at 648 (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)). We concluded that the death sentence was not disproportionate.

Based on these and other similar cases in the pool, we discern the following salient factors pertaining to defendant here: (1) defendant was convicted on the theory of premeditation and deliberation and the theory of felony murder, *see State v. Thomas*, 350 N.C. 315, 514 S.E.2d 486; (2) defendant murdered the elderly victim in her home, *see State v. Meyer*, 353 N.C. 92, 540 S.E.2d 1; *State v. Chandler*, 342 N.C. 742, 467 S.E.2d 636; (3) the jury found defendant had a history of violent felony convictions,(e)(3), and no death sentence has been disproportionate where this circumstance has been found, *see State v. Thomas*, 350 N.C. 315, 514 S.E.2d 486; (4) the jury found aggravating circumstances pursuant to both (e)(3) and (e)(5), each of which is alone sufficient to support a death sentence, *see State v. Meyer*, 353 N.C. 92, 540 S.E.2d 1; (5) defendant took no steps to seek help for the victim, *see State v. Chandler*, 342 N.C. 742, 467 S.E.2d 636; (6) defendant was an adult, *compare State v. Robinson*, 342 N.C. 74, 463 S.E.2d 218 (1995) (defendant age twenty-one), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 793 (1996) *with Stokes*, 319 N.C. 1, 352 S.E.2d 653 (defendant age seventeen); and (7) defendant's actions in Ms. McCracken's apartment were consistent with a deliberate killing, *cf. State v. Benson*, 323 N.C. 318, 372 S.E.2d 517. These factors all indicate that defendant's death sentence is not disproportionate.

In addition, we feel compelled to address defendant's mental and intellectual status. Defendant presented the testimony of Claudia Coleman, Ph.D., who was qualified and recognized by the court as an

expert in clinical psychology, neuropsychology, and forensic psychology. During the guilt-innocence portion of the proceedings, defendant offered Dr. Coleman's testimony for the purpose of casting doubt on the credibility of his confession to Detective Saul. In a *voir dire* conducted in the absence of the jury, Dr. Coleman described the various tests she had administered to defendant, including tests for intelligence and screening for neurological difficulties. The intelligence test yielded an overall verbal IQ of 68, a performance score of 63, and a full-scale IQ of 63. Other tests showed defendant's reading, spelling, and arithmetic scores were significantly below average for his age, but his memory was within normal limits. Dr. Coleman testified during *voir dire* that defendant demonstrated symptoms of schizophrenic process, along with a history of alcohol and drug dependence. When asked her opinion of defendant's intelligence, Dr. Coleman responded:

> [I]t is my opinion that he has not historically functioned within the . . . true range of mental retardation. I believe that he's probably functioned in the borderline range. . . . [I]t's still significantly below normal or average, but above actual retardation. . . . I believe that some of the time[d] test[s] on the intelligence testing were biased to a certain degree because of his psychomotor slowness. Now, I have to qualify my own opinion. Again, it may be that because he has had the head injuries [which defendant self-reported to Dr. Coleman] that he has functioned in that range. But I don't have information that he's functioned quite that low. It appears that he's functioned a little bit higher than retardation.

She went on to clarify that because the antipsychotic and tranquilizing drugs being taken by defendant could have the side effect of slowing his thinking and performance, her opinion that defendant's intelligence category was borderline rather than retarded took into account the effect of these prescribed drugs on his test scores.

After *voir dire* was completed, Dr. Coleman testified before the jury. Her testimony concerning defendant's intelligence was that

> he was functioning within the mild range of mental retardation on the testing across the board for both verbal and performance I.Q. scores. And it resulted in an overall I.Q. score within the range of mild mental retardation. . . . [T]hat score was . . . the full scale at 63. . . . [A]gain, I . . . think that the performance test was

> influenced somewhat by some medication he was on, and it's probably a little higher than that.

She summed up her testimony in the guilt-innocence phase by stating:

> First of all, [defendant], in my opinion, has the symptoms, and has had them for quite a while, of a schizophrenic process, . . . specifically what is characterized as undifferentiated schizophrenia. Schizophrenia is a very serious major mental illness that involves a person, disturbance and disorganization in a person's thinking, behavior, mood. . . . [I]t is also my opinion with regard to the available information that he has a serious, very serious, long history of substance dependence. The substances being primarily alcohol, marihuana, cocaine, and at one time heroin. . . . [I]t is my impression that [defendant's] performance I.Q. is down, the one I got from him, because of medication side effects that he takes for his psychotic symptoms. He's on an antipsychotic medication, and has been on it for some time. Those types of medications tend to slow a person down. It slows their thinking and kind of behaviorally slows them. And because of that, we often on—particularly on motor or times tasks get some deficits that if an individual weren't on the medication, we wouldn't find. In other words, it would be a little higher.
>
> Now, on the verbal I.Q. testing his score within the mentally retarded range should not have been affected significantly by the medication. But historically he has functioned, in my opinion, more in the borderline range. Which, if you look at average functioning, what you've got is superior, high average, average, low average. And this holds for I.Q. or social functioning. Borderline and then retarded. . . . [I] think that he has certainly functioned intellectually and socially and adaptively in the borderline range, which is, again, below average. And significantly below average but probably within the range of retardation. I cannot be sure of that unless we were able to administer the tests when he was mentally stable and not on medication.[2]

After the jury returned a verdict of guilty, defendant recalled Dr. Coleman at the sentencing phase. She again testified that defendant exhibited borderline mental functioning with verbal functioning in

2. We note that the penultimate sentence in this portion of Dr. Coleman's testimony appears inconsistent with the rest of her testimony. Because she elsewhere testified several times that she believed defendant fell in the borderline range, we assume either that she misspoke here or that a transcription error occurred.

the mildly retarded range. As noted above, at least one juror found as a mitigating circumstance pertinent to the instant analysis that defendant was under the influence of a mental or emotional disturbance at the time of the offense, that defendant suffered from a mental condition insufficient to constitute a defense but which significantly reduced defendant's culpability, and that defendant was under the influence of cocaine at the time of the offense. However, no juror found "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" or "defendant's limited mental capacity at the time of the commission of the offense significantly reduced defendant's culpability for the offense," even though these factors were submitted to the jury.

It appears the jury heeded Dr. Coleman's testimony. Her opinions that defendant was suffering from schizophrenic process and that his intellectual status was borderline rather than retarded are reflected in the jury's findings of, and failure to find, the corresponding mitigating circumstances. Because defendant's own expert provided opinion testimony that he was not retarded, and because the jurors, who heard defendant and the expert, found he was not retarded, we conclude that our earlier decisions addressing retarded capital defendants are only marginally pertinent. *See, e.g., State v. Holden*, 346 N.C. 404, 488 S.E.2d 514 (1997), *cert. denied*, 522 U.S. 1126, 140 L. Ed. 2d 132 (1998); *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995); *McCollum*, 334 N.C. 208, 433 S.E.2d 144. The fact that defendant's IQ fell in the borderline range does not affect our conclusion, after reviewing the record in its entirety, that the sentence of death was not disproportionate.

Nevertheless, we are aware that defendant's IQ raw score falls into the retarded range and that Governor Michael F. Easley has signed legislation that provides that a mentally retarded defendant shall not be sentenced to death. Act of Aug. 4, 2001, ch. 346, sec. 1, 2001 N.C. Sess. Laws (adding N.C.G.S. § 15A-2005 effective 1 October 2001 for trials docketed to begin on or after that date). This legislation includes a provision applicable to defendants who may be mentally retarded but have already been sentenced to death. Ch. 346, sec. 3, 2001 N.C. Sess. Laws (adding N.C.G.S. § 15A-2006 effective 1 October 2001). At the time of defendant's trial, his counsel had no reason to anticipate that defendant's IQ would have the significance that it has now assumed. Accordingly, we additionally hold that our

ruling today as to other issues in defendant's trial shall not prejudice any right of defendant to seek post-conviction relief pursuant to this new legislation.

Based upon the foregoing, we conclude that defendant received a fair trial, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. RODNEY TAYLOR

No. 505A99

(Filed 17 August 2001)

1. **Criminal Law— motion to continue—reasonable time to prepare case**

The trial court did not abuse its discretion in a capital first-degree murder and robbery with a dangerous weapon trial by denying defendant's motion to continue when defendant had twenty-eight days' notice of the trial date, because counsel had adequate notice that the trial was imminent and had a reasonable time to prepare for trial.

2. **Confessions and Incriminating Statements— motion to suppress—Sixth Amendment right to counsel—extradition**

The trial court did not abuse its discretion in a capital first-degree murder and robbery with a dangerous weapon trial by denying defendant's motion to suppress his confession made to North Carolina police officers while he was placed in custody in Florida for the sole purpose of extradition to North Carolina, because: (1) defendant's Sixth Amendment right to counsel had not attached prior to or during defendant's confinement for extradition to North Carolina; (2) defendant knowingly, voluntarily, and understandingly signed a waiver of his rights; and (3) there is no evidence of coercion.

3. **Jury— selection—prosecutor's use of word "necessary"**

The trial court did not err in a capital first-degree murder and robbery with a dangerous weapon trial by allowing the prosecutor to repeatedly use the word "necessary" during jury selection to allegedly imply that the death penalty is necessary to deter

crime, because: (1) it cannot be said that the question as to whether the jurors thought the death penalty was "necessary" conveyed to the jury the impression that the death penalty is a deterrent to crime; and (2) it is improper to speculate as to what each juror felt was the reason for the necessity or lack of necessity for the death penalty.

4. Jury— selection—possible biases of prospective jurors

The trial court did not abuse its discretion in a capital first-degree murder and robbery with a dangerous weapon trial by preventing defense counsel from probing the possible biases of prospective jurors, because: (1) the trial court gave defense counsel numerous opportunities to pose rephrased questions to prospective jurors; and (2) although defendant focuses on the trial court's act of sustaining the prosecutor's objection to his question concerning whether a juror thought it was wrong to question what a police officer says, defendant's counsel elicited several answers from the juror concerning his past contacts with police officers and the juror stated that nothing in these contacts would affect his service as a juror.

5. Jury— excusal for cause—bias against imposing death penalty

The trial court did not err in a capital first-degree murder and robbery with a dangerous weapon trial by excusing for cause a prospective juror based on his alleged bias against imposing the death penalty because although the prospective juror did not unequivocally state his bias against the death penalty, it cannot be said that the trial court could have only been left with the impression that the juror would follow the law impartially.

6. Witnesses— expert—qualifications

The trial court did not abuse its discretion in a capital first-degree murder and robbery with a dangerous weapon trial by ruling that a witness was not qualified to testify as an expert under N.C.G.S. § 8C-1, Rule 702(a) regarding the position of the victim's body when he was shot, because: (1) it did not appear the witness had the experience necessary to testify regarding this particular matter, and the trial court did not believe this testimony would be helpful; and (2) the testimony had previously been elicited from the State's pathologist on cross-examination, and the trial court was within its discretion under N.C.G.S. § 8C-1, Rule 403 to exclude this testimony as cumulative.

7. Sentencing— capital—mitigating circumstances—mental capacity to appreciate criminality of conduct—mental or emotional disturbance—expert testimony excluded

The trial court did not err in a capital sentencing proceeding by excluding the testimony of defendant's expert witness as to his opinion on the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance concerning defendant's mental capacity to appreciate the criminality of his conduct or on the N.C.G.S. § 15A-2000(f)(2) mitigating circumstance concerning whether defendant was under the influence of a mental or emotional disturbance at the time of the murder, because: (1) the expert was not qualified to give what was in essence a medical opinion as to any possible mental defect defendant had based on his drug use; and (2) the expert's testimony lacked the requisite uniqueness regarding this defendant.

8. Sentencing— capital—mitigating circumstances—combining instead of submitting separately

The trial court did not err in a capital sentencing proceeding by combining requested mitigating circumstances and excluding some submitted mitigating circumstances, instead of submitting the proposed circumstances separately and independently, because the trial court's final list of mitigating circumstances subsumed the proposed mitigating circumstances to the exclusion of none.

9. Sentencing— capital—mitigating circumstances—request for peremptory instruction on all

The trial court did not err in a capital sentencing proceeding by denying defendant's request for a peremptory instruction on all mitigating circumstances submitted to the jury, because: (1) a trial court is not required to sift through all the evidence and determine which of defendant's proposed mitigating circumstances entitle him to a peremptory instruction; (2) it is insufficient for a defendant to submit a general request for peremptory instructions without specifying the evidence that supports each of those instructions; and (3) a defendant must also distinguish his requests between statutory and nonstatutory mitigating circumstances.

10. Sentencing— capital—death penalty proportionate

The trial court did not err by imposing the death penalty in a first-degree murder case, because: (1) defendant was found

guilty on the basis of premeditation and deliberation and under the felony murder rule; (2) the jury found the N.C.G.S. § 15A-2000(e)(4) aggravating circumstance that the murder was committed to avoid lawful arrest and the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the murder was committed while defendant was engaged in the commission of a robbery; (3) defendant left the victim dead in the middle of the road; and (4) defendant admitted that he shot the victim while the victim was on his knees facing away from defendant, showing an egregious disregard for human life.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Fullwood, J., on 23 October 1998 in Superior Court, New Hanover County, upon a jury verdict finding defendant guilty of first-degree murder. On 24 February 2000, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of an additional judgment. Heard in the Supreme Court 12 February 2001.

Roy A. Cooper, Attorney General, by Tiare B. Smiley, Special Deputy Attorney General, for the State.

Margaret Creasy Ciardella for defendant-appellant.

BUTTERFIELD, Justice.

On 2 February 1998, defendant was indicted for first-degree murder and for robbery with a dangerous weapon. Defendant was tried capitally before a jury at the 12 October 1998 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. Following a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction. On 23 October 1998, the trial court sentenced defendant to death. The trial court also sentenced defendant to a consecutive minimum sentence of 103 months' imprisonment and a maximum of 133 months' imprisonment for the robbery conviction. Defendant appealed his sentence of death for first-degree murder to this Court as of right. On 24 February 2000, this Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of the robbery conviction and judgment.

At trial, the State's evidence tended to show that on 1 January 1998, defendant and his brother, Kashene Taylor, left the Hillcrest Housing Complex in Wilmington, North Carolina, with Brian Troy shortly before 6:00 p.m. and drove to Bryan Road. Defendant and Troy got out of the car and talked briefly. As Troy knelt in the road, defendant shot him in the head and upper body. Defendant and Kashene Taylor then returned to apartment 4 in the Hillcrest Housing Complex.

The victim's body was discovered by a passing motorist, who summoned the paramedics and police. When the paramedics arrived at 6:32 p.m., they found the victim's lifeless body in the roadway. Officers from the Wilmington Police Department arrived shortly afterwards and secured the scene. An autopsy performed on the victim's body on 2 January 1998 revealed gunshot wounds to the head and the hip. The cause of death was determined to be the gunshot wound to the head.

The victim's father, Willie Troy, Jr. (Mr. Troy), testified that he dropped his son off between 5:00 p.m. and 5:15 p.m. on 1 January 1998 near the intersection of 13th and Mears Streets in Wilmington. He stated that his son had indicated to him that he was going to visit friends at apartment 4. Mr. Troy also testified that he gave his son $10.00 as he got out of the car and that his son was carrying a pager.

The victim sold drugs for defendant. Katie Coe, defendant's girlfriend, testified that she told defendant that the victim had told her that he had spent the money he owed defendant. The victim told defendant that a member of the Wilmington Police Department's city/county vice-narcotics team had confiscated the drugs from him. Sergeant Billy Maultsby of the Wilmington Police Department testified that Ms. Coe told him that defendant did not feel that the victim was being truthful about the drugs and money the victim owed defendant and that defendant was upset by the contradictory stories. Ms. Coe also testified that the victim left apartment 4 sometime before 6:00 p.m. to purchase marijuana. According to Ms. Coe, defendant and Kashene Taylor arrived shortly thereafter and left to find the victim. Veronica Roberts, Michael Coe's girlfriend, testified that she, defendant, Kashene Taylor, Michael Coe, and Katie Coe were all present when the victim arrived. According to Ms. Roberts, defendant motioned for the victim to step outside, and Kashene Taylor followed them.

The victim was not with defendant when he returned to the apartment. Katie Coe testified that defendant was breathing hard when he returned. On the night of 1 January 1998, after Mr. Troy told the police of his son's intention to visit his friends, the police went to apartment 4. Defendant, Michael Coe, and Katie Coe were present when the police arrived. The apartment occupants confirmed that the victim had been there that evening. On 2 January 1998, defendant and Katie Coe left Fayetteville, North Carolina, by bus for New York, New York. During the bus ride to New York, defendant told Ms. Coe that he had shot the victim. Ms. Coe returned to Wilmington from New York after calling the Wilmington Police Department. A magistrate issued a warrant for defendant's arrest on 8 January 1998. Defendant was subsequently located in Fort Lauderdale, Florida.

In Florida, defendant was presented to a Broward County committing magistrate on 9 January 1998. On 11 January 1998, two Wilmington Police Department detectives interviewed defendant in the Broward County jail. At that time, defendant gave taped and written confessions of the murder. Defendant waived extradition and was returned to North Carolina. The arrest warrant was served upon defendant on 23 January 1998.

PRETRIAL ISSUES

[1] In his first assignment of error, defendant contends that the trial court committed reversible error in denying his motion to continue, thereby denying his constitutional due process rights. Defendant argues that twenty-eight days' notice of the trial date was insufficient time for defendant to prepare his defense adequately. Defendant was appointed counsel in late January 1998 and assistant counsel in early February 1998. A hearing pursuant to Rule 24 of the General Rules of Practice for the North Carolina Superior and District Courts was held on 12 March 1998, at which time defendant was informed that his case would be tried as a capital case. On 1 September 1998, defendant was notified that the trial would begin on 12 October 1998.

Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review. *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981). When a motion to continue raises a constitutional issue, the trial court's ruling is fully reviewable upon appeal. *Id.* Even if the motion raises a constitutional issue, a denial of a motion to continue is grounds for a new trial only when defendant shows both that the denial was erroneous and that he suffered

prejudice as a result of the error. *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982).

"It is implicit in the constitutional [guarantee] of assistance of counsel . . . that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense. However, no set length of time is guaranteed and whether defendant is denied due process must be determined under the circumstances of each case." *State v. McFadden*, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977). Defendant cites the distance from New Hanover County to defendant's place of confinement, the busy trial schedules of both counsel, and the logistics of obtaining records and procuring witnesses from Florida and New York as having made the twenty-eight days' notice of trial burdensome. Defendant contends that the trial court's denial of the motion to continue denied his constitutional rights by not allowing his attorneys adequate time to prepare for trial. Defendant was represented by two experienced and competent trial attorneys. The record reveals that defendant had filed numerous defense motions well prior to trial. Counsel was given notice that the State was prepared to set the case for trial in June 1998. In its findings, the trial court found that there had been some discussion of an August 1998 trial date. While the record is devoid of any indication that defendant either agreed to or voiced any objection to the August trial date, there is no evidence that the trial judge erred in denying the motion to continue. The record in the case *sub judice* reveals that counsel had adequate notice that the trial was imminent and had a reasonable time to prepare for trial. The trial court's denial of the motion to continue was not erroneous, nor was it prejudicial to defendant. This assignment of error is overruled.

[2] Defendant next assigns error to the trial court's denial of the motion to suppress his confession. Defendant contends that the motion to suppress should have been granted based on a violation of his Fifth and Sixth Amendment rights. The record indicates that on 8 January 1998, a New Hanover County magistrate issued a warrant for defendant's arrest for murder. After the warrant was issued, North Carolina authorities were informed that defendant had fled to Fort Lauderdale, Florida. Using the Police Information Network (PIN), North Carolina authorities notified Fort Lauderdale authorities of the arrest warrant. Defendant was located in Fort Lauderdale and was placed into custody.

On 9 January 1998, defendant appeared before a Broward County, Florida, committing magistrate. The committing magistrate ordered

defendant held in the Broward County jail for the Wilmington, North Carolina, murder. At the request of the Florida public defender, the judge issued an oral order prohibiting law enforcement officers from speaking to defendant about the matter. On Sunday, 11 January 1998, detectives from the Wilmington Police Department went to the Broward County jail and interviewed defendant. Defendant then confessed to the victim's murder. Defendant contends that his Sixth Amendment right to counsel attached upon appointment of counsel at his 9 January 1998 extradition probable cause hearing before the Florida committing magistrate. We disagree.

Central to defendant's argument is the point at which defendant's Sixth Amendment right to counsel attached. It is well settled that an accused is entitled to the assistance of counsel at every critical stage of the criminal process as constitutionally required under the Sixth and Fourteenth Amendments to the United States Constitution. As we have said previously, a defendant's right to counsel under the Sixth and Fourteenth Amendments "attaches only at such time as adversary judicial proceedings have been instituted 'whether by way of formal charge, preliminary hearing, indictment, information or arraignment.' " *State v. Franklin*, 308 N.C. 682, 688, 304 S.E.2d 579, 583 (1983) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689, 32 L. Ed. 2d 411, 417 (1972)), *overruled on other grounds by State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985). This Court stated in *State v. McDowell*, 301 N.C. 279, 289, 271 S.E.2d 286, 293 (1980), *cert. denied*, 450 U.S. 1025, 68 L. Ed. 2d 220 (1981):

> While it is true that the investigation had narrowed its focus upon [the defendant], it had not so progressed that the state had committed itself to prosecute. It is only when the defendant finds himself confronted with the prosecutorial resources of the state arrayed against him and immersed in the complexities of a formal criminal prosecution that the sixth amendment right to counsel is triggered as a guarantee.

Initially, we must determine if defendant's Sixth Amendment right to counsel had attached prior to his confinement in Florida. In what appears to be a case of first impression, the instant case presents us with the question of whether the issuance of an arrest warrant for first-degree murder alone is sufficient to trigger the Sixth Amendment right to counsel. The United States Supreme Court has expressly declined to extend a defendant's Sixth Amendment right to counsel to the point of his arrest. The Court's rulings in *Massiah v. United States*, 377 U.S. 201, 12 L. Ed. 2d 246

(1964); *Kirby*, 406 U.S. 682, 32 L. Ed. 2d 411; and *Brewer v. Williams*, 430 U.S. 387, 51 L. Ed. 2d 424 (1977), clearly established that law enforcement officers cannot initiate interrogation of a defendant without counsel present after the right to counsel has attached. In *Williams*, the defendant's right to counsel attached at his arraignment; however, in *Massiah*, the right attached at indictment. *Williams* dispelled the notion that the *Massiah* rule was applicable only after indictment.

In *United States v. Gouveia*, 467 U.S. 180, 81 L. Ed. 2d 146 (1984), the Court declined to extend the *Massiah-Williams* rule to the time of a defendant's arrest. The Court in *Gouveia* plainly stated, "we have never held that the right to counsel attaches at the time of arrest." *Id.* at 190, 81 L. Ed. 2d at 155. Rather, the determination of when the right to counsel attaches is based on the rule established in *Kirby* that the right attaches only upon the commencement of adversary judicial criminal proceedings where the State has committed itself to prosecute.

As the Court noted in *Gouveia*, "the right to counsel exists to protect the accused during trial-type confrontations with the prosecutor." *Id.* Under N.C.G.S. § 15A-642(b), "indictment may not be waived in a capital case or in a case in which the defendant is not represented by counsel." An arrest warrant for first-degree murder is not a sufficient charging document upon which a defendant can be tried. Therefore, an arrest warrant for first-degree murder in this state is not a formal charge as contemplated under *Kirby*. Defendant's Sixth Amendment right to counsel did not attach either at the issuance of the warrant or at the time of his arrest upon the warrant following his return to North Carolina.

Defendant bases a portion of his argument on the mistaken belief that he was arrested in Florida for the charge of murder and attempts to incorporate substantive Florida law that would pertain only to a defendant being charged with a crime committed in Florida. Contrary to defendant's allegations that he was not picked up as a fugitive, it is clear to us that defendant, who was suspected of murder in North Carolina and not Florida, was placed into custody in Florida for the sole purpose of extradition to North Carolina.

Florida and North Carolina have adopted a Uniform Criminal Extradition Act. Under the Act, the asylum state may hold the fugitive until a Governor's Warrant is issued by the demanding state's executive. Extradition is a right granted to the states under Article IV,

Section 2, Clause 2 of the United States Constitution. Extradition is based upon comity and full faith and credit between the states in order to facilitate the speedy trial of persons ultimately prosecuted in the demanding state. *See* 31A Am. Jur. 2d *Extradition* §§ 1-3 (1989). An extradition proceeding is intended to be a summary and mandatory executive proceeding. *State v. Owen*, 53 N.C. App. 121, 123, 280 S.E.2d 44, 45, *disc. rev. denied*, 304 N.C. 200, 285 S.E.2d 107 (1981); *State v. Carter*, 42 N.C. App. 325, 328, 256 S.E.2d 535, 537, *appeal dismissed and disc. rev. denied*, 298 N.C. 301, 259 S.E.2d 302 (1979).

Under both North Carolina and Florida law, an indigent person being held for extradition is entitled to appointed counsel. N.C.G.S. § 7A-451(a)(5) (1999); Fla. Stat. ch. 941.10 (2001). The right to counsel for indigents in extradition proceedings is statutory, not constitutional. Here, defendant's Florida counsel was appointed to represent defendant during his extradition proceeding. A fugitive may challenge extradition by applying for a writ of *habeas corpus* in the asylum state. We note that the record is devoid of any indication that defendant sought a writ of *habeas corpus* while in Florida. The question of whether defendant would have had a constitutional right to counsel during a Florida *habeas corpus* proceeding is not relevant here. Furthermore, when a fugitive voluntarily returns to North Carolina, he has waived his right to challenge those extradition matters which are exclusive to the asylum state. *State v. Cutshall*, 109 N.C. 764, 772, 14 S.E. 107, 109 (1891).

On 11 January 1998, two detectives with the Wilmington Police Department arrived at the Broward County jail to question defendant. Defendant gave detailed taped and written confessions. Defendant argues that this was in violation of the committing magistrate's bench order that no law enforcement officers speak to defendant concerning "this matter." A determination of whether the actions of the North Carolina law enforcement officers violated the Florida magistrate's order is not dispositive of the admissibility of defendant's confession in his prosecution for murder in North Carolina.

Defendant maintains that the requested order prohibiting law enforcement contact was an implied assertion to deal with law enforcement officers, from any jurisdiction, only through counsel. Defendant's argument is premised on the belief that his Sixth Amendment right to counsel had attached at his arrest or with the appointment of counsel. Our determination that the right to counsel had not attached nullifies any merit defendant's argument may have had. This leaves any violation of the magistrate's order as a matter

exclusively for the Florida courts. Any violation did not affect defendant's constitutional rights and, therefore, is not relevant to our considerations. Without any attachment of the Sixth Amendment right to counsel, a suspect is free to waive the rights available to him under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), and its progeny.

The question before this Court is whether defendant knowingly and intelligently waived his *Miranda* rights prior to his 11 January 1998 confession. Defendant was read his *Miranda* rights at 10:45 a.m. on 11 January 1998. Defendant then knowingly, voluntarily, and understandingly signed a waiver of those rights. Defendant's confession was untainted by coercion and was properly admissible at trial.

Defendant's Sixth Amendment right to counsel did not attach prior to or during his confinement for extradition to North Carolina. The right was not triggered by the issuance of the arrest warrant, the detention of defendant in Florida, or the appointment of counsel for extradition purposes. We hold that there was no violation of defendant's Fifth, Sixth, or Fourteenth Amendment rights. Accordingly, we conclude that the trial court did not err in denying defendant's motion to suppress his confession. This assignment of error is overruled.

JURY SELECTION

[3] Defendant also assigns error to the trial court's ruling allowing the prosecutor to repeatedly use the word "necessary" during jury selection. Defendant maintains that the word "necessary" implies to the prospective jurors that the death penalty is necessary to deter crime. As both defendant and the State properly observe, this Court examined a similar occurrence in *State v. Willis*, 332 N.C. 151, 420 S.E.2d 158 (1992), in which we stated:

> We also cannot say that the question as to whether the jurors thought the death penalty was "necessary" conveyed to the jury the impression that the death penalty is a deterrent to crime. The question does not imply why the death penalty is necessary and the members of the jury might have different reasons for thinking it is necessary. We cannot speculate as to what each juror felt was the reason for the necessity or the lack of necessity for the death penalty.

Id. at 182, 420 S.E.2d at 173. Defendant has presented no persuasive argument that distinguishes the facts in the instant case from those in *Willis*. This assignment of error is without merit.

[4] In conjunction with the preceding assignment of error, defendant maintains that the trial court erred in not allowing defense counsel to probe the possible biases of prospective jurors. Defendant identifies several instances where the trial court sustained the prosecutor's objections to defense counsel's *voir dire* questions. Many of the instances cited by defendant relate to the prosecutor's use of the word "necessary." There remains one instance that requires our consideration.

"The extent and manner of questioning during jury *voir dire* is within the sound discretion of the trial court." *State v. Richardson*, 346 N.C. 520, 529, 488 S.E.2d 148, 153 (1997), *cert. denied*, 522 U.S. 1056, 239 L. Ed. 2d 652 (1998). "It is well recognized in this jurisdiction that both the State and defendant have a right to question prospective jurors about their views on the death penalty so as to insure a fair and impartial verdict." *State v. Adcock*, 310 N.C. 1, 10, 310 S.E.2d 587, 593 (1984). "The extent and manner of inquiry into prospective jurors' qualifications in a capital case is a matter that rests largely in the trial judge's discretion and his rulings will not be disturbed absent a showing of an abuse of that discretion." *Id.* Examination of the record indicates that the trial judge gave defense counsel numerous opportunities to pose rephrased questions to prospective jurors. In particular, defendant focuses on the trial court's act of sustaining the prosecutor's objection to his question concerning whether a juror thought it was wrong to question what a police officer says. This, defendant maintains, precluded him from determining whether the juror had any biases toward police officers.

To the contrary, immediately after the prosecutor's objection was sustained, defendant's counsel elicited several answers from the juror concerning his past contacts with police officers. This colloquy ended with the juror stating that there was nothing in these contacts that would affect his service as a juror. We hold that defendant has failed to show any abuse of discretion on the part of the trial judge. This assignment of error is overruled.

[5] Defendant also assigns error to the trial court's excusal for cause of a prospective juror, alleging that the juror was qualified to serve under *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985), and

Witherspoon v. Illinois, 391 U.S. 510, 20 L. Ed. 2d 776 (1968). It is well settled in this state that a prospective juror's bias against the death penalty need not be proven with " 'unmistakable clarity.' " *State v. Jaynes*, 353 N.C. 534, 551, 549 S.E.2d 179, 193 (2001) (quoting *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)); *accord 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). It is not a matter of whether the venireman utters formulary words that determines his fitness to serve in a capital trial. Rather, it is the juror's ability to adhere to his oath and follow the law as given by the trial court. "[T]here will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Wainwright*, 469 U.S. at 425-26, 83 L. Ed. 2d at 852. Reviewing courts are required to pay deference to the trial court's judgment concerning the juror's ability to follow the law impartially. *Davis*, 325 N.C. at 624, 386 S.E.2d at 426.

Defendant points to the lengthy *voir dire* of Joseph Sylvester, attempting to illustrate Mr. Sylvester's desire to follow the law impartially. Mr. Sylvester stated on several occasions that he was in favor of the death penalty. However, when asked if he could "be part of the machinery that imposes the death penalty," he responded, "No, sir." Mr. Sylvester continued to give conflicting answers that were observable by the trial judge. After rehabilitation, where he indicated he could follow the judge's instructions, Mr. Sylvester was asked by the trial judge if he could vote for the death penalty. Mr. Sylvester responded, "See, that, I'm not sure yet. I'm for the death penalty, but I myself, personally, I don't know if I can handle it, that's what I'm saying." Faced with the conflicting responses of the juror, the trial judge allowed the motion to excuse the juror for cause. Although the venireman did not unequivocally state his bias against the death penalty without conflicting himself, we cannot say that the trial court could have only been left with the impression that the juror would follow the law impartially. We give the trial court due deference in its ability to determine this juror's ability to follow the law impartially. Accordingly, we defer to the trial judge and overrule this assignment of error.

GUILT-INNOCENCE PHASE

[6] Defendant assigns error to the trial court's ruling that Wayne Hill was not qualified to testify as an expert witness regarding the posi-

tion of the victim's body when he was shot. The admissibility of expert testimony is governed by Rule 702 of the North Carolina Rules of Evidence, which provides, "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion." N.C.G.S. § 8C-1, Rule 702(a) (1999). "It is undisputed that expert testimony is properly admissible when such testimony can assist the jury . . . . [T]he trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 139-40, 322 S.E.2d 370, 376 (1984). "Although an expert's opinion testimony is not objectionable merely because it embraces an ultimate issue, it must be of assistance to the trier of fact in order to be admissible." *State v. Jackson*, 320 N.C. 452, 459-60, 358 S.E.2d 679, 683 (1987).

After careful review of the record, we can find no evidence that the trial judge abused his discretion in finding that Wayne Hill was not qualified to testify as to the position of the victim's body when the first shot was fired. The trial judge aptly observed that while the witness had extensive experience in a number of areas, it did not appear that he had the experience necessary to testify regarding this particular matter. The tendered witness has an associate of applied science degree in police sciences, is an approved instructor in Massachusetts for an occupational school training course on crime-scene photography and investigation, has self-published at least two pamphlets on ammunition, and has had emergency medical technician ambulance training. He has also had the opportunity to view several accident scenes, help set a broken leg, review autopsy photographs that he obtained from various medical institutions, and receive training in tae kwon do and karate in the Marine Corps. The record reveals that the witness planned to testify chiefly to the possibility that the victim could have been shot in some position other than kneeling. This testimony had previously been elicited from the State's pathologist on cross-examination. Indeed, the judge was well within his discretion under N.C.G.S. § 8C-1, Rule 403 to exclude this testimony as cumulative. We do not speculate as to whether the witness' testimony would or would not have embraced the ultimate question of defendant's guilt had he been allowed to testify. It is sufficient that the trial judge properly rejected the tendered expert because he was not satisfied with the witness' expertise to testify in this area and did not believe

that this witness' testimony would be helpful. This assignment of error is overruled.

SENTENCING PROCEEDING

[7] Defendant alleges that the trial court erroneously excluded defendant's expert witness' testimony during the sentencing proceeding. Dr. Darrell Irwin was accepted by the trial court as an expert in sociology and criminology. Dr. Irwin was allowed to testify extensively about defendant's childhood and adolescent environments in which violence and drugs were rife. The witness was not allowed to give an opinion on defendant's mental capacity to appreciate the criminality of his conduct or on whether defendant was under the influence of a mental or emotional disturbance at the time of the murder. The trial court, based on the witness' allowed testimony regarding defendant's drug use on the day of the murder, submitted the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance, that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, but did not submit the N.C.G.S. § 15A-2000(f)(2) mitigating circumstance, that the murder was committed while defendant was under the influence of a mental or emotional disturbance. Defendant argues that the excluded testimony would have increased the likelihood that at least one juror would have found the (f)(6) mitigating circumstance and would have supported the submission of the (f)(2) mitigating circumstance. We do not find defendant's arguments convincing.

Defendant correctly states that the admissibility of mitigating evidence during the sentencing proceeding is not constrained by the Rules of Evidence. N.C.G.S. § 8C-1, Rule 1101(b)(3) (1999). However, the trial judge may exclude evidence that is "repetitive, unreliable, or lacking an adequate foundation." *State v. Locklear*, 349 N.C. 118, 158, 505 S.E.2d 277, 300 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999). Defense counsel asked Dr. Irwin in the offer of proof, "Based on that model of drug violence, do you have an opinion about whether Rodney Taylor could conform his conduct to the requirements of the law?" He responded, "I think he operated in a certain culture, which is a drug dealing subculture, and the conduct there is not in accordance with the law." Defense counsel then asked Dr. Irwin, "Is it your opinion that his ability to conform his conduct was impaired?" "Yes," he responded. While Dr. Irwin was clearly qualified to give his opinion as to the possible cultural affects living in a drug-infested environment would have had on defendant, he was not qualified to give what is in essence a medical opinion as to any possible

mental defect, as his training and experience were insufficient to allow the court to admit this portion of his testimony. The trial judge properly exercised his discretion in excluding testimony that was unreliable for its intended purpose. Although the courts have often properly allowed the testimony of psychiatrists and psychologists to address mitigating circumstances focused on a particular defendant's mental state, we do not believe it proper to allow a sociologist who studies the functions and patterns of groups to give this type of testimony. Indeed, the above portions of testimony could have applied to any family member or associate of defendant who grew up in the same environment. The primary purpose of mitigating circumstances is, as defendant notes, to treat the capital defendant with "that degree of respect due the uniqueness of the individual." *Lockett v. Ohio*, 438 U.S. 586, 605, 57 L. Ed. 2d 973, 990 (1978). The witness' testimony lacked the requisite uniqueness regarding this defendant, and the trial court did not err in excluding the testimony. Accordingly, defendant was not entitled to submission of the (f)(2) mitigating circumstance or enhancement of the (f)(6) mitigating circumstance by this testimony. These assignments of error are overruled.

[8] Defendant submitted fifty-three nonstatutory mitigating circumstances at the charge conference. In addition to statutory mitigating circumstances, the final list included twelve nonstatutory mitigating circumstances and the N.C.G.S. § 15A-2000(f)(9) mitigating circumstance. Defendant assigns as error the trial court's combining of the requested mitigating circumstances and the exclusion of some submitted mitigating circumstances. After a careful and thorough review of the record, we hold that the trial court's final list of mitigating circumstances subsumed the proposed mitigating circumstances to the exclusion of none.

This Court has held that " '[t]he refusal [of a trial judge] to submit . . . proposed circumstances separately and independently . . . [is] not error.' " *State v. Hartman*, 344 N.C. 445, 468, 476 S.E.2d 328, 341 (1996) (quoting *State v. Greene*, 324 N.C. 1, 21, 376 S.E.2d 430, 443 (1989), *sentence vacated on other grounds*, 494 U.S. 1002, 108 L. Ed. 2d 603 (1990)), *cert. denied*, 520 U.S. 1201, 137 L. Ed. 2d 708 (1997). We have also stated 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*, 525 U.S. 843, 142 L. Ed. 2d 88 (1998). For each of the contended omitted mitigating circum-

stances, there existed a corresponding mitigating circumstance that subsumed the proposed one. Also, at least one juror found the (f)(9) catchall mitigating circumstance. This finding indicates that the jury availed itself of the opportunity to consider any evidence of mitigating value. Defendant has failed to demonstrate any omission or any improper combination of mitigating circumstances inconsistent with the holdings of this Court. These assignments of error are overruled.

[9] In another assignment of error, defendant alleges that the trial court committed reversible constitutional error by denying his request for a peremptory instruction on all mitigating circumstances submitted to the jury. Defendant maintains that all of the mitigating circumstances, except the (f)(6) mitigating circumstance, submitted to the jury were supported by uncontroverted evidence and that he was therefore entitled to peremptory instructions on each. We disagree. Defendant submitted a general written request asking that the court "give a peremptory instruction on all the mitigating circumstances submitted." This Court held in *State v. Gregory*, 340 N.C. 365, 416, 459 S.E.2d 638, 667 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996), that a trial court is "not required to sift through all the evidence and determine which of defendant's proposed mitigating circumstances entitle him to a peremptory instruction." It is insufficient for a defendant to submit a general request for peremptory instructions without specifying the evidence that supports each of those instructions. A defendant must also distinguish his requests between statutory and nonstatutory mitigating circumstances. *Id.*; *see also Locklear*, 349 N.C. at 161, 505 S.E.2d at 302. Defendant failed to satisfy either of these requirements in his request. The trial court did not err in denying defendant's peremptory instruction request. This assignment of error is without merit.

PRESERVATION ISSUES

Defendant raises thirteen additional issues for the purpose of permitting this Court to reexamine its prior holdings and also for the purpose of preserving these issues for possible further judicial review: (1) the trial court committed reversible error by denying defendant's request for allocution before the jury; (2) the trial court erred in instructing that each juror "may," rather than "must," consider any mitigating circumstances the juror determined to exist when deciding sentencing Issues Three and Four; (3) the trial court committed reversible error in denying defendant's motions to dis-

close the theory upon which the State would seek a conviction of first-degree murder and defendant's motion to dismiss the indictment for first-degree murder; (4) the trial court erred in denying defendant's request for individual *voir dire* and sequestration of the jurors; (5) the North Carolina death penalty statute is unconstitutional; (6) the trial court erred in denying defendant's motion for a bill of particulars as to aggravating circumstances; (7) the trial court committed reversible error in denying defendant's motion for an instruction on residual doubt as a mitigating circumstance; (8) the trial court committed reversible error in instructing the jury that all evidence presented in the guilt phase of the trial was competent for jury consideration during the sentencing phase of the trial; (9) the trial court's instructions defining the burden of proof applicable to mitigating circumstances violated defendant's constitutional rights because they used the inherently ambiguous and vague terms "satisfaction" and "satisfy," thus permitting jurors to establish for themselves the legal standard to be applied to the evidence; (10) the trial court committed reversible error in its instructions that the jury had a "duty" to recommend death; (11) the trial court erred in its instructions that the answers to Issues One, Three, and Four must be unanimous; (12) the trial court committed reversible error in its instructions that permitted jurors to reject a submitted mitigating circumstance because it had no mitigating value; and (13) the trial court committed reversible error in its instructions as to what each juror may consider regarding the mitigating circumstances in Issues Three and Four. We have considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. Therefore, we reject these assignments of error.

PROPORTIONALITY REVIEW

[10] Finally, this Court has the exclusive statutory duty in capital cases to review the record to determine (1) whether the record supports the aggravating circumstances found by the jury; (2) whether the death sentence was entered under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (1999). 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. We find no evidence that the sentence of death was imposed under the influence of passion, prejudice, or any other arbi-

trary consideration. Thus, we turn to our final statutory duty of proportionality review.

In the present case, the jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. At defendant's capital sentencing proceeding, the jury found the two aggravating circumstances submitted for its consideration: that the murder was committed to avoid a lawful arrest, N.C.G.S. § 15A-2000(e)(4), and that the murder was committed while defendant was engaged in the commission of a robbery, N.C.G.S. § 15A-2000(e)(5).

Three statutory mitigating circumstances were submitted for the jury's consideration: 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); defendant's age at the time of the murder, N.C.G.S. § 15A-2000(f)(7); and the catchall mitigating circumstance, that there existed any other circumstance arising from the evidence that the jury deems to have mitigating value, N.C.G.S. § 15A-2000(f)(9). Of these, the jury found the existence of only the (f)(9) mitigator. Of the twelve nonstatutory mitigating circumstances submitted by the trial court, one or more jurors found the following four to have mitigating value: that defendant was an illegitimate child without parental guidance and without supervision for extended periods of time; that all of defendant's "parental figures," including his mother, have been involved in the use and/or sale of drugs since defendant's birth and were incarcerated for such activity during defendant's formative years; that when defendant was a child, his mother moved the family into several homes and neighborhoods where drugs were openly sold and violence was prevalent; and that when defendant was a teenager, his mother sold the family's possessions, stole from her sons, and prostituted herself for drug money.

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 our proportionality review, we must compare the present case with other cases in which this

Court has ruled upon the proportionality issue." *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 determined the death penalty 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 that this case is not substantially similar to any case in which this Court has found the death penalty disproportionate.

Several characteristics of this case support this conclusion. Defendant was convicted of first-degree murder on the basis of premeditation and deliberation. We have recognized that "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). In none of the cases held disproportionate by this Court did the jury find the existence of the (e)(4) aggravating circumstance, as the jury did here. Moreover, in only two cases has this Court held a death sentence disproportionate despite the existence of multiple aggravating circumstances. In *Young*, this Court considered *inter alia* that the defendant had two accomplices, one of whom "finished" the crime. *Young*, 312 N.C. at 688, 325 S.E.2d at 193. By contrast, defendant in the present case acted alone. In *Bondurant*, this Court weighed the fact that the defendant expressed concern for the victim's life and remorse for his action by accompanying the victim to the hospital. *Bondurant*, 309 N.C. at 694, 309 S.E.2d at 182-83. In the present case, defendant left the victim dead in the middle of a road.

We also consider cases in which this Court has held the death penalty proportionate; however, "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *State v. McCollum*, 334 N.C. at 244, 433 S.E.2d at 164 (1993). We conclude that 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.

This Court previously held proportionate a death sentence based, as in the present case, solely on the (e)(4) and (e)(5) statutory aggravating circumstances. *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). Further, there are four statutory aggravating circumstances that, standing alone, this Court has held sufficient to support a sentence of death. *See 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)(5) statutory circumstance, which the jury found here, is among those four. *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).

In the present case, defendant admitted to law enforcement officials that he shot the victim while the victim was on his knees facing away from defendant. The crime of which defendant was convicted and the circumstances under which it occurred manifest an egregious disregard for human life. Accordingly, we conclude that the sentence of death recommended by the jury and ordered by the trial court is not disproportionate.

We conclude that defendant received a fair trial and capital sentencing proceeding, free from prejudicial error. Accordingly, the sentence of death recommended by the jury is left undisturbed.

NO ERROR.

GEORGE C. YANCEY, ADMINISTRATOR FOR THE ESTATE OF LUCY W. YANCEY v. ARTIE SYLVESTER LEA AND HUSS, INCORPORATED

No. 366A00

(Filed 17 August 2001)

Motor Vehicles— gross negligence—passing and turning accident

The trial court did not err in an automobile negligence action by granting defendants' motion for a directed verdict on a gross negligence claim and in refusing to instruct the jury on gross negligence where the sole evidence of negligence was that defendant

Lea began to pass at or about the same time decedent had signaled her intent to turn left. The evidence at most discloses a breach of Lea's duty to exercise ordinary care, but falls substantially short of manifesting any wicked purpose or willful and wanton conduct in conscious and intentional disregard of the rights and safety of others. There was certainly no evidence of racing, excessive speed, intoxication, or any combination thereof, the circumstances present in gross negligence motor vehicle cases to date.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 139 N.C. App. 76, 532 S.E.2d 560 (2000), finding no error in a judgment entered 7 December 1998 by Smith (W. Osmond, III), J., in Superior Court, Granville County. Heard in the Supreme Court 13 March 2001.

Glenn, Mills & Fisher, P.A., by William S. Mills, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Steven M. Sartorio, for defendant-appellees.

LAKE, Chief Justice.

This is a wrongful death action, arising from a motor vehicle accident, wherein plaintiff, George C. Yancey, administrator of the estate of Lucy W. Yancey, driver of one of the vehicles, filed suit for damages for her death against the driver and owner of the other vehicle, defendants Artie Sylvester Lea and Huss, Incorporated, respectively. This case presents the issue of whether the trial court erred in granting defendants' motion for directed verdict as to plaintiff's claim of gross negligence and refusing to instruct the jury on the issue of defendants' gross negligence. We conclude that the trial court did not err and affirm the decision of the Court of Appeals.

On 5 September 1996, the day before the subject accident, Hurricane Fran swept through North Carolina, and during the evening of 6 September, the weather was poor and the skies were still overcast. Defendant Lea was operating a tractor-trailer truck for his employer, defendant Huss, and was transporting a load, weighing approximately eighty thousand pounds, northbound on Interstate Highway 85 to his employer's terminal in Chase City, Virginia. Because of hurricane-related delays on I-85 north of Durham, defendant Lea decided to return to his depot via Highway 15 North, a two-

lane highway. As Lea traveled through Granville County after dark, there was no street lighting or electricity to houses along the highway, and as a result, Lea could not see residential houses or driveways on either side of the highway.

As defendant Lea proceeded north on Highway 15 and approached the town of Bullock in Granville County, he observed and passed, without incident in a passing zone, a pickup truck pulling a trailer. The driver of the pickup truck testified that as he was passed by the tractor-trailer, defendant Lea may have been driving anywhere between fifty-five and sixty-five miles per hour in a fifty-five-mile-per-hour zone.

Defendant Lea testified that he was in the town limits of Bullock when he first saw the taillights of decedent's automobile as it passed over a knoll on the north side of town. When defendant Lea cleared this knoll, decedent's vehicle came back in sight, and he observed that it was traveling straight on Highway 15 but appeared to be slowing down. At this point, the vehicles entered into a passing zone for northbound traffic, and as the distance between the two closed, defendant Lea decided he should pass decedent's automobile. He testified that he could have stopped his truck behind this vehicle but consciously chose to pass instead. The speed limit was forty-five miles per hour in the location of the collision, and the roadway was straight and with unobstructed visibility.

In proceeding to pass decedent's vehicle, defendant Lea testified that he confirmed the passing zone, turned on his left-turn signal and blinked his headlights to warn the driver of the automobile of his intention to pass in the left-hand lane. Defendant Lea further testified that he did not see any turn signal or brake lights from the automobile at any time before he started to pass, and that when he was even with the automobile, he observed the automobile begin to turn and its left front fender cross in front of the truck's right fender. Defendant testified that he was in sixth gear at the time of the collision, so he could not have been driving faster than forty miles per hour. Upon colliding, the tractor-trailer and the automobile moved forward 170 feet before coming to a stop on the highway.

A passenger in decedent's car at the time of the accident, Bobbie Lee Elliott, testified at trial that decedent's car was slowing down in order to turn left off Highway 15 into a residential driveway. Elliott further testified that decedent's left-turn signal was flashing when defendant Lea's tractor-trailer approached, and that the turn signal

was on at the time of the collision. The investigating officer testified that when he spoke to defendant Lea after the accident, Lea showed no signs of a physical or a mental impairment or fatigue, and additionally, the officer testified that the blinkers on decedent's car were not on or operating when he arrived at the scene of the accident or when he had an opportunity to examine the automobile. An expert in the field of accident reconstruction, Dr. Roland F. Barrett, testified as to the physical facts discovered at the scene of the accident. Dr. Barrett confirmed that the truck was entirely in the left-hand passing lane at the time of impact, that it was straight in the passing lane and that the right front area of the truck first made contact with the left side of decedent's vehicle as that vehicle tried to turn.

At the close of all the evidence, plaintiff moved to amend his complaint and to have gross negligence included as a basis for his claim against defendants Lea and Huss. Concurrent with his motion to amend, plaintiff also requested that the jury be given an instruction on the issue of gross negligence with respect to defendant Lea's conduct. Specifically, plaintiff requested that the trial judge give the pattern instruction for reckless driving, N.C.P.I.—Civ. 207.10 (motor veh. vol. 1989), entailing willful or wanton conduct on the part of defendant Lea. The trial court granted plaintiff's motion to amend but denied plaintiff's request for a gross negligence instruction on the grounds that the evidence did not support submission of that issue to the jury.

The jury found both negligence by defendant Lea and contributory negligence on the part of the decedent, and on 7 December 1998, the trial court entered the jury's verdict and dismissed the action against defendants with prejudice. Plaintiff appealed to the Court of Appeals, where a divided court affirmed the decision of the trial court.

The question raised in this case is whether there was evidence of gross negligence on the part of defendant Lea sufficient to override decedent's contributory negligence and allow recovery by plaintiff. Contributory negligence is not a bar to a plaintiff's recovery when the defendant's gross negligence, or willful or wanton conduct, is a proximate cause of the plaintiff's injuries. *Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E.2d 345, 350 (1971). In the sole issue before us, plaintiff contends that defendant Lea's conduct, as reflected in the evidence of record, constituted gross negligence sufficient to overcome the affirmative defense of contributory negligence, and

thus the trial court was required to instruct the jury on gross negligence. We disagree.

This Court has long held that "[w]hen charging the jury in a civil case it is the duty of the trial court to explain the law and to apply it to the evidence on the substantial issues of the action." *Cockrell v. Cromartie Transp. Co.*, 295 N.C. 444, 449, 245 S.E.2d 497, 500 (1978); *see also Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc.*, 288 N.C. 213, 217 S.E.2d 566 (1975); *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 188 S.E.2d 342 (1972). As this Court stated in *Cockrell*:

> If a party contends that certain acts or omissions constitute a claim for relief or a defense against another, the trial court must submit the issue with appropriate instructions if there is evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the claim or defense asserted. *See, Vernon v. Crist*, 291 N.C. 646, 231 S.E.2d 591 (1977); *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970).

Cockrell, 295 N.C. at 449, 245 S.E.2d at 500. In this regard, see also *Adams v. Mills*, 312 N.C. 181, 186-87, 322 S.E.2d 164, 168 (1984).

In determining or defining gross negligence, this Court has often used the terms "willful and wanton conduct" and "gross negligence" interchangeably to describe conduct that falls somewhere between ordinary negligence and intentional conduct. We have defined "gross negligence" as "wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Bullins v. Schmidt*, 322 N.C. 580, 583, 369 S.E.2d 601, 603 (1988); *see also Hinson v. Dawson*, 244 N.C. 23, 92 S.E.2d 393 (1956); *Wagoner v. North Carolina R.R. Co.*, 238 N.C. 162, 77 S.E.2d 701 (1953). "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 37-38 (1929), *quoted in Parish v. Hill*, 350 N.C. 231, 239, 513 S.E.2d 547, 551 (1999). Our Court has defined willful negligence in the following language:

> An act is done wilfully when it is done purposely and deliberately in violation of law or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason. "The true conception of wilful negligence involves a deliberate purpose not to discharge some duty necessary to the

> safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed on the person by operation of law." *Thompson on Negligence* (2d Ed.) § 20.

Foster v. Hyman, 197 N.C. at 191, 148 S.E. at 37 (citations omitted); *see also Brewer v. Harris*, 279 N.C. at 296-97, 182 S.E.2d at 350.

It is clear from the foregoing language of this Court that the difference between ordinary negligence and gross negligence is substantial. As this Court has stated:

> An analysis of our decisions impels the conclusion that this Court, in references to *gross negligence*, has used that term in the sense of wanton conduct. Negligence, a failure to use due care, *be it slight or extreme*, connotes inadvertence. Wantonness, on the other hand, connotes *intentional wrongdoing*. Where malicious or wilful injury is not involved, wanton conduct must be alleged and shown to warrant the recovery of punitive damages. Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others.

Hinson, 244 N.C. at 28, 92 S.E.2d at 397 (emphasis added).

Thus, the difference between the two is not in degree or magnitude of inadvertence or carelessness, but rather is intentional wrongdoing or deliberate misconduct affecting the safety of others. An act or conduct rises to the level of gross negligence when the *act* is done purposely and with knowledge that such act is a breach of duty to others, i.e., a *conscious* disregard of the safety of others. An act or conduct moves beyond the realm of negligence when the *injury or damage* itself is intentional. *Brewer*, 279 N.C. at 297, 182 S.E.2d at 350.

In the area of motor vehicle negligence, it appears there are no cases wherein the appellate courts of this state have held that a gross negligence instruction should have been given in the context of a simple passing and turning scenario, such as in the instant case. Our case law as developed to this point reflects that the gross negligence issue has been confined to circumstances where at least one of three rather dynamic factors is present: (1) defendant is intoxicated, *Foster v. Hyman*, 197 N.C. 189, 148 S.E. 36; (2) defendant is driving at excessive speeds, *Baker v. Mauldin*, 82 N.C. App. 404, 346 S.E.2d 240 (1986) (defendant driving over one hundred miles per hour); or (3)

defendant is engaged in a racing competition, *Harrington v. Collins*, 298 N.C. 535, 259 S.E.2d 275 (1979); *Lewis v. Brunston*, 78 N.C. App. 678, 338 S.E.2d 595 (1986). In some of these cases, a combination of the above factors are present. *See Brewer v. Harris*, 279 N.C. 288, 182 S.E.2d 345 (defendant's decedent driving over one hundred miles per hour while intoxicated); *Boyd v. L.G. DeWitt Trucking Co.*, 103 N.C. App. 396, 405 S.E.2d 914 (defendant intoxicated and traveling in excess of the posted speed limit), *disc. rev. denied*, 330 N.C. 193, 412 S.E.2d 53 (1991); *Siders v. Gibbs*, 39 N.C. App. 183, 249 S.E.2d 858 (1978) (defendant driving between sixty and eighty miles per hour in a thirty-five-mile-per-hour zone while intoxicated); *Johnson v. Yates*, 31 N.C. App. 358, 229 S.E.2d 309 (1976) (defendant driving seventy to eighty miles per hour in a fifty-five-mile-per-hour zone while intoxicated). In *Brewer*, this Court held that the jury should have been instructed on defendant's willful and wanton conduct where the evidence showed that, at the time of the accident, defendant had a blood alcohol content of .31, that he was driving over one hundred miles per hour before entering a curve and that he ignored warnings from a passenger in his own car to slow down. While we do not hold these factors to comprise an exhaustive list from which gross negligence must always be found, they do serve well to guide our present analysis.

In the case *sub judice*, none of these three factors existed. There was no racing competition, there was no allegation or evidence of intoxication, and plaintiff does not contend excessive speed or speeding on the part of defendant Lea at the time of the accident. The only adverse evidence relating to defendant Lea's speed came from a witness who estimated that at some time and distance prior to the point of collision, he was passed by defendant Lea at a speed somewhere between fifty-five and sixty-five miles per hour in a fifty-five-mile-per-hour zone. This Court has held that testimony reflecting a speed between one named speed and another, such as between thirty-five miles per hour and forty-five miles per hour, is only evidence of the lower estimated speed. *Hinson v. Dawson*, 241 N.C. 714, 86 S.E.2d 585 (1955); *Mitchell v. Melts*, 220 N.C. 793, 18 S.E.2d 406 (1942).

In the instant case, plaintiff basically contends that defendant Lea, rather than slowing and stopping his tractor-trailer behind decedent's vehicle, as defendant Lea acknowledged he could have done, instead elected to pass and thereby chose to ignore the substantial risk of severe injury or death to others. Plaintiff asserts that this was

a conscious, mental process on the part of defendant Lea, coupled with the substantial likelihood of severe injury or death because of the size and weight of his truck, and thus defendant's conduct was elevated beyond simple or ordinary negligence to a reckless disregard. Plaintiff asserts that the evidence viewed in the light most favorable to plaintiff would support the following conclusions: that defendant Lea was tired and in a hurry to get home; that he consciously took Highway 15 instead of Interstate 85 on the basis of less traffic, allowing him to get home faster; that defendant Lea either saw and chose to ignore or should have seen decedent's left-turn signal; that he could have stopped his truck and patiently waited for decedent to complete the maneuver for which she was slowing; and that defendant Lea consciously chose to disregard the risk that decedent's vehicle was turning into a driveway to the left.

In his brief, plaintiff acknowledges that this Court has not applied the issue of gross negligence in the context of a tractor-trailer passing an automobile while the latter was signaling a left turn, and in that regard, plaintiff asserts that the case of *Carr v. Murrows Transfer, Inc.*, 262 N.C. 550, 138 S.E.2d 228 (1964), is distinguishable from the instant case. In *Carr*, the plaintiff's evidence showed that the defendant was following the plaintiff's milk truck, which had on a left-turn signal and which was gradually reducing its speed, and as the milk truck was turning left, it was struck by the defendant's passing tractor-trailer. The defendant in *Carr* stated that prior to his attempt to pass, there was nothing to indicate the plaintiff's intention to make a left turn. In the case *sub judice*, plaintiff asserts that the *Carr* case is distinguishable because "it involved a defendant who was simply inattentive to the turning movements of the preceding vehicle and testified that the milk truck did nothing to indicate its intention to make a left turn." To the contrary, we conclude that the facts in *Carr* are virtually identical to plaintiff's allegations and evidence in the instant case, i.e., that defendant Lea ignored or at best "should have seen" decedent's left-turn signal in operation. This Court in *Carr* did not consider or discuss the question of gross negligence or willful and wanton conduct.

In his brief, plaintiff cites to *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), contending that because defendant Lea was fully aware of decedent's decreasing speed as if coming to a halt, he showed reckless disregard of the risks and consciously created the probable likelihood of serious injury. Additionally, plaintiff relies strongly on the United States District Court case of *Phillips v. Dallas*

Carrier Corp., 766 F. Supp. 416, 420 (M.D.N.C. 1991). In *Phillips*, the defendant was driving his tractor-trailer on a two-lane highway behind the plaintiff's vehicle when the plaintiff slowed to make a left turn onto a rural paved road. The defendant attempted to pass by crossing over the centerline into the opposite lane, colliding with the plaintiff when she turned left into his path. Plaintiff in the case *sub judice* contends the facts here are more compelling than those in *Phillips* because the defendant in *Phillips* blew his horn in warning as he passed, and there was no evidence in *Phillips* that the plaintiff's left-turn signal was on. Plaintiff further asserts that like defendant Lea in the instant case, the defendant in *Phillips* was in a hurry and made a conscious decision to pass the plaintiff even though he could have safely stopped his truck behind her. The trial court in *Phillips* concluded that a reasonable jury could determine that the defendant consciously disregarded any possible harm he might inflict and thus submitted gross negligence.

In analyzing the facts and circumstances of the instant case with those in *Woodson* and *Phillips*, we reject the comparisons. The character, quality and quantity of evidence found in *Woodson* clearly does not exist in the instant case. In *Woodson*, there was a controlled set of circumstances which developed slowly, and unlike the instant case, the defendant in *Woodson* had been previously cited for the same unlawful conduct, clearly evidencing knowing misconduct. Likewise, in *Phillips*, the facts are readily distinguishable from those in the case *sub judice*. The factual circumstances in *Phillips* show that the defendant truck driver elected to pass the plaintiff's vehicle at the intersection of Highway 64 and Rural Paved Road 1416, ignoring and passing over double yellow lines prohibiting passing at that location and ignoring the working caution signal for the intersection, which should have alerted the defendant to the reason the plaintiff in *Phillips* had stopped at the intersection and to the possibility that she would be making a left turn.

In the case *sub judice*, the strongest evidence against defendant Lea, and really the sole basis for plaintiff's case for negligence, was the evidence of decedent's operative left-turn signal and defendant Lea's acknowledgment that he chose to pass, in a passing zone, although he could have stopped behind decedent's automobile and waited to determine what maneuver she was going to make. Although there was evidence to the contrary, plaintiff's evidence reflects an operative left-turn signal, which plaintiff contends defendant Lea either saw and chose to ignore or should have seen.

At best, this case presents a set of circumstances where virtually the sole evidence of negligence is that defendant Lea began to pass at or about the same time decedent had signaled her intent to turn left. When this evidence is considered in the light most favorable to plaintiff, and is tested in such light by this Court's definition of gross negligence and its past application in this state, it falls substantially short of manifesting any wicked purpose, or willful and wanton conduct in conscious and intentional disregard of the rights and safety of others. To conclude otherwise under the facts of this case would substantially blur the distinction this Court has established between gross and ordinary negligence. There was certainly no evidence here of any racing competition, any excessive speed, any intoxication, or any combination thereof. At most, the evidence, in the light most favorable to plaintiff, discloses a breach of defendant Lea's duty to exercise ordinary care.

We therefore hold that the trial court was entirely correct in granting defendants' motion for directed verdict as to plaintiff's claim of gross negligence and in refusing to instruct the jury on the issue of gross negligence. The opinion of the Court of Appeals is affirmed.

AFFIRMED.

ANN ADAMS AND HUSBAND, DEXTER ADAMS, PLAINTIFFS v. ERIN CHRISTINA TESSENER, DEFENDANT v. EDWARD SCOTT LACKEY, INTERVENOR

No. 3PA01

(Filed 17 August 2001)

Child Support, Custody and Visitation— custody dispute between natural father and maternal grandparents—conduct by father inconsistent with protected status—findings

In a child custody contest between the maternal grandparents and the father, the trial court did not err in applying the "best interests of the child" standard and in determining that a child's interests were best served by maintaining primary physical custody with his grandparents where the child was born after his intoxicated parents met in a bar and had a single unprotected sexual encounter, with neither knowing the other's last name; the mother moved in with her parents for a time after the birth, even-

tually moving out and consenting to her parents having physical custody of the child; the eventual conclusion that the mother was not fit to have custody was not disputed; and the trial court found that the father had done nothing after being told about the pregnancy and had not pursued any inquiry about the child after being told that he would be contacted about child support. While the Due Process Clause ensures that the government cannot unconstitutionally infringe upon a parent's paramount right to custody solely to obtain a better result, a parent's right to custody is not absolute and may be lost upon clear and convincing evidence that the parent is unfit or that the parent's conduct is inconsistent with his or her protected status. The trial court's findings in this case, viewed cumulatively, are sufficient to support its conclusion that the father's conduct was inconsistent with his protected interest in the child.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 141 N.C. App. 64, 539 S.E.2d 324 (2000), reversing and remanding an order entered by Owsley, J., on 3 June 1999 in District Court, Burke County. Heard in the Supreme Court 15 May 2001.

LeCroy Ayers & Willcox, by M. Alan LeCroy, for plaintiff-appellants.

Crowe & Davis, P.A., by H. Kent Crowe, for intervenor-appellee.

MARTIN, Justice.

This case involves a custody dispute between the mother, father, and maternal grandparents of a minor child, Aaron McLendon Adams (Aaron). Aaron was born on 15 February 1998 as a result of a single instance of unprotected sexual intercourse in July 1997 between defendant, Erin Christina Tessener (Tessener), and intervenor, Edward Scott Lackey (Lackey). In September 1997, Tessener informed Lackey that she was pregnant and that he was likely the father. Lackey took no action at that time.

Aaron was born prematurely and required extended hospitalization after birth. He had health problems and special medical needs in the first ten months of his life which required costly medical visits, daily medication, and constant attachment to a heart monitor. Aaron continues to have developmental difficulties.

After Aaron's birth, Tessener moved in with her parents, plaintiffs Ann and Dexter Adams, Aaron's grandparents. When Aaron was released from the hospital, he also lived with the Adams. Between February and April 1998, Tessener decided to leave the Adams' home. By "Consent Custody Agreement, Order and Confession of Judgment" filed 7 April 1998 (the Consent Judgment), Tessener and the Adams agreed that Tessener was not fit to have primary physical custody of Aaron. They further agreed that the Adams were fit and proper persons to have primary physical custody and that Aaron's best interests would be served thereby. Accordingly, the trial court ordered that Aaron's primary physical custody remain with the Adams.

In June 1998 Tessener informed Lackey that the Department of Social Services (DSS) would contact him about a potential child support obligation. Lackey made no inquiry concerning Aaron. DSS subsequently located Lackey and conducted DNA testing which conclusively determined that Lackey was Aaron's father. Lackey then executed a voluntary support agreement and has provided child support for Aaron since that time.

In October and November 1998, Lackey visited Aaron at the Adams' residence three times and removed him from the residence for one afternoon visit. On 30 October 1998 Tessener filed a motion in the cause seeking modification of the Consent Judgment. On 23 November 1998 Lackey filed a motion to intervene seeking custody of Aaron.

The matter was heard at the 2 February 1999 contested domestic session of District Court, Burke County. The trial court concluded that Tessener was not fit to have custody of Aaron. Tessener has not appealed that determination. The trial court further concluded that "[t]he actions and conduct of the Intervenor [Lackey] have been inconsistent with his protected interest in the minor child. Specifically, the conduct of Intervenor . . . proves that he is unfit to have the primary and legal care, custody and control of the minor child. Therefore, pursuant to *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528, the court must look to the best interests of the child." The trial court determined that the Adams were fit and proper to have custody of Aaron and that Aaron's best interests would be served thereby.

Lackey appealed to the Court of Appeals. The Court of Appeals held that the trial court's findings of fact were insufficient to support

the conclusion that Lackey was unfit to have custody of Aaron. *Adams v. Tessener*, 141 N.C. App. 64, 72, 539 S.E.2d 324, 330 (2000). The Court of Appeals stated that there was "a substantial body of evidence" supporting Lackey's fitness to have custody. *Id.* The Court of Appeals therefore reversed the trial court's order and remanded with instructions to award custody to Lackey. *Id.* We reverse the decision of the Court of Appeals.

This Court has recognized that the protection of the family unit is guaranteed by the Ninth and Fourteenth Amendments to the United States Constitution. *Petersen v. Rogers*, 337 N.C. 397, 401, 445 S.E.2d 901, 903 (1994). The United States Supreme Court has recently reaffirmed that a parent enjoys a fundamental right "to make decisions concerning the care, custody, and control" of his or her children under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 57 (2000). In *Troxel*, the United States Supreme Court held that a fit parent is presumed to act in the child's best interest and that there is "normally . . . no reason for the [s]tate to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68-69, 147 L. Ed. 2d at 58. Similarly, this Court has enunciated the fundamental principle that "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." *Petersen*, 337 N.C. at 403-04, 445 S.E.2d at 905.

We further elaborated on this principle in *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997). In *Price*, the defendant gave birth to a child out of wedlock and represented that the plaintiff was the father. *Id.* at 70-71, 484 S.E.2d at 529. When the defendant and the plaintiff separated, the child remained in the plaintiff's physical custody for approximately six additional years. *Id.* at 71, 484 S.E.2d at 529-30. A court-ordered blood test ultimately excluded the plaintiff as the biological father of the child. *Id.*

The trial court concluded that both the plaintiff and the defendant were fit and proper to have custody of the child. *Id.* at 71, 484 S.E.2d at 530. The trial court then determined that the child's best interests would be served by granting primary custody to the plaintiff. *Id.* The trial court stated, however, that it was precluded from granting custody to the plaintiff under *Petersen*. *Id.* Accordingly, the

trial court granted custody to the defendant. *Id.* The Court of Appeals affirmed the custody award. *Id.* at 71-72, 484 S.E.2d at 530.

In a custody proceeding between two natural parents (including biological or adoptive parents), or between two parties who are not natural parents, the trial court must determine custody based on the "best interest of the child" test. *Id.* at 72, 484 S.E.2d at 530. *Price*, however, involved a custody dispute "between a natural parent and a third party who is not a natural parent." *Id.* After acknowledging the *Petersen* presumption—that natural parents have a constitutionally protected, paramount right to custody of their children—we conducted a "due-process analysis in which the parent's well-established paramount interest in the custody and care of the child is balanced against the state's well-established interest in protecting the welfare of children." *Id.*

This Court reaffirmed that a natural parent has a constitutionally protected "liberty interest in the companionship, custody, care and control of his or her child." *Id.* at 74, 484 S.E.2d at 531. The Court noted, however, that while a fit and suitable parent " 'is entitled to custody of his [or her] child, it is equally true that where fitness and suitability are absent he [or she] loses this right.' " *Id.* at 75, 484 S.E.2d at 532 (quoting *Wilson v. Wilson*, 269 N.C. 676, 677, 153 S.E.2d 349, 351 (1967)). In short, the Court indicated that a parent's right to custody is not absolute. *Id.* at 76, 484 S.E.2d at 533.

The Court noted

> "that the Due Process Clause would be offended '[i]f a [s]tate were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63, 53 L. Ed. 2d 14, [46-47 (1977)] (Stewart, J., concurring in judgment)."

Id. at 78, 484 S.E.2d at 534 (quoting *Quilloin v. Walcott*, 434 U.S. 246, 255, 54 L. Ed. 2d 511, 520 (1978)). The Court thus determined when the "best interest of the child test" could be applied without violating the parent's constitutional rights:

> A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she

> will act in the best interest of the child. Therefore, the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent would offend the Due Process Clause. However, conduct inconsistent with the parent's protected status . . . would result in application of the "best interest of the child" test without offending the Due Process Clause. Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy.

Id. at 79, 484 S.E.2d at 534 (citations omitted).

Finding the situation in *Price* involved "a period of voluntary nonparent custody rather than unfitness or neglect," *id.* at 82, 484 S.E.2d at 536, this Court reversed and remanded "for a determination of whether defendant's conduct was inconsistent with the constitutionally protected status of a natural parent," *id.* at 84, 484 S.E.2d at 537. We further instructed that if the defendant's conduct was inconsistent with her constitutionally protected status, the trial court should determine custody using the "best interest of the child" standard. *Id.*

Petersen and *Price*, when read together, protect a natural parent's paramount constitutional right to custody and control of his or her children. The Due Process Clause ensures that the government cannot unconstitutionally infringe upon a parent's paramount right to custody solely to obtain a better result for the child. *See Troxel*, 530 U.S. at 72-73, 147 L. Ed. 2d at 61 ("the Due Process Clause does not permit a [s]tate to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made"). As a result, the government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody, *see Jolly v. Queen*, 264 N.C. 711, 715-16, 142 S.E.2d 592, 596 (1965), or where the parent's conduct is inconsistent with his or her constitutionally protected status, *Price*, 346 N.C. at 84, 484 S.E.2d at 537. *See also* 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 224 (5th ed. 2000) (minor child should not be placed "in the hands of a third person except upon convincing proof that the parent is an unfit person to have custody of the child or for some other extraordinary fact or circumstance.")

Turning to the present case, we first note that in custody cases, the trial court sees the parties in person and listens to all the witnesses. *Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 902-03 (1998). This allows the trial court to "detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges." *Newsome v. Newsome*, 42 N.C. App. 416, 426, 256 S.E.2d 849, 855 (1979), *quoted in Pulliam*, 348 N.C. at 625, 501 S.E.2d at 903. Accordingly, the trial court's findings of fact " 'are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary.' " *Pulliam*, 348 N.C. at 625, 501 S.E.2d at 903 (quoting *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975)); *see also In re Orr*, 254 N.C. 723, 726, 119 S.E.2d 880, 882 (1961) ("Findings of fact made in the custody proceeding, when supported by competent evidence, are conclusive on appeal."); *Tyner v. Tyner*, 206 N.C. 776, 780-81, 175 S.E. 144, 147 (1934) (Clarkson, J., concurring) ("The findings of fact in the courts below are ordinarily conclusive on this Court and rightly so. The court below sees those most vitally interested, examines the evidence and is in a better position to render justice on all the facts.").

We are also cognizant of the fact that when a trial court "refuse[s] to award custody to either the mother or father and instead award[s] the custody of the child to grandparents or others . . . [the] 'parent's love must yield to another' " to serve the child's best interests. *Wilson*, 269 N.C. at 677-78, 153 S.E.2d at 351 (quoting *Holmes v. Sanders*, 246 N.C. 200, 201, 97 S.E.2d 683, 684 (1957)). Nonetheless, parents *normally* love their children and desire not only what is best for them, but also a deep and meaningful relationship with them. Therefore, the decision to remove a child from the custody of a natural parent must not be lightly undertaken. Accordingly, a trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence. *Cf. Santosky v. Kramer*, 455 U.S. 745, 747-48, 71 L. Ed. 2d 599, 603 (1982).

In the present case, the trial court specifically determined that Lackey's "actions and conduct . . . have been inconsistent with his protected interest in the minor child." The trial court made the following findings of fact:

> 5. Erin Christina Tessener—hereinafter referred to as Defendant—met Edward Scott Lackey—hereinafter referred to as Intervenor—at [a bar] in Catawba County during July 1997.

6. The Defendant and the Intervenor—who were both intoxicated—had unprotected sexual intercourse the night they met.

7. Neither party knew the other's last name when they parted the following morning.

8. Defendant became pregnant as a result of the meeting.

. . . .

10. Defendant located Intervenor in September 1997 and informed him of her pregnancy and the likelihood that he had fathered the child.

11. Intervenor chose to do nothing about the pregnancy and impending birth.

12. Intervenor never voluntarily contacted Defendant after that meeting—before or after the birth of the child—to inquire about the health and progress of the mother or child or to inquire further about whether he had fathered the child.

. . . .

22. In June of 1998, Defendant located Intervenor and informed him he would be contacted by the Department of Social Services regarding a potential child support obligation.

23. Intervenor, once again, did not pursue any inquiry about the mother or child.

. . . .

47. Scott Lackey/Intervenor has worked for thirteen years at Holland Alignment and Service, a business belonging to his uncle. He also volunteers with the Mountain View Volunteer Fire Department.

48. Intervenor is married, but has been separated for two years. There is no formal separation agreement.

49. Intervenor owns his own residence.

50. Intervenor has a girlfriend, Sherry Letterman, who stays overnight with him approximately five nights a week. Ms. Letterman has two minor children who also stay overnight frequently with Mr. Lackey.

51. Intervenor has a brother, Bobby Lackey, who stays with him on occasion for several days at a time. Bobby Lackey has prior criminal convictions for taking indecent liberties with a minor child, simple assault, damage to property, assault on a female (two counts), DWI, appearing drunk and disruptive in a public place, assault on a law-enforcement officer, and delaying and obstructing an[] officer. Numerous other charges have been dismissed.

52. Intervenor has prior criminal convictions for driving an automobile with no insurance or registration, driving while his license was revoked, appearing drunk and disruptive in a public place, two counts of careless and reckless driving (which were plea negotiations after he had been charged with two counts of driving while impaired) and delaying and obstructing a law enforcement officer.

53. Intervenor repeatedly denies responsibility for his actions with respect to his criminal charges and convictions.

54. Intervenor admits he has violated the terms of the court orders in the above convictions.

55. Intervenor denies the serious nature of his brother's convictions.

56. Intervenor admits to drinking alcoholic beverages and frequenting bars. He states he does not have a substance abuse problem.

57. Intervenor, when visiting his son Aaron, has shown affection and appropriate behavior to his son.

58. Intervenor states he wants to take care of his son, and is capable of doing so.

59. Intervenor's schedule is irregular because of his full time job and the work as a volunteer fireman.

60. At the time of the hearing, Intervenor had only seen [his son] seven times since birth.

Lackey does not dispute that the evidence supports these findings and has not otherwise assigned error to any of the trial court's findings of fact. We must therefore determine whether the trial court's findings support its legal conclusion that Lackey's conduct has been inconsistent with his protected interest in the minor child.

The trial court found that Tessener informed Lackey of her pregnancy and the likelihood that he had fathered the child in September 1997. Nonetheless, according to the trial court, Lackey elected to do "nothing" about the pregnancy and impending birth. The trial court determined that Lackey never voluntarily contacted Tessener after that meeting—before or after the birth of the child—to inquire about the health and progress of the child or to inquire further about whether he had fathered the child. The trial court also found that, in June 1998, Tessener located Lackey and informed him that DSS would contact him regarding a potential child support obligation. According to the trial court, Lackey again did not pursue any inquiry about the child.

The trial court's findings of fact are sufficient, when viewed cumulatively, to support its conclusion that Lackey's conduct was inconsistent with his protected interest in the child. Moreover, the evidence of record constitutes clear and convincing proof that Lackey's conduct was inconsistent with his right to custody of the child. Accordingly, the trial court did not err in applying the "best interest of the child" standard and in determining that Aaron's interests were best served by maintaining his primary physical custody with the Adams.

Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

BEN JOHNSON HOMES, INC. v. WATKINS

No. 148A01

Case below: 142 N.C. App. 162

Motion by defendant to dismiss appeal by plaintiffs for lack of substantial constitutional question allowed 16 August 2001. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 16 August 2001. Justice Martin recused.

BIVENS v. DELTA WOODSIDES/DELTA MILLS

No. 319P01

Case below: 143 N.C. App. 715

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 16 August 2001.

BLOCH v. PAUL REVERE LIFE INS. CO.

No. 297P01

Case below: 143 N.C. App. 228

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001. Petition by defendants (Mercer and Costner) for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001.

BURGER v. DOE

No. 295P01

Case below: 143 N.C. App. 328

Petition by defendants (Richard Skeens and Alice Skeens) for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001.

CRAIG v. CTY. OF CHATHAM

No. 270PA01

Case below: 143 N.C. App. 30

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 16 August 2001. Conditional petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 16 August 2001.

EDMONDS v. TEMPLETON

No. 382P01

Case below: 143 N.C. App. 715

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 16 August 2001.

ESTATE OF WATERS v. JARMAN

No. 370P01

Case below: 144 N.C. App. 98

Petition by defendant (Lenoir Memorial Hospital, Inc. d/b/a/ Lenior Memorial Hospital) for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001.

FINKLEY v. FAULKNER

No. 374P01

Case below: 143 N.C. App. 715

Petition by respondent (Commissioner of Motor Vehicles) for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001.

FOREMAN v. FOREMAN

No. 394P01

Case below: 144 N.C. App. 582

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001.

GREENE CIT. FOR RESP. GROWTH, INC.
v. GREENE CTY. BD. OF COMM'RS

No. 333P01

Case below: 143 N.C. App. 702

Petition by defendant and intervenor for writ of supersedeas denied 16 August 2001. Petition by defendant and intervenor for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001. Temporary stay dissolved 16 August 2001.

HAMBY v. HAMBY

No. 368P01

Case below: 143 N.C. App. 635

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001.

HUBBARD v. CTY. OF CUMBERLAND

No. 278P01

Case below: 143 N.C. App. 149

Petition by defendant (County of Cumberland) for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001.

IN RE ESTATE OF PARRISH

No. 340P01

Case below: 143 N.C. App. 244

Petition by appellant (Lucille S. White) for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001.

IN RE HAYES

No. 348P01

Case below: 143 N.C. App. 715

Notice of appeal by respondent (Hayes) pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 16 August 2001. Petition by respondent (Hayes) for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001.

INGLES MKTS., INC. v. PAULCO, INC.

No. 290P01

Case below: 143 N.C. App. 347

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001.

JOHNSON v. WRIGHT

No. 371P01

Case below: 143 N.C. App. 715

Petition by defendant (Lenior Memorial Hospital) for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001.

NEWTON v. B.F. GOODRICH CO.

No. 328P01

Case below: 143 N.C. App. 568

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 16 August 2001.

SPEARMAN v. SPEARMAN

No. 354P01

Case below: 143 N.C. App. 347

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001.

STATE v. BURWELL

No. 365P01

Case below: 143 N.C. App. 716

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 16 August 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001.

STATE v. COLLINS

No. 341P01

Case below: 143 N.C. App. 716

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001.

STATE v. CONRAD

No. 315P01

Case below: 137 N.C. App. 588

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 16 August 2001. Justice Edmunds recused.

STATE v. FULP

No. 342PA01

Case below: 144 N.C. App. 428

Petition by Attorney General for writ of supersedeas allowed 16 August 2001. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 16 August 2001.

STATE v. GRAY

No. 556A93-2

Case below: Lenior County Superior Court

Motion by defendant to stay proceedings pending U.S. Supreme Court's decision in *Michens v. Taylor*, 00-9285 allowed 16 August 2001.

STATE v. HALL

No. 372P01

Case below: 143 N.C. App. 717

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 16 August 2001. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 16 August 2001.

STATE v. HAYWOOD

No. 416P01

Case below: 144 N.C. App. 223

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 16 August 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001.

STATE v. LASSITER

No. 390P01

Case below: 137 N.C. App. 773

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 16 August 2001. Justice Edmunds recused.

STATE v. MASON

No. 388P01

Case below: 126 N.C. App. 318

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 16 August 2001.

STATE v. MESSER

No. 405A01

Case below: 145 N.C. App. 43

Motion by Attorney General for temporary stay allowed 30 July 2001.

STATE v. NOWELL

No. 433P01

Case below: 144 N.C. App. 636

Motion by Attorney General for temporary stay allowed 3 August 2001.

STATE v. PARKER

No. 351P01

Case below: 144 N.C. App. 450

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 16 August 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001.

STATE v. PICKARD

No. 320P01

Case below: 143 N.C. App. 485

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001.

STATE v. ROBINSON

No. 261A92-6

Case below: Bladen County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Bladen County, denied 16 August 2001.

STATE v. RODGERS

No. 383P01

Case below: 143 N.C. App. 718

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 16 August 2001.

STATE v. STOKES

No. 467P89-2

Case below: 136 N.C. App. 668

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 16 August 2001. Notice of appeal by defendant pro se pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 16 August 2001.

STATE v. WARD

No. 158A92-7

Case below: Pitt County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Pitt County, denied 16 August 2001. Motion by Attorney General to lift stay of execution allowed 16 August 2001.

STATE v. WHITE

No. 94A94-3

Case below: Mecklenburg County Superior Court

Application by defendant for writ of habeas corpus denied 16 August 2001. Petition by defendant for writ of certiorari to review the order of the Superior Court, Mecklenburg County, denied 20 August 2001. Motion by defendant for stay of execution of judgment denied 20 August 2001. (See also *White v. Easley*, infra)

STATE v. WILLIAMS

No. 303P01

Case below: 143 N.C. App. 570

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001.

STATE ex rel. BARKER v. ELLIS

No. 338P01

Case below: 144 N.C. App. 135

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001. Justice Edmunds recused.

TOWN OF HIGHLANDS v. EDWARDS

No. 410P01

Case below: 144 N.C. App. 363

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001. Justice Martin recused.

TOWN OF HILLSBOROUGH v. CRABTREE

No. 360P01

Case below: 143 N.C. App. 707

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001.

WHITE v. EASLEY

No. 94A94-5

Case below: Wake County Superior Court
North Carolina Court of Appeals

Motion by defendant to bypass the Court of Appeals, to suspend the Rules of Appellate Procedure, and to enjoin the Secretary of the Department of Correction from executing Clifton White denied 20 August 2001. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and writ of certiorari to review the order of the North Carolina Court of Appeals denied 22 August 2001. Motion by plaintiff to enjoin execution denied 22 August 2001. (See also *State v. White, supra*)

ZENOBILE v. McKECUEN

No. 361P01

Case below: 144 N.C. App. 104

Petition by defendant (Jeannie Young) for discretionary review pursuant to G.S. 7A-31 denied 16 August 2001.

PETITION TO REHEAR

CHAPPELL v. ROTH

No. 68A01

Case below: 353 N.C. App. 690

Petition by plaintiff to rehear pursuant to Rule 31 denied 16 August 2001.

STATE OF NORTH CAROLINA v. WILLIE JUNIOR LLOYD

No. 196A00

(Filed 5 October 2001)

1. **Evidence— prior crimes or acts—assault with a deadly weapon with intent to kill inflicting serious injury**

The trial court did not abuse its discretion in a capital first-degree murder prosecution by admitting evidence of the circumstances leading to defendant's 1991 conviction for assault with a deadly weapon with intent to kill inflicting serious injury under N.C.G.S. § 8C-1, Rule 404(b), because: (1) the evidence was admissible to show lack of accident, motive, common plan or scheme and intent; (2) the probative value of the evidence outweighed any unfair prejudice; (3) the prior incident was not too remote in time when defendant spent part of the time between 1991 and 1998 in jail; and (4) the trial court followed the pattern instruction which was in substantial conformity with defendant's requested instruction as to the "other crimes" evidence.

2. **Evidence— victim's prior violent acts—threats—statements she killed another man**

The trial court did not err in a capital first-degree murder prosecution by excluding evidence relating to the victim's threats and statements to defendant that the victim had killed another man and gotten away with it, because: (1) evidence of the victim's prior violent act is not relevant to the killing of the victim in the absence of evidence that defendant shot the victim in self-defense; (2) the evidence was irrelevant and inadmissible under N.C.G.S. § 8C-1, Rule 404(b) when defendant claimed he never intentionally shot the victim and that the shooting was accidental; (3) the State's cross-examination of defendant did not open the door to this evidence; and (4) the rule of completeness under N.C.G.S. § 8C-1, Rule 106 did not entitle defendant to introduce the portion of his statement to the police indicating that the victim had told him she killed another man and got away with it when defendant did not seek to introduce the excluded parts of his police statement contemporaneously as required by statute, but instead sought to introduce them on rebuttal.

3. Evidence— photographs of victim—victim's bloodstained shirt

The trial court did not abuse its discretion in a capital first-degree murder prosecution by admitting four photographs of the victim's front porch showing a pool of blood and the victim's bloodstained shirt, five photographs of the victim's bloodstained shirt marked with bullet holes, and the victim's bloodstained shirt, because: (1) the photographs were introduced for the limited purpose of illustrating witness testimony; (2) the photographs were relevant under N.C.G.S. § 8C-1, Rules 401 and 402 for the purpose of allowing the jury to understand the witness's testimony and for corroborating the State's case; (3) the photographs were not unnecessarily gory, inflammatory, or excessive; and (4) the victim's shirt was relevant to illustrate a witness's testimony and to corroborate the State's case.

4. Evidence— hearsay—prior consistent statement—corroboration

The trial court did not err in a capital first-degree murder prosecution by allowing a police officer to testify as to what the victim's six-year-old grandson told the officer shortly after the victim's murder, because: (1) prior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness's in-court testimony; (2) the testimony of the officer was admitted for the limited purpose of corroborating the child's testimony; and (3) even if any of the statements did not corroborate the child's trial testimony, their admission was not prejudicial when numerous witnesses gave similar testimony.

5. Evidence— defendant's demeanor after arrest—relevancy—lay opinion

The trial court did not abuse its discretion in a capital first-degree murder prosecution by admitting testimony of two of the State's witnesses concerning defendant's demeanor as calm at the time of his arrest within an hour of shooting the victim, because: (1) the testimony was relevant under N.C.G.S. § 8C-1, Rule 401 since it tended to negate defendant's claim that the shooting was accidental and shed light on both the circumstances of the murder and on defendant's intent and state of mind at the time of the offense; (2) the probative value of the testimony was not substantially outweighed by unfair prejudice, N.C.G.S. § 8C-1, Rule 403; and (3) the lay testimony was based upon the investigators'

personal observations of defendant for a period of time and was helpful to a clear understanding of whether defendant acted with intent or whether the shooting was an accident, N.C.G.S. § 8C-1, Rule 701.

6. Evidence— expert testimony—victim's four wounds—pain

The trial court did not err in a capital first-degree murder prosecution by allowing a pathologist to testify that each of the victim's four wounds would have been painful, because: (1) expert testimony concerning the pain and suffering of the victim in a first-degree murder case is relevant and admissible to assist the jury in ascertaining whether defendant was acting with premeditation and deliberation and to rebut defendant's claim of accident; (2) the State properly used the testimony as a basis for its argument that if the victim had her hand on the gun as defendant contended, it was unlikely that she would have kept it there during four separate shots that caused her pain; and (3) the statements concerning the victim's pain were not unfairly prejudicial in light of other testimony about the victim's pain.

7. Criminal Law— prosecutor's argument—hope you are not a victim in a criminal case—police do the best they can to fight crime—defendant's characterization of shooting—biblical reference

The trial court did not abuse its discretion in a capital first-degree murder prosecution by allowing the State to argue during closing arguments that "you better hope you're not a victim in a criminal case," "the police do the best they can to fight crime," "defendant's characterization of the shooting was the most proposterous accident that has ever happened," and by citing the biblical reference of the "Dance, Death" poem, because: (1) the State did not urge the jurors to put themselves in the place of the victim; (2) the prosecutor was defending the tactics of the police department; (3) the prosecutor did not improperly state his personal opinion; and (4) the remarks in the poem did not suggest that the law enforcement powers of the State were divinely ordained or inspired by God, nor did they suggest that to resist such powers is to resist God.

8. Criminal Law— jury instruction—flight—determination of guilt

The trial court did not err in a capital first-degree murder prosecution by instructing the jury that it could consider evi-

dence of flight in determining defendant's guilt, because: (1) there was testimony from numerous witnesses that defendant hurriedly left the scene of the murder without providing medical assistance to the victim; and (2) the fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper.

9. Sentencing— capital—aggravating circumstance—especially heinous, atrocious, or cruel murder—insufficient evidence

The trial court erred in a capital sentencing proceeding by submitting to the jury the statutory aggravating circumstance under N.C.G.S. § 15A-2000(e)(9) that the murder was especially heinous, atrocious, or cruel, and defendant's sentence of death is vacated, because: (1) the victim's death was relatively rapid; (2) being shot more than one time does not by itself necessarily make a death especially physically agonizing to an extent sufficient to support the submission of this circumstance; (3) the victim's death was not dehumanizing when no family members witnessed the actual shooting and the victim's time of consciousness afterwards was relatively short; (4) the victim did not suffer psychological torture when there was no evidence the victim was aware that she was going to be killed until defendant shot her; and (5) the facts fail to demonstrate that defendant showed an unusual depravity of the mind.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Allen (J.B., Jr.), J., on 23 July 1999 in Superior Court, Alamance County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 15 May 2001.

Roy A. Cooper, Attorney General, by Joan M. Cunningham, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Danielle M. Carman, Assistant Appellate Defender, for defendant-appellant.

EDMUNDS, Justice.

On 19 October 1998, defendant Willie Junior Lloyd was indicted for the first-degree murder of Cynthia Catherine Woods. He was tried capitally before a jury at the 28 June 1999 Special Criminal Session of Superior Court, Alamance County. On 20 July 1999, the jury found

defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation. Following a capital sentencing proceeding, the jury recommended a sentence of death, and on 23 July 1999, the trial court entered judgment in accordance with the recommendation. Defendant appeals to this Court as a matter of right. For the reasons that follow, we find no prejudicial error in the guilt-innocence phase of defendant's trial, but we vacate the death sentence and remand the case for a new capital sentencing proceeding.

The evidence at trial established that defendant was involved in a romantic triangle with victim Woods. Defendant had been seeing Woods for several years. However, she was living with another boyfriend, William Coltraine, whom she had been dating for fourteen years. At the time of the murder, Woods was attempting to terminate her relationship with defendant. Freddie Woods, the victim's son, who was twenty-six years old at the time of trial and lived at the victim's home, testified that his mother "was trying to break everything off" with defendant. Woods told Freddie that she had obtained a restraining order against defendant and had changed her telephone number as a result of defendant's calls. Woods frequently asked Freddie to tell defendant that she was asleep or not home if defendant telephoned her. Coltraine testified that in 1995, defendant was charged with placing harassing telephone calls to Woods' residence and with second-degree trespass at Woods' residence, and a judge ordered defendant "not to call back at the house and also not to come on our property anymore." Coltraine also stated that if he told defendant that Woods was asleep when defendant telephoned her, defendant would instruct him to "tell the bitch I called."

On 28 September 1998, Woods was at home with Freddie. When defendant telephoned in the late morning, Woods asked Freddie to tell defendant that she was asleep. That afternoon, Woods left home to pick up from school her five-year-old grandson, Jovanta Woods. Defendant called again for Woods while she was gone. After Woods and Jovanta returned, Jovanta began his homework in the kitchen, and Freddie watched television in his bedroom. At approximately 3:00 p.m., defendant went to Woods' home. Jovanta heard a doorbell ring and heard Woods and defendant step into the house and begin arguing. He then heard two loud bangs and went to the front porch, where he saw Woods lying on the porch. Freddie also heard a "loud banging" and went outside to find Woods lying on the porch in a pool of blood. She was bleeding from her nose and mouth, her body was flinching, and her right foot was under the storm door. Freddie saw

defendant running toward his car. Defendant stopped to look back at Freddie, then entered his car and drove away "extremely fast." Jovanta also observed defendant drive away quickly from the scene. Freddie ran after defendant's car in an attempt to determine his license plate number, then returned to the porch and called for emergency assistance. Freddie asked Woods if she knew defendant's last name, and she was able to respond that it was "Willie Lloyd." Freddie relayed this information to police and also described defendant's vehicle.

Several witnesses who worked at the Annedeen Hosiery Mill across from Woods' residence observed defendant and Woods on 28 September 1998. Gene Terrill testified that as he left Annedeen at approximately 3:06 p.m., he observed Woods partially inside her house, yelling at defendant to "[g]et the hell out of here." Defendant's hand was on the door at the time. Terrill heard the arguing become louder, followed by a shot. He saw Woods grab the door. As she fell, defendant rapidly fired additional shots at her while yelling "bitch" in an angry tone. Defendant then looked at Terrill and quickly moved toward his car, driving off at a "very fast rate." Terrill went to the porch and saw Woods flinching and bleeding from her ears, nose, and mouth. Terrill saw both Jovanta crying on the porch and Freddie running after defendant's car.

Tim Guffey, also an employee with Annedeen, left work shortly after 3:00 p.m. When he heard two gunshots, he approached Woods' home, where he saw

> a guy running down the steps towards his car. And then he slammed the door. And he took off real fast, you know. He was fish tailing down the street. . . . Looked like he was going to wipe the side of the street out on both sides, you know, the way he was going.

He added that defendant did not stop at a stop sign as he drove away. Guffey also saw Jovanta crying on the porch while Freddie knelt over Woods with a telephone in his hand, and observed Woods flinching and bleeding from the mouth.

Katie Poole, another Annedeen employee, was waiting for her husband at the shipping dock. She noticed defendant on Woods' porch. Woods, who was behind her storm door, yelled at defendant to "[g]et the hell away from here." Shortly afterwards, Poole heard more than four gunshots and heard a car "spinning off, like tires were hol-

lering." She also observed Jovanta and Freddie on the front porch after the shooting. Similarly, Mike Long, a neighbor of Woods, heard five to six gunshots shortly after 3:00 p.m. and then "heard somebody take-off squeeling [sic] tires a little bit."

When emergency personnel arrived on the scene, Woods' breathing was labored, and she appeared to be unconscious. Her shirt, on which bullet holes and powder burns could be seen, was cut from her body to facilitate CPR. Woods apparently died before she reached the hospital.

As defendant fled the scene, he passed an automobile driven by Jason McPherson, who testified that defendant was "going around two lanes of traffic on the wrong side of the street, and through an intersection, which about hit me in the process." Defendant drove to Culp Weaving where Coltraine, his rival for the victim's affections, had just gotten off work. Coltraine, who was talking with Tim and Wayne Crutchfield in the parking lot, testified that defendant approached the men and calmly stated,

> I'm pretty sure you don't know me do you? . . . Well, I'm the guy that y'all tried to have locked up one time. . . . I was man enough to come by and tell you that I had killed Catherine, and she's laying over there on the porch. Maybe you better go on home. Maybe you better go on home.

Defendant also told Coltraine, "I did come to kill both of you." Tim Crutchfield similarly testified that defendant approached the men in the parking lot and stated to Coltraine, "[Y]ou don't know who I am, but I just shot Cathy. . . . She's laying on the porch. You might ought to go check on her. She's dead." Wayne Crutchfield testified that defendant approached the three men in the parking lot and stated, "I know you all don't know me. . . . She's laying on the porch." Wayne Crutchfield also heard defendant say that he was going to turn himself in.

After leaving Culp Weaving, defendant drove to a convenience store to buy a soft drink. He called the Burlington Police Department at 3:26 p.m., identified himself, and told police he would turn himself in. He added, however, that he first needed to drive around for half an hour to clear his head because "after something like this, you are just not in the state of mind that you're used to," and requested that an officer meet him at his residence. Defendant next drove to another convenience store where he purchased cigarettes and another soft

drink and called his mother to tell her that Woods was hurt. He then drove home, where Detective Tye Fowler of the Burlington Police Department and Lieutenant Eddie Sheffield of the Alamance County Sheriff's Department arrested him and charged him with murder. Defendant was calm and cooperative, and he appeared to be uninjured. Lieutenant Sheffield retrieved a .380-caliber semiautomatic handgun, a magazine, and loose rounds of ammunition from inside defendant's residence.

Dr. John Butts, Chief Medical Examiner for the State of North Carolina, performed an autopsy of Woods. He testified that she suffered four bullet wounds. One wound was to her left breast, another was to her right shoulder, a third was to her lower right shoulder, and a fourth was to her lower abdomen. The shot that struck the victim's breast was fired at such a close range that Dr. Butts stated, "[T]he muzzle of the gun in my opinion was up against her body at the time it was discharged." Although at least two of the wounds were not individually fatal, all of the shots would have caused painful injuries and collectively were the cause of death. Dr. Butts testified that the shot to her lower right shoulder, which was fired from behind and above and penetrated several vital organs, was "rapidly, relatively rapidly, fatal," suggesting that this wound was the immediate cause of death. Dr. Butts also stated that, depending on the relative positions of the shooter and the victim, the wounds could have been inflicted by someone who was standing above Woods and that the wounds on the front of her body were somewhat inconsistent with her standing upright. He detected a powder deposit on Woods' right wrist, which was consistent with a defensive gesture. Eugene Bishop, a special agent with the North Carolina State Bureau of Investigation, testified that three projectiles retrieved from Woods' body and a fourth projectile and six shell casings retrieved from the scene of the crime had all been fired from the .380-caliber semiautomatic pistol seized from defendant's home at the time of his arrest.

The State also introduced evidence of a prior assault by defendant on Ronnie Turner in 1991. Turner testified that in August of that year he ended a relationship with Darlene Baldwin, a co-worker who was also involved romantically with defendant. After finishing work on 27 August 1991, Turner stopped at a convenience store on his way home. As he was stepping out of his car, defendant pulled up alongside and fired five shots. Four of the shots hit Turner in his lower abdomen, and the fifth struck the rear glass of Turner's car. Phil Ayers, a lieutenant with the Alamance County Sheriff's Department,

testified that defendant called police on the day of the shooting to turn himself in. Defendant told Lieutenant Ayers that Turner had been dating his girlfriend, and he decided to take the matter "in his own hands." He waited for Turner to leave work, followed him to the convenience store, then started shooting with a .380-caliber pistol. He fired four to five times because he knew one or two shots missed Turner. As a result of this incident, defendant pled guilty to assault with a deadly weapon with intent to kill inflicting serious bodily injury.

After the State rested its case-in-chief, defendant testified on his own behalf. He stated that he met Woods in May 1993 when they worked together and that, shortly thereafter, they began dating. He claimed that he gave Woods $35,000 in cash to purchase a house in Alabama where they would live together, worked on her vehicle on many occasions, and paid a number of her bills. They frequently took trips together to Alabama, Virginia, and cities in North Carolina. Woods also called defendant once or twice a day. However, defendant also testified that he and Woods had several altercations and that he feared her. Although Woods charged defendant with harassing telephone calls and second-degree trespass in April 1995, defendant claimed he was acquitted on the telephone charge and received a prayer for judgment continued on the trespass charge. He continued to go about Woods' premises, and Woods gave defendant her new telephone number the day after the court hearing. Defendant thereafter made Woods the beneficiary of his life insurance. In addition, defendant testified that he spoke with Coltraine about his relationship with Woods, and Coltraine threatened him both at home and work. Because of these threats, defendant and Woods purchased a .380-caliber handgun approximately two years before the shooting.

A week before Woods was killed, she telephoned defendant and expressed irritation with him because the alternator he installed in her car was causing a fire. Defendant also spoke with Woods on 24 September 1998 and 26 September 1998. On 28 September 1998, defendant called Woods' house at approximately 9:00 a.m., but Freddie told him that Woods was not there. When he called again around 2:30 p.m., Woods was upset. Defendant obtained permission from his supervisor, Darren Yancey, to leave work early to pick up Woods and also to pick up Jovanta from school. At trial, Yancey corroborated this portion of defendant's testimony.

Defendant testified that he kept his pistol at work as protection from Coltraine. He stated that on the day of the shooting he put the

pistol in his pocket as he left work to pick up Woods, but also stated that he was in such a hurry that he did not realize he was carrying the gun in his pants when he arrived at her home. He rang Woods' doorbell, and she came outside and "smack[ed him] in the face with a book." She was upset about her car. Defendant grabbed Woods' hands so that she would stop hitting him, but when he let go she punched him in the face. Woods then told defendant, "I got something for your mother f——— a—," and ran into her home. Defendant attempted to sit down on the front steps, but Woods emerged from her house and hit defendant in the head with an object. Defendant, fearing that Woods had a weapon, remembered "I had the gun on me. So, I just reached on my side and pulled it out." Defendant told Woods, "[S]ee what I got in my hand." Although defendant never pointed the gun at Woods, she grabbed it with both hands and twisted defendant's arms. As a result, defendant was "leaning all the way back. I never could get up on my foot." The gun fired one time and then three more times in rapid succession. Defendant fell to the porch, and the gun dropped out of his and Woods' hands. Defendant never saw any blood on the victim, nor did he notice Freddie or any of the employees from Annedeen. He checked Woods' pulse and observed that she was not breathing. He looked into the house, but did not see a telephone, so he went to his car and drove away. He went to Culp Weaving to tell Coltraine that he had an emergency at home, then called police to turn himself in.

On cross-examination, the State confronted defendant with inconsistencies between his trial testimony and statements he made to Detectives Mike Fuquay and Tye Fowler of the Burlington Police Department after being arrested and signing a waiver of his *Miranda* rights on 28 September 1998. Defendant denied telling the detectives the following at the time of his arrest: that he and the victim never struck each other during their relationship; that he had been trying to talk to the victim for several days before her murder, and she refused his telephone calls; that during one telephone conversation on 28 September 1998, the victim told defendant not to call her anymore and hung up on him; that during this conversation, defendant told the victim that he was coming to her house, and she told him not to come; that he went to the victim's house and saw that her car was gone and went to a telephone booth to call her house; that Freddie answered the phone and told him that the victim was picking up Jovanta from school; that when defendant went back to the victim's residence, her car was in the yard; that the victim told him that she did not want to talk to him; that he turned around to leave; and that the victim said,

"Get the f— out of here," or "Go the hell on." Defendant also claimed that he told the detectives that Woods had come out onto the porch and hit him with a book, but that the detectives did not write down that statement. When the prosecutor asked if defendant told the detectives that he shot Woods "out of instinct," defendant responded, "I told him I pulled the gun out of instinct of her coming outside knowing I didn't know what she had in her hand."

Although defendant contended that the case had aspects of self-defense, the trial court made findings that defendant shot the victim four times with a pistol he brought on the premises; testified he never pointed the weapon at the victim, but the victim grabbed the weapon; and testified both he and the victim had a finger on the trigger when the gun discharged. Based on these findings, the court concluded that there was no evidence of self-defense and advised defendant that he would not instruct the jury on self-defense. We agree with the trial court's analysis and conclusion.

GUILT-INNOCENCE PHASE

I.

[1] Defendant first contends that the trial court erred in admitting evidence of the circumstances leading to defendant's 1991 conviction for assaulting Ronnie Turner with a deadly weapon with intent to kill inflicting serious injury. The trial court admitted this evidence pursuant to Rule 404(b) of the North Carolina Rules of Evidence. Defendant argues that the evidence was irrelevant under Rule 404(b), and in the alternative, even if the evidence was relevant, its probative value was substantially outweighed by the danger of unfair prejudice under Rule 403. Defendant additionally alleges this "other crimes" evidence violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 23, 24, and 27 of the North Carolina Constitution. Finally, defendant contends that the trial court erred in denying his requested jury instructions about the permissible uses of the evidence.

We digress briefly to discuss defendant's constitutional claims. He has alleged constitutional violations for each assignment of error raised in his brief. In several instances, however, defendant failed to preserve the constitutional issue at trial and has provided no argument and cited no cases in support of his constitutional arguments. Constitutional issues not raised and passed upon at trial will not be

considered for the first time on appeal. *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988). Accordingly, we will address only those issues that were properly preserved. Although defendant did make a constitutional objection pertaining to admission of Rule 404(b) evidence, because he does not provide argument or cite any cases in support of the alleged constitutional violations in his brief, we will consider only his arguments based on statutes or the rules of evidence. "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C. R. App. P. 28(b)(5).

Prior to trial, defendant filed a motion to exclude evidence or testimony of misconduct or other crimes, asserting that introduction of such evidence would be highly prejudicial and inflammatory. The trial court deferred ruling on the motion until trial, and at trial conducted a *voir dire* regarding the evidence of defendant's assault on Turner. During the *voir dire* conducted in the absence of the jury, the trial court heard testimony of Ronnie Turner and Lieutenant Phil Ayers of the Alamance County Sheriff's Department. Turner testified that in early August 1991, he ended a sexual relationship with defendant's live-in girlfriend, Darlene Baldwin. On 27 August 1991, Turner drove to a convenience store after leaving work. As he emerged from his car, defendant "pulled up real fast" in his car, shot Turner four times, then drove away.

Lieutenant Ayers' *voir dire* testimony was more detailed than his later trial testimony. He stated on *voir dire* that he had interviewed defendant shortly after defendant shot Turner. Defendant believed the relationship between his girlfriend and Turner had ended, but he still "wasn't satisfied with the situation." After arming himself with a .380-caliber semiautomatic pistol, defendant waited for Turner to leave work and followed him to a convenience store. Defendant told Lieutenant Ayers he "figured" Turner had a gun (a .22-caliber pistol was recovered under the driver's seat of Turner's automobile) and that when he saw a passenger in Turner's vehicle reach for something, he shot Turner. Defendant added that he only wanted to scare Turner. After the shooting, defendant returned home and told Baldwin, "I done shot your boyfriend, so go over there and see." He also told Baldwin, "I should go ahead and get you, I would kill you now, but you have grandchildren and I don't want to kill you on account of them." Defendant thereafter surrendered to police.

At the conclusion of the *voir dire*, the trial court issued a detailed order, ruling that this "other crimes" evidence was admissible under

Rule 404(b) to show absence of accident, motive, plan, and intent, but not preparation or knowledge. The trial court also found that the evidence was relevant under Rule 401 and that its probative value substantially outweighed any unfair prejudice to defendant under Rule 403. Defendant then requested that the trial court instruct the jury that it "may not consider this evidence in order to show that the defendant acted in conformity." The trial court instead instructed the jury in accord with the pattern instruction, N.C.P.I.—Crim. 104.15 (1984), informing the jury about the purposes for which the evidence could be considered and instructing the jury that it could "not convict [defendant] on the present charge because of something he may have done in the past."

Rule 404(b) provides:

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

N.C.G.S. § 8C-1, Rule 404(b) (1999). We have held that Rule 404(b) is a

> clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Accordingly, " 'evidence of other offenses is *admissible* so long as it is *relevant to any fact or issue other than* the character of the accused.' " *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986) (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 91 (1982)) (emphasis added), *quoted in State v. Coffey*, 326 N.C. at 278, 389 S.E.2d at 54. In addition to the requirement that the evidence be offered for a purpose other than to show criminal propensity, "[t]he admissibility of evidence under [Rule 404(b)] is guided by two further constraints—similarity and temporal proximity [of the acts]." *State v. Lynch*, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993). The evidence of defendant's assault on Turner met all requirements for admissibility under Rule 404(b).

A. ABSENCE OF ACCIDENT

In the case at bar, defendant testified that the shooting was accidental and that he did not intend to shoot the victim. We have held that "[w]here, as here, an accident is alleged, evidence of similar acts is more probative than in cases in which an accident is not alleged." *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991) (evidence that defendant fatally shot her first husband admissible in trial of defendant for the fatal shooting of her second husband under similar circumstances). Indeed, "[t]he doctrine of chances demonstrates that the more often a defendant performs a certain act, the less likely it is that the defendant acted innocently." *Id.* at 305, 406 S.E.2d at 891.

> "The recurrence or repetition of the act increases the likelihood of a mens rea or mind at fault. In isolation, it might be plausible that the defendant acted accidentally or innocently; a single act could easily be explained on that basis. However, in the context of other misdeeds, the defendant's act takes on an entirely different light. The fortuitous coincidence becomes too abnormal, bizarre, implausible, unusual, or objectively improbable to be believed. The coincidence becomes telling evidence of mens rea."

Id. (quoting Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 5:05, 1011 (1984)).

The similarities between the instant shooting and defendant's assault on Turner are striking: (1) both situations involved a love triangle consisting of two men and one woman; (2) in both instances defendant sought out the victims armed with a .380-caliber pistol; (3) in both cases defendant claimed he drew his pistol only in response to a perceived threat; (4) defendant shot both victims multiple times and shot each victim in the abdomen; (5) both shootings occurred during daylight hours; (6) defendant quickly fled both crime scenes in his own car; (7) defendant immediately went to the other party in the love triangle, related what he had done to the victim, and added that he had contemplated killing the other party as well; and (8) shortly after committing each crime, defendant voluntarily turned himself in to police. Based on this evidence, we hold that the trial court properly admitted the evidence to show lack of accident.

B. MOTIVE

The evidence was also relevant to show defendant's motive. "[T]he State may also introduce [other crimes] evidence if it is relevant to establish a pattern of behavior on the part of the defendant

tending to show that the defendant acted pursuant to a particular motive." *Id.* at 306-07, 406 S.E.2d at 892; *see also State v. White*, 349 N.C. 535, 552, 508 S.E.2d 253, 264 (1998) ("[E]vidence of defendant's acts of violence against [the witness], even though not part of the crimes charged, was admissible since it ' "pertain[ed] to the chain of events explaining the context, motive and set-up of the crime" ' and ' "form[ed] an integral and natural part of an account of the crime . . . necessary to complete the story of the crime for the jury." ' *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174-75 (1990) (quoting *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1999))"), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999). In both shootings, there was strong evidence suggesting defendant acted out of jealousy. In the case at bar, proof of motive was significant in light of defendant's testimony that he had a good relationship with the victim prior to her death.

C. COMMON PLAN OR SCHEME AND INTENT

Finally, " '[e]vidence of other offenses is admissible if it tends to show the existence of a plan or design to commit the offense charged, or to accomplish a goal of which the offense charged is a part or toward which it is a step.' " *State v. Stager*, 329 N.C. at 307, 406 S.E.2d at 892 (quoting *State v. Barfield*, 298 N.C. 306, 329, 259 S.E.2d 510, 529 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980)). Evidence of other crimes does not have to show the existence of a "common plan" as defendant argues. Where a defendant claims accident, a prior bad act with a "concurrence of common features" to the crime charged, *State v. Barfield*, 298 N.C. at 329, 259 S.E.2d at 530, tends to negate a defendant's contention that he "had *no plan* to shoot [the victim]," *State v. Stager*, 329 N.C. at 304, 406 S.E.2d at 891. *See, e.g., State v. Murillo*, 349 N.C. 573, 594, 509 S.E.2d 752, 764 (1998), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999). Defendant's *modus operandi* in each of the two shootings was sufficiently similar to permit a finding that evidence of the prior shooting was relevant to show that defendant had a plan or design to shoot the victim in the case at bar. This analysis also applies to demonstrate that the evidence was admissible to show defendant's intent to shoot the victim.

Despite the above finding, evidence of the 1991 assault on Turner may nevertheless have been excluded if its probative value was substantially outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 403 (2001). The determination of whether to exclude

such evidence is a matter left to the sound discretion of the trial court, and its determination will not be disturbed on appeal absent an abuse of discretion. *State v. Stager*, 329 N.C. at 308-09, 406 S.E.2d at 893-94. In this case, the trial court admitted the evidence of defendant's 1991 assault on Turner for the limited purposes of proving absence of accident, motive, plan, and intent. The trial court also found that the probative value of the evidence outweighed any unfair prejudice to defendant. We cannot say that the trial court abused its discretion in its holding.

We next address defendant's contention that the shooting of Turner was too remote in time to show absence of accident, motive, plan, and intent in the case at bar. Defendant shot Turner in 1991 and Woods in 1998. The record indicates that defendant received a six-year sentence for assaulting Turner with a deadly weapon with intent to kill inflicting serious bodily injury and, in 1993, received a three-year active sentence for assaulting Darlene Baldwin with a deadly weapon inflicting serious injury. "It is proper to exclude time defendant spent in prison when determining whether prior acts are too remote." *State v. Berry*, 143 N.C. App. 187, 198, 546 S.E.2d 145, 154, *disc. rev. denied*, 353 N.C. 729, 551 S.E.2d 439 (2001); *see also State v. Riddick*, 316 N.C. 127, 134, 340 S.E.2d 422, 427 (1986). Although the record does not show the precise dates of defendant's incarceration, there is no doubt that he spent part of the time between 1991 and 1998 in jail. Moreover, remoteness in time can become significant when the evidence of the prior crime is introduced to show that both crimes "arose out of a common scheme or plan. In contrast, remoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *State v. Stager*, 329 N.C. at 307, 406 S.E.2d at 893 (citation omitted). Even so, in considering whether earlier events are admissible to show a plan, we can take into account the unusual similarities between the instances. *State v. Penland*, 343 N.C. 634, 654, 472 S.E.2d 734, 745 (1996) ("Given the commonality of the distinct and bizarre behaviors, the ten-year gap between the incidents did not 'negate[] the plausibility of the existence of an ongoing and continuous plan to engage . . . in such . . . activities.' ") (quoting *State v. Shane*, 304 N.C. 643, 656, 285 S.E.2d 813, 821 (1982), *cert denied*, 519 U.S. 1098, 136 L. Ed. 2d 725 (1997)). Accordingly, we hold that the evidence of defendant's 1991 shooting of Turner and subsequent conviction was not so remote in time as to make it inadmissible. *See State*

v. Murillo, 349 N.C. at 596, 509 S.E.2d at 766 (twenty-two years not too remote); *State v. Riddick*, 316 N.C. at 134, 340 S.E.2d at 427 (six years not too remote).

Finally, we address defendant's contention that the trial court erred in failing to give his requested instruction as to the "other crimes" evidence. We consistently have held that " 'a trial court is not required to repeat verbatim a requested, specific instruction that is correct and supported by the evidence, but that it is sufficient if the court gives the instruction in substantial conformity with the request.' " *State v. McNeill*, 346 N.C. 233, 239, 485 S.E.2d 284, 288 (1997) (quoting *State v. Brown*, 335 N.C. 477, 490, 439 S.E.2d 589, 597 (1994)), *cert. denied*, 522 U.S. 1053, 139 L. Ed. 2d 647 (1998). Here, the trial court followed the pattern instruction, which was in substantial conformity with defendant's request. We previously have rejected a virtually identical argument in *State v. Burr*, 341 N.C. 263, 292, 461 S.E.2d 602, 617-18 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996). These assignments of error are overruled.

II.

[2] Next, defendant argues that the trial court erred in excluding relevant and admissible defense evidence relating to the victim's threats and statements to him that she had killed another man and "got[ten] away with it." On appeal, defendant contends that evidence of these threats and statements was admissible under Rules 401 and 402 of the North Carolina Rules of Evidence, admissible on redirect examination because the State opened the door to the evidence on cross-examination, admissible under Rule 106 of the North Carolina Rules of Evidence, admissible as nonhearsay or under the state-of-mind or catchall exceptions to the hearsay rule, and admissible as corroborative evidence. Although defendant made a constitutional objection to this evidence at trial and raises constitutional violations in his appeal, he failed to provide argument or cite cases in support of the constitutional violations in his brief. Accordingly, as noted above, our review is limited only to those arguments based on statutes or rules of evidence.

After the State rested and before defendant gave his opening statement or presented evidence, the State made a motion *in limine* to prevent defendant from telling jurors in his opening statement that the victim had stated to him that she had killed a man and gotten away with it. The trial court instructed defendant not to mention that

evidence in opening statements or until the court "hears that fully and rules on whether or not that's admissible." Defendant objected.

Subsequently, defendant testified in his own defense, and the trial court conducted a *voir dire* to determine if he could testify to the evidence. On *voir dire*, defendant stated:

Q. Did she ever threaten you?

A. Yes, sir.

Q. And tell the, tell the Court about that.

A. Well, she said if she ever caught me messing around on her, she would kill me.

Q. How many times was that?

A. I say about twenty.

Q. Was she a violent person?

A. I would say she was, yes.

Q. And on what do you base that statement? What do you base that statement on?

A. Well, just like I said if she don't, if you don't do what she say, she can get very violent with you.

Q. While the jury is out, Your Honor, had she ever told you anything about killing someone before?

A. Yes, she have [sic].

Q. Tell the Judge about that.

A. She said she had killed some guy named Ricky Wade.

Q. Did she tell you how she did it?

A. She told me several different ways she said she did it.

Q. Well, did she tell you whether she used a gun or knife or what?

A. She said she used a gun and a knife in one of the occasions.

Q. Did she tell you when that happened?

A. No, she never did state a date to when it happened.

Q. Did she say anything to you about whether she didn't get away with it, got away with it?

A. Well, she said she got away with it and she could do it again.

Q. When would she tell you that?

A. Mostly when she got angry for something I didn't do for her.

Q. Did you, did you believe her?

A. Yes, I did.

Defendant's counsel argued that the evidence was "not being offered for the truth thereof. It's being offered to explain his actions, to explain his state of mind, to explain as to the reasonableness of his belief that his actions were warranted in pulling his firearm that you'll hear about later." The trial court ruled that defendant could not testify as to Woods' statements about Ricky Wade.

On cross-examination, the State questioned defendant about inconsistencies in his trial testimony and statements he made to Detectives Mike Fuquay and Tye Fowler at the time of his arrest. On redirect, defendant's counsel then asked defendant, "Did you tell Officer Fuquay that Catherine Woods had threatened to kill you and—[?]" The State interrupted with an objection, and defendant argued that the State had opened the door to such question on cross-examination, contending that the State "should not be allowed to put before this jury what they perceive to be the favorable portions of [defendant's] statement to the police, without us being allowed to cross examine or redirect [defendant] about the points that we would like to have the jury consider." The trial court stated that it had reviewed the portion of defendant's testimony from the previous session (his testimony covered two days). Based on that transcript and the court's recollection, the court did not believe that the State had asked defendant on cross-examination what he told the police as to what the victim had said, and therefore did not open the door to such questioning. Our independent review of the transcript reveals that the trial court's recollection was accurate.

The trial court nevertheless allowed defendant to present additional *voir dire* testimony on the issue. During the *voir dire*, defendant testified again about Woods' statements to him that she had killed Ricky Wade. Dexter Lowe, a sergeant with the Burlington Police Department, also testified during the *voir dire* that he investigated

the shooting of Ricky Wade on 10 June 1984. Sergeant Lowe stated that Woods and Wade were dating and that Woods shot and killed Wade after Wade assaulted her, although Woods only meant to scare Wade. Sergeant Lowe also testified that Woods was charged with first-degree murder, but the grand jury failed to return an indictment.

After the *voir dire*, the trial court entered an order precluding defendant from testifying as to Woods' statements to him about Wade's death. The trial court made numerous findings of fact to support its exclusion of the evidence, including: (1) defendant's statements to police that the victim told defendant about the Wade killing were irrelevant and unduly prejudicial, (2) the State never opened the door to admit evidence of the Wade killing, and (3) the jury would not be instructed on self-defense because defendant testified he neither pointed his gun at the victim nor fired it intentionally. A trial court's findings of fact are binding on appeal when supported by any competent evidence. *State v. Ross*, 329 N.C. 108, 123, 405 S.E.2d 158, 167 (1991).

We first address defendant's argument that under Rules 401 and 402, evidence of Woods' prior violent act was admissible to prove defendant's apprehension and his state of mind when he drew his gun. "Where . . . a defendant seeks under Rule 404(b) to use evidence of a prior violent act by the victim to prove the defendant's state of mind at the time he killed the victim, the defendant must show that he was aware of the prior act and that his awareness somehow was related to the killing." *State v. Strickland*, 346 N.C. 443, 456, 488 S.E.2d 194, 201 (1997), *cert. denied*, 522 U.S. 1078, 139 L. Ed. 2d 757 (1998). However, in the absence of evidence that the defendant shot the victim in self-defense, "evidence of the victim's prior [violent act] . . . [is] not relevant to the killing of the victim." *Id.* (where there was no evidence that defendant shot the victim in self-defense, evidence of the victim's prior assault against his wife was not relevant to the killing of the victim); *see also State v. Leazer*, 337 N.C. 454, 458, 446 S.E.2d 54, 56-57 (1994) (where defendant did not contend he killed in self-defense, evidence that the victim had been convicted of two prior murders would be more prejudicial than pertinent). Indeed, "evidence of a victim's violent character is irrelevant in a homicide case when the defense of accident is raised." *State v. Goodson*, 341 N.C. 619, 623, 461 S.E.2d 740, 742 (1995) (where defendant claimed that shooting his wife was accidental, evidence as to wife's reputation for violence was inadmissible). Because defendant claimed that he never

intentionally shot Woods and that the shooting was accidental, this evidence was irrelevant and inadmissible under Rule 404(b). It would have served only "to show to the jury that the deceased was somewhat less worthy of living than someone who hadn't performed" violent acts. *State v. Smith*, 337 N.C. 658, 665, 447 S.E.2d 376, 380 (1994). Accordingly, the trial court did not abuse its discretion by excluding this evidence.

We next address defendant's argument that the State opened the door to the excluded evidence by eliciting on cross-examination testimony from defendant that he was "afraid" and "scared" of the victim. A review of the transcript of the present case reveals that the State's cross-examination of defendant did not open the door as defendant claims. The State confirmed defendant's testimony on direct examination that he was scared of Woods, but did not introduce any new related evidence during cross-examination. Only when the State initially elicits the evidence may defendant's otherwise inadmissible evidence be offered to explain or rebut the State. *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981). Because the State did not introduce any new evidence, it did not open the door to the victim's alleged statement concerning the Wade killing.

We next turn to defendant's argument that Rule 106 of the North Carolina Rules of Evidence entitled him to introduce the portion of his statement to the police indicating that the victim had told him she killed Ricky Wade and got away with it. When part of a recorded statement is introduced by a party, Rule 106, known as the "rule of completeness," allows an opposing party to introduce any other part of that statement "at that time . . . which ought in fairness to be considered contemporaneously with it." N.C.G.S. § 8C-1, Rule 106 (1999). Defendant asserts his right to introduce the excluded portion of his statement because other parts of defendant's police statement had been introduced by the State. However, defendant's argument fails because he did not seek to introduce the excluded parts of his police statement contemporaneously as required by the statute, but instead sought to introduce them on rebuttal. *See also State v. Thompson*, 332 N.C. 204, 220, 420 S.E.2d 395, 404 (1992) ("Rule 106 does not require introduction of additional portions of the statement or another statement that are neither explanatory of nor relevant to the passages that have been admitted.").

We have also considered defendant's other arguments made in support of his contention that this evidence should have been ad-

mitted and find them meritless. These assignments of error are overruled.

III.

[3] Defendant contends the trial court erroneously admitted into evidence irrelevant, unduly prejudicial, and cumulative photographic and real evidence in violation of Rules 401, 402, and 403 of the North Carolina Rules of Evidence. He argues that four photographs of the victim's front porch showing a pool of blood and the victim's bloodstained shirt, five photographs of the victim's bloodstained shirt marked with bullet holes, and the victim's bloodstained shirt were improperly admitted.

As to defendant's objections to the photographs, we note at the outset that defendant's motion *in limine*, filed to limit the number of photographs admitted into evidence, referred to photographs "of the decedent as the body appeared when first discovered and as the body appeared as the autopsy was conducted by the Medical Examiner's office" but made no reference to photographs of the crime scene or the victim's shirt.

We first address State's exhibit 4, a photograph of the area around the victim's front porch. State's witness Gene Terrill used the photograph to illustrate his testimony as to where he saw the victim lying and the location of her head. He also used the photograph to show both defendant's and the victim's positions on the porch when defendant first shot the victim. Terrill stated that the photograph would help him illustrate and explain this testimony to the jury. Defendant objected that the photograph was inflammatory because it showed blood and argued that the State could "use other photographs to illustrate the location of the decedent at the time he observed her." The trial court overruled defendant's objection and gave the jury the following limiting instruction: "As to State's Exhibit Number 4, I do instruct you that State's Exhibit Number 4 is being introduced into evidence for the limited purpose of illustrating and explaining the testimony of this witness. You're not to consider this photograph for any other reason."

Because defendant objected to the admission of this photograph solely on the basis of Rule 403 of the North Carolina Rules of Evidence, he has waived appellate review on the issue of the relevance of the photograph. N.C. R. App. P. 10(b)(1); *see also State v. Knight*, 340 N.C. 531, 559, 459 S.E.2d 481, 498 (1995). However, even

if defendant had properly preserved the issue of relevance for appeal, the photograph was relevant and admissible under Rules 401 and 402 of the North Carolina Rules of Evidence. We have held that " '[p]hotographs are usually competent to be used by a witness to explain or illustrate anything that it is competent for him to describe in words.' " *State v. Watson*, 310 N.C. 384, 397, 312 S.E.2d 448, 457 (1984) (quoting *State v. Cutshall*, 278 N.C. 334, 347, 180 S.E.2d 745, 753 (1971)). Photographs are admissible to illustrate testimony concerning the manner of a killing in order to prove circumstantially the elements of first-degree murder. *State v. Blakeney*, 352 N.C. 287, 310, 531 S.E.2d 799, 816 (2000), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001). Even "gory or gruesome photographs are admissible so long as they are used for illustrative purposes and are not introduced solely to arouse the jurors' passions." *State v. Trull*, 349 N.C. 428, 444, 509 S.E.2d 178, 189 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999).

> When determining the admissibility of a photograph, the trial court should consider "[w]hat a photograph depicts, its level of detail and scale, whether it is color or black and white, a slide or a print, where and how it is projected or presented, [and] the scope and clarity of the testimony it accompanies."

State v. Gaines, 345 N.C. 647, 666, 483 S.E.2d 396, 407-08 (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)), *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). Here, Terrill testified that the photograph would help him illustrate and explain his testimony to the jury. Therefore, we find such photograph relevant for the purpose of allowing the jury to understand his testimony and for corroborating the State's case.

Defendant contends that even if the photograph was relevant, its prejudicial effect substantially outweighed its probative value, pursuant to Rule 403. Whether to exclude relevant evidence under the Rule 403 balancing test lies "within the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling was 'manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Hyde*, 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000) (quoting *State v. Hennis*, 323 N.C. at 285, 372 S.E.2d at 527), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001). Because the photograph helped explain Terrill's testimony to the jury, we cannot say that the trial court's decision to admit the photograph

was so arbitrary that it could not have been the result of a reasoned decision.

Defendant also objects to State's exhibits 13, 14, and 15. State's exhibit 13 shows the victim's front porch and her shirt lying next to a pool of blood, State's exhibit 14 shows an enlarged view of the front of the victim's bloodstained shirt with a bullet hole, and State's exhibit 15 shows an enlarged view of the back of the victim's shirt with a bullet hole on the sleeve. State's witness Freddie Woods used exhibit 13 to illustrate his testimony pertaining to observing his mother on the front porch and blood around her body. He used exhibits 14 and 15 to illustrate his testimony about the type of shirt his mother was wearing on the day she was shot and the blood he saw on the shirt. Defendant objected to the photographs, claiming that they were inflammatory because of the quantity of blood depicted and were not illustrative of Freddie's testimony because he testified that emergency personnel prevented him from viewing the victim on the porch. The trial court overruled defendant's objections and instructed the jury as follows:

> [T]he Court is allowing into evidence two photographs, State's Exhibit 13 and State's Exhibit 14. These photographs are being introduced into evidence for the sole and limited purpose of illustrating and explaining the testimony of this witness, Freddie Woods. You're not to consider these photographs for any other purpose. . . .
>
> . . . .
>
> . . . State's Exhibit Number 15 is introduced into evidence for the sole and limited purpose of illustrating and explaining the testimony of Freddie Woods. I do instruct you that you're not to consider State's Exhibit 15 for any other purpose.

Here, Freddie testified that the photographs would help illustrate his testimony to the jury concerning the circumstances surrounding Woods' murder. Despite defendant's contention to the contrary, Freddie testified that he was able to view Woods immediately after she was shot and was kept away from the porch area only after emergency personnel arrived. Accordingly, we hold that these photographs were relevant under Rules 401 and 402. We also reject defendant's contention that the photographs were inadmissible because they were inflammatory. We have reviewed the exhibits and do not find them unnecessarily gory. Therefore, we cannot say that the trial court abused its discretion in admitting them.

Later in his testimony, Freddie matched these photographs with the victim's actual bloodstained shirt, which was admitted into evidence without objection. Defendant now argues that it was plain error to admit the victim's shirt because it was irrelevant, unduly prejudicial, and cumulative. However, we have previously held that "[a]rticles of clothing identified as worn by the victim at the time the crime was committed are competent evidence, and their admission has been approved in many decisions of this Court." *State v. Rogers*, 275 N.C. 411, 430, 168 S.E.2d 345, 356 (1969), *cert. denied*, 396 U.S. 1024, 24 L. Ed. 2d 518 (1970). Specifically, we have held that " '[b]loody clothing of a victim that is corroborative of the State's case, is illustrative of the testimony of a witness, or throws any light on the circumstances of the crime is relevant and admissible evidence at trial.' " *State v. Gaines*, 345 N.C. at 666, 483 S.E.2d at 407 (quoting *State v. Knight*, 340 N.C. at 559, 459 S.E.2d at 498) (no abuse of discretion in admitting bloody shirt, pants, belt, radio, radio holder, and handcuff case of victim where items helped jury to understand testimony of witnesses and showed matters that were corroborative of the State's case); *see also State v. Harden*, 344 N.C. 542, 560, 476 S.E.2d 658, 667 (1996) (bloody clothing of officers admissible where it "tended to show the circumstances surrounding the officers' struggle with defendant, the location and number of wounds, and the officers' relative sizes"), *cert. denied*, 520 U.S. 1147, 137 L. Ed. 2d 483 (1997); *State v. Knight*, 340 N.C. at 559, 459 S.E.2d at 498 (victim's bloody jacket, shirt, and T-shirt properly admitted to illustrate testimony of State's witness). We hold that Woods' shirt was relevant to illustrate Freddie's testimony and to illuminate matters that were corroborative of the State's case. Defendant has failed to demonstrate that the trial court committed plain error in admitting this evidence.

The last photographs defendant addresses in his appeal are State's exhibits 57, 68, 69, 70, and 71. These photographs depict the location of shell casings on the porch, bullet holes in the victim's shirt along with a ruler showing the size of the bullet holes, powder burns on the shirt, and the porch where Woods was shot. All five photographs were introduced during the testimony of Officer Lori Oxendine, an identification technician with the Burlington Police Department. Officer Oxendine testified that she could use the photographs to illustrate her testimony to the jury. Defendant objected on the basis that the photographs were cumulative and inflammatory, "showing large amounts of blood." The trial court overruled defend-

ant's objection and instructed the jury: "Ladies and gentlemen, I'm allowing into evidence these photographs, and they're being introduced in evidence for the sole and limited purpose of illustrating and explaining the testimony of this witness, Lori Oxendine. You're not to consider these photographs for any other purpose."

Defendant's argument that the photographs are cumulative must be considered in light of our holding that the number of illustrative photographs admitted lies within the discretion of the trial court. *State v. LaPlanche*, 349 N.C. 279, 283, 507 S.E.2d 34, 36 (1998). Here, we cannot say the trial court abused its discretion in admitting the photographs. The State presented a limited number of photographs to illustrate the scene and the victim's shirt. Each photograph depicted a different aspect of the scene or of the object portrayed. The photographs of the bullet holes and powder burns on the victim's shirt were different from the photographs used to illustrate Freddie's testimony. Freddie identified the shirt as the one worn by Woods on the day of her murder, while Officer Oxendine testified as to the location of bullet holes in the shirt. After reviewing the photographs, we agree with the trial court that they are not inflammatory. The number of photographs admitted was not excessive. They were relevant to illustrate Officer Oxendine's testimony, and their probative value substantially outweighed any danger of unfair prejudice. The victim's shirt showing the location of bullet holes similarly was probative without being unfairly prejudicial. These assignments of error are overruled.

IV.

[4] Defendant next contends the trial court committed error by allowing Officer Dexter Lowe to testify as to what Jovanta Woods told him on 28 September 1998 shortly after the victim's murder. Defendant argues that four of Jovanta's statements to Officer Lowe were not corroborative of his trial testimony and therefore were inadmissible hearsay under Rule 802 of the North Carolina Rules of Evidence.

Jovanta, who was six years old at the time of the trial, testified that he lived with Woods and considered her his mother. On the day she was shot, Woods picked Jovanta up from school, and he worked on homework in the kitchen after they arrived home. While in the kitchen, Jovanta heard the doorbell ring and thereafter heard defendant and the victim "fussing." He recognized defendant's voice because he had heard it four times previously. When he heard two

loud bangs, he went to the front porch where he saw the victim lying down. She did not move or speak to him. Jovanta saw some blood around her, and he also saw defendant drive away quickly in a car. On direct and cross-examination, Jovanta testified that he did not see a gun or any bullets on the porch. He remembered talking to Officer Lowe shortly after the murder and testified that he told Officer Lowe essentially what he had said in court.

Officer Lowe thereafter testified that he was a juvenile investigator with the Burlington Police Department and had interviewed Jovanta on 28 September 1998 shortly after the victim's murder. Over defendant's objection, he summarized Jovanta's statement. In overruling the objection, the trial court instructed the jury: "[I]f you find this corroborates what Jovanta Woods has heretofore testified to, you will consider it. If you find it does not corroborate his testimony, you will disregard it." Defendant asked to be heard outside the presence of the jury and argued that his objection was based on a contradiction between Officer Lowe's statement and Jovanta's trial testimony as to where Jovanta was when the victim was shot. Defendant asked the court to redact that portion of Officer Lowe's statement. The trial court declined defendant's request, brought the jury back, and again instructed that

> the testimony of this officer is being admitted solely for the limited purpose of corroborating the testimony of Jovanta Woods and for no other purpose. And I instruct you that if you find his testimony, that is Officer Lowe's testimony, corroborates what Jovanta Woods has testified, then you will consider that. If you find it does not corroborate what Jovanta Woods has heretofore testified, then you'll disregard it.

Over objection, Officer Lowe related to the jury what Jovanta had told him during the interview:

> I started off explaining to him what my job was, and what it consists of. And at that point, he immediately stated to me that, "I know why I'm here. And the reason is because [defendant] shot my Mama." At that point, I asked the child what had occurred at the residence. And he stated that he had just gotten home from school. He stated that [the victim] had picked him up. That his Uncle Freddie [was] in another room, and he heard some shots. The child stated that [the victim] was in the living room, inside of the house, at the door. That [the defendant] was on the porch arguing with [the victim] over her not doing her job. The child

> stated he heard three shots he thought, and [the victim] fell down and started bleeding from the nose and the mouth.
>
> The child further stated he never saw a gun, just heard the shots. As he had, was standing beside of [the victim], he further stated that after [the defendant] had shot [the victim], [the defendant] got into a small dark colored vehicle and left. He stated that he knew [the defendant] had shot [the victim] because he saw the bullets on the porch and that they were gold.

Rule 801 of the North Carolina Rules of Evidence defines hearsay as "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). Although hearsay is inadmissible except provided by statute or the Rules of Evidence, N.C.G.S. § 8C-1, Rule 802 (1999), an exception to this general rule allows admission of a prior consistent statement. *State v. Lee*, 348 N.C. 474, 484, 501 S.E.2d 334, 341 (1998). Under this exception, "a witness' prior consistent statements may be admitted to corroborate the witness' sworn trial testimony." *State v. Gell*, 351 N.C. 192, 204, 524 S.E.2d 332, 340, *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000). The reasoning supporting admission of prior consistent statements for corroborative purposes " 'rests upon the obvious principle that, as conflicting statements impair, so uniform and consistent statements sustain and strengthen [the witness'] credit before the jury.' " *State v. Levan*, 326 N.C. 155, 167, 388 S.E.2d 429, 435 (1990) (quoting *Jones v. Jones*, 80 N.C. 246, 249 (1879)) (alteration in original).

"Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness." *State v. Rogers*, 299 N.C. 597, 601, 264 S.E.2d 89, 92 (1980).

> In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony. . . . However, the witness's prior statements as to facts not referred to in his trial testimony *and not tending to add weight or credibility* to it are not admissible as corroborative evidence. Additionally, the witness's prior contradictory statements may not be admitted under the guise of corroborating his testimony.

State v. Ramey, 318 N.C. 457, 469, 349 S.E.2d 566, 573-74 (1986) (citations omitted). In other words, "[w]here testimony which is offered to corroborate the testimony of another witness does so substantially, it is not rendered incompetent by the fact that there is some variation." *State v. Rogers*, 299 N.C. at 601, 264 S.E.2d at 92. " 'Such variations affect only the weight of the evidence which is for the jury to determine.' " *State v. Benson*, 331 N.C. 537, 552, 417 S.E.2d 756, 765 (1992) (quoting *State v. Moore*, 300 N.C. 694, 697, 268 S.E.2d 196, 199 (1980)). Accordingly, "prior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness' in-court testimony." *State v. Williamson*, 333 N.C. 128, 136, 423 S.E.2d 766, 770 (1992). A trial court has "wide latitude in deciding when a prior consistent statement can be admitted for corroborative, nonhearsay purposes." *State v. Call*, 349 N.C. 382, 410, 508 S.E.2d 496, 513 (1998).

Defendant argues that the trial court erred by allowing Officer Lowe to testify that: (1) Jovanta said, "I know why I'm here. And the reason is because Willie shot my mama"; (2) Jovanta was standing next to the victim at the time of the shooting; (3) Jovanta heard three shots; and (4) Jovanta saw gold bullets on the porch. We review these statements *seriatim*. The first statement is consistent with and corroborates Jovanta's trial testimony that he heard defendant and the victim arguing, heard shots, saw the victim bleeding and lying on the porch, and saw defendant fleeing the crime scene. *State v. Williamson*, 333 N.C. at 136, 423 S.E.2d at 770 ("prior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness' in-court testimony"). In light of the detail given in Jovanta's testimony, his comment that "Willie shot my mama" is an admissible shorthand statement of fact. *State v. Spaulding*, 288 N.C. 397, 411, 219 S.E.2d 178, 187 (1975), *death sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976).

As to the second statement, the officer's testimony was that "[t]he child further stated he never saw a gun, just heard the shots. As he had, was standing beside of [the victim], he further stated that after Willie shot [the victim], Willie got into a small dark colored vehicle and left." We do not agree with defendant's interpretation that Jovanta was with the victim at the moment she was shot. We believe a more reasonable interpretation of the statement is that Jovanta was standing next to the victim when he saw defendant get into a vehicle

and leave. This interpretation is in harmony with Jovanta's statement that he never saw a gun and his trial testimony that he was in the kitchen when he heard shots. The State never suggested that Jovanta was an eyewitness to the crime, and we find no error in admitting this portion of Jovanta's statement to Officer Lowe.

Jovanta's third statement was not definite. He told Officer Lowe he "thought" he heard three shots. This account is not an explicit contradiction to his trial testimony that he heard two shots, and we find that it corroborates his trial testimony that he did hear shots. Moreover, even if it was error to admit this statement, the error was not prejudicial. Defendant never contended that shots were not fired and in fact acknowledged that four shots discharged from his gun as he and the victim struggled over the weapon.

Finally, although Jovanta's fourth statement concerning bullets he saw on the porch does not corroborate his trial testimony, its admission was not prejudicial error. Numerous witnesses, including Chris Smith, Lori Oxendine, Tina Rosencrans, Tye Fowler, and Robert Brown, testified that they observed or recovered these objects on the porch, and even under defendant's version of the shooting there would have been bullets and shell casings at the crime scene. These assignments of error are overruled.

V.

[5] Defendant contends the trial court erroneously admitted testimony of two of the State's witnesses concerning defendant's demeanor at the time of his arrest on 28 September 1998. Defendant argues that such testimony violated Rules 401, 403, 701, and 702 of the North Carolina Rules of Evidence and his rights under the United States and North Carolina Constitutions. As noted above, we shall address those contentions based upon alleged rule violations.

At trial, Eddie Sheffield, a lieutenant with the Alamance County Sheriff's Department, testified that he observed defendant for ten or fifteen minutes when he arrested defendant on 28 September 1998. The State, without objection by defendant, asked Lieutenant Sheffield several questions about defendant's demeanor:

> Q. Did you have any conversation with Willie Lloyd when you checked him and before placing him in your car about a firearm?
>
> A. Very little. Mr. Lloyd, I just simply asked him to walk over toward me and he was very, very cordial. He was very humble,

calm. He did exactly what I asked him to do with no hesitation at all.

. . . .

Q. Did he seem to get upset when you cuffed him?

A. No, sir.

. . . .

Q. Did Mr. Lloyd seem to be upset when he was cuffed by Fowler and Fuquay?

A. No, sir.

Q. Did you see him become upset at any time that you were out at that area?

A. No, sir.

Q. How would you describe his demeanor during that period of time, Lieutenant Sheffield?

A. Mr. Lloyd was calm. He was very polite, very cordial, did exactly what I asked him to do with no hesitation whatsoever.

Thereafter, the State began a series of questions pertaining to the witness' experience in homicide investigations, and defendant objected. The trial court overruled the objection, and the following exchange took place:

Q. Based on your experience over fifteen years in investigating or being involved in numerous homicide, homicides and your opportunity to observe the defendant for ten to fifteen minutes on September 28, 1998, was there anything about Willie Lloyd's actions that seemed out of the ordinary or inappropriate to you?

A. Yes.

Q. What did you observe about the defendant's actions that seemed inappropriate to you?

Q. Or out of the ordinary to you?

A. He was overly calm.

Defendant's motion to strike Lieutenant Sheffield's answer was denied.

Burlington Police Detective Tye Fowler also testified that he observed defendant for approximately two to three hours when he arrested him on 28 September 1998. Without objection, the prosecutor asked questions about defendant's demeanor:

> Q. And during that period of time, how, how would you describe his demeanor based on your experience as a law enforcement officer and your opportunity to observe him for that period of time on September 28, 1998?
>
> A. He was calm, rational, did not observe any, and I remember looking for any signs of impairment or anything. I found none. His walk, his, was normal. Speech was normal.
>
> Q. Did you observe him display any outward sign of emotion during that period of time you were with him on September 28, 1998?
>
> A. One particular time I thought he may have got a little teary-eyed. I wouldn't describe it as crying, but just a little teary-eyed. Other than that, he was, his emotional level was very level.

However, when the prosecutor began a series of questions based upon Detective Fowler's experience, defendant objected. After the trial court overruled the objection, the following exchange took place:

> Q. Based on your experience of going to a number of homicide calls, and based on the defendant knowing, you having told the defendant that he was being charged with murder, was there anything about his actions that seemed out of the ordinary or inappropriate to you?
>
> A. Yes.
>
> Q. What?
>
> Q. What seemed inappropriate or out of the ordinary to you about Mr. Lloyd's actions?
>
> A. His emotional state appeared to be calm.

Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1999). In the context of a

murder, "evidence is relevant if it 'tend[s] to shed light upon the circumstances surrounding the killing.' " *State v. Richmond*, 347 N.C. 412, 428, 495 S.E.2d 677, 685 (quoting *State v. Stager*, 329 N.C. at 322, 406 S.E.2d at 901), *cert. denied*, 525 U.S. 843, 142 L. Ed. 2d 88 (1998). Here, testimony of defendant's calm demeanor within an hour of shooting the victim tended to negate defendant's claim that the shooting was accidental and to shed light both on the circumstances of the murder and on defendant's intent and state of mind at the time of the offense. Accordingly, such testimony was relevant under Rule 401. *State v. Braxton*, 352 N.C. 158, 186, 531 S.E.2d 428, 444-45 (2000) (testimony by State's witnesses that defendant appeared calm and relaxed immediately after the murder "was relevant . . . to establish his state of mind and intent to kill"), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *State v. Lambert*, 341 N.C. 36, 50-51, 460 S.E.2d 123, 131-32 (1995) (deputies' testimony as to defendant's lack of emotion shortly after her husband's murder was relevant under Rule 401); *State v. Stager*, 329 N.C. at 321-22, 406 S.E.2d at 901 (testimony that defendant was calm and not crying shortly after the victim's death "tend[ed] to shed light upon the circumstances surrounding the killing" and was therefore relevant under Rule 401).

Pursuant to N.C.G.S. § 8C-1, Rule 402, relevant evidence is generally admissible unless "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403. The decision whether to exclude relevant evidence under Rule 403 lies within the sound discretion of the trial court, *State v. Braxton*, 352 N.C. at 186, 531 S.E.2d at 444, and " 'its ruling may be reversed for abuse of discretion only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision,' " *State v. Richmond*, 347 N.C. at 429, 495 S.E.2d at 686 (quoting *State v. Collins*, 345 N.C. 170, 174, 478 S.E.2d 191, 194 (1996)). Because Lieutenant Sheffield's and Detective Fowler's testimony about defendant's demeanor shortly after the murder was probative of the circumstances surrounding the murder and defendant's intent, we conclude that the trial court did not abuse its discretion in permitting the testimony and ruling that the probative value of the testimony was not substantially outweighed by unfair prejudice. *See State v. Braxton*, 352 N.C. at 186, 531 S.E.2d at 444-45; *State v. Richmond*, 347 N.C. at 428-29, 495 S.E.2d at 685-86; *State v. Lambert*, 341 N.C. at 51, 460 S.E.2d at 132.

We now consider whether the testimony constituted improper lay opinion. Under Rule 701:

> 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 determination of a fact in issue.

N.C.G.S. § 8C-1, Rule 701 (1999). We have long held that:

> "The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence."

State v. Leak, 156 N.C. 643, 647, 72 S.E. 567, 568 (1911) (quoting John Jay McKelvey, *Handbook of the Law of Evidence* § 132 (rev. 2d ed. 1907)), *quoted in State v. Stager*, 329 N.C. at 321, 406 S.E.2d at 901. Accordingly, "[o]pinion evidence as to the demeanor of a criminal defendant is admissible into evidence." *State v. Stager*, 329 N.C. at 321, 406 S.E.2d at 900. Here, testimony that defendant was calm shortly after the murder was based upon the investigators' personal observations of defendant for a period of time and was helpful to a clear understanding of whether defendant acted with intent or whether the shooting occurred by accident. *State v. Dickens*, 346 N.C. 26, 46, 484 S.E.2d 553, 564 (1997) (detective's opinion about a witness' demeanor was admissible under Rule 701 where it "was based on his personal observations over the course of two meetings and was helpful to a clear understanding of his testimony concerning the difference between [the witness'] statements"); *State v. Lambert*, 341 N.C. at 51, 460 S.E.2d at 132 (deputies' opinion testimony was admissible where it related to their perceptions of defendant during time shortly after shooting, stemmed from personal experience, and was helpful to clear understanding of defendant's demeanor shortly after crime); *State v. Shoemaker*, 334 N.C. 252, 259-60, 432 S.E.2d 314, 317 (1993) (testimony by law enforcement officers that defendant appeared "carefree," "extremely calm," "nonchalant," "very unconcerned," and "uncaring" on the night of the shooting admissible as opinion evidence). Although defendant argues that testimony comparing his demeanor to that of other homicide suspects was error, we have previously held such comparisons permissible. *See State v. Lambert*, 341 N.C. at 51, 460 S.E.2d at 132. Because the testimony of

Lieutenant Sheffield and Detective Fowler was not offered as expert opinion, we decline to address defendant's contention that the testimony was inadmissible under Rule 702. N.C.G.S. § 8C-1, Rule 702 (2001). These assignments of error are overruled.

VI.

[6] Defendant next contends the trial court erred by allowing pathologist Dr. Butts to testify that each of the victim's four wounds would have been painful. Defendant argues this evidence was irrelevant and unduly prejudicial, pursuant to Rules 401, 402, and 403 of the North Carolina Rules of Evidence. Specifically, he contends: (1) testimony that the victim's wounds would have been painful did not tend to prove that defendant intentionally shot the victim with malice, premeditation, and deliberation, nor did it rebut defendant's claim of accident; and (2) even if the testimony was relevant, it was unduly prejudicial in that it created sympathy for the victim and excited prejudice against defendant. Although defendant also argues that this evidence violated his constitutional rights under the United States and North Carolina Constitutions, we do not address these contentions for the reasons set out above.

At trial, Dr. Butts testified on direct examination that the victim suffered from four gunshot wounds. When asked whether the victim's wounds would have been painful, Dr. Butts responded:

> Q. Dr. Butts, can you tell the members of the jury based on your expertice [sic] in your field, medicine and forensic pathology, the type of pain that is associated with Gunshot Wound Number 1 which in your report is to the left breast?
>
> A. My opinion of being shot is painful. It hurts. I can't say anymore than that.
>
> Q. And do you have an opinion as to the pain that would be associated with Gunshot Wound Number 2, the gunshot wound to the right lateral shoulder?
>
> A. It would be painful.
>
> Q. With respect to Gunshot Wound Number 3 to [the] right posterior shoulder, do you have an opinion as to the pain that would be associated with that type of gunshot wound?
>
> A. Yes, sir. It would be painful.

Q. And with respect to Number 4, the gunshot wound to the right abdomen, do you have an opinion?

A. Yes, sir.

Q. And what would that opinion be?

A. It would be painful.

Defendant objected to the State's question as to "gunshot wound number 1" and moved to strike all of Dr. Butts' answers concerning the pain the victim would have suffered. The trial court overruled defendant's objection and denied his motion. Defendant argues that the admission of this evidence was error and additionally claims that the error was exacerbated by the State's closing argument:

> And then when you're struggling with somebody, her hand, her finger, his finger, on the trigger of that gun, she's getting shot all these times, and her finger stays right there on the trigger of the gun. Wonder woman. I mean, you know, that's painful, ladies and gentlemen. . . . You know it was painful. Dr. Butts told you it was painful.

We have held that "expert testimony concerning the pain and suffering of the victims in a first-degree murder case is relevant and admissible to assist the jury in ascertaining whether the defendant was acting with premeditation and deliberation." *State v. Vick*, 341 N.C. 569, 582, 461 S.E.2d 655, 662 (1995) (holding Dr. Butts' testimony regarding the victims' pain was relevant and admissible to show premeditation and deliberation); *see also State v. Ali*, 329 N.C. 394, 417, 407 S.E.2d 183, 196-97 (1991) (testimony from medical examiner that victim's wounds would have been painful was relevant and admissible in determining whether killing was done with premeditation and deliberation). Accordingly, Dr. Butts' testimony was relevant to assist the jury in determining whether defendant acted with premeditation and deliberation and to rebut defendant's claim of accident. Moreover, the State properly used the testimony as a basis for its argument that if the victim had her hand on the gun as defendant contended, it was unlikely that she would have kept it there during four separate shots that caused her pain.

We also disagree with defendant's contention that the testimony was unfairly prejudicial. In *State v. Gaines*, 345 N.C. at 664, 483 S.E.2d at 406, the surgeon who treated the victim testified that the pain from the victim's wounds "must have been excessive." Although

the defendant contended that the testimony was unfairly prejudicial, we held as follows:

> The State's evidence at trial showed that the victim was shot one time in the chest with a shotgun. Dr. Robicsek testified, without objection, that the victim had an extensive wound on the upper abdomen and was bleeding profusely from that wound, that there were major injuries in the lower portion of the right lung, and that there were extensive injuries in the upper abdomen. In light of this testimony, Dr. Robicsek's statement, that the victim's pain was "excessive," cannot be said to be unfairly prejudicial.

Id. at 665, 483 S.E.2d at 406-07. In the case at bar, Dr. Butts testified that the wound to the victim's lower right abdomen damaged her large bowel and part of her hip bone. He also described one of the wounds to the victim's right shoulder area as causing damage to her lungs, heart, spleen, and stomach, resulting in "a great deal of internal bleeding or hemorrhaging." When asked what the victim's capability would have been after receiving the wound, Dr. Butts responded that "the movement of that particular part of the body would likely have been painful." Defendant did not object to any of this testimony, nor did he object to the admission into evidence of eight of the nine photographs taken of the victim by Dr. Butts during the autopsy. In light of this testimony, we do not find Dr. Butts' statements concerning the victim's pain unfairly prejudicial. These assignments of error are overruled.

VII.

[7] Defendant argues that he is entitled to a new trial because the trial court erroneously allowed the State to make grossly improper comments during closing arguments in the guilt-innocence phase of the trial. Defendant first asserts that the State improperly traveled outside the record when it argued:

> You know, you want to hold the Burlington Police Department to that kind of standard? They've got to do every single one of those things Mr. Garner ticked off in every single crime, you better hope you're not a victim in a criminal case, because they won't have time to investigate it. . . . They do the best they can to fight crime in county, in the City of Burlington.

The trial court overruled defendant's objection to these comments, then later instructed the jury:

> Ladies and gentlemen, these closing arguments are not to be construed by you as evidence in the case and is [sic] not to be construed as your instructions on the law. I will give you the instructions on the law. Nevertheless, all three of the attorneys have an opportunity . . . to argue to you their contentions and positions in this case.

Defendant renewed his objection at the close of the State's argument and moved for a mistrial, without success.

A trial judge "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061 (1999). "The decision to grant or deny such a motion will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion." *State v. Diehl*, 353 N.C. 433, 436, 545 S.E.2d 185, 187 (2001).

As to closing arguments, we have stated the following:

> " '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. Hyde*, 352 N.C. 37, 56, 530 S.E.2d 281, 294 (2000) (quoting *State v. Guevara*, 349 N.C. 243, 257, 506 S.E.2d 711, 721 (1998), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999)), *cert. denied*, [531] U.S. [1114], [148] L. Ed. 2d [775] (2001). This Court will not disturb the trial court's exercise of discretion over the latitude of counsel's argument absent any gross impropriety in the argument that would likely influence the jury's verdict. "We further emphasize that 'statements contained in closing arguments to the jury are not to be placed in isolation or taken out of context on appeal. Instead, on appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred.' " [*State v.*] *Guevara*, 349 N.C. at 257, 506 S.E.2d at 721 (quoting *State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 41, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994)).

State v. Cummings, 353 N.C. 281, 297, 543 S.E.2d 849, 859 (2001).

Defendant specifically points to the State's comment, "you better hope you're not a victim in a criminal case," and contends that this statement improperly urged jurors to put themselves in the place of

the victim. Although "[a]n argument 'asking the jurors to put themselves in place of the victims will not be condoned,' " *State v. McCollum*, 334 N.C. 208, 224, 433 S.E.2d 144, 152 (1993) (quoting *United States v. Pichnarcik*, 427 F.2d 1290, 1292 (9th Cir. 1970)), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994), the State here merely told jurors that they should hope that they do not become victims of crime. Defendant had appropriately pointed out in his closing argument various avenues of investigation that the State had not pursued, and the State responded to the effect that if the police followed defendant's suggestions, criminal investigations would be burdensome and protracted. At no point did the State urge the jurors to put themselves in the place of Catherine Woods.

Defendant also points to the State's remark that the police "do the best they can to fight crime" and asserts that this comment was outside of the evidentiary record. We have held that prosecutors may "defend their own tactics, as well as those of the investigating authorities, when challenged." *State v. Payne*, 312 N.C. 647, 665, 325 S.E.2d 205, 217 (1985). As noted above, defendant argued that the Burlington Police Department did not properly or thoroughly investigate the shooting of Catherine Woods. The prosecutor here was defending the tactics of the Burlington Police Department against that challenge. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Defendant contends that the prosecutor improperly argued personal beliefs and opinions not supported by the evidence and personally vouched for the evidence when he stated:

> You know, you've been told that the investigation stank. You've been told that our witnesses have lied basically. You've been told that you ought to believe Willie Lloyd because he testified under oath. I think everyone of them was sworn in and took this stand, and they had to put their hand on that Bible to tell you they were telling the truth. And that I don't have first degree murder when a woman has been shot at six times on her front porch, hit four times and it's an accident, this is the biggest, most preposterous accident that has ever happened in Alamance County if that's what you find.
>
> . . . .
>
> Who's got something to gain by what they told you from this chair, ladies and gentlemen? Who's going to get punished if you

> find him guilty? It ain't Catherine Woods. If I didn't have a case of first degree murder, if the evidence wasn't sufficient for you to consider any of [the] things the Judge was going to tell you, you wouldn't be here to consider that. You wouldn't find out the law on that.

The trial court overruled defendant's objections to this argument and advised the jury that "[t]he attorneys for the State and the defendant, ladies and gentlemen, have an opportunity to argue their contentions and positions, and you should give them your close attention."

Defendant specifically points to the State's characterization of defendant's version of the shooting as "the biggest, most preposterous accident that has ever happened in Alamance County" and argues that this opinion was improper. However, this language was the prosecutor's response to defendant's contention that the shooting was accidental. We have held that "hyperbolic language is acceptable in jury argument so long as it is not inflammatory or grossly improper." *State v. Hill*, 347 N.C. 275, 298, 493 S.E.2d 264, 277 (1997) (trial court did not err by failing to grant a mistrial *ex mero motu* where prosecutor argued that "this may be the most atrocious crime that has occurred here in Harnett County"), *cert. denied*, 523 U.S. 1142, 140 L. Ed. 2d 1099 (1998); *see also State v. Larry*, 345 N.C. 497, 530, 481 S.E.2d 907, 926 (no error where prosecutor argued to jury that defendant was the "worst of the worst"), *cert. denied*, 522 U.S. 917, 139 L. Ed. 2d 234 (1997); *State v. Fullwood*, 343 N.C. 725, 740-41, 472 S.E.2d 883, 891 (1996) (no error where prosecutor argued that defendant's crime was "one of the worst murders anybody has ever heard of"), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997). We conclude that the prosecutor did not state his personal opinion in arguing that, if defendant was right, the shooting was "the biggest, most preposterous accident that has ever happened in Alamance County." As in the cases cited above, the State's argument was that the jury should conclude from the evidence that the shooting was intentional.

Defendant also argues that the prosecutor's statements, "[i]f I didn't have a case" and "if the evidence wasn't sufficient," constituted improper vouching for the evidence. After a review of the entire argument, we conclude that the prosecutor was doing no more than speaking with proprietary interest when he referred to "his" case. The gist of his comments was a request that the jurors carefully attend the judge's forthcoming instructions to determine whether his arguments

were consistent with the law. Accordingly, the comments were not objectionable.

Finally, defendant contends the prosecutor made improper biblical arguments when he recited the following "Dance, Death" poem during closing arguments:

> [Defendant] is as guilty of first degree murder as sure as he's sitting in that chair in this courtroom right now, ladies and gentlemen of the jury.
>
> Dance of death. Your deeds are done. A new time has set in, and you are summoned by the maker. One day death itself will dance before the Lord. The wind and breath of the Lord will call for death. Slowly death will bring all limp life and all brutal forms of death to the judgment seat. God will pronounce death guilty, will sentence death to death, and thus sentence to death tears, crying, hunger and lonesomeness and disease.
>
> Even now, there's enough evidence gathered against death by those who live under the spirit. They build evidence while they work, and while they wait for the dance of death. . . . The date has been set. God knows the hour.

Defendant did not object to these statements but now argues that the trial court should have intervened *ex mero motu*.

When "a defendant fails to object during 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*." *State v. Call*, 353 N.C. 400, 416-17, 545 S.E.2d 190, 201 (2001). " '[O]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken.' " *State v. Davis*, 353 N.C. 1, 31, 539 S.E.2d 243, 263 (2000) (quoting *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996)). Indeed, " '[t]o establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.' " *State v. Grooms*, 353 N.C. 50, 81, 540 S.E.2d 713, 732 (2000) (quoting *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999)).

We previously have discouraged arguments that improperly use religious sentiment. *State v. Ingle*, 336 N.C. 617, 648, 445 S.E.2d 880, 896 (1994), *cert. denied*, 514 U.S. 1020, 131 L. Ed. 2d 222 (1995). Specifically:

> This Court has disapproved " 'arguments to the effect that the law enforcement powers of the State come from God and that to resist those powers is to resist God.' " *State v. Cummings*, 352 N.C. 600, 628, 536 S.E.2d 36, 56 (2000) (quoting *State v. Geddie*, 345 N.C. 73, 100, 478 S.E.2d 146, 160 (1996), *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 43 (1997))[, *cert. denied*, —— U.S. ——, 149 L. Ed. 2d 641 (2001)]. We have also repeatedly cautioned counsel " 'that they should base their jury arguments solely upon the secular law and the facts.' " [*State v.*] *Davis*, 353 N.C. at 28, 539 S.E.2d at 262 (quoting *State v. Williams*, 350 N.C. 1, 27, 510 S.E.2d 626, 643, *cert. denied*, 528 U.S. 880, 145 L. Ed. 2d 162 (1999)).

State v. Call, 353 N.C. at 419, 545 S.E.2d at 202-03.

> "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. Although we may believe that parts of our law are divinely inspired, it is the secular law of North Carolina which is to be applied in our courtrooms. Our trial courts must vigilantly ensure that counsel for the State and for defendant do not distract the jury from [its] sole and exclusive duty to apply secular law."

State v. Braxton, 352 N.C. at 217, 531 S.E.2d at 462 (quoting *State v. Williams*, 350 N.C. at 27, 510 S.E.2d at 643) (alteration in original).

However, despite these admonitions, we have "found biblical arguments to fall within permissible margins more often than not." *State v. Artis*, 325 N.C. 278, 331, 384 S.E.2d 470, 500 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). Most pertinently, we have twice held that prosecutorial arguments citing the identical "Dance, Death" language used here were not so grossly improper as to require the trial court to intervene *ex mero motu*. *State v. Moody*, 345 N.C. 563, 574-75, 481 S.E.2d 629, 634-35, *cert. denied*, 522 U.S. 871, 139 L. Ed. 2d 125 (1997); *State v. Elliott*, 344 N.C. 242, 284-85, 475 S.E.2d 202, 222 (1996), *cert. denied*, 520 U.S. 1106, 137 L. Ed. 2d 312 (1997). Although we disapprove of and caution

prosecutors against using such language in arguments to the jury, because the remarks did not suggest that the law enforcement powers of the State were divinely ordained or inspired by God, nor did they suggest that to resist such powers is to resist God, we cannot say that the arguments were so grossly improper that the trial court erred in failing to intervene *ex mero motu*. *State v. Cummings*, 352 N.C. at 628-29, 536 S.E.2d at 56 ("[w]hen the potential impact of a biblical reference is slight, it does not amount to gross impropriety requiring the trial court's intervention"). These assignments of error are overruled.

VIII.

[8] Finally, defendant contends the trial court erroneously instructed the jury that it could consider evidence of flight in determining his guilt, claiming that the evidence did not support the instruction. As noted above, we will not address defendant's arguments that the instruction violated his rights under the United States and North Carolina Constitutions.

During the charge conference, the trial court informed the parties that it intended to give an instruction on flight in accordance with the pattern instruction, N.C.P.I.—Crim. 104.36. Defendant objected, stating that "[f]light, if there was any[,] was soon cured by the defendant voluntarily turning himself in," and argued that flight goes beyond fleeing the scene of a crime and means to "flee the jurisdiction of a court." The court overruled defendant's objection and instructed the jury as follows:

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

At the close of the court's charge to the jury, defendant renewed his objection to the instruction.

We have held that "[e]vidence of a defendant's flight following the commission of a crime may properly be considered by a jury as evidence of guilt or consciousness of guilt." *State v. King*, 343 N.C. 29, 38, 468 S.E.2d 232, 238 (1996). A trial court may properly instruct on flight where there is " 'some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged.' " *State v. Allen*, 346 N.C. 731, 741, 488 S.E.2d 188, 193 (1997) (quoting *State v. Fisher*, 336 N.C. 684, 706, 445 S.E.2d 866, 878 (1994), *cert. denied*, 513 U.S. 1098, 130 L. Ed. 2d 665 (1995)). However, "[m]ere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991).

In the case at bar, there was testimony from numerous witnesses that defendant hurriedly left the scene of the murder without providing medical assistance to the victim. Jovanta Woods testified that he saw defendant drive away quickly from his residence. Freddie Woods also testified that he saw defendant run toward his vehicle and drive away "extremely fast." Gene Terrill testified that he saw defendant go to his car at a hurried pace after shooting the victim and drive off at a "very fast rate." Tim Guffey testified that he saw defendant "running down the steps towards his car. And then he slammed the door. And he took off real fast, you know. He was fish tailing down the street." Guffey added that defendant did not stop at the stop sign and "[l]ooked like he was going to wipe the side of the street out on both sides, you know, the way he was going." Katie Poole stated that she heard defendant's car "spinning off, like tires were hollering." Mike Long testified that after hearing shots, he "heard somebody take-off squeeling [sic] tires a little bit." Jason McPherson was driving near the victim's home after the murder when he saw defendant "going around two lanes of traffic on the wrong side of the street, and through an intersection, which about hit me in the process."

After defendant ran to his car and recklessly sped away from the scene of the crime, he drove to Culp Weaving to confront Coltraine. Defendant then went to a convenience store where he bought a soda. Although he thereafter called the Burlington Police Department to arrange a surrender, at no time during his conversation with Officer Peter Wan did defendant request assistance for the victim, nor did he tell the officer where he could then be found. Instead, he said he needed to drive around for half an hour to clear his head before turning himself in. Defendant then went to another convenience store to

buy cigarettes and another soft drink. At some point prior to turning himself in, defendant also called his mother and told her that the victim had been hurt.

Defendant argues that "[w]hile the record evidence showed that defendant drove away from the Plaid Street house shortly after the shooting, it also clearly showed that he did so because he was shaken and needed to get himself together." However, we have held that " '[t]he fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper.' " *State v. Norwood*, 344 N.C. 511, 534, 476 S.E.2d 349, 359-60 (1996) (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)) (holding that "defendant's contention that his response to the fire was the natural response of a retarded person from an unexpected result does not negate the evidence of flight"), *cert. denied*, 520 U.S. 1158, 137 L. Ed. 2d 500 (1997). The evidence of defendant's behavior in the aftermath of the shooting establishes that he did more than merely leave the scene of the crime and is sufficient to support a finding of consciousness of guilt, as set out in the instruction. Therefore, the trial court properly instructed the jury as to defendant's flight. *State v. Beck*, 346 N.C. 750, 758, 487 S.E.2d 751, 757 (1997) (evidence sufficient to support instruction on flight where defendant shot victim, left residence without rendering any assistance or seeking to obtain medical assistance for victim, and told cab driver to leave area where he resided after seeing police vehicles there); *State v. Fisher*, 336 N.C. at 706, 445 S.E.2d at 878 (evidence sufficient to warrant instruction on flight where defendant ran from scene and some hours later telephoned Winston-Salem Police Department to turn himself in); *State v. Sweatt*, 333 N.C. 407, 419, 427 S.E.2d 112, 119 (1993) (no error in instruction on flight where evidence showed that "shortly after the victim was murdered, defendant passed [police officer] on the highway traveling at a very high rate of speed").

Accordingly, we reject defendant's contention that he was prejudiced by the instruction. "[T]he trial court's instruction correctly informed the jury that proof of flight was not sufficient by itself to establish guilt and would not be considered as tending to show premeditation and deliberation." *State v. Grooms*, 353 N.C. at 81, 540 S.E.2d at 732. The court did not suggest that there was evidence to support the State's contention of flight, but instructed only that the State contended that defendant fled. "Where there is some evidence supporting the theory of the defendant's flight, the jury must decide whether the facts and circumstances support the State's contention

that the defendant fled." *State v. Norwood*, 344 N.C. at 535, 476 S.E.2d at 360. Consequently, it was not error for the prosecutor to argue flight to the jury. These assignments of error are overruled.

Based upon the foregoing, we find no prejudicial error in the guilt-innocence phase of defendant's trial.

CAPITAL SENTENCING PROCEEDING

[9] We address in detail only defendant's contention that the trial court erroneously submitted to the sentencing jury the statutory aggravating circumstance that the murder was "especially heinous, atrocious, or cruel" (HAC). N.C.G.S. § 15A-2000(e)(9) (1999). The jury found this and other aggravating circumstances and recommended a death sentence. We conclude from a careful review of the record that submission of this aggravating circumstance was error, and we vacate the sentence of death on this ground.

The State correctly contends that

> [i]n determining whether the evidence is sufficient to support a finding of essential facts which would support a determination that a murder was "especially heinous, atrocious, or cruel" the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom.

State v. Hamlet, 312 N.C. 162, 175, 321 S.E.2d 837, 846 (1984). However, we have also held that "[w]here it is doubtful whether a particular aggravating circumstance should be submitted, the doubt should be resolved in favor of defendant." *State v. Oliver*, 302 N.C. 28, 61, 274 S.E.2d 183, 204 (1981). Accordingly, in deciding whether to give the instruction, the court must view any evidence tending to show that a murder was especially heinous, atrocious, or cruel in the light most favorable to the State. If doubt nevertheless remains, the instruction should not be given.

We have held that the HAC aggravating circumstance is appropriately given "when the level of brutality involved exceeds that normally found in first-degree murders or when the murder in question is conscienceless, pitiless, or unnecessarily torturous to the victim," *State v. Kandies*, 342 N.C. 419, 450, 467 S.E.2d 67, 84, *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996), or where the killing was committed in a fashion beyond what was necessary to effectuate the victim's death, *State v. Reese*, 319 N.C. 110, 146, 353 S.E.2d 352, 373

(1987), *overruled on other grounds by State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44, *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). However, it has been our intention that the HAC aggravating circumstance not become "a 'catch all' provision which can always be employed in cases where there is no evidence of other aggravating circumstances." *State v. Goodman*, 298 N.C. 1, 25, 257 S.E.2d 569, 585 (1979). We have identified three types of murders that would warrant the submission of the HAC aggravating circumstance. *State v. Golphin*, 352 N.C. 364, 480, 533 S.E.2d 168, 242 (2000), *cert. denied*, —— U.S. ——, 149 L. Ed. 2d 305 (2001). The first type consists of those killings that are physically agonizing for the victim or which are in some other way dehumanizing. *State v. Lloyd*, 321 N.C. 301, 319, 364 S.E.2d 316, 328, *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988). The second type includes killings that are less violent but involve infliction of psychological torture by leaving the victim in his or her "last moments aware of but helpless to prevent impending death," *State v. Hamlet*, 312 N.C. at 175, 321 S.E.2d at 846, and thus may be considered "conscienceless, pitiless, or unnecessarily torturous to the victim," *State v. Brown*, 315 N.C. 40, 65, 337 S.E.2d 808, 826-27 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *and overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). The third type includes killings that "demonstrate[] an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder[s]." *Id.* at 65, 337 S.E.2d at 827.

We begin with a review of analogous cases. The State refers us to *State v. Sexton*, 336 N.C. 321, 444 S.E.2d 879, *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994), and *State v. Alston*, 341 N.C. 198, 461 S.E.2d 687 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996), in which we upheld the submission of the HAC aggravating circumstance. In *Sexton*, the defendant abducted, raped, and strangled the victim, while in *Alston*, the defendant burglarized the victim's home, savagely beat her, strangled her, and left her body for her mother to find. While *Sexton* and *Alston* are similar to the case at bar in several respects, they are different in that the victims in those cases were strangled, not shot. Although we are unwilling to suggest that the method by which a murderer kills his victim is anything more than one consideration among many in determining whether submission of an aggravating or mitigating circumstance is appropriate, our holdings imply that a killing by strangulation is more likely to be "especially heinous, atrocious, or cruel" than an

otherwise similar murder by shooting. For instance, in *Sexton* we wrote that

> in her last moments, the victim, the mother of a young child, lay nude with soaking wet hair on the backseat of her van, as a stranger whom she could look in the eye wrapped her stockings around her neck. Whatever the time span, the minimum or longer, that it took for the victim to lose consciousness, the moments just before and during the strangulation would have been filled with overwhelming panic for the victim who, knowing that death was impending, was helpless to prevent it. To the victim, this ten seconds or longer was not a brief moment. A jury could reasonably infer that as the breath of life was choked out of the victim, she experienced extreme anguish and psychological terror.

State v. Sexton, 336 N.C. at 374, 444 S.E.2d at 909. We went on to find that the facts in *Sexton* were similar to two other strangulation cases where the HAC aggravating circumstance had properly been submitted, but were unlike two shooting cases where the evidence was held insufficient to support submission of the HAC circumstance. *Id.* at 374-75, 444 S.E.2d at 909.

The State also argues that our analysis of the stabbing death in *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316, supports the submission of the HAC aggravating circumstance in the case at bar. However, the victim in *Lloyd* suffered a somewhat prolonged death lasting at least five to ten minutes during which time he knew of his impending death but was left helpless to prevent it. It was on this basis that the trial court's submission of the HAC factor was affirmed, although there was also evidence that the death was physically agonizing to the victim. *Id.* at 320, 364 S.E.2d at 328. As detailed below, the victim in the case at bar suffered a less protracted death.

The State additionally cites two murder cases involving fatal gunshot wounds in which we upheld the submission of the HAC aggravating circumstance to the jury. *State v. Lynch*, 340 N.C. 435, 459 S.E.2d 679 (1995), *cert. denied*, 517 U.S. 1143, 134 L. Ed. 2d 558 (1996); *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808. However, each of these cases is distinguishable from the case at bar. In *Lynch*, the defendant was found guilty of shooting two victims fatally, and the HAC aggravating circumstance was submitted as to one of them. This victim was first shot as she sat in an automobile. Although she was able to exit the car, the defendant shot her several more times as she staggered in the street, then shot her again as a rescuer attempted to

drag her to safety. *State v. Lynch*, 340 N.C. at 448, 459 S.E.2d at 699. In *Brown*, the victim, although shot six times, lived as long as fifteen minutes. *State v. Brown*, 315 N.C. at 66, 337 S.E.2d at 827. By contrast, although the record in the case at bar does not reveal the precise number of minutes the victim survived after being shot, the evidence nevertheless demonstrates that death was relatively rapid. Robert Brown, a responding emergency medical technician, testified that Woods quit breathing and her pulse stopped prior to intubation, and he believed she was dead when she was taken from the porch. Dr. Butts testified that one suffering from the victim's wounds

> would not be in my opinion necessarily rendered immediately unconscious, but bleeding would be relatively rapid and extensive, and [it] would be my opinion that they would be likely to lose consciousness within a relatively short period of time. Within a matter of [a] few minutes, be my opinion, if not sooner.

Dr. Butts' opinion is consistent with Freddie's testimony that the victim was bleeding extensively and was incapacitated after providing defendant's name and with Jovanta's testimony that the victim did not speak to him when he came out to the porch.

Although the State points out that the victim suffered as a result of four individual gunshot wounds, we have never held that being shot more than one time by itself necessarily makes death especially physically agonizing to an extent sufficient to support the submission of the HAC aggravating circumstance. *See, e.g., State v. Stanley*, 310 N.C. 332, 340, 312 S.E.2d 393, 398 (1984) (evidence insufficient to support submission of the HAC circumstance where victim became unconscious minutes after being shot nine times in rapid succession); *State v. Hamlette*, 302 N.C. 490, 504, 276 S.E.2d 338, 347 (1981) (evidence insufficient to support submission of the HAC circumstance even though victim lingered twelve days after being shot multiple times). As noted above, the evidence indicates that the victim did not remain conscious long after the wounds were inflicted.

The State argues that the victim's death was dehumanizing because she died in front of strangers and family members. However, no family members witnessed the actual shooting, and the victim's time of consciousness afterwards was relatively short. Although we agree that a trial court may properly consider this aspect of a case in determining whether to instruct on the HAC aggravating circumstance, we note that in *State v. Stanley*, 310 N.C. at 333-34, 312 S.E.2d

at 394-95, involving a similar shooting, the State did not argue and we did not consider the presence of others in determining whether the murder was especially heinous, atrocious, or cruel. Some aspects of the HAC circumstance address the mental condition of the victim, while other aspects address the defendant's state of mind. Accordingly, in considering whether the victim's death was dehumanizing, we consider both that no one else was present when defendant shot the victim and that the victim's son and grandson saw her immediately after she was felled and watched her perish. The former circumstance, focusing on defendant, suggests that he did not seek to make the victim's death especially horrifying or to inflict emotional torment on her, while the latter circumstance, focusing on the victim, suggests that she was aware that beloved family members were powerless to save her in her final moments.

Such nuances in interpretation of the evidence, some of which weigh in favor of giving the HAC aggravating circumstance while others weigh against it, require that the trial court balance all aspects of the case in determining whether to give the instruction. On review, we conduct a similar balancing test and conclude that the victim's tragic death was not especially physically agonizing or otherwise dehumanizing to the victim in a way that justified imposition of the HAC aggravating circumstance.

The State argues that submission of the HAC circumstance was appropriate because the victim did not lose consciousness immediately after being shot and consequently was aware of the inevitability of death. However, we have never held that the fact that death was somewhat lingering necessarily makes a murder especially heinous, atrocious, or cruel. *State v. Artis*, 325 N.C. at 320, 384 S.E.2d at 494. The threshold requirement that the State must meet before the HAC aggravating circumstance can be submitted for any type of murder is whether the level of brutality involved exceeds that normally present in first-degree murder. *State v. Goodman*, 298 N.C. at 25, 257 S.E.2d at 585. As a practical matter, our review of cases involving fatal shootings indicates that frequently death is not instantaneous and the victim remains conscious for at least a few minutes before expiring. Accordingly, the fact that a victim's death is not immediate does not by itself establish that a killing was especially heinous, atrocious, or cruel. *See, e.g., State v. Hamlet*, 312 N.C. at 176-77, 321 S.E.2d at 846-47 (submission of HAC circumstance improper where first shot hit victim in head and rendered him unconscious until he died five hours later); *State v. Stanley*, 310 N.C. at 340, 312 S.E.2d at 398 (sub-

mission of HAC circumstance improper even though victim shot nine times but did not die instantly); *State v. Hamlette*, 302 N.C. at 504, 276 S.E.2d at 347 (submission of HAC circumstance improper even though victim lingered twelve days before dying). As detailed above, the evidence in the case at bar strongly suggests that the victim became unconscious shortly after being shot. "That [the victim] might have remained conscious for a matter of minutes after being shot does not distinguish this case from the ordinary death-by-shooting cases." *State v. Stanley*, 310 N.C. at 340, 312 S.E.2d at 398.

In addition, although we have held that the HAC aggravating circumstance may apply where the defendant inflicts psychological torture before the murder by stalking the victim, *see State v. Moose*, 310 N.C. 482, 494, 313 S.E.2d 507, 515 (1984), in the case at bar, there was no evidence that the victim was aware that she was going to be killed until defendant shot her. The State properly concedes in its brief that the victim was not being "stalked for the kill." Consequently, the victim did not suffer psychological torture from a realization that defendant was preparing to kill her.

Two other cases cited by the State, *State v. Bonney*, 329 N.C. 61, 405 S.E.2d 145 (1991) (defendant reloaded weapon twice while shooting victim, who was at least initially alive and unable to escape, twenty-seven times), and *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *overruled on other grounds by State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995), *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), *and by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (defendant allowed each victim to hear the other being shot while helpless to prevent his own death), are factually distinguishable. In the case at bar, the victim was shot four times without warning and in rapid succession. By contrast, in *Bonney* and *Pinch*, significant time elapsed between the initial gunshot wound and the subsequent fatal shots. Although the victim's death in the case at bar was not instantaneous, it cannot be said to have been "especially" torturous for the victim.

The State contends that the evidence shows that defendant not only lacked remorse, but also bragged about killing his victim. Our review of the record indeed suggests that defendant was calm in the aftermath of the shooting and did not express regret, although we note that Detective Fowler testified that defendant appeared to be "a

little teary-eyed" at one point. The record does not indicate whether defendant's sorrow was for the victim or for himself. Nevertheless, we do not interpret defendant's confrontation with Coltraine in the aftermath of the shooting as mere braggadocio. Although defendant unquestionably wanted Coltraine to know he was not a man to be taken lightly, he also told Coltraine to go to the victim's home. Defendant thereafter demonstrated some understanding of the gravity of his act by voluntarily surrendering to the police. Taken together, these facts fail to demonstrate that defendant exhibited unusual depravity of mind. Thus, the case at bar is distinguishable from *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983), cited by the State, in which the defendant boasted to fellow inmates that he had "kind of liked the idea of" killing the victim. *Id.* at 347, 307 S.E.2d at 319.

The State also argues that defendant acted with unusual depravity of mind because he did not attempt to help his victim after shooting her and fled the scene without knowing whether anyone would call for medical assistance. However, there was evidence at trial that defendant turned and saw Freddie standing in the door after the shooting, suggesting that defendant knew someone was home to help the victim. In addition, he drove to Coltraine's place of work to inform him about the shooting.

Although defendant shot the victim four times, the record does not indicate the sequence in which the wounds were inflicted. According to Dr. Butts' testimony, not all the shots caused fatal injuries, but the immediately fatal shot apparently was fired from above and behind the victim, leading to an inference that it was not the first. In addition, all four shots were fired in quick succession. Accordingly, we fail to see that this evidence suggests that defendant carried out this shooting in a fashion beyond that necessary to effectuate the victim's death.

Finally, we are aware that the trial court must consider all relevant factors in the case before it as it determines whether to instruct a jury as to this aggravating circumstance, giving these factors appropriate weight and balancing them against each other. Nevertheless, after reviewing all aspects of this case, and being mindful of the (e)(9) requirement that the killing be *especially* heinous, atrocious, or cruel, we conclude that the trial court erred in instructing the jury as to that aggravating circumstance. Accordingly, we vacate the death sentence and remand for a new capital sentencing proceeding.

Most of the remaining issues raised by defendant in this appeal are unlikely to arise again at resentencing. However, in the interest of judicial economy, we address three additional matters that may recur upon remand.

At his sentencing proceeding, defendant requested that the trial court peremptorily instruct the jury pursuant to the mitigating circumstance set out in subsection 15A-2000(f)(8) that "[t]he defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony." N.C.G.S. § 15A-2000(f)(8) (1999). During defendant's sentencing proceeding, he called as a witness Robert Martin, a former prosecutor with the Alamance County District Attorney's Office. Martin testified that in 1994 he prosecuted a case against Glen Farrar, who had been charged with assault with a deadly weapon with intent to kill inflicting serious injury. Defendant testified for the State, and Farrar was convicted and sentenced to twenty years' imprisonment. Martin stated that defendant's testimony was helpful to the State. After Martin testified, defendant and the State stipulated that Farrar had been charged and convicted of a felony.

Defendant thereafter filed a written request that the trial court submit the (f)(8) statutory mitigating circumstance to the jury; defendant also requested that the trial court instruct peremptorily as to this circumstance. The trial court agreed to submit the (f)(8) circumstance, but refused to give a peremptory instruction, stating that it was "[f]or the jury to say whether or not [defendant] testified truthfully." Defendant objected, and the trial court gave a nonperemptory instruction. Defendant renewed his objection at the close of the trial court's charge to the jury. Subsequently, one or more jurors found the circumstance to exist.

We have held that " '[u]pon request, a trial court should give a peremptory instruction for any mitigating circumstance, whether statutory or nonstatutory, if it is supported by uncontroverted evidence.' " *State v. Golphin*, 352 N.C. at 474, 533 S.E.2d at 239 (quoting *State v. Wallace*, 351 N.C. 481, 525-26, 528 S.E.2d 326, 354, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000)). The State now argues that because there was no evidence that defendant testified truthfully at Farrar's trial, the trial court correctly refused to give defendant's requested peremptory instruction. However, the State presented no evidence at trial to contradict defendant's evidence on this circumstance, nor does it argue on appeal that any such evi-

dence was presented. *See State v. Holden*, 338 N.C. 394, 402, 450 S.E.2d 878, 882 (1994). The State relied on defendant's testimony at Farrar's trial, and under the North Carolina Rules of Professional Conduct, "[a] lawyer shall not . . . counsel or assist a witness to testify falsely." Rev. R. Prof. Conduct N.C. St. B. 3.4(b) (Fairness to opposing party and counsel), 2001 Ann. R. (N.C.) 623. The evidence of defendant's truthful testimony is both uncontroverted and credible, and " '[w]here . . . all of the evidence in [a capital prosecution], if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to a peremptory instruction on that circumstance.' " *State v. Holden*, 338 N.C. at 402-03, 450 S.E.2d at 882 (quoting *State v. Johnson*, 298 N.C. 47, 76, 257 S.E.2d 597, 618 (1979)) (second alteration in original). Consequently, if similar evidence is presented at defendant's resentencing proceeding, the trial court should give a peremptory instruction on this statutory mitigating circumstance.

Defendant also contends that the trial court erred in allowing the prosecutor to make grossly improper closing arguments during the sentencing phase of trial. We held above in our review of the guilt-innocence phase of defendant's trial that the trial court did not err by failing to intervene *ex mero motu* when the prosecutor recited the "Dance, Death" poem during closing argument. At defendant's capital sentencing proceeding, the prosecutor again read this poem to the jury, but added the following italicized words at the conclusion:

> The date has been set. God knows the hour. *Let the Judge set the date. The death penalty is the only appropriate punishment in this case for what Willie Lloyd did to Catherine Woods.*

(Emphases added.)

Despite our oft-repeated distaste for biblical references in argument, we reluctantly held above that the recitation of the poem without the italicized language did not require intervention by the trial court. This additional language, however, crosses the line into impropriety by linking the law enforcement powers of the State, and specifically the judge, to divine powers of God. We admonish the State against making such arguments at defendant's new sentencing proceeding.

Finally, defendant contends that the trial court erred in allowing the prosecutor to argue to the jury during sentencing closing arguments:

> Justice is in your laps. Your voice is the conscience of this community. . . . In all respects, you are the last link in the State's chain of law enforcement. . . . The officers can do no more, the State of North Carolina, the District Attorney's Office can do no more. It's in your laps.

Although defendant objected to this argument, the trial court overruled the objections and instructed the jury as follows:

> Ladies and gentlemen, counsel has an opportunity to argue their contentions and their positions. And this is not evidence, and this is not your instructions on the law. You've heard the evidence, and I will give you the instructions on the law. Nevertheless, the attorneys do have the opportunity to argue their positions and their contentions in this matter.

Defendant renewed his objections at the close of the State's argument and moved for a mistrial. The trial court again overruled defendant's objections and denied his motion.

We have held that "[t]o suggest that the jury is effectively an arm of the State in the prosecution of the defendant or that the jury is the last link in the State's chain of law enforcement is improper." *State v. Elliott*, 344 N.C. at 285, 475 S.E.2d at 222-23 (trial court not required to intervene *ex mero motu* when defendant failed to object to argument that jury was last link in the State's chain of law enforcement); *see also State v. Brown*, 320 N.C. 179, 203, 358 S.E.2d 1, 18, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). Accordingly, we admonish the State against making this argument at defendant's new sentencing proceeding.

In conclusion, we find no prejudicial error in the guilt-innocence phase of defendant's capital trial, but we vacate the death sentence and remand for a new capital sentencing proceeding.

GUILT-INNOCENCE PHASE: NO PREJUDICIAL ERROR.

SENTENCING PHASE: DEATH SENTENCE VACATED; REMANDED FOR NEW CAPITAL SENTENCING PROCEEDING.

STATE OF NORTH CAROLINA v. NATHANIEL FAIR JR.

No. 506A99

(Filed 5 October 2001)

1. Jury— selection—peremptory challenges—racial discrimination—procedure

The U.S. Supreme Court has established a three part test to determine whether the State impermissibly discriminated on the basis of race when selecting jurors. First, the defendant must make a prima facie showing that the State exercised a peremptory challenge on the basis of race; the burden then shifts to the State to offer a facially valid, race-neutral rationale for its peremptory challenge; and the court must then decide whether the defendant has proven purposeful discrimination. In this case, discussion of the prima facie showing was moot because the State set forth its reasons for challenging two of the prospective jurors before the court ruled on defendant's objections, and the court asked the State if it wished to give reasons for the third challenge before it ruled on the objection.

2. Jury— selection—peremptory challenges—race-neutral rationale

The trial court did not err in a capital first-degree murder prosecution by allowing the State to use peremptory strikes against three African-American jurors where the first clearly stated that he had long been opposed to the death penalty and related an extremely strong predisposition for a life sentence; the second excused juror made a great deal of eye contact with defendant, had visited people in prison, and her father and two uncles had been in prison; and the third worked with the Department of Correction counseling inmates on a daily basis, was familiar with a death-row inmate, had concerns about the death penalty, and had knowledge of a psychiatrist who often testified for the defense in capital sentencing hearings. These reasons provide race-neutral rationales for the peremptory challenges.

3. Jury— selection—peremptory challenges—racial discrimination not shown

A defendant in a capital first-degree murder prosecution did not prove purposeful discrimination in the State's exercise of

peremptory challenges where the defendant, the victim, and about one-half of the State's witnesses were African-American, the State noted during jury selection that "this case is not about race," and the trial court made no procedural errors and thoroughly considered both parties' arguments concerning the *Batson* challenges.

4. Jury— selection—death penalty views

The trial court did not err in a capital first-degree murder prosecution by excusing for cause three prospective jurors based on their views of the death penalty. The first juror stated unequivocally that he would not follow the trial court's instructions on the law if they were inconsistent with his own personal beliefs; the second juror repeatedly changed his mind about whether he could recommend a death sentence; and the third indicated that her strong personal feelings about the death penalty would influence her consideration of the case and that her decision might be based on factors unrelated to the evidence or the trial court's instructions.

5. Evidence— corroboration—fact not in issue

The trial court did not err in a capital first-degree murder prosecution by excluding testimony from the managers of two adult-oriented establishments that the victim came to their stores two or three times a month where defendant contended that the testimony would have corroborated his assertion that he met the victim in one of the stores on the night of the victim's death. Neither of the witnesses was able to testify to seeing defendant and the victim together on the night in question; moreover, where and when defendant met the victim was not a disputed fact at trial.

6. Evidence— habit—occasional visits to store

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by determining that the victim's visits to adult-oriented businesses did not constitute relevant evidence of habit. Occasional visits to a store do not rise to the level of regular and systematic conduct.

7. Appeal and Error— preservation of issues—basis for admission of evidence—change from trial theory

A defendant in a capital first-degree murder prosecution did not preserve for appeal the issue of whether the victim's visits to

adult-oriented businesses constituted admissible character evidence because he stated in no uncertain terms at trial that the proffered testimony was not character evidence. Defendant's change in position runs afoul of Appellate Rule 10.

8. Criminal Law-prosecutors's argument— reversal of voir dire assertion

The trial court did not err in a capital prosecution for first-degree murder by not intervening ex mero motu during the State's closing argument regarding defendant's account of meeting the victim in an adult video store. Even though the State asserted on voir dire that it did not contest how or where defendant met the victim and then attacked defendant's credibility in its closing argument by questioning defendant's account of how he met the victim, the State's argument was not so grossly improper as to warrant a new trial.

9. Constitutional Law— defendant's silence—cross-examination—admissible

The trial court did not err in a capital prosecution for first-degree murder by allowing the State to cross-examine defendant about his failure to tell the police about a witness who could have backed up his story, about his failure to tell a journalist about the person who allegedly committed the crime, and about statements made to an officer while in a holding cell. Defendant's objection to the first set of questions was sustained, the State asked defendant no questions concerning silence during cross-examination about his holding cell statements, and it would have been natural for defendant to reveal the identity of the real killer when he voluntarily spoke to the press.

10. Criminal Law— prosecutor's argument—defendant's silence

The trial court did not err in a capital prosecution for first-degree murder by refusing to instruct the jury to disregard the State's closing argument that the jury could decide not to believe defendant's trial testimony based on his silence about evidence that another person committed the crime when he was speaking to the media. A defendant who chooses to testify is subject to impeachment when his earlier silence is inconsistent with his testimony on the stand.

11. Evidence— expert testimony—basis—hearsay

The trial court did not err in a capital prosecution for first-degree murder by allowing an SBI DNA expert to base her testimony in part on bloodstained cloth samples taken by another agent who was unable to testify where the expert examined the pants from which the samples were taken to determine whether the cuttings were from the areas indicated by the other agent's notes. The cuttings and the pants were admitted into evidence, so that defendant was able to cross-examine the expert fully concerning the original location of the blood samples and was free to conduct his own tests, and the jury was free to make its own determination.

12. Sentencing— capital—statutory mitigating circumstances

In a capital sentencing proceeding, the trial court is required to submit statutory mitigating circumstances to the jury if they are supported by the evidence even when defendant objects. If a jury finds that a statutory mitigating circumstance exists, it must consider that circumstance in its final sentence determination.

13. Sentencing— capital—mitigating circumstance—emotional disturbance—drug use and depression—evidence insufficient

Evidence of drug use did not warrant submission of the mental or emotional disturbance mitigating circumstance in a capital sentencing proceeding because voluntary intoxication alone is not sufficient. Although defendant argued that he was depressed, there was no testimony that he had been medically diagnosed as suffering from depression. Moreover, the mere fact that he was depressed or suffering a family crisis prior to the murder does not warrant submission of this mitigator where there is not substantial evidence that he was depressed or in crisis at the time he killed the victim.

14. Sentencing— capital—mitigating circumstance—impaired capacity—drug use—insufficient link to crime

There was insufficient evidence in a capital sentencing proceeding to support submission of the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance of impaired capacity to appreciate the criminality of conduct where defendant relied upon his extensive and continuous drug use. Although drug use can support this mitigator, defendant here did not show a link between his drug use

and his allegedly impaired capacity at the time of the murder. His search for drugs that night at most reveals a motive.

15. Constitutional Law—ineffective assistance of counsel—procedure for raising

Ineffective assistance of counsel (IAC) claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required. IAC claims prematurely asserted on direct appeals will be dismissed without prejudice to defendant's right to reassert them during a subsequent motion for appropriate relief (MAR) proceeding. When an IAC claim is raised on direct appeal, defendants are not required to file a separate MAR in the appellate court during the pendency of that appeal.

16. Constitutional Law— ineffective assistance of counsel—attorney conduct not unreasonable

A capital first-degree murder defendant who alleged ineffective assistance of counsel failed to show that his attorney's conduct rose to the level of unreasonableness or prejudiced defendant's trial where defendant pointed to an admission elicited as a matter of reasoned trial strategy, the failure to object to cross-examination about communications with his attorney which were not privileged, the failure to object to the proper impeachment of defendant with his post-arrest silence, the failure to object to closing arguments which were not grossly improper or prejudicial, and the request to submit statutory mitigating circumstances as nonstatutory circumstances when the evidence of the circumstances was not sufficient.

17. Sentencing— capital—death penalty—not disproportionate

A death penalty was not disproportionate where defendant repeatedly stabbed his victim; stole the man's wallet, money, jewelry, and car; left the man to die; went on a shopping spree with the man's credit cards; was convicted on the basis of premeditation and deliberation; and the jury found three of the four aggravating circumstances which can sustain a death sentence standing alone.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Bullock, J., on 18 May 1999 in Superior Court, Wake County, upon a jury verdict finding defendant guilty of first-degree murder. On 13 August 2001, the

Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of an additional judgment. Heard in the Supreme Court 19 April 2001.

Roy A. Cooper, Attorney General, by Jill Ledford Cheek, Special Deputy Attorney General, and Steven F. Bryant, Assistant Attorney General, for the State.

Thomas K. Maher for defendant-appellant.

MARTIN, Justice.

On 12 May 1999, a jury found Nathaniel Fair, Jr. (defendant) guilty of robbery with a dangerous weapon and the first-degree murder of Reubin McNeill (victim) on the basis of malice, premeditation, and deliberation, and under the felony murder rule. On 18 May 1999, the jury recommended a sentence of death, and the trial court entered judgment in accordance with that recommendation. The trial court also sentenced defendant to 94-122 months in prison for the robbery conviction.

The victim's body was found near a vacant lot off Wilcox Road in Wake County, North Carolina, on 6 August 1998. The victim, a middle school principal within the Wake County Public School System, had not been seen alive since 4 August 1998, when he left his residence around 6:00 p.m. to attend a church meeting. He had been carrying a wallet with credit cards in his back left pocket, wearing a silver class ring with a burgundy stone, and driving a green Ford Explorer. After the church meeting ended between 8:15 and 8:30 p.m., the victim spoke briefly with some choir members and then left. When the victim had not arrived home by 11:00 p.m., his wife began to call his cell phone. Early the next morning, she called the police.

On 6 August 1998, around 1:30 p.m., a Carolina Power and Light employee found the victim's body and called 911. Law enforcement officers and paramedics who responded to the scene described the victim's clothing as extremely bloody. The victim was wearing a watch but no other jewelry. The authorities found no wallet or money on the victim. The inner lining of the victim's left rear pocket was flipped over the top of his pants, with a bloodstain appearing on the pocket lining.

Around 9:30 p.m. on 6 August 1998, police located the victim's car at Crabtree Valley Mall. They found a stained gauze bandage inside the truck, and the City-County Bureau of Investigation (CCBI) noted

blood on the driver's door, steering wheel, and console area. CCBI found defendant's prints on the truck's left front door, rear hatch, and the cell phone on the console.

On 5 August, around 1:00 a.m., defendant approached the home of Tony Lucas in a green Ford Explorer. Defendant had a deep cut on his hand and blood on his clothes. Defendant refused to go to the doctor and instead bandaged the cut himself with duct tape. Lucas testified that when defendant cut the tape for the bandage, defendant produced a knife with blood on it. Defendant stated that his hand had been cut when he was jumped by three men.

Defendant changed clothes while at the Lucas residence and then went to buy beer with Lucas and another individual. During the drive Lucas noticed blood on the Explorer's steering wheel. An employee from Handy Hugo convenience store testified defendant had purchased gas that night for a green Explorer. Defendant paid for the gas with a credit card and signed the credit card slip as "Reubin McNeill." The Handy Hugo employee recalled that defendant was wearing a class ring with a stone which may have been reddish in color. At some point during the evening, defendant told Lucas' sister, Carolyn, that he was in trouble and that she would not see him again.

Several employees at Crabtree Valley Mall testified that on 5 August, a man fitting defendant's general description had purchased items with credit cards bearing the name Reubin McNeill. At least two of these employees, Ted Murphy from Brookstone and Penny Franklin from Sharon Luggage and Gifts, identified defendant as the man who made the purchases on 5 August.

Haywood McCoy testified that defendant had asked him to retrieve luggage from an Explorer parked in the Crabtree Valley Mall parking lot. Defendant told McCoy he had left the vehicle there because he had the feeling the police were watching him when he left the mall after shopping. Defendant also told McCoy the items in the Explorer were the only evidence that could tie him to a crime in which "he had cut somebody up." McCoy testified he could not locate the Explorer in the parking lot.

Defendant was arrested on 13 August 1998 at an apartment in Durham, North Carolina. As police approached, defendant raised his hands in the air, dropping some cards in the process. Police found a driver's license and various credit cards bearing Reubin McNeill's

name near defendant. At that time, defendant told the police, "those aren't mine." Police also found a purple card bearing the name "Tank" and a pager number.

The state presented DNA evidence at trial via State Bureau of Investigation (SBI) Special Agent Brenda Bissette. Bissette testified that a DNA profile taken from three samples of the victim's pants matched defendant's DNA. On a piece taken from the inside of the victim's pocket, defendant's DNA was dominant. Finally, Bissette testified that the DNA of both the victim and defendant appeared in samples taken from the Explorer.

Dr. Thomas Clark, a pathologist, performed an autopsy on the victim's body. In addition to multiple superficial wounds, the autopsy revealed a stab wound that entered the victim's lung and caused bleeding in the chest cavity. The autopsy also identified a group of wounds that entered the heart. According to Dr. Clark, the cause of death was multiple stab wounds.

Defendant testified on his own behalf. He stated that after graduating from high school, he had pled guilty to a rape charge, received a life sentence, and served prison time in South Carolina. Defendant was paroled in 1993 and eventually attended Fayetteville State and North Carolina State Universities. According to defendant, in November 1997, he began using crack cocaine and never stopped. Defendant testified he purchased crack cocaine from people known on the street as "Tank" and "T-Bone." In one transaction, defendant obtained $600.00 of cocaine from T-Bone and never paid for it. Defendant testified T-Bone had once shot out defendant's car windshield and tried to attack him because defendant owed him money. Defendant reported this incident to the police.

Defendant testified he first met the victim in 1996 at Snap Shot Video, an adult video establishment. Defendant also testified he had encountered the victim on 4 August 1998 in an adult-oriented establishment where defendant was smoking crack cocaine. Defendant and the victim left in the victim's car. The two men drank a beer together at a restaurant and discussed engaging in some sort of sexual conduct with each other. Defendant decided, "I wasn't going to have any sex with him or get with him or anything like that unless I got some drugs." Defendant and the victim drove to Shepherd Street, where defendant bought three rocks of cocaine from "Tank." Tank made a phone call to obtain more cocaine for defendant, and directed defendant to drive to the spot where the victim's body was eventually

found. Defendant testified that Tank told him to wait there about fifteen minutes for more drugs.

According to defendant, after they arrived at the spot, a car pulled up, and defendant and the victim exited the Explorer. Defendant recognized the man in the other car as T-Bone. Defendant testified that T-Bone demanded the money defendant owed him and brandished a knife in front of defendant's face. Defendant grabbed the knife and T-Bone shoved defendant into the front of the victim's truck. Defendant then grabbed T-Bone's knife by the blade. After continued brawling, the victim eventually pulled T-Bone off of defendant. According to defendant, T-Bone stabbed the victim, and they fell down. Defendant then fled in the victim's Ford Explorer to Carol and Tony Lucas' house.

Defendant denied bringing a knife to the Lucas home but admitted using the victim's credit cards. Defendant stated he left the Explorer at Crabtree Valley Mall because when he left the mall, he saw a police officer in an unmarked car with a radio in his hand. Defendant also admitted he asked McCoy to try to retrieve items from the Explorer but denied telling McCoy he had "cut anybody up real bad."

JURY SELECTION

[1] Defendant first argues that the trial court, by allowing the state to use peremptory strikes against three African-American jurors, violated his right to equal protection under the state and federal Constitutions, U.S. Const. amend. XIV, N.C. Const. art. I, § 26; his right to fair and equal jury selection under the North Carolina Constitution, N.C. Const. art. I, §§ 19, 26; and his Sixth Amendment right to a representative jury from a cross-section of the community, U.S. Const. amend. VI.

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, 89, 90 L. Ed. 2d 69, 83 (1986), as well as Article I, Section 26 of the North Carolina Constitution, *State v. Fletcher*, 348 N.C. 292, 312, 500 S.E.2d 668, 680 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 113 (1999).

In *Batson*, the U.S. Supreme Court established a three-part test to determine whether the state had impermissibly discriminated on the basis of race when selecting jurors. 476 U.S. at 96-98, 90 L. Ed. 2d

at 87-89. Our courts have adopted the *Batson* test for review of peremptory challenges under the North Carolina Constitution. *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001); *State v. Mitchell*, 321 N.C. 650, 365 S.E.2d 554 (1988). First, the defendant must make a *prima facie* showing that the state exercised a peremptory challenge on the basis of race. *Lawrence*, 352 N.C. at 14, 530 S.E.2d at 815. If this showing is made, the court advances to the second step, where the burden shifts to the state to offer a facially valid, race-neutral rationale for its peremptory challenge. *Id.* The state's explanation must be clear and reasonably specific, although it "need not rise to the level justifying exercise of a challenge for cause." *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88, *quoted in Lawrence*, 352 N.C. at 14, 530 S.E.2d at 815. Moreover, the state's proffered rationale need not be persuasive or even plausible. *Lawrence*, 352 N.C. at 14, 530 S.E.2d at 816. As long as the state's reason appears facially valid and betrays no inherent discriminatory intent, the reason is deemed race-neutral. *Id.* Our courts allow the defendant to submit evidence to show that the state's proffered reason is merely a pretext for discrimination. *Id.*

In the third and final step, the trial court must decide whether the defendant has proven purposeful discrimination. *Id.* This involves weighing various factors such as " 'susceptibility of the particular case to racial discrimination, whether the State used all of its peremptory challenges, the race of witnesses in the case, questions and statements by the prosecutor during jury selection which tend to support or refute an inference of discrimination, and whether the State has accepted any African-American jurors.' " *State v. Golphin*, 352 N.C. 364, 427, 533 S.E.2d 168, 211 (2000) (quoting *State v. White*, 349 N.C. 535, 548-49, 508 S.E.2d 253, 262 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999)), *cert. denied*, —— U.S. ——, 149 L. Ed. 2d 305 (2001).

Upon review, the trial court's determination is given great deference because it is based primarily on evaluations of credibility. *Id.* Such determinations will be upheld as long as the decision is not clearly erroneous. *Lawrence*, 352 N.C. at 14, 530 S.E.2d at 816.

Where the trial court fails to rule on a peremptory challenge, "the question of whether the defendant established a *prima facie* case becomes moot." *Golphin*, 352 N.C. at 426, 533 S.E.2d at 211. In the absence of an express ruling, " 'we need not address the question of whether defendant met his initial burden of showing discrimination[,] and [we] may proceed as if a *prima facie* case had been estab-

lished.' " *State v. Bonnett*, 348 N.C. 417, 434, 502 S.E.2d 563, 575 (1998) (quoting *State v. Harden*, 344 N.C. 542, 557, 476 S.E.2d 658, 665 (1996), *cert. denied*, 520 U.S. 1147, 137 L. Ed. 2d 483 (1997)), *cert. denied*, 525 U.S. 1124, 142 L. Ed. 2d 907 (1999). Similarly, the reviewing court may proceed with its analysis under *Batson* and its progeny where the state presents reasons for its challenges despite the defendant's failure to establish a *prima facie* case. *State v. Smith*, 352 N.C. 531, 532 S.E.2d 773 (2000), *cert. denied*, —— U.S.——, 149 L. Ed. 2d 360 (2001).

In the present case, defendant argues that prospective jurors Rotini, Sanders, and Vann were improperly excluded from the jury on the basis of race. The state set forth its reasons for challenging prospective juror Rotini before the trial court ruled on defendant's objection. The state did the same with prospective juror Sanders. The trial court also did not immediately rule on defendant's objection to prospective juror Vann but instead asked the state if it wished to give reasons for the challenge. For these reasons, discussion of defendant's *prima facie* case is moot. *Golphin*, 352 N.C. at 426, 533 S.E.2d at 211; *Smith*, 352 N.C. 531, 532 S.E.2d 773. We therefore move to the second prong of the *Batson* test and determine whether the state met its burden of providing race-neutral reasons for its peremptory challenges. *Lawrence*, 352 N.C. at 14, 530 S.E.2d at 815.

[2] We first address the state's proffered rationale for its challenge to prospective juror Rotini. At the time the state challenged that prospective juror, it had already used two peremptory challenges, one on a white male and the second on an Hispanic female. Furthermore, at that point in jury selection, the state had already accepted the first African-American juror it questioned. The state argued that its acceptance of the first African-American juror not excused for cause was proof the state was not engaging in any pattern or practice in exercising its peremptory challenges. Further, the state argued that prospective juror Rotini's views on the death penalty prompted the state's peremptory challenge. Our review of prospective juror Rotini's *voir dire* reveals the state's rationale was valid. Prospective juror Rotini clearly stated he had long been opposed to the death penalty and was not capable of taking someone else's life. Moreover, the juror related an extremely strong predisposition for a life sentence rather than death if he were selected for the jury. Accordingly, the trial court did not err in finding the state had provided a race-neutral reason to challenge prospective juror Rotini.

Turning to prospective juror Sanders, the state argued that its challenge of Sanders was supported by her eye contact with defendant, her history of visiting prisons, and her close family members having spent time in prison. All these facts, according to the state, indicated Sanders' potential sympathy for defendant. A thorough review of the transcript reveals the state's excusal of Sanders was unrelated to race. As the state argued to the trial court, the record of prospective juror Sanders' *voir dire* indicates that the juror made a great deal of eye contact with defendant, that she had visited people in prison, and that her father and two uncles had been in prison. Accordingly, the trial court properly concluded that the state had articulated a race-neutral rationale for its peremptory challenge.

Finally, we consider the state's peremptory challenge of prospective juror Vann. The state listed the following reasons in support of its peremptory challenge of this prospective juror: his employment with the Department of Correction, which involved counseling inmates on a daily basis; his statements indicating real concerns about the death penalty; his familiarity with a death-row inmate; and his knowledge of a psychiatrist who often testified for the defense in capital sentencing hearings. The record indicates that the state's reasons for its peremptory challenge are supported by the witness' *voir dire* testimony. Moreover, these reasons provide a facially valid and race-neutral rationale for this peremptory challenge. Accordingly, the trial court properly found the state's rationale for its peremptory challenge of prospective juror Vann to be race-neutral.

[3] Because the state provided race-neutral reasons for its peremptory challenges of prospective jurors Rotini, Sanders, and Vann, we now proceed to the third prong of the *Batson* inquiry. In this inquiry, we evaluate whether defendant proved purposeful discrimination by applying the factors listed in *Golphin*, 352 N.C. at 427, 533 S.E.2d at 211. First, we note that defendant, the victim, and approximately one-half of the state's witnesses were African-American. This made the jury selection process less likely to be susceptible to racial discrimination. *White*, 349 N.C. at 550, 508 S.E.2d at 262. Moreover, the state noted during jury selection that "this case is not about race." This statement tends to refute an inference of discrimination. *Id.* at 548-49, 508 S.E.2d at 262. Additionally, the record indicates that the trial court made no procedural errors but instead thoroughly considered both parties' arguments concerning the *Batson* challenges before allowing the state's peremptory challenges of the three jurors.

Finally, the record reveals that the state accepted two African-Americans to serve on defendant's jury. *Id.*

According the required level of deference to the trial court in its credibility determinations, *Golphin*, 352 N.C. at 427, 533 S.E.2d at 211, and noting that a showing of clear error was not made, *Lawrence*, 352 N.C. at 14, 530 S.E.2d at 816, we hold the record reveals no evidence of purposeful discrimination by the state in exercising its peremptory challenges of prospective jurors Rotini, Sanders, and Vann. Jury selection in this case complied in all respects with *Batson*. For the same reasons, there is no violation of defendant's right to fair and equal jury selection under the North Carolina Constitution or of his Sixth Amendment right to a representative jury from a cross-section of the community. Defendant's assignments of error are without merit.

[4] Defendant also assigns error to the trial court's excusal for cause of prospective jurors Neal, Cooke, and Baker because of their views on the death penalty. Defendant argues that the state challenged these three jurors merely because their answers were equivocal and that these dismissals violated the Sixth and Fourteenth Amendments to the United States Constitution.

The Sixth and Fourteenth Amendments prohibit exclusion of jurors in capital cases merely because they have reservations about the death penalty. *Witherspoon v. Illinois*, 391 U.S. 510, 517-18, 20 L. Ed. 2d 776, 782-83 (1968); *see also State v. Gregory*, 340 N.C. 365, 459 S.E.2d 638 (1995) (finding no error where prospective jurors were excused for cause because they demonstrated they would be unable to put aside their own opinions and follow the law), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). Capital jurors, however, must be impartial about finding the facts and applying the law. *Wainwright v. Witt*, 469 U.S. 412, 416, 83 L. Ed. 2d 841, 846-47 (1985). Jurors who are unable to articulate clearly their willingness to set aside their own beliefs on capital punishment and defer to the law may be excused for cause. *State v. Blakeney*, 352 N.C. 287, 299, 531 S.E.2d 799, 809-10 (2000), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001); *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 907-08 (1993). The holding in *Wainwright* established that it was proper to exclude a juror where his or her views on the death penalty would

> "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." [*Adams*

> *v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980).] We note that . . . this standard . . . does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

469 U.S. at 424-26, 83 L. Ed. 2d at 851-53 (footnotes omitted). Accordingly, in analyzing this issue, we will not disturb the trial court's decision in the absence of an abuse of discretion. *State v. Hill*, 347 N.C. 275, 288, 493 S.E.2d 264, 271 (1997), *cert. denied*, 523 U.S. 1142, 140 L. Ed. 2d 1099 (1998).

Turning first to prospective juror Neal, the record reveals Neal stated unequivocally that he would not follow the trial court's instructions on the law if they were inconsistent with his own personal beliefs. Neal indicated he would adhere to a standard of "zero doubt" rather than "reasonable doubt" and that he would not change his decision-making in accordance with the trial court's instructions:

> [Q] Okay. Let me talk to you a little bit about the burden of proof. The State is held to a burden of proof beyond a reasonable doubt throughout the trial. Throughout both phases of the trial. Nothing more, nothing less than that. Judge Bullock will define what reasonable doubt is for you, and that is the standard that each and every juror must follow. Again, not any preconceived notions about what reasonable doubt is, and he will continue to refer to it as reasonable doubt, not beyond a shadow of a doubt, not beyond all doubt, or not anything lesser than beyond a reasonable doubt. Given your feelings about this, do you think that you can hold the State to that burden, nothing more and nothing less?

[A] I would find it very difficult. It would have to be proven in my definition of reasonable doubt. To the point that reasonable was almost to the point of zero, almost.

[Q] Okay.

[A] Meaning zero to almost zero doubt. The evidence would have to be so heavily weighted on that there was [sic], in effect, in my mind, be almost no doubt.

[Q] Okay. In your mind. And that's what we're talking about here, what it would be in your mind. So you are saying, then, to me, and correct me if I'm wrong. Okay? Because I am not trying to put words in your mouth, I am just trying to understand here. But what you are saying is that you would have to be one hundred percent certain that it wouldn't make any difference to you in your mind what the instruction on reasonable doubt is, that you would have to be one hundred percent certain before you could vote or before you could recommend a sentence of death?

[DEFENSE COUNSEL]:

Objection.

BY THE COURT:

Sustained.

[Q] Let me rephrase that. Would you be able to set aside what your definition of reasonable doubt is and apply the standard that Judge Bullock gives you?

[A] I'll have to think about this one just a minute.

[Q] Please, yes. Take your time.

[A] Reasonable doubt in my mind is my own feeling, my own principles. And if reasonable doubt is not defined to match my principles in this Court or any Court, then I will not violate my principles to adhere to what the Court says.

Following this discussion, defendant requested, outside the juror's presence, that the trial court instruct the juror on reasonable doubt. The trial court declined to give such an instruction, stating that it was more interested in whether the juror would "follow the law that's given to him and not as what he thinks it is." When prospective juror Neal was brought back in for further questioning, he reiter-

ated that he would follow his personal beliefs rather than the law if the law differed from his own beliefs.

The comments of prospective juror Neal make it abundantly clear he was unwilling " 'to temporarily set aside [his] own beliefs in deference to the rule of law.' " *Brogden*, 334 N.C. at 43, 430 S.E.2d at 907-08 (quoting *Lockhart v. McCree*, 476 U.S. 162, 176, 90 L. Ed. 2d 137, 149-50 (1986)). Accordingly, the trial court did not abuse its discretion in allowing the state's motion to excuse Neal for cause. *See id.* at 43, 430 S.E.2d at 908; *see also Blakeney*, 352 N.C. at 299-301, 531 S.E.2d at 810-11 (holding juror excusal was proper where jurors stated that their strong personal beliefs would not allow them to vote for the death penalty under any circumstances).

We next consider the excusal for cause of prospective juror Cooke. After extensive *voir dire* of Cooke, his ability to recommend the death penalty remained unclear. Prospective juror Cooke initially told the state he could impose the death penalty if defendant "deserved to die." After further inquiry from the state, he admitted, "I don't think I can [recommend the death penalty]." When the state asked if his beliefs were so strong he could not vote for the death penalty under any circumstances, prospective juror Cooke stated, "I could give the death penalty if I thought it was right." Finally, after conceding he was "going back and forth," prospective juror Cooke agreed with the state that, if he served on the jury, he would hold the state to a higher burden of proof concerning the death penalty and that he could not follow the trial court's instructions on that phase of the proceeding.

Defendant and the trial court then examined prospective juror Cooke. Cooke continued to vacillate concerning his position on the death penalty and admitted he was confused. He eventually informed the trial court that he could vote for the death penalty under certain circumstances. At this point, the trial court denied the motion to dismiss Cooke for cause.

Upon further questioning by the state, however, prospective juror Cooke repeated his assertion that he would require a higher burden of proof during the sentencing proceeding than "beyond a reasonable doubt." The prospective juror also stated again that he could not recommend defendant be put to death under any circumstances. After the state renewed its challenge to prospective juror Cooke and defendant requested further *voir dire*, the trial court concluded, "[T]his juror's views would prevent or substantially impair the

performance of his jury duties, as a juror in a Court with his instructions and his oath. The Court, in its discretion, will not allow further questions about the subject and allow[s] the State's challenge for cause."

Cooke's bias for or against the death penalty was by no means illuminated with unmistakable clarity. *See State v. Morganherring*, 350 N.C. 701, 726, 517 S.E.2d 622, 637 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 322 (2000). Cooke repeatedly changed his mind about whether he could recommend a death sentence. In a case such as this, where a juror's remarks concerning the death penalty are so equivocal that a court, either in *voir dire* or upon review, cannot discern whether the juror would be able to properly apply the law, deference must be given to the trial court's decision. *Id.* at 727, 517 S.E.2d at 637. Moreover, because prospective juror Cooke indicated he would not follow the trial court's instructions concerning sentencing and would instead apply a higher standard than beyond a reasonable doubt, there is ample evidence to support the trial court's decision to excuse him for cause.

Finally, we consider the trial court's excusal for cause of prospective juror Baker. She agreed during *voir dire* that she already had set ideas about when the death penalty was appropriate. The state investigated whether these ideas would interfere with Baker's duties as a juror:

> [Q] I know and, again, I have to talk in such generalities. But as I understood you, you indicated that if you had to say yes or no, that these strong feelings you have, some of them are strong, you could not set them aside?
>
> [A] True. It depends on evidence and all.
>
> . . . .
>
> [Q] When you say that you could not set those strong feelings aside, you can't say right now that you could set them aside because it would depend on what the evidence would, in fact, show?
>
> [A] Correct.
>
> [Q] And that there would be instances where the evidence would be such that you could set them aside, maybe, or there could be some circumstances, based on the evidence, that you couldn't set them aside; is that fair? Or do you think those

strong feelings would always be a part of you and would affect your ability—

[A] They would always be a part of me and would probably affect (pause)—

[Q] Okay. And because of those feelings, they would, in fact, affect decisions that you would make. And it would, in fact, affect your making decisions about this Defendant for having committed whatever crime it is the jury decides he committed, whatever kind of first-degree murder. But it would affect your ability to make decisions in the case because of your strong feelings?

[DEFENSE COUNSEL]:

Objection.

[A] Yes.

BY THE COURT:

Overruled.

[Q] And you can answer. And since it would affect the decisions that you would make, does that mean that you might possibly find yourself making a decision[] in this case, based on or influenced by something other than the evidence that's presented and the law that Judge Bullock gives?

[A] It could be possible.

After this exchange, the trial court allowed the state's motion to excuse prospective juror Baker for cause. Prospective juror Baker had indicated that her strong personal feelings about the death penalty would influence her consideration of the case. *See Morganherring*, 350 N.C. at 727, 517 S.E.2d at 637. Moreover, the prospective juror stated that her decision-making in the case might be based on factors unrelated to the evidence or the trial court's instructions. Because this prospective juror clearly indicated that her personal feelings would "substantially impair the performance of h[er] duties as a juror," *Wainwright*, 469 U.S. at 424, 83 L. Ed. 2d at 851, she was properly dismissed for cause. The trial court did not abuse its discretion in excluding the challenged prospective jurors. This argument is without merit.

GUILT-INNOCENCE PHASE

[5] Defendant next assigns error to the trial court's exclusion of the testimony of the managers of two adult-oriented establishments. Glenn Moore, store manager of Our Place Video, testified on *voir dire* that the victim visited his establishment two to three times per month. Catherine Keith testified on *voir dire* that the victim would come to Snap Shot Video, where she worked, twice a month. Defendant argued for the admission of this evidence at trial on the theory that it bolstered his credibility by corroborating his assertion that he met the victim at Our Place Video on the night of the victim's death.

Defendant argued on *voir dire* that the testimony was admissible as relevant evidence of habit. The state asserted that the witnesses' statements were irrelevant because the witnesses could not testify they saw defendant and the victim together at Our Place Video on the night in question. The trial court stated that it would have allowed defendant's evidence for corroborative purposes had either of the witnesses been able to testify to seeing defendant and the victim together on the night in question. The trial court excluded the evidence on relevancy grounds, however, finding that the frequency with which the victim visited these establishments was immaterial to the issues for trial.

Defendant alleges that the exclusion of this evidence violated his constitutional right to present a defense. Specifically, defendant asserts that his due process right to present evidence under both the state and federal Constitutions, as well as the North Carolina Rules of Evidence, was violated by the trial court's exclusion of the challenged testimony. On appeal, defendant characterizes the testimony of these two witnesses as relevant and admissible to show the habitual practices of, as well as the character of, the victim.

The right to present evidence in one's own defense is protected under both the United States and North Carolina Constitutions. As noted by the United States Supreme Court in *Chambers v. Mississippi*, 410 U.S. 284, 35 L. Ed. 2d 297 (1973), "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Id.* at 294, 35 L. Ed. 2d at 308.

Like all evidence offered at trial, however, evidence offered to support a defense must be relevant to be admissible. N.C.G.S. § 8C-1, Rule 402 (1999). Evidence is relevant if it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1999). The jury should not be prohibited from hearing evidence that is "in any way connected with the matter in issue" or evidence "from which any inference of the disputed fact can reasonably be drawn." *State v. McCraw*, 300 N.C. 610, 618-19, 268 S.E.2d 173, 178 (1980); *see also State v. York*, 347 N.C. 79, 95, 489 S.E.2d 380, 389 (1997) (holding that testimony regarding letter written by the defendant's cellmate allegedly illustrating the codefendant's "manipulative hold" over the defendant was not relevant because it did not go to "prove the existence of any fact . . . of consequence in the determination of the charge of murder for which defendant was found guilty"). Relevant evidence may be excluded, however, when "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (1999).

In *Chambers*, the defendant's conviction was reversed because the trial court erroneously excluded testimony of three witnesses that would have corroborated self-incriminating statements made by another suspect. 410 U.S. at 292-93, 35 L. Ed. 2d at 307-08. In the instant case, however, the excluded testimony was not offered to challenge the identity of defendant as the true perpetrator. *See id.* Rather, it was offered to corroborate defendant's statement that he met the victim at an adult-oriented establishment on 4 August 1998. Whether defendant was with the victim on the night the victim was killed, however, was not a matter at issue in this case. *See McCraw*, 300 N.C. at 618-19, 268 S.E.2d at 179. That issue was effectively mooted by defendant's own admission that he spent time with the victim on the night of 4 August. Similarly, where and at what time defendant met the victim was not a disputed fact at trial. *See id.* Even if it had been a disputed fact, neither of the witnesses could have shed light on that issue because neither of them could testify to seeing defendant and the victim together on the night of 4 August 1998. In any event, the evidence offered by the two witnesses was collateral, or immaterial, to any disputed issue in the case. *See York*, 347 N.C. at 95, 489 S.E.2d at 389; 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 3 n.22 (5th ed. 1998) (noting that in

prior editions Dean Brandis defined immateriality as follows: "*Immaterial* is properly used to describe evidence which, though relevant in some degree, is of such slight probative value that to exclude it is not error."); *see also* N.C.G.S. § 8C-1, Rule 403. Accordingly, the trial court did not err in excluding the challenged evidence on relevancy grounds.

[6] Defendant's arguments pertaining to habit evidence deserve mention, as habit evidence is a subcategory of the relevance inquiry. Evidence of habit is relevant to prove that "the conduct of the person . . . on a particular occasion was in conformity" therewith. N.C.G.S. § 8C-1, Rule 406 (1999). In determining whether a practice constitutes habit, a court must weigh, on a case-by-case basis, the number of specific instances of the behavior, the regularity of the behavior, and the similarity of the behavior. *Crawford v. Fayez*, 112 N.C. App. 328, 335, 435 S.E.2d 545, 550 (1993), *disc. rev. denied*, 335 N.C. 553, 441 S.E.2d 113 (1994). To rise to the level of habit, the instances of specific conduct must be "sufficiently numerous to warrant an inference of systematic conduct and to establish one's regular response to a repeated specific situation." *Id.*; *see also State v. Palmer*, 334 N.C. 104, 112, 431 S.E.2d 172, 176 (1993) (holding that the custom of always having money on one's person constituted a regular response to a repeated specific situation and was therefore habit). The trial court's ruling on the admissibility of habit evidence may be disturbed only for an abuse of discretion. *Crawford*, 112 N.C. App. at 335, 435 S.E.2d at 550.

Defendant contends the testimony excluded in this case tended to show the victim had a habit of frequenting adult-oriented establishments. The two witnesses who testified on *voir dire* indicated that the victim visited each of their stores two or three times each month. Occasional visits to a store do not rise to the level of regular and systematic conduct. *Id.* The trial court therefore did not abuse its discretion in determining that the challenged testimony did not constitute relevant evidence of habit. *See id.*

[7] Defendant also characterizes the excluded testimony as admissible character evidence. At trial, however, defendant's counsel did not argue that this testimony was character evidence. In fact, the defense stated on *voir dire*, "[W]e have asked no questions and have elicited no evidence, and intend not to elicit any evidence from either of these witnesses as to any trait of [the victim's] character." Nonetheless, in the instant appeal, defendant argues that the testi-

mony of Moore and Keith should have been allowed as relevant evidence of the character of the victim.

Rule 10 of the North Carolina Rules of Appellate Procedure requires that, "[i]n 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." N.C. R. App. P. 10(b)(1). Rule 10 has been interpreted by this Court to stand for the proposition that "[w]here . . . a defendant withdraws challenged questions, we do not find that the court's ruling on those questions has been preserved for review. The defendant abandoned his position at trial and cannot now resume the battle in this forum." *State v. Larrimore*, 340 N.C. 119, 149, 456 S.E.2d 789, 805 (1995); *see also Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) (noting that "[a]n examination of the record discloses that the cause was not tried upon [the defendant's] theory, and the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court").

While defendant stated in no uncertain terms at trial that the evidence proffered was not character evidence, he now seeks to establish error on appeal by asserting that the evidence was indeed character evidence. Defendant's change in position runs afoul of the specificity required by Rule 10 for preservation of error. N.C. R. App. P. 10; *Larrimore*, 340 N.C. at 149, 456 S.E.2d at 805. Accordingly, this question is not before us for review.

[8] In his next argument, defendant contends the trial court erred by failing to intervene *ex mero motu* during the state's closing argument to prevent the state from challenging defendant's account of his meeting with the victim in the adult video store. On *voir dire*, the state had objected to the testimony of witnesses Moore and Keith, arguing that it was not relevant. As further basis for its objection, the state argued that it had not cross-examined defendant about that issue and that there was "no contest" about when and where defendant met the victim. The trial court heard further argument by defendant for admission of the testimony as habit evidence, but finally ruled that the testimony of Moore and Keith was irrelevant and therefore inadmissible. The state in closing argument challenged defendant's credibility, stating:

> There will certainly be questions in your mind as to how all of this came about. How did Reubin McNeill come to be with the Defendant that night? We don't know enough of the evi-

> dence, because the only living person who can tell us about that simply isn't telling the truth about so many other things. How they met that night is only uncontroverted, if you believe the Defendant.

Defendant did not object, and the trial court did not intervene. Defendant now argues that the trial court's failure to intervene *ex mero motu* violated his due process right to a fair trial.

Trial counsel are allowed wide latitude in their arguments to the jury in capital proceedings. *State v. Smith*, 351 N.C. 251, 268, 524 S.E.2d 28, 41, *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100 (2000); *State v. Robinson*, 346 N.C. 586, 606, 488 S.E.2d 174, 187 (1997). Counsel may argue the facts in evidence as well as all reasonable inferences that may be drawn therefrom. *State v. Guevara*, 349 N.C. 243, 257, 506 S.E.2d 711, 721 (1998), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999). In the absence of an objection by the opposing party, the trial court is obligated to intervene to prevent a closing argument only where the argument is so grossly improper that it impedes the defendant's right to a fair trial. *Golphin*, 352 N.C. at 452, 533 S.E.2d at 226; *State v. Roseboro*, 351 N.C. 536, 546, 528 S.E.2d 1, 8, *cert. denied*, 531 U.S. 1019, 148 L. Ed. 2d 498 (2000). Grossly improper argument is defined as conduct so extreme that it renders a trial fundamentally unfair and denies the defendant due process. *See, e.g., Taylor v. Kentucky*, 436 U.S. 478, 487, 56 L. Ed. 2d 468, 477 (1978) (holding that defendant's right to due process was violated where court refused to give jury instructions on presumption of innocence after state's closing argument implied that all defendants are guilty); *Miller v. Pate*, 386 U.S. 1, 6-7, 17 L. Ed. 2d 690, 694 (1967) (holding that the defendant's due process rights were violated where prosecutor's argument intentionally misrepresented the evidence).

In the instant case, the state asserted on *voir dire* that it did not contest how or where defendant met the victim. Contrary to this representation, however, the state later attacked defendant's credibility in its closing argument by questioning whether defendant's account of how he met the victim was true. Even so, the state's argument was not so grossly improper as to warrant a new trial. *See Golphin*, 352 N.C. at 452, 533 S.E.2d at 226. Accordingly, this argument is without merit.

[9] Defendant next argues the trial court erred by allowing the state to cross-examine defendant concerning three instances of his postarrest silence. According to defendant, this violated the Due Process

Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution.

Defendant first cites a line of questions asked by the state while cross-examining defendant:

Q . . . [Y]ou knew that Tank could back you up on your story; didn't you?

A No, I didn't. I didn't know that Tank could back me up on my story.

Q Well, he could have told the police that he sent T-Bone there to meet you that night?

[DEFENSE COUNSEL]:

Objection.

BY THE COURT:

Sustained.

Defendant also cites a second set of questions the state asked him on cross-examination:

Q Now, right before lunch when we broke, I was talking to you about your arrest over in Durham on August the—late night of August the 12th, early morning hours of August the 13th. Do you remember when you were arrested?

A Yes.

Q And you were brought over to the police station here in Raleigh; is that correct?

A That's correct.

Q And when you got out of the car, a newsman asked you about commenting. Do you remember that? With news cameras and everything?

A Yes, I remember that. I remember that.

Q And you made some comments; didn't you?

A Uh-huh. (Affirmative) Yes, ma'am.

Q When you made some comments to the press that night, did you say anything about T-Bone?

A No, I didn't say anything about T-Bone.

Q Did you say anything about Tony?

A No.

Q Did you, when you were interviewed by the press that night, or when you made the comments to the press that night, do you recall making the statement, "I didn't kill nobody. I hope they find the real killer?"

A Something to that—yes.

Q And you hoped they found the real killer?

A I might have said something to that effect.

Q And if the videotape shows that you said that—

A I remember saying that I didn't kill anybody. I remember that. I might have said I hoped they found who did it.

Q Okay. Why didn't you say, "I know who the real killer is"?

[DEFENSE COUNSEL]:

Objection.

BY THE COURT:

Overruled.

[A] I don't know.

. . . .

Q Why didn't you offer some of that information?

A I don't know. My thinking at that time, I couldn't tell you why I even spoke to the news people.

Q Well, you knew at the time that you testified that somebody named T-bone killed Reuben McNeill, didn't you?

A Yeah.

Q And you didn't make that offer at that time?

A No, I didn't.

Defendant also attributes error to the state's cross-examination of him concerning statements he made to a police officer while in a holding cell. Specifically, defendant argues the state improperly

asked him if he said the authorities could not "pin this on" him, that he was not "trying to run from them," and that "they were just slow to catch" him. According to defendant, these questions attacked defendant's alibi by implying that if he was actually innocent and his story was true, defendant would have revealed the identity of the true killer after defendant was arrested. Defendant claims these three instances of cross-examination violated his right to remain silent.

It is well established under both the United States and the North Carolina Constitutions that post-*Miranda* silence may generally not be used to impeach the defendant on cross-examination. *Doyle v. Ohio*, 426 U.S. 610, 619, 49 L. Ed. 2d 91, 98 (1976) (holding that when *Miranda* warnings are given, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial"); *State v. Rouse*, 339 N.C. 59, 95, 451 S.E.2d 543, 563 (1994) ("A defendant's silence after receiving *Miranda* warnings cannot be used against him as evidence of guilt."), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995). This rule is supported by the assurance, given explicitly in the *Miranda* warnings, that silence will carry no penalty. *Doyle*, 426 U.S. at 618, 49 L. Ed. 2d at 98; *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966).

When the defendant chooses to speak *voluntarily* after receiving *Miranda* warnings, however, the rule in *Doyle* is not triggered. *Anderson v. Charles*, 447 U.S. 404, 408, 65 L. Ed. 2d 222, 226 (1980) (per curiam); *State v. Westbrooks*, 345 N.C. 43, 65, 478 S.E.2d 483, 496-97 (1996). "Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent." *Anderson*, 447 U.S. at 408, 65 L. Ed. 2d at 226. Once the defendant speaks voluntarily, cross-examination on those statements is permissible if it "merely inquires into prior inconsistent statements." *Id.* Cross-examination can properly be made into why, if the defendant's trial testimony regarding his alibi is true, he did not include in his earlier statement the relevant information disclosed at trial. *Id.* at 408-09, 65 L. Ed. 2d at 227. Conversely, cross-examination on prior inconsistent statements is improper if it is intended to elicit meaning from, or comment on, the defendant's exercise of his or her right to remain silent. *Id.*

This Court has adopted the rule of *Doyle* and *Anderson* but has added a further analysis. *Westbrooks*, 345 N.C. at 66, 478 S.E.2d at 497;

see also Jenkins v. Anderson, 447 U.S. 231, 239, 65 L. Ed. 2d 86, 95 (1980) (holding that "[e]ach jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative"). Our next step in that analysis is to determine whether the admission of the challenged testimony is consistent with the rules of evidence regarding prior inconsistent statements. *Westbrooks*, 345 N.C. at 64, 478 S.E.2d at 496.

Under the North Carolina Rules of Evidence, a prior statement is considered inconsistent if it fails to mention a material circumstance presently testified to which would have been natural to mention in the prior statement. *State v. Lane*, 301 N.C. 382, 386, 271 S.E.2d 273, 276 (1980). In *Lane*, the defendant denied that he sold drugs to an undercover agent, but later testified to a different alibi. *Id.* This Court held that cross-examination on the earlier denial was improper because it would not have been natural under the circumstances for the defendant to have mentioned his alibi defense at that time. *Id.* Under the North Carolina Rules of Evidence, even the failure to speak may be considered an inconsistent statement and proper for impeachment. *State v. Mack*, 282 N.C. 334, 193 S.E.2d 71 (1972).

As a preliminary matter, we note that in the first set of questions cited above, the trial court sustained defendant's objection to the following: "Well, he could have told the police that he sent T-Bone to meet you there that night?" When the objection is immediately sustained, the use of defendant's silence for impeachment purposes is avoided and no due process violation occurs. *Greer v. Miller*, 483 U.S. 756, 764, 97 L. Ed. 2d 618, 629-30 (1987). As to the state's cross-examination concerning statements defendant made to police while in a holding cell, we have reviewed the portion of the transcript cited by defendant and conclude that the state asked no questions concerning defendant's silence. After thorough review, we discern no error in this portion of the state's cross-examination.

The sole remaining issue in this assignment of error is whether the trial court properly overruled defendant's objection to the question, "Why didn't you say, 'I know who the real killer is'?" Turning to this issue, we first note it is unclear from the record whether defendant was advised of his right to remain silent at the time of his arrest. Defendant makes no assertion in his brief that such a warning had in fact been given. Assuming *arguendo* that defendant was advised of

his right to remain silent, we hold that defendant's constitutional rights were not violated by the cross-examination at issue.[1] Defendant chose not to exercise his right to remain silent, but instead spoke voluntarily to the press, in the presence of the police, after he was arrested. *See Anderson*, 447 U.S. at 408, 65 L. Ed. 2d at 226; *Rouse*, 339 N.C. at 95, 451 S.E.2d at 563. Cross-examination focused on defendant's statements, and the implications thereof, and not on defendant's silence.

The cross-examination that took place in this case is similar to that in *Anderson*, where the defendant was asked why, if his testimony was true, he did not tell the same story to the police upon his arrest. 447 U.S. at 405-06, 65 L. Ed. 2d at 224-25. In *Anderson*, as here, the state did not draw meaning from the defendant's prior silence, but instead used, for purposes of impeachment, the statements of a defendant who had voluntarily chosen not to remain silent. *Id.* at 408-09, 65 L. Ed. 2d at 227.

Accordingly, in the instant case, when the state asked defendant why he did not inform someone that he knew who the real killer was, it did not capitalize on any previous assurance made to defendant that he had the right to remain silent. *See Doyle*, 426 U.S. at 618-19, 49 L. Ed. 2d at 98. Rather, the state permissibly challenged defendant's voluntary and inconsistent prior statement. *See Anderson*, 447 U.S. at 408, 65 L. Ed. 2d at 226. The impeachment therefore did not violate defendant's constitutional rights.

After his arrest, defendant told the press that he did not kill anyone and that he hoped they would find the real killer. Implicit in this statement was the assertion that defendant did not know the identity of the real killer. Defendant's trial testimony, in which he revealed the alleged identity of the real killer, was clearly inconsistent with this earlier statement to the press. The inquiry under the test set out in *Lane* becomes: Accepting the defendant's present alibi—that he was not the killer—as true, would it have been natural for him to have revealed the identity of the killer at the time he commented to the press? 301 N.C. at 386, 271 S.E.2d at 276. We believe that it would have been natural for defendant to have included this information

1. If no *Miranda* warnings were given prior to defendant's comments to the media, no constitutional violation nonetheless occurred during the cross-examination at issue. *See Fletcher v. Weir*, 455 U.S. 603, 607, 71 L. Ed. 2d 490, 494 (1982) (holding that where postarrest *Miranda* warnings were not given, cross-examination as to postarrest silence does not violate due process when defendant chooses to take the stand).

in his voluntary statement to the press if defendant did indeed have information about the identity of the killer. *See id.* Under the rules of evidence, defendant's prior inconsistent statement was properly used to impeach his trial testimony. *See Jenkins*, 447 U.S. at 240, 65 L. Ed. 2d at 96; *Westbrooks*, 345 N.C. at 65, 478 S.E.2d at 496. Accordingly, this argument is rejected.

[10] Defendant next assigns error to the trial court's refusal to instruct the jury to disregard the state's closing argument that the jury could use defendant's postarrest silence as a basis for disbelieving defendant's trial testimony. The state's closing argument referenced defendant's failure to mention his alibi on two occasions: when he voluntarily spoke to the media, and when he was arrested. Defendant first cites the following portion of the state's closing argument:

> [Defendant] never told his story to the police when the trail was hot, so to speak. That he never told the media who the alleged real killer was, but he did say to the media, I hope you catch the real killer. Consider that. An innocent man arrested for murder. An innocent man having in his pocket the names, telephone or pager number of the person who set this all up. The name and the telephone number of the man he said—or he says now, is the person who caused T-bone to make the delivery. An innocent man wouldn't say to the police, wouldn't say to the media, ["]I didn't do it, but let me tell you who did." No, the Defendant did not tell his story back then. The Defendant did not tell us that Tank had anything to do with this case. You heard Sergeant Lynch testify. The name Tank meant nothing to him until it was mentioned by the defense lawyers in opening statement. And it's then that we began to try to see where the pager number goes to, if anything. Some national account that they would never probably ever be able to trace. Why didn't the Defendant, if his story were true, why didn't he tell us way back then so that we could have done something—
>
> [DEFENSE COUNSEL]:
>
> Objection.
>
> BY THE COURT:
>
> Sustained.

[DEFENSE COUNSEL]:

> We would ask the jury be instructed to disregard that last paragraph.

BY THE COURT:

> Denied.

Defendant argues the trial court's refusal to instruct the jury to disregard this argument violated defendant's constitutional rights because the argument exacerbated the prejudice from the state's improper impeachment during cross-examination.

As previously noted, the state's use of defendant's prior inconsistent statement to the media for impeachment purposes during cross-examination was proper. In that portion of the state's closing argument outlined above, the state was again properly using defendant's voluntary, inconsistent statement to the media for impeachment purposes. *See State v. Buckner*, 342 N.C. 198, 221, 464 S.E.2d 414, 427 (1995), *cert. denied*, 519 U.S. 828, 136 L. Ed. 2d 47 (1996). The state's purpose is made clear in the conclusion to the challenged portion of argument, where the state asked, "Why didn't the Defendant, if his story were true, . . . tell us way back then so that we could have done something[?]" The state was properly attempting to impeach defendant's trial testimony by pointing out that if defendant was indeed innocent and his trial testimony were true, it would have been natural for defendant to have included the killer's identity in his comments to the media. *See Westbrooks*, 345 N.C. at 66-67, 478 S.E.2d at 497-98; *Lane*, 301 N.C. at 386, 271 S.E.2d at 276.

The second comment of which defendant complains involves defendant's conduct at the time he was arrested. Defendant alleges that the following portion of the state's closing argument violated defendant's constitutional rights:

> [Defendant] had Tank's pager number, supposedly, in his pocket when he was arrested. When that was retrieved from his pocket he didn't mention it then. What does your reason and common sense tell you about that?

According to defendant, because this argument sought to impeach him through his postarrest silence, the trial court should have intervened *ex mero motu*.

If the defendant chooses to testify, he is subject to impeachment when his earlier silence is inconsistent with his testimony on the

stand. *Portuondo v. Agard*, 529 U.S. 61, 69, 146 L. Ed. 2d 47, 56 (2000) (holding no constitutional violation where the prosecutor's comments concerned the defendant's credibility as a witness, rather than suggesting that his silence was evidence of guilt); *Raffel v. United States*, 271 U.S. 494, 497, 70 L. Ed. 1054, 1058 (1926) (holding that where the defendant "takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue"). Once the defendant takes the stand, "his credibility may be impeached and his testimony assailed like that of any other witness." *Brown v. United States*, 356 U.S. 148, 154, 2 L. Ed. 2d 589, 596 (1958). Under our rules of evidence, even an omission constitutes an inconsistent statement subject to impeachment. *Mack*, 282 N.C. at 340, 193 S.E.2d at 75.

In the instant case, defendant elected to take the stand in his own defense. He therefore opened the issue of his credibility for scrutiny on cross-examination. The state referenced defendant's prior silence in its closing argument, not to draw meaning from it, but rather to impeach defendant's alibi. A card bearing the name "Tank" fell out of defendant's pocket during his arrest. The state properly pointed out that if Tank had sabotaged defendant as defendant claimed, then it would have been natural for defendant to have related that fact at the time of his arrest.

For these reasons, as well as the reasons stated in our discussion of defendant's prior assignment of error, defendant has shown no violation of his constitutional rights. The trial court thus did not err by failing to intervene *ex mero motu*. This argument is without merit.

[11] Defendant next argues that the trial court violated his constitutional right to confront the witnesses against him by allowing expert testimony to be predicated on hearsay. During trial, SBI Special Agent Brenda Bissette testified concerning the presence and the physical location of defendant's DNA on the victim's flipped-over pants pocket. Bissette's expert testimony was based in part on the testing of cloth samples cut from the victim's pants by SBI Special Agent Jenny Elwell. Agent Elwell was unavailable to testify at trial because she had delivered twins less than forty-eight hours before her scheduled testimony. Agent Bissette testified in her stead, noting that she had looked at the victim's pants herself to determine whether the cuttings were indeed taken from the areas indicated by Agent Elwell in her notes.

Defendant claims that the exact location of the cutting and the bloodstains was a crucial fact in his case, one upon which he was not allowed to cross-examine Agent Elwell. If the bloodstain was indeed from the victim's flipped-over pants pocket, the state's case would be considerably advanced. According to defendant, the location of the bloodstain was *substantive* evidence and thus was improperly proffered as the basis of an expert witness opinion. Allowing the location of the bloodstain to be proven via inadmissible hearsay, defendant argues, violated his constitutional right to confront the witnesses against him.

An expert may properly base his or her opinion on tests performed by another person, if the tests are of the type reasonably relied upon by experts in the field. N.C.G.S. § 8C-1, Rule 703 (1999); *State v. Daughtry*, 340 N.C. 488, 459 S.E.2d 747 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996); *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). The expert may also base his or her opinion on facts that would otherwise be inadmissible. *Huffstetler*, 312 N.C. at 106, 322 S.E.2d at 119. It is the expert opinion itself, not its underlying factual basis, that constitutes substantive evidence. *State v. Wade*, 296 N.C. 454, 251 S.E.2d 407 (1979).

In *Huffstetler*, this Court considered Agent Bissette's expert testimony concerning the identification of blood samples. 312 N.C. at 105, 322 S.E.2d at 119. Bissette testified on cross-examination that although she had not personally performed the blood tests, she could "interpret and visually scan" the test results and determine if the tests were properly conducted. *Id.* at 106, 322 S.E.2d at 119. There, as here, the defendant argued that his right to confrontation was violated because he was denied an opportunity to cross-examine the person who actually conducted the tests. *Id.* Relying on Rule 703 of the North Carolina Rules of Evidence, we rejected defendant's contention and determined:

> [i]n such cases the defendant will have the right to fully cross-examine the expert witness who testifies against him. He will be free to vigorously cross-examine the expert witness, as did the defendant in the present case, concerning the procedures followed in gathering information and the reliability of information upon which the expert relies in forming his opinion. The jury will have plenary opportunity, as did the jury in this case, to understand the basis for the expert's opinion and to determine whether that opinion should be found credible.

Huffstetler, 312 N.C. at 108, 322 S.E.2d at 121; *see also Daughtry*, 340 N.C. at 511, 459 S.E.2d at 758-59 (holding that trial court properly allowed expert to testify concerning DNA in blood samples on the defendant's pants because, although expert did not conduct tests himself, expert reviewed the inherently reliable test report and was subject to vigorous cross-examination about the testing procedures).

In the present case, Agent Bissette had Agent Elwell's completed official report, including drawings, on which to rely. As in *Huffstetler*, although Agent Bissette had not personally cut the samples from the victim's clothes, she could "interpret and visually scan" the SBI report and determine the original location of the samples. 312 N.C. at 106, 322 S.E.2d at 119. Indeed, Bissette testified she not only had reviewed Elwell's report, but also had personally examined the cuttings along with the victim's pants and verified that the cuttings came from the locations designated in the report. Defendant was able to cross-examine Agent Bissette fully concerning the original location of the blood samples. *Id.* at 108, 322 S.E.2d at 121.

Furthermore, the relevant blood samples, the cuttings, and the victim's pants were admitted into evidence at trial and were included in the record on appeal. Our examination of these exhibits reveals it was unnecessary for defendant to cross-examine either Bissette or Elwell concerning the location of the blood samples. Defendant was able to use physical evidence—the samples, the cuttings, and the victim's pants—to argue to the jury that the samples could not have originated from the location urged by the state. Defendant was also free to conduct his own scientific tests on the samples, cuttings, and pants and to present the results to the jury. Moreover, the jury was free to examine this evidence and make its own determination. Accordingly, defendant's argument that his right to confront witnesses was violated is without merit.

CAPITAL SENTENCING PROCEEDING

[12] Defendant next argues the trial court erred in submitting two statutory mitigating circumstances as nonstatutory mitigating circumstances. At trial, defendant requested, and the trial court submitted, nineteen nonstatutory mitigating circumstances and the (f)(9) catchall circumstance. Defendant argues, however, that two of the nonstatutory mitigating circumstances submitted mirror the statutory mitigating circumstances in N.C.G.S. § 15A-2000(f)(2) and (f)(6). Despite defendant's request at trial that these mitigating circum-

stances be submitted in nonstatutory form, defendant now argues the trial court was under an "independent duty" to submit the statutory mitigators because they were supported by sufficient evidence. Defendant argues that the trial court's error was prejudicial, in essence, because he was denied the opportunity to have the jury automatically give these circumstances mitigating value.

The trial court is required to submit a statutory mitigating circumstance to the jury if it is supported by substantial evidence. N.C.G.S. § 15A-2000(b) (1999); *State v. Hooks*, 353 N.C. 629, 639, 548 S.E.2d 501, 509 (2001); *State v. Chandler*, 342 N.C. 742, 756, 467 S.E.2d 636, 644, *cert. denied*, 519 U.S. 875, 136 L. Ed. 2d 133 (1996). This is the case even where the defendant objects to submission of the mitigator. *State v. Lloyd*, 321 N.C. 301, 311-12, 364 S.E.2d 316, 323-24 (1988), *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988). The defendant carries the burden of producing substantial evidence on a specific mitigating circumstance. *Hooks*, 353 N.C. at 639, 548 S.E.2d at 509. If a jury finds that a statutory mitigating circumstance exists, it must consider that circumstance in its final sentence determination. *State v. Mahaley*, 332 N.C. 583, 598, 423 S.E.2d 58, 67 (1992), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 649 (1995). We consider each mitigating circumstance in turn.

[13] First, we consider whether the trial court should have submitted the (f)(2) statutory mitigating circumstance, which provides that "[t]he capital felony was committed while the defendant was under the influence of mental or emotional disturbance." N.C.G.S. § 15A-2000(f)(2). "While under the influence" has been interpreted to mean that the defendant was mentally or emotionally disturbed at the time the crime took place. *Chandler*, 342 N.C. at 757, 467 S.E.2d at 644. In the present case, defendant argues that the evidence warranted submission of the (f)(2) factor because he not only was under the influence of drugs at the time of the murder, but also was depressed because of his involvement in a family crisis prior to the murder.

As a preliminary matter, we note, and defendant concedes, that voluntary intoxication, standing alone, does not warrant submission of the (f)(2) mitigator. *Id.* at 757, 467 S.E.2d at 644-45. Accordingly, evidence of defendant's drug abuse is insufficient to warrant reversal on this issue. As to defendant's depression and family crisis, the record reveals that defendant received counseling concerning his substance abuse, basic need for shelter, and academic and family problems. Even defendant's own witnesses, however, did not testify

that defendant had been medically diagnosed as suffering from depression. No evidence was presented from any of these witnesses that defendant had been diagnosed as "under the influence of mental or emotional disturbance" at all, let alone at the time of the killing.

This lack of evidence is the critical factor in resolving the instant issue. The (f)(2) mitigating circumstance is properly submitted only if there is evidence to show that a mental or emotional disturbance existed and that it impacted defendant *at the time of the murder. See id.* (trial court properly failed to submit (f)(2) mitigating circumstance where expert testified defendant suffered from substance abuse and mixed personality disorder, but expert admitted on cross-examination he did not know what effect alcohol mixed with a personality disorder would have had on defendant's actions). Accordingly, the mere fact that defendant was depressed or suffering a family crisis prior to the murder does not warrant submission of the (f)(2) mitigator when, as here, there was not substantial evidence that defendant was depressed or in crisis at the time he killed the victim. *See id.* at 757, 467 S.E.2d at 644.

[14] We next address defendant's argument concerning the (f)(6) mitigating circumstance. This mitigating circumstance provides that "[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." N.C.G.S. § 15A-2000(f)(6). According to defendant, the evidence of his extensive and continuous drug use required the trial court to submit the (f)(6) mitigating circumstance.

This Court has held that evidence of drug use can support submission of the (f)(6) mitigating circumstance. *State v. McLaughlin*, 330 N.C. 66, 68-70, 408 S.E.2d 732, 733-34 (1991) (evidence that on the day of the murder defendant ingested marijuana, wine, beer, and "two hits of acid" supported submission of mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was impaired); *State v. Irwin*, 304 N.C. 93, 106, 282 S.E.2d 439, 448 (1981) ("[v]oluntary intoxication, to a degree that it affects defendant's ability to understand and to control his actions is properly considered under . . . G.S. 15A-2000(f)(6)") (citation omitted). Submission of the (f)(6) mitigator is required only if the evidence shows that voluntary intoxication impaired defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law *at the time of the murder. State v. Miller*, 339 N.C. 663, 687, 455 S.E.2d 137, 150

(despite evidence of defendant's drug abuse and withdrawal, trial court properly refused to submit (f)(6) because there was "no evidence that [defendant] was impaired by drugs or withdrawal therefrom at the time of the murder, or that any symptoms of withdrawal he may have experienced at that time impaired his capacity."), *cert. denied*, 516 U.S. 893, 133 L. Ed. 2d 169 (1995).

In the present case, defendant offered evidence of his cocaine habit but did not show a link between his drug use and his allegedly impaired capacity at the time of the murder. *See id.* At most, the record reveals that defendant's search for drugs on the night of 4 August 1998 may have been a motive for defendant to kill the victim. This evidence is insufficient to support submission of the (f)(6) mitigator. This assignment of error fails.

INEFFECTIVE ASSISTANCE OF COUNSEL

[15] Defendant next alleges he was denied his right to the effective assistance of counsel. He argues that *any* claim of ineffective assistance of counsel (IAC) should properly be litigated in a motion for appropriate relief (MAR).

IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. *Compare Blakeney*, 352 N.C. at 308-09, 531 S.E.2d at 814-15 (concluding that IAC claim alleging counsel's ineffectiveness in failing to interpose an objection was appropriately resolved on direct appeal), *with State v. House*, 340 N.C. 187, 196-97, 456 S.E.2d 292, 297 (1995) (determining that whether defendant consented to argument of his counsel regarding defendant's guilt was appropriately deferred for consideration in MAR). This rule is consistent with the general principle that, on direct appeal, the reviewing court ordinarily limits its review to material included in "the record on appeal and the verbatim transcript of proceedings, if one is designated." N.C. R. App. P. 9(a).

We agree with the reasoning in *McCarver v. Lee*, 221 F.3d 583, 589 (4th Cir. 2000), *cert. denied*, 531 U.S. 1089, 148 L. Ed. 2d 694 (2001): "N.C.G.S. § 15A-1419 is not a general rule that any claim not brought on direct appeal is forfeited on state collateral review. Instead, the rule requires North Carolina courts to determine whether the particular claim at issue could have been brought on direct review."

Accordingly, should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent MAR proceeding. *See State v. Kinch*, 314 N.C. 99, 106, 331 S.E.2d 665, 669 (1985) ("We cannot properly determine this issue on this direct appeal because an evidentiary hearing on this question has not been held. Our decision on this appeal is without prejudice to defendant's right to file a [MAR] in the superior court based upon an allegation of [IAC]."). It is not the intention of this Court to deprive criminal defendants of their right to have IAC claims fully considered. Indeed, because of the nature of IAC claims, defendants likely will not be in a position to adequately develop many IAC claims on direct appeal. Nonetheless, to avoid procedural default under N.C.G.S. § 15A-1419(a)(3), defendants should necessarily raise those IAC claims on direct appeal that are apparent from the record. *See McCarver*, 221 F.3d at 589-90. When an IAC claim is raised on direct appeal, defendants are not required to file a separate MAR in the appellate court during the pendency of that appeal.

Defendant presents five instances of conduct by his attorney that he argues denied him his right to effective assistance of counsel. These instances may be determined from the record alone, and we therefore decide them on the merits. Appellate counsel is commended for properly raising these claims on direct appeal.

[16] Attorney conduct that falls below an objective standard of reasonableness and prejudices the defense denies the defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984); *State v. Strickland*, 346 N.C. 443, 454-55, 488 S.E.2d 194, 200-01 (1997), *cert. denied*, 522 U.S. 1078, 139 L. Ed. 2d 757 (1998). An IAC claim must establish both that the professional assistance defendant received was unreasonable and that the trial would have had a different outcome in the absence of such assistance. *Strickland*, 466 U.S. at 687-88, 80 L. Ed. 2d at 693.

Defendant argues that his counsel elicited a damaging admission from him on direct examination regarding defendant's assault on a convenience store clerk. Our review of the record reveals that counsel elicited this admission as a matter of reasonable trial strategy. The admission corroborated defendant's defense that his addiction to crack cocaine drove him to commit seemingly inculpatory acts, such as taking the victim's car and using his credit cards.

Defendant next points to counsel's failure to object when defendant was cross-examined about his communications with his attorney. The prosecutor asked, "[W]hen did you first tell anybody at all about 'Tank'?" and defendant responded, "When I told my lawyers." Defendant argues that although these communications were protected by the attorney-client privilege, which protects confidential communications made by a client to his attorney, *State v. Brown*, 327 N.C. 1, 20, 394 S.E.2d 434, 446 (1990), counsel took no action to shield these communications from the jury. The communication at issue here is not protected by the privilege, however, because it was not confidential. Rather, the substance of the communication had already been exposed to the jury as an aspect of defendant's defense. Moreover, even if the communication had been confidential, defendant waived the attorney-client privilege when he presented the substance of the communication as part of his defense.

Defendant also argues that counsel failed to object when the state allegedly impeached him with his postarrest silence. As detailed in our previous analysis, the state's impeachment of defendant was proper. There was no basis for an objection by trial counsel, and thus there was no ineffective assistance of counsel.

Defendant next asserts that counsel denied him effective assistance by failing to object to the state's closing argument. The state's argument challenged the veracity of defendant's account of the night the victim was killed. For the reasons delineated above, this argument was not so grossly improper as to render the trial fundamentally unfair. Further, defendant has failed to show prejudice under the second prong of *Strickland*. *See Strickland*, 466 U.S. at 687-88, 80 L. Ed. 2d at 693.

Finally, defendant asserts that his counsel was ineffective in requesting submission of the N.C.G.S. § 15A-2000(f)(2) and (f)(6) statutory mitigating circumstances as nonstatutory mitigating circumstances. Defendant argues that counsel deprived him of the opportunity to have the jury automatically give mitigating value to the (f)(2) and (f)(6) circumstances if the jury found them to exist. As previously discussed, the evidence did not support the submission of these statutory mitigating circumstances. This claim of ineffective assistance therefore fails.

Defendant has failed to show that his attorney's conduct rose to the level of unreasonableness or that his attorney's conduct preju-

diced defendant's trial. *See id.* Defendant's ineffective assistance of counsel claims are thus without merit.

PRESERVATION

Defendant raises one additional issue to preserve it for later review: the trial court's refusal to dismiss the short-form murder indictment on constitutional grounds.

Defendant presents no argument requesting this Court to reconsider its prior holdings on this issue. *See, e.g., State v. Braxton*, 352 N.C. 158, 173, 531 S.E.2d 428, 436-37 (2000), *cert. denied*, —— U.S. ——, 148 L. Ed. 2d 797 (2001); *State v. Wallace*, 351 N.C. 481, 503-09, 528 S.E.2d 326, 340-43, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). Accordingly, this assignment of error is without merit.

PROPORTIONALITY REVIEW

[17] Having concluded defendant's trial and capital sentencing proceeding were free of error, we must next review and determine: (1) whether the record supports the jury's finding of any aggravating circumstances upon which the death sentence was based; (2) whether the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2).

In the present case, defendant was convicted of first-degree murder on the basis of malice, premeditation, and deliberation, and under the felony murder rule. The jury answered "yes" to each of the three aggravating circumstances submitted: (1) defendant had previously been convicted of a felony involving the threat of violence to the person, N.C.G.S. § 15A-2000(e)(3); (2) defendant committed the murder while engaged in the commission of a robbery, N.C.G.S. § 15A-2000(e)(5); and (3) the murder was especially heinous, atrocious or cruel, N.C.G.S. § 15A-2000(e)(9).

Of the twenty mitigating circumstances submitted, one or more jurors found that: (1) this murder was committed while defendant was under the influence of mental or emotional disturbance caused by his abuse of crack cocaine; (2) the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired by his ingestion of crack cocaine on the day and the night of and just before the murder; (3)

defendant compiled a good academic record, including being on the dean's list, while at Fayetteville State University; (4) defendant was accepted as a transfer student and enrolled at North Carolina State University in 1996 and studied civil engineering; (5) defendant maintained a good record on parole until he began using and became addicted to crack cocaine; (6) defendant has acknowledged his addiction to crack cocaine; (7) defendant sought to obtain in-patient treatment for his drug addiction at the Wake Alcohol Treatment Center on 27 July 1998; (8) defendant interviewed at Cornerstone, a division of Wake Mental Health, on 3 August 1998, attempting to get help with his cocaine addiction; and (9) other circumstances arising from the evidence pursuant to N.C.G.S. § 15A-2000(f)(9).

After thoroughly examining the record, transcript, and briefs in this case, we conclude the evidence fully supports the aggravating circumstances found by the jury. N.C.G.S. § 15A-2000(d)(2). Further, there is no evidence that defendant's death sentence was imposed under the influence of passion, prejudice, or any arbitrary factor. *Id.*

Finally, we turn to our statutory duty of proportionality review. In our proportionality review, we must determine " 'whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant.' " *State v. McCollum*, 334 N.C. 208, 239, 433 S.E.2d 144, 161 (1993) (quoting *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983)), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). Proportionality review is intended 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*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). We must compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate, as well as those in which the death penalty was held to be proportionate. *McCollum*, 334 N.C. at 240, 244, 433 S.E.2d at 162, 164. Whether a death sentence 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).

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); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

After thorough comparison, we hold that the present case is not substantially similar to any case in which this Court found a death sentence disproportionate. Defendant in the present case was convicted of first-degree murder on the basis of malice, premeditation, and deliberation, and under the felony murder rule. "[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). Moreover, the facts show that defendant repeatedly stabbed a man; stole his wallet, money, jewelry, and car; left the man to die; and went on a shopping spree with the man's credit cards.

In our review of this case, we have also compared it with cases where this Court found the death penalty to be proportionate. *See McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although we consider all the cases in the pool of similar cases during proportionality review, "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.*

North Carolina courts recognize four statutory aggravating circumstances, each of which, standing alone, is sufficient to sustain a death sentence. *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* N.C.G.S. § 15A-2000(e). In the instant case, the jury found three of the four aggravating circumstances: (e)(3), (e)(5), and (e)(9). Thus, we conclude that the present case bears more similarity to cases in which we have found a death sentence to be proportionate than it does to those cases in which we have found a death sentence to be disproportionate. *See McCollum*, 334 N.C. at 244, 433 S.E.2d at 164.

In the exercise of our experienced judgment, the members of this Court hold that, based on the characteristics of this defendant and

the crimes he committed, the death sentence is not disproportionate in this case. *See Green*, 336 N.C. at 198, 443 S.E.2d at 47. This assignment of error is without merit.

Accordingly, defendant received a fair trial, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. LYLE CLINTON MAY

No. 509A99

(Filed 5 October 2001)

1. Evidence— guilt of another—mental history

The trial court did not err in a capital first-degree murder prosecution by excluding evidence allegedly indicating that someone else had killed the victim. Such evidence must point directly to the guilt of a specific person and must be inconsistent with the defendant' guilt. Here, even if the evidence of this person's mental history indicated that he could have been suspected of this crime, it was not inconsistent with defendant's guilt. Furthermore, defendant failed to make an offer of proof for some of the evidence.

2. Sentencing— capital—prosecutor's argument—life in prison

The trial court did not err by not intervening ex mero motu during the State's closing arguments in a capital sentencing proceeding where the prosecutor commented on the life defendant would have in prison.

3. Criminal Law— prosecutor's argument—capital sentencing—mental health expert—financial considerations

The trial court did not err by not intervening ex mero motu during the State's closing arguments in a capital sentencing proceeding where the argument fell within the recognized area of challenging an expert's opinion because of the financial consideration involved.

4. Criminal Law— prosecutor's argument—capital sentencing—mental health diagnosis

The trial court did not err by not intervening ex mero motu during the State's closing arguments in a capital sentencing proceeding where the prosecutor argued that defendant's mental health diagnosis was made so as to result in insurance compensation and that defendant was not mentally ill.

5. Criminal Law— prosecutor's argument—capital sentencing—garbage

The trial court did not err by not intervening ex mero motu during the State's closing arguments in a capital sentencing proceeding where the prosecutor argued that a person's acts are garbage when a person's beliefs are garbage.

6. Sentencing— capital—prosecutor's arguments—cumulative effect—no error

The cumulative effect of a prosecutor's closing arguments in a capital sentencing proceeding did not warrant a new sentencing hearing where the trial court did not err by failing to intervene in any of the arguments.

7. Appeal and Error— preservation of issues—failure to object

A defendant in a capital first-degree murder prosecution waived appellate review of issues involving jury selection and an ex parte motion for hospital records by failing to object.

8. Homicide— first-degree murder—short-form indictment

North Carolina's short-form indictment for murder does not violate due process.

9. Sentencing— capital—instructions—aggravating circumstance—especially heinous, atrocious, or cruel murder—instructions

The trial court did not err by giving Pattern Jury Instruction 150.10 on the especially heinous, atrocious, or cruel aggravating circumstance in a capital sentencing proceeding.

10. Sentencing— capital—mitigating circumstances—nonstatutory—instructions—mitigating value

The trial court did not err in a capital sentencing proceeding by instructing the jury that it need not consider nonstatutory mit-

igators unless it found that those circumstances had mitigating value.

11. Sentencing— capital—instructions—use of "may"

The trial court did not err in a capital sentencing proceeding by using the word "may" in the instructions on Issues Three and Four on the Issues and Recommendation as to Punishment form.

12. Sentencing— capital—death penalty—not disproportionate

A death sentence was not disproportionate where defendant was convicted on the theory of premeditation and deliberation; multiple aggravating circumstances were found to exist; defendant did not show concern for the victims, but attempted to hide his crime; he showed very little remorse; and one of the victims was a small child, less than five years old and under four feet tall, who weighed only 51 pounds.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two sentences of death entered by Downs, J., on 18 March 1999 in Superior Court, Buncombe County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. Heard in the Supreme Court 14 May 2001.

Roy A. Cooper, Attorney General, by William P. Hart, Special Deputy Attorney General, and Robert C. Montgomery, Assistant Attorney General, for the State.

Marshall Dayan for defendant-appellant.

ORR, Justice.

Defendant was indicted 3 November 1997 for the first-degree murders of Valeri Sue Riddle and Kelley Mark Laird, Jr. On 12 March 1999, a jury found defendant guilty of both charges. Following a capital sentencing proceeding, the jury recommended a sentence of death for each murder, and the trial court entered judgments accordingly.

After consideration of the assignments of error brought forward on appeal by defendant and a thorough review of the transcript of the proceedings, the record on appeal, the briefs, and oral arguments, we find no error meriting reversal of defendant's convictions or sentences.

On 8 July 1997, Diane Boussois was at her home in Asheville. Her son, Darrell Godfrey, was entertaining guests. These guests included defendant in this case, Lyle Clinton May, and the victims in this case, Valeri Sue Riddle and her four-year-old son, Kelley Mark Laird. The next morning, 9 July 1997, Ms. Boussois left home and saw Valeri Riddle, Mark Laird, and Darrell Godfrey up and awake. When Ms. Boussois returned home around 11:30 p.m., the house was empty, but she found a red liquid on the floor which she later learned was blood.

In the early morning hours of 10 July 1997, the Asheville Police found the dead bodies of Valeri Riddle and Mark Laird on a pull-off area on the Blue Ridge Parkway. The police found at the Parkway scene a variety of personal items, including a Swiss army knife with a broken blade. They also found a larger knife 2.3 miles from the Parkway scene.

Near the time that the police discovered the bodies of the victims, they also located defendant outside a restaurant in Asheville. Asheville Police Officer Darren Moore saw defendant in the parking lot and noticed that he had blood on his shirt, socks, and shoes, and cuts on his arms. The police later found that some of this blood came from the victims. After confronting defendant, Officer Moore arrested him without incident and took him to the police station. There, during a police interview, defendant confessed. In addition to an oral confession, defendant gave a confession in his own handwriting. In that written statement, he confessed that he had stabbed Valeri Riddle to death because she "got on [his and Godfrey's] nerves." He also wrote that he had killed Mark Laird because he "did not want to see the kid crying or having the memory of his mom getting killed." He then described how he had disposed of the bodies and how Godfrey had "watched both killings and went along willingly for the ride."

The police also found significant physical evidence indicating defendant's guilt. That evidence included DNA from both victims on defendant's socks and shorts and defendant's DNA on the pillowcase from Ms. Boussois' home, where the murders had occurred. A box of matches found on defendant at the time of his arrest was of the same kind as matches found near the victims' bodies. The police also found defendant's bloody fingerprint on the trunk of Valeri Riddle's car.

The autopsy report showed that Valeri Riddle had been stabbed multiple times. She had suffered blunt-force injuries that fractured

her skull, and her neck had been broken. Mark Laird had been stabbed and beaten. His blunt-force injuries were likely made by a heavy, cylindrical object like a pipe or baseball bat.

[1] Defendant first contends that the trial court erred because it excluded, as irrelevant, evidence allegedly indicating that Darrell Godfrey had killed the victim. Defendant specifically complains about three pieces of evidence. First, defendant sought to elicit testimony from Godfrey's mother, Ms. Boussois, that Godfrey had been hospitalized at Broughton Hospital because he was hearing voices telling him to kill people. Second, defendant sought to introduce evidence that Godfrey and the victim had a heated argument days before the homicide. Third, defendant tried to submit testimony from Dr. Raheja, a staff psychiatrist at Broughton Hospital, concerning Godfrey's intake assessment and discharge summary. This testimony would have revealed that Godfrey had told doctors he had hallucinations telling him to kill himself and other people and that Godfrey had a history of violent conduct, including beating a man with a baseball bat.

The trial court properly excluded this evidence on several grounds. This Court has stated:

> [W]here the evidence is proffered to show that someone other than the defendant committed the crime charged, admission of the evidence must do more than create mere conjecture of another's guilt in order to be relevant. Such evidence must (1) point directly to the guilt of some specific person, and (2) be inconsistent with the defendant's guilt.

State v. McNeill, 326 N.C. 712, 721, 392 S.E.2d 78, 83 (1990). Furthermore, "[t]his Court has consistently required that such evidence satisfy both prongs." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 222 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). For example, in *State v. Sneed*, 327 N.C. 266, 393 S.E.2d 531 (1990), this Court held that the trial court improperly excluded evidence that another could have committed the crime because it found the following:

> The excluded evidence tended to show that Joe Reid, a specific person other than the defendant, robbed Tripp's Service Station and killed [the victim]. Since all of the evidence tended to show that only one person committed the robbery and murder, [the] testimony implicating Joe Reid was also inconsistent with the

> guilt of the defendant. Therefore, the excluded testimony was relevant and admissible as substantive evidence.

Id. at 271, 393 S.E.2d at 533-34. The evidence in *Sneed* demonstrated not only that a third party committed the crime, but also that the defendant did not commit the crime. More recently, in *State v. Israel*, 353 N.C. 211, 539 S.E.2d 633 (2000), this Court again ruled that the trial court should have admitted evidence of the possible guilt of a third party. There, the evidence pointed to a specific third party who had motive and opportunity to kill the victim. *Id.* at 219, 539 S.E.2d at 638. The evidence also indicated that the defendant and the third party did not visit the victim at her apartment, where the murders were committed, at the same time. The defendant was seen on the apartment complex's surveillance videotape on one day, *id.* at 213, 539 S.E.2d at 635, and the third party on two different days, *id.* at 215, 539 S.E.2d at 636. The evidence was inconclusive as to when the victim was killed.

On the other hand, in *State v. Rose*, 339 N.C. 172, 451 S.E.2d 211, this Court found no error when the trial court excluded evidence that a third party might have committed the crime. The Court stated, "the evidence here . . . simply indicated that one person felt that [a third party] might have been 'involved.' This evidence was not inconsistent with defendant's guilt." *Id.* at 191, 451 S.E.2d at 222.

The case at bar is similar to *Rose*. Defendant in this case attempted to submit three pieces of evidence. Even if this evidence indicated that Godfrey could have been suspected of committing the crime for which defendant was accused, defendant failed to produce any evidence that was inconsistent with his own guilt. On the contrary, the State's evidence shows that Godfrey and defendant were both on the scene when the homicide occurred. Godfrey's involvement in the crime is entirely consistent with defendant's guilt. Thus, the speculative evidence that Godfrey could have killed the victims is not relevant to whether defendant in fact did kill the victims.

Furthermore, we will not disturb the trial court's decision to exclude Ms. Boussois' testimony because defendant failed to make an offer of proof for that evidence. This Court has stated:

> In order for a defendant to preserve for appellate review the exclusion of evidence, "a defendant must make an offer of proof as to what the evidence would have shown or the relevance and

content of the answer must be obvious from the context of the questioning." *State v. Geddie*, 345 N.C. 73, 95-96, 478 S.E.2d 146, 157 (1996), *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 43 (1997). " 'It is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify.' " *State v. Johnson*, 340 N.C. 32, 49, 455 S.E.2d 644, 653 (1995) (quoting *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985)).

State v. Hipps, 348 N.C. 377, 407, 501 S.E.2d 625, 643 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999). This assignment of error is therefore overruled.

[2] Defendant next contends that the trial court erred by failing to intervene *ex mero motu* during the State's closing arguments at the sentencing proceeding. Defendant argues that the trial court erred by not intervening to strike improper arguments made by the prosecutor. Because defendant failed to object to these allegedly improper statements during the closing arguments, he "must demonstrate that the prosecutor's closing arguments amounted to gross impropriety." *State v. Rouse*, 339 N.C. 59, 91, 451 S.E.2d 543, 560 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995). " '[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.' " *State v. Warren*, 348 N.C. 80, 126, 499 S.E.2d 431, 457 (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)), *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998). "We further emphasize that 'statements contained in closing arguments to the jury are not to be placed in isolation or taken out of context on appeal. Instead, on appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred.' " *State v. Guevara*, 349 N.C. 243, 257, 506 S.E.2d 711, 721 (1998) (quoting *State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 41, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994)), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999).

Defendant claims that the trial court erred by failing to intervene on three specific occasions. First, he claims that the trial court should have intervened when the prosecutor commented as follows on the life defendant would have in prison:

> I know that it's hard when you sit here and you look at [the defendant] like that in his shirt and sometimes his tie, it's hard to picture him in a prison yard playing cards with the guys, in a prison gym punching a punching bag, in a prison cell having a snack, watching TV or listening to the radio. But if your verdict is life, one day soon that's what he'll be doing, and life will not be worse for him.
>
> He isn't someone who will sit there contemplating what he's done and where he's gone wrong. You know that from the evidence. He'll sit there eating his fireballs, savoring his memory of how much he enjoyed what he did.

Defendant claims that this argument stated facts outside the record and amounted to prosecutorial misconduct.

This Court, however, has often rejected almost identical arguments. *See, e.g., State v. Smith*, 347 N.C. 453, 467, 496 S.E.2d 357, 365, *cert. denied*, 525 U.S. 845, 142 L. Ed. 2d 91 (1998); *State v. Alston*, 341 N.C. 198, 252, 461 S.E.2d 687, 717 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996); *State v. Reeves*, 337 N.C. 700, 732, 448 S.E.2d 802, 817 (1994), *cert. denied*, 514 U.S. 1114, 131 L. Ed. 2d 860 (1995). In *State v. Smith*, 347 N.C. 453, 496 S.E.2d 357, the defendant contended that the prosecutor improperly argued to the jury that if defendant were sentenced to life in prison, he would spend his time comfortably doing things such as playing basketball, lifting weights, and watching television. This Court found no error because the prosecutor's argument " 'served to emphasize the State's position that the defendant deserved the penalty of death rather than a comfortable life in prison.' " *Id.* at 467, 496 S.E.2d at 365 (quoting *Alston*, 341 N.C. at 252, 461 S.E.2d at 717). The prosecutor's statements in this case are nearly identical to the statements in *Smith*. While the prosecutor improperly argued facts not in the record, the trial court still did not abuse its discretion by failing to intervene *ex mero motu*.

[3] Defendant also complains about portions of the prosecutor's argument concerning defendant's expert witness, a psychiatrist. Again, however, defendant failed to object, so he must prove that the prosecutor's statements amounted to gross impropriety. *Rouse*, 339 N.C. at 91, 451 S.E.2d at 560. In his closing argument, the prosecutor challenged the evaluation of defendant's expert as follows:

> Who can deny that there's a very real struggle between the forces for evil and the forces for good in the world? Who can deny that?
>
> In our collective consciousness, that sometimes has been overborne by a cycle that has worked its way into our criminal justice system. Here's a psychiatrist making fifteen hundred dollars a day retirement income, and the best he can do for excuseology [sic] is come here and say "He's faking normal." He says the mental status exams are normal, the physiology exams they did on him at Broughton they're normal. He says malingering, yeah, there's some element of malingering. He's faking, but he's faking normal. He's faking normal. That's the best he can do.

The prosecutor then continued with the portion to which defendant objects:

> A guy who's making fifteen hundred dollars a day is absolutely going to tell you every time you show him a crime like this that it's the result of mental illness. His way of life depends on that. You think somebody's going to pay anybody fifteen hundred dollars a day to walk in here and say that is one mean guy; that guy does whatever he wants, whenever he wants, wherever he wants, and that makes him very dangerous to all living creatures? Nobody's paying someone fifteen hundred dollars a day to do that, ladies and gentlemen, to come in here and say that.
>
> And there is a world of difference between a clinical psychologist who seeks to help you when you're stressed or you're suffering and an interested professional witness, somebody who builds up a resume and has a long-term goal of making fifteen hundred bucks a day doing what he did.

Defendant claims that this argument was grossly improper because it accused his expert witness of being "unethical and venal."

This Court, however, has rejected virtually identical challenges in the past. *See, e.g.*, *State v. Cummings*, 352 N.C. 600, 626, 536 S.E.2d 36, 55 (2000), *cert. denied*, —— U.S. ——, 149 L. Ed. 2d 641 (2001); *State v. Atkins*, 349 N.C. 62, 83-84, 505 S.E.2d 97, 111 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). In *State v. Cummings*, 352 N.C. 600, 536 S.E.2d 36, the defendant contended that the prosecutor's arguments implied bias on the part of the defendant's expert and were so grossly improper that they required intervention by the trial court *ex mero motu*. In that case, the prose-

cutor stated that the expert was hired and paid by the defendant for his favorable diagnosis. We found no error.

In this case, as in all cases, the prosecution is allowed wide latitude in its arguments, especially at sentencing, and is permitted to argue not only the evidence presented, but also all reasonable inferences that can be drawn from the evidence. *State v. Garner*, 340 N.C. 573, 598, 459 S.E.2d 718, 731 (1995), *cert. denied*, 516 U.S. 1129, 133 L. Ed. 2d 872 (1996). Here, as in *Cummings*, the prosecutor's statements identified by defendant as being objectionable, but not objected to by defendant at trial, "did not exceed the 'broad bounds allowed in closing arguments at the capital sentencing proceeding.' " *Cummings*, 352 N.C. at 626, 536 S.E.2d at 55 (quoting *State v. Thomas*, 350 N.C. 315, 362, 514 S.E.2d 486, 514, *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999)). Defendant does not explain why the prosecutor's argument was improper, except to state that the prosecutor accused defendant's expert witness of being "unethical and venal." However, we do not view the prosecutor's argument as going so far as to accuse the expert witness of being "unethical and venal." While it would be unquestionably inappropriate under these facts to argue that an expert witness had, in essence, offered perjured testimony in exchange for a fee, the argument in question falls within the recognized area of challenging an expert's opinion because of the financial consideration involved. *Id.* The prosecutor's argument was that defendant would not have offered his expert as a witness if the expert's testimony would have been injurious to the defendant. Thus, based on the evidence, the trial court's failure to intervene *ex mero motu* did not amount to gross impropriety, and therefore, the trial court did not abuse its discretion.

[4] Defendant next complains about the prosecutor's statements during his closing argument about the insurance procedures at Broughton Hospital, where defendant received a psychiatric exam. The prosecutor argued that the defendant was not cured during his time at Broughton because he was not mentally ill. He then stated:

> See this book, the DSM-IV? Remember back when [defendant's expert witness] was on the stand and I said it's loaded with insurance codes, isn't it? He said, yes, it is.
>
> That's why they diagnose him at all. That's why they give him any diagnosis. Because they can't get paid if they don't have an insurance code attached to a diagnosis.

Again, defendant did not object to this portion of the prosecutor's argument and thus must show that it was grossly improper. He has failed to do so.

Here, as with defendant's complaint regarding the prosecutor's statements about the defense expert's possible bias, the prosecutor's statements identified by defendant as being objectionable, but not objected to by defendant at trial, were supported by the direct evidence of record or by reasonable inferences that could be drawn from that evidence. They "did not exceed the 'broad bounds allowed in closing arguments at the capital sentencing proceeding.' " *Cummings*, 352 N.C. at 626, 536 S.E.2d at 55 (quoting *Thomas*, 350 N.C. at 362, 514 S.E.2d at 514). Defendant claims that the argument was improper because the prosecutor accused the state hospital of fraud, and there was nothing to support this allegation. However, during trial, the prosecutor asked defendant's expert, "And [the DSM-IV is] loaded with insurance codes so that psychiatrists and psychologists can get reimbursed by insurance companies for seeing people?" Defendant's expert answered, "I think it's fair [to say that]." He was then asked: "Do you remember testifying in a previous case . . . that you can't take this stuff from the DSM-IV too seriously?" He responded, "I'm sure I've said that in many cases." Here again, we view the prosecutor's argument as being based on inferences from the evidence that the medical diagnosis was categorized in such a way as to fall within the various insurance codes provided. Furthermore, the argument that the diagnosis was made so as to result in insurance compensation is not so grossly improper as to warrant intervention by the trial court *ex mero motu*, and thus, the trial court did not abuse its discretion.

[5] Defendant next complains that the prosecutor's closing argument was improper because he called defendant "garbage." In fact, he did not call defendant "garbage." The prosecutor's statement, in context, was:

> And when you are the kind of person [defendant] is, he thinks he can do whatever he wants, whenever he wants and wherever he wants; he thinks that having family rules like going to church on Sunday and not doing drugs are bothersome, you perpetrate atrocious conduct. Garbage in/garbage out. Because you have no moral rectitude. And the more those psychiatrically-based beliefs take hold on our consciousness, the more foolishness and injustice results.

The prosecutor did not call defendant "garbage." Rather, he intimated that, in effect, when a person's beliefs are "garbage," then a person's acts are usually "garbage." The trial court therefore did not abuse its discretion by failing to intervene *ex mero motu*.

[6] Defendant's final complaint regarding the prosecutor's closing argument is that the trial court's failure to intervene *ex mero motu* in each of the above instances cumulatively warrants a new sentencing hearing. However, because the trial court did not err in failing to intervene in any of these instances, there is no cumulative error. This assignment of error is therefore overruled.

[7] Defendant argues several other issues. All of these contentions, however, are barred because defendant failed to object to any of them. With certain exceptions not applicable to any of these contentions, a timely objection at trial is required to preserve an alleged error on appeal. N.C.G.S. § 15A-1446(a), (b) (1999); N.C. R. App. P. 10(b)(1); *State v. Adams*, 335 N.C. 401, 411, 439 S.E.2d 760, 765 (1994).

Defendant's failure to object therefore precludes him from raising these issues on appeal. First, defendant is barred from arguing that the trial court committed reversible error by allowing the prosecutor to peremptorily challenge prospective juror Harill Heath because of his religion. The record reveals that defendant failed to object to the prosecutor's challenge. This assignment of error is therefore overruled.

Second, defendant is barred from arguing that the trial court erred when it reopened *voir dire* on prospective juror Edward Chandler and allowed the State to peremptorily challenge that juror. The record reveals that defendant failed to object to the trial judge's decision to reopen *voir dire* even after being explicitly asked if he had any objection. This assignment of error is therefore overruled.

Third, defendant is barred from challenging the order issued before trial that resulted from an *ex parte* motion by the State for the Broughton Hospital psychiatric records of codefendant Darrell Godfrey and one of the victims, Valeri Riddle. Defendant claims that the trial court had no authority to issue this order *ex parte*, that the trial court failed to make the necessary findings to issue the order, and that the *ex parte* hearing violated his Sixth Amendment right to counsel. The record again reveals that defendant lodged no objection, constitutional or otherwise, to the *ex parte* hearing, or to the order,

either at trial or before. Nor did he make a motion to strike the order or to prevent the State from using the records the order produced. He further failed to appeal from that order or to petition for appellate review when he became aware of the order before trial. Defendant has therefore waived any right to appellate review of this issue.

PRESERVATION ISSUES

[8] Defendant also makes several contentions that he admits this Court has already decided against him. His first preservation claim is that North Carolina's short-form indictment for murder violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. We have previously held, however, that the short-form indictment does not violate due process because it gives the defendant notice that he was charged with first-degree murder and that the maximum penalty to which he could be subjected is death. *See State v. Braxton*, 352 N.C. 158, 175, 531 S.E.2d 428, 438 (2000), *cert. denied*, — U.S. —, 148 L. Ed. 2d 797 (2001); *State v. Lawrence*, 352 N.C. 1, 530 S.E.2d 807 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001). Because defendant has presented no compelling reason for this Court to reconsider its position on this issue, we overrule this assignment of error.

[9] Defendant next argues that the trial court improperly instructed the jury during sentencing by giving pattern jury instruction 150.10. Defendant claims that this instruction inadequately limits the facially vague N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel. We have consistently upheld the instruction as given. *See, e.g., State v. Stroud*, 345 N.C. 106, 115-16, 478 S.E.2d 476 (1996), *cert. denied*, 522 U.S. 826, 139 L. Ed. 2d 43 (1997). "Because these jury instructions incorporate narrowing definitions adopted by this Court and expressly approved by the United States Supreme Court, or are of the tenor of the definitions approved, we reaffirm that these instructions provide constitutionally sufficient guidance to the jury." *State v. Syriani*, 333 N.C. 350, 391-92, 428 S.E.2d 118, 141, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). Because defendant offers no compelling reason to alter or reverse our previous holdings, we overrule this assignment of error.

[10] Defendant next alleges that the trial court erred when it instructed the sentencing jury that it need not consider nonstatutory mitigators unless it found that those circumstances had mitigating value. Defendant claims that these instructions violate the Eighth and

Fourteenth Amendments to the United States Constitution. Defendant concedes that this Court has previously decided this issue against him, *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990); *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990), but contends that two later opinions by the United States Supreme Court, *Penry v. Lynaugh*, 492 U.S. 302, 106 L. Ed. 2d 256 (1989); and *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), have invalidated our prior holdings. We disagree. Since *Penry* and *McKoy* were handed down by the United States Supreme Court, we have consistently upheld jury instructions similar to those given in this case and in *Huff* and *Fullwood*. *See, e.g., State v. Lynch*, 340 N.C. 435, 475, 459 S.E.2d 679 (1995), *cert. denied*, 517 U.S. 1143, 134 L. Ed. 2d 558 (1996); *State v. Robinson*, 336 N.C. 78, 117, 443 S.E.2d 306, 325 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995). Because defendant has presented no compelling reason for this Court to reconsider its position on this issue, we overrule this assignment of error.

[11] Next, defendant argues that the trial court's instruction on the capital sentencing procedure unconstitutionally made the consideration of mitigating evidence discretionary with the jury during sentencing. Specifically, defendant contends that the instructions violated the Eighth Amendment because the word "may" in the instructions on Issues Three and Four on the "Issues and Recommendation as to Punishment" form allowed each juror to ignore mitigating circumstances that the juror personally found to exist in Issue Two.

This Court has repeatedly rejected virtually identical challenges to the use of the word "may" in the instructions for the consideration of mitigating evidence in Issue Three and Issue Four. *See, e.g., State v. Geddie*, 345 N.C. at 104, 478 S.E.2d at 162; *State v. Gregory*, 340 N.C. 365, 417-19, 459 S.E.2d 638, 668-69 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). Because defendant has presented no compelling reason for this Court to reconsider its position on this issue, we overrule this assignment of error.

PROPORTIONALITY REVIEW

[12] Having concluded that defendant's trial and capital sentencing proceeding were free from prejudicial error, we must now determine: (1) whether the record supports the aggravating circumstances found by the jury and upon which the sentences of death were based; (2)

whether the death sentences were entered under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the death sentences are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *See* N.C.G.S. § 15A-2000(d)(2) (1999).

After thoroughly reviewing the record, transcripts, and briefs in this case, we conclude that the record fully supports as to each murder the jury's finding of the aggravating circumstance that the crime was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9). The jury also found as to each murder the aggravating circumstance that the murder was part of a course of conduct in which defendant engaged and which included defendant's commission of other crimes of violence against another person or persons. N.C.G.S. § 15A-2000(e)(11). After meticulous review and careful deliberation, we conclude that this aggravating circumstance submitted to and found by the jury is also fully supported by the record as to each murder. Further, we conclude that nothing in the record suggests that defendant's death sentences in this case were imposed under the influence of passion, prejudice, or any other arbitrary factor. We must now turn to our final statutory duty of proportionality review.

Proportionality review is designed to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). In conducting proportionality review, we determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983); *accord* N.C.G.S. § 15A-2000(d)(2). Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *Green*, 336 N.C. at 198, 443 S.E.2d at 47.

In our proportionality review, it is proper to compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). It is also proper for this Court to compare this case with the cases in which we have found the death penalty to be proportionate. *Id.* Although we review all of these cases when engaging in this statu-

tory duty, we will not undertake to discuss or cite all of those cases each time we carry out that duty. *Id.*

This Court has determined that the sentence of death was disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *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).

However, we find the present case distinguishable from each of these seven cases. In three of those cases, *Benson*, *Stokes*, and *Jackson*, the defendant either pled guilty or was convicted by the jury solely under the theory of felony murder. Here, defendant was convicted on the theory of premeditation and deliberation. 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).

Further, multiple aggravating circumstances were found to exist in only two of the disproportionate cases. *See Young*, 312 N.C. 669, 325 S.E.2d 181; *Bondurant*, 309 N.C. 674, 309 S.E.2d 170. The present case, however, is distinguishable from both of those cases. In determining that the death penalty was disproportionate in *Young*, the Court noted that the jury failed to find the especially heinous, atrocious, or cruel aggravating circumstance, N.C.G.S. § 15A-2000(e)(9). *Young*, 312 N.C. at 691, 325 S.E.2d at 194. Here, however, the jury found the especially heinous, atrocious, or cruel aggravating circumstance. In *Bondurant*, this Court found the death penalty disproportionate because the defendant immediately exhibited remorse and concern for the victim's life. The defendant went into the hospital to secure medical help for the victim, voluntarily spoke to police, and admitted shooting the victim. *Bondurant*, 309 N.C. at 694, 309 S.E.2d at 182-83. Here, the evidence was very different. After the murder, instead of showing concern for the victims' lives, defendant attempted to hide his crime by disposing of the bodies in the woods. After defendant was arrested, he showed little remorse. When asked how he felt about killing the victims, defendant said, "It was a rush. I

had thought about it quite a while." Thus, we find no significant similarity between this case and *Young* or *Bondurant*.

An additional characteristic of this case supports the determination that imposition of the death sentence was not disproportionate. In the present case, one of the victims was a small child, less than five years old and under four feet tall, who weighed a mere fifty-one pounds.

After reviewing the cases, 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 those in which juries have consistently returned recommendations of life imprisonment. Accordingly, we cannot conclude that the defendant's death sentences are disproportionate.

Having considered and rejected all of defendant's assignments of error, and after a thorough and careful review of the record, transcripts, briefs, and oral arguments, we conclude that defendant received a fair trial and capital sentencing proceeding, free from prejudicial error. Therefore, the convictions and sentences of death entered against defendant must be and are left undisturbed.

NO ERROR.

STEPHEN TIMOTHY BYRD AND SANDRA SAIN BYRD, PETITIONERS FOR THE ADOPTION OF RACHEL LEIGH BYRD

No. 250A00

(Filed 5 October 2001)

Adoption— consent of putative father—conditioning acknowledgment and support on proof of biological paternity

The consent of a putative father is not required under N.C.G.S. § 48-3-601(b)(2)(4)(II) before an adoption may proceed when the putative father has conditioned his acknowledgment of fatherhood and support of mother and child upon proof of biological paternity, because: (1) the statute requires the putative father to satisfy three requirements, including that he must have acknowledged paternity, made reasonable and consistent sup-

port payments for the mother or child or both in accordance with his financial means, and regularly communicated or attempted to communicate with the mother and child; and (2) even though defendant acknowledged paternity of the minor child prior to the filing of the adoption petition until faced with the news from the mother that another man actually may be the biological father, he failed to consistently provide the kind of tangible support required under the statute and support paid or offered by a third party on a parent's behalf does not relieve that parent from his or her own support obligations.

Justice BUTTERFIELD concurring in part and dissenting in part.

Justice WAINWRIGHT joins in opinion concurring in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 137 N.C. App. 623, 529 S.E.2d 465 (2000), affirming an order signed 10 February 1999 by Morelock, J., in District Court, Wake County. Heard in the Supreme Court 12 February 2001.

Manning, Fulton & Skinner, P.A., by Howard E. Manning and Michael S. Harrell, for petitioner-appellees Stephen and Sandra Byrd.

H. Spencer Barrow and George B. Currin for respondent-appellant Michael Thomas Gilmartin.

Rik Lovett & Associates, by James F. Lovett, Jr., on behalf of the North Carolina Family Policy Council, amicus curiae.

LAKE, Chief Justice.

The question presented for review in this case is whether the consent of a putative father must be obtained before an adoption may proceed when the putative father has conditioned his acknowledgment of fatherhood and support of mother and child upon proof of biological paternity. The Court of Appeals held that the putative father's consent was not required under the circumstances of the case. *In re Adoption of Byrd*, 137 N.C. App. 623, 632, 529 S.E.2d 465, 471 (2000). For the reasons set forth below, we uphold this result.

The circumstances of this case as they developed presented a most difficult situation for the parties involved, as they do now for

this Court. Respondent Michael Thomas Gilmartin had a relationship with Shelly Dawn O'Donnell from April to June 1997. O'Donnell was then eighteen years old and was a high school senior. Respondent was seventeen years old and was a high school dropout. During this period, the couple engaged in unprotected sexual intercourse. O'Donnell also engaged in sexual relationships with three other men either shortly before, during or after her relationship with respondent.

On 22 September 1997, after enrolling at Chowan College in Murfreesboro, North Carolina, O'Donnell learned that she was pregnant. She informed respondent that he was the father based upon her then-perceived due date and period of conception. During September and October of 1997, O'Donnell and respondent frequently saw each other and discussed the pregnancy. Respondent told O'Donnell that he would help support and raise the child.

O'Donnell had suffered an unfortunate family situation. Her father, mother and brother had all passed away. Since their deaths, she had lived with her grandparents until starting college. When O'Donnell revealed her pregnancy to her grandparents, they refused to continue allowing her to live with them. O'Donnell moved into the home of Terry and Jane Williams. Terry Williams was O'Donnell's pastor.

In October 1997, O'Donnell met with respondent and his mother, Patricia Gilmartin. Respondent's mother offered O'Donnell a place to live during the pregnancy, as well as assistance with medical bills and living expenses. O'Donnell declined the offer.

Respondent lived with his uncle and later with his grandparents in Pea Ridge, North Carolina. Respondent worked for his grandfather doing odd jobs until November 1997, earning approximately $80 to $90 per week. In November 1997, respondent moved to Nags Head, North Carolina, to work in construction in an effort to earn and save money for the care of O'Donnell and the expected child. Respondent, however, did not save any money, and in early December of that year respondent left Nags Head and returned to live with his grandparents and complete his general equivalency diploma.

While respondent was working in Nags Head, O'Donnell consulted with a different physician on 14 November 1997, and received a revised due date for her child approximately two weeks earlier than the first date. This revised due date apparently indicated to O'Donnell

that her former boyfriend also could have been the child's father. She then advised respondent that he might not be the biological father of her child. Upon this revelation, respondent became upset and questioned O'Donnell regarding her sexual history, since she had repeatedly told him that he was the biological father of her child. Following this turn of events, O'Donnell and respondent had only brief encounters with each other until the child's birth.

In late November or early December 1997, O'Donnell decided to place her expected child for private adoption. Using the adoption facilitator, Christian Adoption Network, she met petitioners Stephen and Sandra Byrd in December 1997. Respondent was unaware of O'Donnell's intentions until he received a letter from an attorney on 31 December 1997, requesting that he relinquish his parental rights so that the child could be placed for adoption. Respondent refused this request.

On 21 January 1998, O'Donnell filed a petition for prebirth determination of right to consent to the adoption in Chowan County, pursuant to N.C.G.S. § 48-2-206, stating her intentions to place the child for adoption and naming respondent as one of the possible biological fathers. On 2 February 1998, respondent filed his response to the petition, stating that his consent to the adoption was required. Respondent asserted that he wanted custody of the child and that he would provide assistance if he was determined to be the biological father. Respondent also requested that the adoption not be approved until it was determined if he was the biological father.

On 4 March 1998, O'Donnell gave birth to Rachel Briann O'Donnell at the Chowan County Hospital in Edenton, North Carolina. Respondent attempted to visit mother and daughter in the hospital but was prevented from doing so pursuant to O'Donnell's instructions. That same day, respondent purchased a money order for $100 for O'Donnell. The next day, respondent again attempted to visit mother and child at the hospital but was advised that they had been discharged. Respondent's mother mailed the money order and some baby clothes to O'Donnell four days after petitioners filed their adoption petition.

Petitioners filed the adoption petition on 5 March 1998, in Wake County, along with an affidavit of parentage wherein O'Donnell named respondent and another man as possible biological fathers. Pursuant to N.C.G.S. § 48-2-301(a), the Wake County Clerk of Superior Court waived the requirement of placement of the child with

the prospective adoptive parents. Petitioners took physical custody of the child on 22 March 1998 and have had exclusive physical custody of the child since that time.

Also on 5 March 1998, respondent filed a complaint seeking custody of the child in Chowan County District Court, conditioned upon the determination that he was the biological father. Respondent also moved for a blood test to determine parentage, and he requested that his complaint for custody and offer of support be summarily dismissed if he was determined not to be the child's biological father.

On 2 April 1998, O'Donnell filed a notice of voluntary dismissal of the prebirth determination of right to consent in Chowan County, and petitioners proceeded with their petition for adoption in Wake County District Court. On 13 April 1998, respondent filed a response to the adoption petition in Wake County District Court, again requesting custody of the child if it was determined by blood tests that he was the biological father. O'Donnell opposed the blood test requested by respondent in Chowan County District Court, and that court subsequently denied the request without prejudice after a hearing on 23 April 1998. Respondent filed a writ of mandamus in the Court of Appeals seeking to compel the test, which the court denied.

On 15 July 1998, petitioners filed a motion for summary judgment in Wake County District Court, requesting the court to dismiss all of respondent's claims. Respondent filed an affidavit in opposition to the motion and a motion for blood tests pursuant to the provisions of N.C.G.S. § 8-50.1(b1). On 13 August 1998, the court denied the motion for summary judgment and granted the request for a blood test. On 21 September 1998, the test results revealed a 99.99% probability that respondent is the child's biological father.

The petition for adoption was heard at the 26-27 October 1998 Civil Session of Wake County District Court, Domestic Division, Judge Fred M. Morelock presiding. The court made findings of fact and concluded that respondent's consent to petitioners' adoption was not required pursuant to N.C.G.S. § 48-3-601(2)(b)(4)(II). The Court of Appeals, with a dissent, affirmed the trial court's order. *In re Adoption of Byrd*, 137 N.C. App. 623, 529 S.E.2d 465.

In the instant case, the only issue on appeal by way of the dissent below is whether respondent's consent must be obtained before the adoption may proceed. Respondent contends that the Court of Appeals erred by affirming the trial court's ruling that his consent to

the adoption was not required because he failed to acknowledge paternity and provide reasonable and consistent support to the biological mother or child within his financial means prior to the filing of the petition for adoption. Under N.C.G.S. § 48-3-601, respondent must acknowledge paternity of the minor child and, in accordance with his financial means, provide reasonable and consistent support payments in order to require his consent to the adoption. The only provision of chapter 48 of the General Statutes that applies and relates to the circumstances of this case is N.C.G.S. § 48-3-601 ("Persons whose consent to adoption is required."). This statute states, in pertinent part:

> Unless consent is not required under G.S. 48-3-603, a petition to adopt a minor may be granted only if consent to the adoption has been executed . . . :
>
> . . . .
>
> (2) In a direct placement, by:
>
> . . . .
>
> b. Any man who may or may not be the biological father of the minor but who:
>
> . . . .
>
> 4. Before the earlier of the filing of the petition or the date of a hearing under G.S. 48-2-206, has acknowledged his paternity of the minor and
>
> . . . .
>
> II. Has provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor, or both, which may include the payment of medical expenses, living expenses, or other tangible means of support, and has regularly visited or communicated, or attempted to visit or communicate with the biological mother during or after the term of pregnancy, or with the minor, or with both . . . .

N.C.G.S. § 48-3-601(2)(b)(4)(II) (1999)

We believe the General Assembly crafted these subsections of this statute primarily to protect the interests and rights of men who have demonstrated paternal responsibility and to facilitate the adoption process in situations where a putative father for all intents and purposes has walked away from his responsibilities to mother and child, but later wishes to intervene and hold up the adoption process. Such a scenario is a far cry from the one in the case at hand. In terms of acknowledgment of responsibility and expression of desire to be a father, respondent did virtually all that could reasonably be expected of any man, and certainly of a seventeen-year-old, under the circumstances. Nevertheless, the statute is clear in its requirements, and respondent must have satisfied the three prerequisites stated, prior to the filing of the adoption petition, in order for his consent to be required. Respondent must have acknowledged paternity, made reasonable and consistent support payments for the mother or child or both in accordance with his financial means, and regularly communicated or attempted to communicate with the mother and child. Under the mandate of the statute, a putative father's failure to satisfy any of these requirements before the filing of the adoption petition would render his consent to the adoption unnecessary.

In this case, respondent's actual and attempted communication with O'Donnell and the child is not at issue, in that his communication with O'Donnell clearly was adequate for purposes of the statute. However, the other two requirements are matters of contention in this case.

Respondent first contends that the Court of Appeals erred in affirming the trial court's conclusion of law that he did not acknowledge paternity of the minor child prior to the filing of the adoption petition. We agree.

Section 48-3-601(2)(b)(4)(II) contains no specific requirements as to the manner of acknowledgment. In 1995, the legislature amended the prior adoption statute, N.C.G.S. § 48-6(a)(3) (1984), and deleted the requirement that the putative father must acknowledge paternity by affidavit. *See In re Baby Girl Dockery*, 128 N.C. App. 631, 633 n.1, 634, 495 S.E.2d 417, 419 n.1 (1998). "In regard to paternity actions, the term 'acknowledgment' generally has been held to mean the recognition of a parental relation, either by written agreement, verbal declarations or statements, by the life, acts, and conduct of the parties, or any other satisfactory evidence that the relation was recognized and admitted." *Carpenter v. Tony E. Hawley, Contr'rs*, 53 N.C. App. 715,

720, 281 S.E.2d 783, 786, *appeal dismissed and disc. rev. denied*, 304 N.C. 587, 289 S.E.2d 564 (1981). Thus, currently, "acknowledgment" may be made orally or in writing, or may be demonstrated by the conduct of the putative father.

Respondent's actions in the instant case satisfy the statutory requirement for acknowledgment of paternity under N.C.G.S. § 48-3-601(2)(b)(4)(II). Under the circumstances, respondent could not reasonably have been expected to do more. After learning of O'Donnell's pregnancy on 22 September 1997, respondent readily and unconditionally acknowledged his paternity of the unborn child, and he maintained this posture through mid-November 1997. In late September 1997, respondent spent the night with O'Donnell and discussed the pending birth of the child. In September and October 1997, O'Donnell visited respondent approximately once a week and discussed various issues with him, including the pregnancy. Throughout this period, respondent unequivocally expressed his desire to be the child's father and a part of its life.

However, in mid-November 1997, O'Donnell was given a revised due date by a second doctor, and based on this new date, she advised respondent there was a possibility that another man was the biological father of the child. Even though this revised due date and the mother herself created uncertainty as to the identity of the biological father, respondent continued to acknowledge his possible paternity, and his willingness to accept that responsibility, conditioned only upon a proven biological link to the child.

Arguably, it would seem to strain logic and any practical legislative intent to require a putative father to blindly and relentlessly acknowledge more than the biological mother herself, especially in the face of resistance from her. However, we need not decide this issue today, as we conclude that under the circumstances of this case, respondent unconditionally acknowledged his fatherhood for a substantial and sufficient amount of time after initially learning of the pregnancy.

This initial period of unconditional acknowledgment by respondent is key to our belief that he did as much as possible, under the circumstances, to satisfy the acknowledgment requirement of N.C.G.S. § 48-3-601(2)(b)(4)(II). During the months when both O'Donnell and respondent believed that he was the father, he clearly acknowledged his paternity and never wavered from this belief until faced with the understandably surprising news from the mother that another man

actually may be the biological father. Even though respondent later conditioned his acknowledgment upon proof of a biological link, his words and actions, when considered as a whole, suffice to satisfy the statute.

We recognize the legislature's apparent desire for fatherhood to be acknowledged definitively regardless of biological link. We also recognize the importance of fixing parental responsibility as early as possible for the benefit of the child. Yet, fundamental fairness dictates that a man should not be held to a standard that produces unreasonable or illogical results. We also believe that the General Assembly did not intend to place the mother in total control of the adoption to the exclusion of any inherent rights of the biological father. As respondent did unconditionally acknowledge his paternity prior to receiving news that he may not be the father based on the revised due date, we conclude that he is not required under the statute to continue to acknowledge his paternity blindly and without question under the circumstances of this case, which included the sustained resistance to his involvement from the mother of the child.

Respondent next contends that the Court of Appeals erred in affirming the trial court's conclusion of law that he did not provide, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of the pregnancy, or the support of the minor, or both. We disagree.

The "support" required under N.C.G.S. § 48-3-601(2)(b)(4)(II) is not specifically defined. We believe, however, that "support" is best understood within the context of the statute as actual, real and tangible support, and that attempts or offers of support do not suffice. Statutory language supports this conclusion. While "attempted" communication satisfies the statute, there is no such language used to describe the support requirement. N.C.G.S. § 48-3-601(2)(b)(4)(II). Presumably, the General Assembly intended a different meaning for the support prong of the test because of the differing language—one that excludes attempt to provide support. The statute also states that support may include "the *payment* of medical expenses, living expenses, or other *tangible means of support*," thus reflecting actual support provided. *Id.* (emphasis added).

Notwithstanding our holding that respondent acknowledged his paternity, we conclude that he did not consistently provide the kind

of tangible support required under the statute. We recognize that petitioners filed their adoption petition the day after the child's birth, thus making it almost impossible to provide support directly to her. Nevertheless, respondent never provided tangible support for the mother or expected child, even when he was unconditionally acknowledging his paternity prior to 14 November 1997. In fact, respondent never provided tangible support within his financial means to mother or child at any time during the relevant period before the filing of the adoption petition. Given this lack of support, we cannot say that respondent satisfied the statutory requirement.

While the putative father is required only to pay support in accordance with his financial means, there was sufficient evidence in this case to support the trial court's findings of fact concerning his ability to make some payment in support. Respondent was capable of gainful employment during the relevant time period. Respondent lived rent-free with his grandparents for most of the relevant period. He worked with his grandfather, making $80 to $90 per week. He held no regular employment, however, until early November 1997, when he moved to Nags Head to seek full-time employment in order to save money for the child. While he worked two different full-time jobs and had $50 a week left over after paying all of his expenses, O'Donnell did not receive any support from respondent during this time from late December 1997 through the date of Rachel's birth. On the date of Rachel's birth, respondent purchased a $100 money order and gave it, along with some baby clothing, to his mother to forward to O'Donnell. However, the money order and clothing were not mailed to O'Donnell until 9 March 1998, after the filing of the adoption petition.

While we recognize the practical importance of family assistance, under the circumstances of this case, attempts or offers of support, made by the putative father or another on his behalf, are not sufficient for purposes of the statute. This Court has ruled that support paid or offered by a third party on a parent's behalf does not relieve that parent from his or her own support obligations. *Alamance County Hosp., Inc. v. Neighbors*, 315 N.C. 362, 365, 338 S.E.2d 87, 89 (1986) (stating that "[a] father cannot contract away or transfer to another his responsibility to support his children"). Likewise, the money order and clothes sent to O'Donnell by respondent, again through his mother, arrived too late, as the statute specifically provides for the relevant time period to end at the filing of the adoption petition. *See* N.C.G.S. § 48-3-601(2)(b)(4)(II). Such gifts only evidence

respondent's ability to provide support within the relevant period. Most importantly, they highlight the fact that even when respondent unconditionally acknowledged his fatherhood, he did not provide any support to the mother or expected child.

We thus conclude that respondent did not satisfy each of the specific requirements of N.C.G.S. § 48-3-601(2)(b)(4)(II) and that his consent is not required for the adoption. The interests of the child and all other parties are best served by an objective test that requires unconditional acknowledgment and tangible support. While respondent did acknowledge his paternity in accordance with the statute, he failed to provide tangible support to mother and child within his financial means, even when he unconditionally believed he was the father. All requirements of the statute must be met in order for a father to require his consent to an adoption. While respondent demonstrated remarkable resolve and a commendable sense of responsibility and concern for a seventeen-year-old father, he did not meet his statutory burden in this case, and thus, for the reasons discussed above, the decision of the Court of Appeals is

AFFIRMED.

Justice BUTTERFIELD concurring in part and dissenting in part.

I concur with the majority's conclusion that respondent acknowledged paternity. Because I believe that respondent also met the support prong of N.C.G.S. § 48-3-601, I respectfully dissent.

Under N.C.G.S. § 48-3-601, consent to adoption is required of the following individual:

> b. Any man who may or may not be the biological father of the minor but who:
>
> . . . .
>
> 4. Before the earlier of the filing of the petition or the date of a hearing under G.S. 48-2-206, has acknowledged his paternity of the minor and
>
> . . . .
>
> II. Has provided, *in accordance with his financial means*, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor, or

> both, . . . and has regularly visited or communicated, or attempted to visit or communicate with the biological mother during or after the term of the pregnancy, or with the minor, or with both . . . .

N.C.G.S. § 48-3-601(2)(b)(4)(II) (1999) (emphasis added).

"In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished." *Electric Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). Furthermore, when interpreting a statute, this Court presumes that the legislature acted with reason and common sense, and that it did not intend an unjust result. *In re Brake*, 347 N.C. 339, 341, 493 S.E.2d 418, 420 (1997). In my opinion, the majority's interpretation of N.C.G.S. § 48-3-601 as applied to the instant case brings about an unjust result.

The evidence shows, and the trial court found, that "on the date of [the child's] birth [4 March 1998], the respondent purchased a $100.00 money order and some baby clothing and gave the same to his mother to forward to O'Donnell. This money order and clothing [were] not mailed to O'Donnell until March 9, 1998." The majority states that the $100.00 money order respondent purchased arrived too late to satisfy the statute. I believe that respondent acted in conformity with the statute in offering support. He went to Nags Head to make money to save for the child. He then learned that he may or may not be the father, returned to his grandparents' home, and failed to find gainful employment. Respondent then set about obtaining his GED. Given respondent's age, his recognition that he had to have more education to secure better employment is, in my judgment, worthy of commendation. Only during the period from 22 September 1997, the date respondent was informed of the pregnancy, through 14 November 1997, the date he learned that he may not be the father, did respondent believe himself to be the only possible father of the child. This demonstration of self-improvement and his continued attempts to communicate with the mother when faced with the possibility that he may not be the father convinces me that he acted reasonably and in accordance with his means to support the mother and child. Disregarding the offer by respondent's mother to allow O'Donnell to live with her, the evidence that respondent saved at least $100.00 for the child is noteworthy. The fact that respondent did not place $50.00 a week into O'Donnell's hands does not alter my analysis. Of particular significance to my analysis is that O'Donnell rebuffed respond-

ent's mother's offer and stated each time respondent asked that she did not need anything. I find the fact that he was anticipating support of the child after the child's birth very persuasive. The statute allows for support of the mother during pregnancy or of the minor after birth. But for the filing of the petition on the day after the child was born, respondent's money would clearly have counted as support of the minor, as he intended. I believe a liberal, rather than strict, construction of the statute is necessary. Such a construction of the statute supports my proposition that the statute is satisfied when adequate attempts are made to provide financial support.

While the statute does specifically state that there can be attempted communication with the mother, it does not speak directly to attempted support. I believe that attempted support is implicit in the statute. Under the majority's holding, attempted support will never satisfy the statute. The putative father, following this reasoning, must actually give monetary support to the mother or to her creditors. The mother can defeat the putative father's attempts by simply refusing or forestalling the offers. Even if the putative father sets up some sort of fund for the child after the mother has rejected offers of support, this must also be classified as an attempt and would fail the majority's test. The mother can also defeat the putative father's attempts by secreting herself from the putative father during the entire pregnancy and refusing any contact with the putative father. Or it may be possible that the putative father may be completely unaware that he is to be a father until he receives notice of an adoption proceeding. This last scenario tends to point to an inconsistency of purpose in the statute itself, rather than in the majority's reasoning. Nonetheless, I do not believe that the legislature intended to enact a law that could be so easily circumvented by a mother failing to accept or discouraging offers of support, thereby giving the mother unilateral authority in the adoption. The majority correctly stated the purpose of the statute as follows:

> We believe the General Assembly crafted these subsections of this statute primarily to protect the interests and rights of men who have demonstrated paternal responsibility and to facilitate the adoption process in situations where a putative father for all intents and purposes has walked away from his responsibilities to mother and child, but later wishes to intervene and hold up the adoption process.

Therefore, I believe that attempted support or actions that manifest support for the child are included under the statute.

I am also concerned that this holding is in conflict with the prior holdings of this Court in *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), and *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997). These cases stand for the well-established rule from the United States Supreme Court that the "interest of a parent in the companionship, care, custody, and management of his or her children" is, "absent a powerful countervailing interest, protect[ed]." *Stanley v. Illinois*, 405 U.S. 645, 651, 31 L. Ed. 2d 551, 558 (1972). Although this constitutional argument was not raised at trial or on appeal, I find its mentioning necessary in light of the majority's holding. There are no facts to indicate that respondent has acted inconsistently with his protected parental interests, a required showing under *Price* in order for a parent to be divested of his or her "constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child." *Price*, 346 N.C. at 79, 484 S.E.2d at 534.

For these reasons, I would reverse the Court of Appeals on the issue of support.

Justice WAINWRIGHT joins in this opinion, concurring in part and dissenting in part.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 253 SAMUEL S. STEPHENSON, RESPONDENT

No. 203A01

(Filed 5 October 2001)

Judges— censure of district court judge—misconduct—soliciting votes in court

A district court judge is censured for willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute based upon his solicitation of support and votes during court for his reelection from defendants and attorneys appearing before him.

This matter is before the Court upon a recommendation by the Judicial Standards Commission, entered 23 March 2001, that respondent, Judge Samuel S. Stephenson, a Judge of the General Court of Justice, District Court Division, Eleventh Judicial District of the State

of North Carolina, be censured for willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of Canons 1, 2A, 3A(1), and 7 of the North Carolina Code of Judicial Conduct. Considered in the Supreme Court 13 September 2001.

No counsel for Judicial Standards Commission or respondent.

ORDER OF CENSURE

In a letter dated 15 March 2000, the Judicial Standards Commission (Commission) notified Judge Samuel S. Stephenson (respondent) 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 allegations that during court on 21 February 2000, respondent solicited support and votes for his reelection from defendants and attorneys appearing before him.

On 5 October 2000, special counsel for the Commission filed a complaint alleging in pertinent part:

> 3. The respondent has engaged in conduct inappropriate to his judicial office as follows:
>
> a. During a recess in proceedings before the respondent in Johnston County District Court on January 20, 2000, the respondent spoke with attorney Sharon H. Kristoff who was appearing on behalf of clients in court that day. In the course of the conversation the respondent talked about running for reelection to his judgeship for which he was opposed and asked Kristoff for her support. When Kristoff indicated she had not made up her mind yet as to who she would support, the respondent replied, "What if you appeared in front of me and asked for a continuance and I said that I hadn't made up my mind yet?" At that point the conversation terminated.
>
> b. The respondent presided over the February 21, 2000, criminal session of Johnston County District Court known as disposition court which is designed to allow defendants to have their cases adjudicated on their own without counsel or through counsel by waiver of appearance. On numerous occasions after disposing of a case, the respondent would call the defendant to the bench, introduce himself, and determine the defendant's residence if the respondent had not

done so prior to disposing of the case. If the defendant lived in the respondent's judicial district, the respondent would advise the defendant of his candidacy for reelection in November of 2000 and ask for the defendant's vote or support. Additionally, in several instances the respondent told the defendant to remember how nice he had been to the defendant; in one instance the respondent wrote his name on a piece of paper, gave it to the defendant, and asked the defendant to remember him in November; and in one instance the respondent offered to provide the defendant in *State v. Burris*, Johnston County file number 00 IF 000427, with campaign yard signs after having given the defendant a PJC [prayer for judgment continued] on payment of court costs and until March 31, 2000, to do so.

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 1, 2A, 2B, 3A(1), and 7 of the North Carolina Code of Judicial Conduct.

On 29 November 2000, respondent answered the complaint as follows:

1. The allegations contained in paragraphs 1 and 2 of the Complaint are admitted.

2. Respondent does now recall the incidents alleged in paragraphs 3 and 4 of the Complaint and acknowledges that he made most of the statements attributed to him. Therefore, Respondent does not contest the allegations contained therein.

3. Respondent never intended to do or say anything that would bring his judicial office into disrepute or violate the North Carolina Code of Judicial Conduct: Things were said and occurred on the occasions complained of that should not have, and Respondent regrets that.

4. Respondent further shows that he was unsuccessful in his reelection bid and that he will be leaving the bench on December 4, 2000.

On 2 February 2001, the Commission served respondent with a notice of formal hearing concerning the charges alleged. The

Commission conducted the hearing on 2 March 2001, at which time special counsel for the Commission presented evidence supporting the allegations in the complaint. The Commission found, *inter alia* the following:

> 9. The respondent engaged in conduct inappropriate to his judicial office as follows:
>
> a. During a recess in proceedings before the respondent in Johnston County District Court on January 20, 2000, the respondent spoke with attorney Sharon H. Kristoff who was appearing on behalf of clients in court that day. In the course of the conversation the respondent talked about running for reelection to his judgeship for which he was opposed and asked Kristoff for her support. When Kristoff indicated she had not made up her mind yet as to who she would support, the respondent replied, "What if you appeared in front of me and asked for a continuance and I said that I hadn't made up my mind yet?" At that point the conversation terminated.
>
> b. The respondent presided over the February 21, 2000, criminal session of Johnston County District Court. On numerous occasions after disposing of a case, the respondent would call the defendant to the bench, introduce himself, and determine the defendant's residence if the respondent had not done so prior to disposing of the case. If the defendant lived in the respondent's judicial district, the respondent would advise the defendant of his candidacy for reelection in November of 2000 and ask for the defendant's vote or support. Additionally, in several instances the respondent told the defendant to remember how nice he had been to the defendant, and in one instance the respondent offered to provide the defendant in *State v. Burris*, Johnston County file number 00 IF 000427, with campaign yard signs after having given the defendant a PJC on payment of court costs and until March 31, 2000, to do so.

After hearing all of the evidence, the Commission concluded on the basis of clear and convincing evidence that respondent's conduct constituted:

> a. conduct in violation of Canons 1, 2A, 3A(1), and 7 of the North Carolina Code of Judicial Conduct;

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).

The Commission recommended that this Court censure respondent.

In reviewing the Commission's recommendations 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). Moreover, the Commission's recommendations are not binding upon this Court. *In re Nowell*, 293 N.C. at 244, 237 S.E.2d at 252. We consider the evidence and then exercise independent judgment as to whether to censure, to remove, or to decline to do either. *Id.*

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." *Id.* 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).

In light of the foregoing, we conclude that respondent's actions constitute conduct in violation of Canons 1, 2A, 3A(1), and 7 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, Samuel S. Stephenson, be and he is hereby, censured for willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

By order of the Court in Conference, this the 4th day of October 2001.

Butterfield, J.
For the Court

GEORGE E. GROVES v. THE TRAVELERS INSURANCE COMPANY, CHRISTINE DE SIMONE, ANDY GREEN, AND PORCELANITE, INC., F/K/A P&M TILE, INC., F/K/A MANNINGTON CERAMIC TILE, INC.

No. 468A00

(Filed 5 October 2001)

Emotional Distress— intentional infliction—insufficient allegations

An action for intentional infliction of emotional distress is remanded to the Court of Appeals for further remand to the superior court for reinstatement of its order granting judgment on the pleadings for defendants for the reason stated in the dissenting opinion in the Court of Appeals that defendants' alleged actions did not constitute extreme and outrageous conduct sufficient to support such a claim.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 139 N.C. App. 795, 535 S.E.2d 105 (2000), affirming in part and reversing in part an order entered 28 April 1999 by Rousseau, J., in Superior Court, Guilford County. Heard in the Supreme Court 13 March 2001.

Donaldson & Black, P.A., by Rachel Scott Decker and Arthur J. Donaldson, for plaintiff-appellee.

Womble, Carlyle, Sandridge & Rice, P.L.L.C., by Richard T. Rice and Garth A. Gersten, for defendant-appellants.

Mark T. Sumwalt, P.A., by Vernon Sumwalt, on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

Cranfill, Sumner & Hartzog, L.L.P., by Gloria T. Becker, on behalf of the North Carolina Association of Self-Insurers, amicus curiae.

PER CURIAM.

As to the issue of plaintiff's claim for intentional infliction of emotional distress, we reverse the decision of the Court of Appeals for the reasons stated in the dissenting opinion of Judge McGee. Accordingly, we remand this case to the Court of Appeals for further remand to the Superior Court, Guilford County, for reinstatement of its order granting judgment on the pleadings in favor of defendants.

REVERSED.

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

JEFFREY DONALDSON v. JAMES LARRY SHEARIN AND FRANCES B. SHEARIN

No. 140A01

(Filed 5 October 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 142 N.C. App. 102, 541 S.E.2d 777 (2001), reversing an order entered 21 December 1999 by Evans, J., in District Court, Nash County, and remanding for entry of judgment for plaintiff. Heard in the Supreme Court 13 September 2001.

Massengill & Bricio, P.L.L.C., by Clint E. Massengill, for plaintiff-appellee.

Dill, Fountain, Hoyle, Pridgen & Stroud, L.L.P., by William S. Hoyle, for defendant-appellants.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. ARTHUR EDWARD BALDWIN, JR.

No. 126PA97-2

(Filed 5 October 2001)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 139 N.C. App. 65, 532 S.E.2d 808 (2000), remanding for a new sentencing hearing a judgment entered by Ross, J., on 15 December 1998 in Superior Court, Forsyth County. Heard in the Supreme Court 13 September 2001.

Roy A. Cooper, Attorney General, by Christopher W. Brooks, Assistant Attorney General, for the State-appellant.

J. Clark Fischer for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

BETTY J. SOUTHER, PETITIONER v. NEW RIVER AREA MENTAL HEALTH DEVELOPMENTAL DISABILITIES AND SUBSTANCE ABUSE PROGRAM, RESPONDENT

No. 126A01

(Filed 5 October 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 142 N.C. App. 1, 541 S.E.2d 750 (2001), affirming an order entered 21 May 1999 by Burke, J., in Superior Court, Wilkes County. Heard in the Supreme Court 13 September 2001.

Legal Services of the Blue Ridge, by Charlotte Gail Blake, for petitioner-appellee.

McElwee Firm, PLLC, by William H. McElwee, III, and Elizabeth K. Mahan, for respondent-appellant.

PER CURIAM.

AFFIRMED.

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

MARY EVELYN JAMES v. WAL-MART STORES, INC.

No. 112A01

(Filed 5 October 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 141 N.C. App. 721, 543 S.E.2d 158 (2001), finding error in a judgment entered 16 June 1999 by Cobb, J., in Superior Court, Pender County, and ordering a new trial. Heard in the Supreme Court 12 September 2001.

Sherman, Smith and Slaughter, P.L.L.C., by L. Bryan Smith, for plaintiff-appellee.

Poyner & Spruill L.L.P., by Timothy W. Wilson, for defendant-appellant.

PER CURIAM.

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

REVERSED.

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

SONJA EVETTE PRICE v. CITY OF WINSTON-SALEM

No. 21A01

(Filed 5 October 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 141 N.C. App. 55, 539 S.E.2d 304 (2000), reversing and remanding an order for summary judgment entered 24 May 1999 by Doughton, J., in Superior Court, Forsyth County. Heard in the Supreme Court 10 September 2001.

Kennedy, Kennedy, Kennedy and Kennedy, L.L.P., by Harold L. Kennedy, III, and Harvey L. Kennedy, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, PLLC, by Gusti W. Frankel and Alison R. Bost, for defendant-appellant.

PER CURIAM.

Justice EDMUNDS did not participate in the consideration or decision of this case. The remaining members of this Court were equally divided, with three members voting to affirm the decision of the Court of Appeals and three members voting to reverse. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Williamson v. Bullington*, 353 N.C. 363, 544 S.E.2d 221 (2001); *Reese v. Barbee*, 350 N.C. 60, 510 S.E.2d 374 (1999).

AFFIRMED.

TERRY P. SMITH, ADMINISTRATOR OF THE ESTATE OF MARY G. SMITH, DECEASED; TERRY P. SMITH, INDIVIDUALLY; AND MARISSA TIERRA SMITH v. BEAUFORT COUNTY HOSPITAL ASSOCIATION, INC., D/B/A BEAUFORT COUNTY HOSPITAL; NINA H. WARD, M.D.; BEAUFORT EMERGENCY MEDICAL ASSOCIATES, P.A.; FAMILY MEDICAL CARE, INC.; GEORGE KLEIN, M.D.; ELISABETH COOK, M.D.; AND DANNIE JONAS, PHYSICIAN ASSISTANT, P.A.

No. 83A01

(Filed 5 October 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 141 N.C. App. 203, 540 S.E.2d 775 (2000), affirming an order entered 21 September 1999 by Griffin, J., in Superior Court, Beaufort County. Heard in the Supreme Court 11 September 2001.

White and Crumpler, by Dudley A. Witt, for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr., and Charles L. Becker, for defendant-appellees Beaufort County Hospital Association, Inc., d/b/a Beaufort County Hospital; Nina H. Ward, M.D.; Beaufort Emergency Medical Associates, P.A.; and Elisabeth Cook, M.D.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Robert M. Clay and Charles George, for defendant-appellees Family Medical Care, Inc.; George Klein, M.D.; and Dannie Jonas, P.A.

PER CURIAM.

AFFIRMED.

STATE v. YOUNG

[354 N.C. 213 (2001)]

STATE OF NORTH CAROLINA v. RICKY NEAL YOUNG

No. 454PA00

(Filed 5 October 2001)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 140 N.C. App. 1, 535 S.E.2d 380 (2000), reversing a judgment entered by Baker, J., on 18 December 1998, in Superior Court, Buncombe County. Heard in the Supreme Court 10 September 2001.

Roy A. Cooper, Attorney General, by John J. Aldridge, III, Assistant Attorney General, for the State-appellant.

Michael E. Casterline, for defendant-appellee.

Forman Rossabi Black Marth Iddings & Slaughter, P.A., by Amiel J. Rossabi, and Seth H. Jaffe, counsel, on behalf of the American Civil Liberties Union of North Carolina Legal Foundation, Inc., amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

JETTIE RUTH STEVENS v. JACINTO HERRERA GUZMAN

No. 97PA01

(Filed 5 October 2001)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 140 N.C. App. 780, 538 S.E.2d 590 (2000), dismissing plaintiff's appeal of a judgment signed 1 March 1999, an order entered 4 June 1999, and orders rendered orally on 26 February and 29 March 1999 by Ammons, J., in Superior Court, Wake County. Heard in the Supreme Court 12 September 2001.

E. Gregory Stott for plaintiff-appellant.

Baker, Jenkins & Jones, P.A., by Kevin N. Lewis and Roger A. Askew; and Jodee Sparkman Larcade, for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

ANDREWS v. CRUMP

No. 376P01

Case below: 144 N.C. App. 68

Petition by defendants (Crump & Hughes) for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

BERMAN v. PINCISS

No. 349P01

Case below: 143 N.C. App. 715

Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 4 October 2001. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

CHEEK v. SUTTON

No. 364P01

Case below: 142 N.C. App. 706

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 25 September 2001.

CITY OF NEW BERN v. CARTERET-CRAVEN ELEC. MEMBERSHIP CORP.

No. 450PA01

Case below: 145 N.C. App. 140

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 4 October 2001.

DAWSON v. ATLANTA DESIGN ASSOCS.

No. 446P01

Case below: 144 N.C. App. 716

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

DEEM v. TREADAWAY & SONS PAINTING & WALLCOVERING, INC.

No. 180P01

Case below: 142 N.C. App. 472

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

DEWITT v. EVEREADY BATTERY CO.

No. 329A01

Case below: 144 N.C. App. 143

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 22 August 2001.

DOLLEY v. PRICE

No. 255A01

Case below: 143 N.C. App. 347

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

FOX v. HEALTH FORCE, INC.

No. 325P01

Case below: 143 N.C. App. 501

Petition by defendants (Healthforce, Inc., and Green) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 October 2001.

GARRISON EX REL. BURTIS v. MEDVESKY

No. 404A01

Case below: 144 N.C. App. 448

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 4 October 2001.

GENERAL ACCIDENT INS. CO. OF AM. v. MSL ENTERS., INC.

No. 112P99-2

Case below: 143 N.C. App. 453

Petition by third-party defendants and third-party plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 30 August 2001.

HAKER-VOLKENING v. HAKER

No. 363P01

Case below: 143 N.C. App. 688

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

HILL v. WILLIAMS

No. 352P01

Case below: 144 N.C. App. 45

Petition by defendants/third party plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

IN RE APPEAL OF WINSTON-SALEM JOINT VENTURE

No. 467P01

Case below: 144 N.C. App. 706

Motion by respondent to dismiss the appeal for lack of substantial constitutional question allowed 4 October 2001. Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

IN RE COOPER

No. 473P01

Case below: 145 N.C. App. 502

Petition by respondent (Marcia Bean Cooper) for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

IN RE ESTATE OF WHITAKER

No. 402P01

Case below: 144 N.C. App. 295

Petition by caveators for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

IN RE McMILLON

No. 312P01

Case below: 143 N.C. App. 402

Petition by respondent (Charles McMillon) for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

JONES v. GMRI, INC.

No. 444PA01

Case below: 144 N.C. App. 558

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 4 October 2001.

LEE CYCLE CTR., INC. v. WILSON CYCLE CTR., INC.

No. 271A01

Case below: 143 N.C. App. 1

"Plaintiffs' motion to file brief pursuant to Rules 2 and 25 of the Rules of Appellate Procedure, filed 20 August 2001, is denied. Plaintiffs' petition for writ of certiorari, also filed 20 August 2001, is allowed. Defendants' motion to dismiss, filed 14 August 2001, is allowed. Plaintiffs shall file their brief on or before 1 October 2001. Defendants shall file their brief on or before 31 October 2001." By order of this Court in Conference, this the 30th day of August, 2001.

LOY v. MARTIN

No. 395P01

Case below: 144 N.C. App. 414

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

MABREY v. SMITH

No. 358P01

Case below: 144 N.C. App. 119

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

MASSEY v. CITY OF CHARLOTTE

No. 382P00-2

Case below: 145 N.C. App. 345

Petition by petitioner appellants for a writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 October 2001.

MILLER v. SHANOSKI

No. 451P01

Case below: 143 N.C. App. 716

Motion by defendant for temporary stay denied 14 September 2001. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 14 September 2001. Petition by defendant for writ of supersedeas and motion for temporary stay denied 14 September 2001.

MORIN v. SHARP

No. 397P01

Case below: 144 N.C. App. 369

Petition by defendants (Sharp and Legion Insurance Company) for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

NORMAN v. NASH JOHNSON & SONS' FARMS, INC.

No. 555A00

Case below: 140 N.C. App. 390

Motion by plaintiffs and defendants to be allowed to withdraw appeal allowed 11 September 2001.

OCCANEECHI BAND OF THE SAPONI NATION v.
N.C. COMM'N OF INDIAN AFFAIRS

No. 527P01

Case below: 145 N.C. App. 649

Motion by defendant for temporary stay allowed 19 September 2001.

PRENTISS v. ALLSTATE INS. CO.

No. 393P01

Case below: 144 N.C. App. 404

Motion by defendant to dismiss the appeal for lack of substantial constitutional question allowed 4 October 2001. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

REED v. HOFFMAN PROPS., INC.

No. 414P01

Case below: 144 N.C. App. 448

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

RENEGAR v. R.J. REYNOLDS TOBACCO CO.

No. 453P01

Case below: 145 N.C. App. 78

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

RICH, RICH & NANCE v. CAROLINA CONSTR. CORP.

No. 378A01

Case below: 144 N.C. App. 303

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 September 2001.

STATE v. ACKERMAN

No. 447P01

Case below: 144 N.C. App. 452

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 October 2001.

STATE v. ADKINS

No. 9A94-4

Case below: Buncombe County Superior Court

"Defendant's petition for writ of certiorari to review the order of the Superior Court is denied. Because an evidentiary hearing is now pending in Superior Court on defendant's motion for appropriate relief, this denial is without prejudice to defendant to refile with this Court a petition for writ of certiorari as to issues determined by the Superior Court as a result of that hearing." By order of the Court in conference this 4 day of October 2001.

STATE v. AGUILAR

No. 512P01

Case below: 145 N.C. App. 503

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001. Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 4 October 2001.

STATE v. BACON

No. 209A91-5

Case below: Onslow County Superior Court

Motion by defendant for stay of execution denied 25 September 2001.

STATE v. BARKLEY

No. 437A01

Case below: 144 N.C. App. 514

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 4 October 2001.

STATE v. BETHEL

No. 421P01

Case below: 142 N.C. App. 213

Petition by defendant Pro Se (Walker) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 October 2001.

STATE v. BIDGOOD

No. 424P01

Case below: 144 N.C. App. 267

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 October 2001.

STATE v. BROCK

No. 456P01

Case below: 145 N.C. App. 204

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 4 October 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

STATE v. COVINGTON

No. 455P01

Case below: 145 N.C. App. 205

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

STATE v. CUMMINGS

No. 4A95-3

Case below: Brunswick County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Brunswick County, denied 4 October 2001.

STATE v. EDWARDS

No. 465P01

Case below: 145 N.C. App. 205

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001. Alternative petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 October 2001.

STATE v. FERGUSON

No. 518P01

Case below: 145 N.C. App. 302

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

STATE v. FRYE

No. 511A93-3

Case below: Catawba County Superior Court

Motion by defendant for stay of execution denied 22 August 2001. Petition by defendant for writ of certiorari to review the order of the Superior Court, Catawba County, denied 22 August 2001.

STATE v. GREEN

No. 505P01

Case below: 145 N.C. App. 715

Motion by Attorney General for temporary stay allowed 10 September 2001 pending the determination of the State's petition for discretionary review. Petition by Attorney General for writ of supersedeas denied 4 October 2001. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001. Temporary stay dissolved 4 October 2001.

STATE v. HOLT

No. 336PA01

Case below: 144 N.C. App. 112

Petition by Attorney General for writ of supersedeas allowed 4 October 2001. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 4 October 2001.

STATE v. KERNODLE

No. 460P01

Case below: 145 N.C. App. 504

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 4 October 2001. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

STATE v. LEAZER

No. 419P01

Case below: 144 N.C. App. 450

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 4 October 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001. Justice Edmunds recused.

STATE v. LYTCH

No. 244A01

Case below: 142 N.C. App. 576

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 October 2001.

STATE v. McCAIL

No. 546P01

Case below: Caldwell County Superior Court

Application by defendant for writ of habeas corpus denied 1 October 2001.

STATE v. McRORIE

No. 508P01

Case below: 145 N.C. App. 504

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 4 October 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

STATE v. MILLER

No. 506P01

Case below: 146 N.C. App. 308

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals dismissed 4 October 2001.

STATE v. NOWELL

No. 433A01

Case below: 145 N.C. App. 636

Petition by the Attorney General for writ of supersedeas regarding Gregory Lee Nowell and Michael Lynn Taylor allowed 4 October 2001. Petition by the Attorney General for discretionary review of the decision of the North Carolina court of Appeals regarding Michael Lynn Taylor pursuant to G.S. 7A-31 allowed 4 October 2001.

STATE v. PRATT

No. 99P01

Case below: 141 N.C. App. 352

Motion by defendant to treat notice of appeal and petition for discretionary review as petition for writ of certiorari allowed 4 October 2001. Notice of appeal by defendant pursuant to G. S. 7A-30 (substantial constitutional question) dismissed ex mero motu 4 October 2001. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 October 2001.

STATE v. PULLIAM

No. 468P01

Case below: 144 N.C. App. 205

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 4 October 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 October 2001.

STATE v. ROBINSON

No. 488A01

Case below: 145 N.C. App. 504

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 4 October 2001. Justice Butterfield recused.

STATE v. ROURKE

No. 420P01

Case below: 143 N.C. App. 672

Petition by defendant pro se for a writ of certiorari to review the decision of the North Carolina Court of Appeals denied 20 August 2001.

STATE v. SMITH

No. 521A01

Case below: 146 N.C. App. 1

Motion by Attorney General for temporary stay allowed 18 September 2001.

STATE v. SNIPES

No. 423P01

Case below: 144 N.C. App. 451

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals dismissed 4 October 2001.

STATE v. STEPHENSON

No. 426P01

Case below: 144 N.C. App. 465

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 4 October 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

STATE v. WARD

No. 158A92-8

Case below: Pitt County Superior Court

Motion by defendant to set aside execution date (motion for stay) denied 13 September 2001. Petition by defendant for writ of prohibition denied 13 September 2001.

STATE v. WHITE

No. 94A94-4

Case below: Mecklenburg County Superior Court

Petition by defendant for writ of certiorari to review the order of Superior Court, Mecklenburg County, denied 20 August 2001. Motion by defendant for stay of execution of judgment denied 20 August 2001. (See also White v. Easley, infra)

STATE v. WOODARD

No. 519PA01

Case below: 146 N.C. App. 75

Motion by Attorney General for temporary stay allowed 14 September 2001.

STATE ex rel. EASLEY v. PHILIP MORRIS, INC.

No. 411P01

Case below: 144 N.C. App. 329

Petition by intervenors for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001. Conditional petition by Attorney General for discretionary review pursuant to G.S. 7A-31 dismissed as moot 4 October 2001.

SWAIN v. ELFLAND

No. 539P01

Case below: 145 N.C. App. 383

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 October 2001.

TEAM TRANSPORT, INC. v. FIRST NAT'L BANK SOUTHEAST

No. 238P01

Case below: 142 N.C. App. 707

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 4 October 2001.

THOMAS v. B.F. GOODRICH

No. 413P01

Case below: 144 N.C. App. 312

Petition by defendant-employer for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

WALKER v. GILLESPIE

No. 436P01

Case below: 145 N.C. App. 206

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

WHALEY v. WHITE CONSOLIDATED INDUS., INC.

No. 359P01

Case below: 144 N.C. App. 88

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

WOMACK v. STEPHENS

No. 355P01

Case below: 144 N.C. App. 57

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

WOOD v. GUILFORD CTY.

No. 318PA01

Case below: 143 N.C. App. 507

Petition by defendant (Guilford County) for discretionary review pursuant to G.S. 7A-31 allowed 22 August 2001.

WOODWARD v. N.C. MGMT. CO.

No. 466P01

Case below: 145 N.C. App. 207

Petition by defendant-appellants for discretionary review pursuant to G.S. 7A-31 denied 4 October 2001.

STATE OF NORTH CAROLINA v. MICHAEL LEMARK WARD

No. 68A99

(Filed 9 November 2001)

1. Homicide— first-degree murder—selective prosecution

The trial court did not err by denying defendant's motion to dismiss the indictment for first-degree murder even though defendant claims the district attorney exercised selective prosecution, because: (1) defendant has presented no evidence establishing that any improper consideration influenced the district attorney's decision to prosecute him for first-degree murder; (2) there is nothing in the record to suggest that defendant's mental disability played any role in the district attorney's election to try him for first-degree murder; (3) defendant failed to make a threshold showing that his prosecution was motivated by a discriminatory purpose; and (4) defendant has not demonstrated that the indictment was unconstitutional.

2. Sentencing— death penalty statute—constitutionality

North Carolina's death penalty statute under N.C.G.S. § 15A-2000 is not unconstitutional on its face and as applied in this case simply because the prosecutor is granted broad discretion.

3. Jury— deputy—custodian or officer in charge of jury—prospective witness

The trial court did not err in a first-degree murder trial by permitting a deputy who was listed as a prospective witness for the State, but who ultimately did not give testimony as a witness in this case, to serve briefly as a custodian or officer in charge of the jury and to coordinate the jury panel's transportation from Nash County to Halifax County, because: (1) upon discovering that the deputy was listed as a potential witness, the trial court promptly replaced the deputy with another bailiff; (2) the mere mention of the deputy's name during the testimony of a State's witness does nothing to impugn the integrity of our jury system, and prejudice cannot be conclusively presumed; and (3) defendant has made no showing of any actual prejudice.

4. Criminal Law— motion for mistrial—defendant in handcuffs in courtroom

The trial court did not abuse its discretion in a first-degree murder trial by denying defendant's motion for a mistrial under N.C.G.S. § 15A-1061 after defendant was led by a deputy sheriff into the courtroom wearing handcuffs in view of prospective jurors even though the trial court did not conduct a voir dire of the prospective jurors regarding this incident, because: (1) the incident did not result in any actual prejudice to defendant; (2) defendant was not handcuffed during the course of the trial; (3) the entire incident transpired within a matter of seconds and the jurors could have seen no more than a glimpse of defendant's wrists in the handcuffs; and (4) the trial court's decision not to conduct an inquiry was a reasoned one so that unwanted attention was not drawn to the fact that defendant had been handcuffed.

5. Discovery— prospective jurors—personal information

The trial court did not err in a first-degree murder trial by denying defendant's pretrial motion for disclosure of jury information known to the State concerning the prospective jurors' previous jury service and the verdicts rendered by the juries on which they served, because personal information about prospective jurors is not subject to disclosure by the State. N.C.G.S. § 15A-903.

6. Jury— selection—defendant's right to remain silent and refrain from testifying

The trial court did not err in a first-degree murder trial by failing to intervene ex mero motu and the prosecutor was not permitted to question prospective jurors in a manner that infringed upon defendant's Fifth Amendment right to remain silent and to refrain from testifying at trial when the prosecutor questioned several members of the venire as to whether they understood defendant's right to refuse to put on evidence or testify in his defense, because: (1) the prosecutor's remarks viewed in context were not impermissible anticipatory comments on defendant's decision not to testify since the prosecutor merely informed prospective jurors of the nature of defendant's right and described the testimonial process; (2) pursuant to defendant's motion, the prospective jurors were sequestered and voir dire was conducted individually, meaning that there was no repeti-

tious or extended comment that would be objectionable; and (3) any error was harmless beyond a reasonable doubt given the overwhelming evidence of defendant's guilt and the trial court's curative instruction to the jury that it was defendant's privilege to refrain from testifying.

7. Jury— selection—voir dire—indoctrination

The trial court did not abuse its discretion in a first-degree murder trial by failing to intervene ex mero motu to prevent the prosecutor from allegedly indoctrinating prospective jurors during voir dire regarding the manner in which prospective jurors should respond to imminent questions from defense counsel, because: (1) the questions were designed to determine whether the jurors would refrain from considering punishment until such time, if at all, as they reached the sentencing proceeding; (2) the prosecutor did not question jurors as to how they would vote, nor did he instruct them on how they should vote, under a given set of facts; and (3) the prosecutor did not misstate the law, but merely sought to determine whether prospective jurors could follow the law and serve as fair and impartial decisionmakers.

8. Jury— selection—voir dire—death penalty as appropriate punishment

The trial court did not abuse its discretion in a first-degree murder trial by allegedly restricting defendant's voir dire of prospective jurors concerning whether they believed the death penalty would be the only appropriate punishment if they found defendant guilty of first-degree murder, because: (1) defendant was able to establish through a series of questions that the prospective jurors at issue could fairly consider a sentence of life imprisonment as a possible punishment; and (2) the trial court sustained objections to the form of the challenged questions, but permitted defense counsel to rephrase the questions and obtain the jurors' responses.

9. Jury— selection—follow-up questions—views on death penalty

The trial court did not abuse its discretion in a first-degree murder trial by allegedly precluding defendant from asking follow-up questions of jurors that would have helped counsel understand the jurors' beliefs about the death penalty, because the record demonstrates that defense counsel was allowed to conduct an exhaustive examination into the prospective jurors' atti-

tudes about the death penalty and whether those attitudes would interfere with their ability to serve.

10. Jury— limiting questions—defendant's burden to put on evidence

The trial court did not abuse its discretion in a first-degree murder trial by allegedly limiting questions designed to determine whether the members of the venire understood that defendant had no burden to put on evidence; furthermore, defendant has failed to make any showing of prejudice resulting from the allegedly erroneous rulings.

11. Jury— selection—challenge for cause—death penalty views

The trial court did not abuse its discretion in a first-degree murder trial by excusing several prospective jurors for cause based on their views about the death penalty, because: (1) while it is true that many of the jurors so challenged were unable to articulate their biases against capital punishment clearly, their responses revealed either that they were predisposed to render a life sentence or that they could not envision any circumstances under which they could impose a sentence of death; (2) defendant has not shown that further questioning by defense counsel would likely have yielded different responses from the challenged jurors; and (3) there was no impropriety in the manner in which the trial court questioned the prospective jurors about their views.

12. Constitutional Law— right to confrontation—cross-examination—contents of SBI report—refreshing recollection

The trial court did not violate defendant's Sixth Amendment right to confrontation in a first-degree murder trial by limiting defendant's cross-examination of a captain of the sheriff's department about the contents of an SBI report unless defendant first introduced the report into evidence, because: (1) although the trial court admonished defense counsel to refrain from specific references to the SBI report, it indicated that counsel was free to direct the witness to refer to the report to refresh his recollection; (2) the captain repeatedly stated that he could not answer questions concerning the results of the forensic analysis performed on several pieces of evidence without looking at the SBI report; and (3) defense counsel, although permitted by the trial court to do so, never instructed the witness to refer to the report for purposes of refreshing his recollection.

13. Constitutional Law— right to confrontation—cross-examination—codefendants—events on day of murder—plea arrangements

The trial court did not violate defendant's Sixth Amendment right to confrontation in a first-degree murder trial by limiting defendant's cross-examination of his two codefendants about the events that took place on the day of the murder and about their respective plea arrangements, because: (1) defense counsel was permitted to cross-examine each of the codefendants at great length; and (2) in those instances where the trial court sustained the prosecutor's objections to defense counsel's questions, the questions called for incompetent hearsay testimony, were unduly repetitive or argumentative, or were simply improper in form.

14. Criminal Law— prosecutor's argument—defendant's power to subpoena witnesses—failure to do so—not comment on failure to testify

The prosecutor did not improperly comment on defendant's failure to testify in a first-degree murder trial when he argued to the jury that defendant had the power to subpoena witnesses to refute the State's evidence but failed to do so even though defendant contends he is the only witness who could have refuted the relevant evidence, because the prosecutor never directly commented on defendant's failure to testify, nor did he suggest that defendant should have taken the stand to refute the State's evidence.

15. Appeal and Error— preservation of issues—redirect examination—failure to object—failure to assert plain error

Although defendant contends the prosecutor improperly placed the burden on defendant to produce evidence to prove his innocence during the prosecutor's redirect examination of a captain of the sheriff's department in a first-degree murder trial, defendant waived appellate review of this issue because: (1) defendant failed to present to the trial court a timely request, objection or motion stating the specific grounds for the ruling the party desired the court to make as required by N.C. R. App. P. 10(b)(1); and (2) defendant did not assert in his assignment of error that the prosecutor's questions warranted the trial court's intervention ex mero motu.

16. Appeal and Error— preservation of issues—jurors' conduct and duties—failure to object—failure to assert plain error

The trial court did not err in a first-degree murder trial by failing to instruct the jurors at every recess regarding their conduct and duties in accordance with N.C.G.S. § 15A-1236, because: (1) defendant did not object to the trial court's failure to give the necessary instructions; and (2) while defendant argues plain error in his brief, he failed to include plain error as an alternative in his assignment of error in the record on appeal as required by N.C. R. App. P. 10(c)(4).

17. Evidence— motion in limine—testimony of well-known criminal defense attorney—corroboration

The trial court did not abuse its discretion in a first-degree murder trial by denying defendant's motion in limine to bar the testimony of a well-known criminal defense attorney and his staff stating that defendant met with the attorney on 18 December 1996, because: (1) the evidence was used to corroborate the testimony of a codefendant concerning the events leading up to the murder; and (2) defendant has not demonstrated that the jury's verdict was based on any unfair prejudice resulting from the attorney's appearance on the witness stand.

18. Criminal Law— prosecutor's argument—defendant's post-arrest silence

The trial court abused its discretion during a capital sentencing proceeding by failing to intervene ex mero motu during the prosecutor's argument regarding defendant's post-arrest silence while at Dorothea Dix Hospital, because: (1) the prosecutor impermissibly commented on defendant's silence; and (2) it cannot be concluded that this omission had no impact on the jury's sentencing recommendation.

Chief Justice LAKE dissenting in part.

Justice WAINWRIGHT joins in this dissenting opinion.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Sumner, J., on 15 December 1998 in Superior Court, Halifax County, upon a jury verdict finding defendant guilty of first-degree murder. On 30 March 2000, the Supreme Court allowed defendant's motion to bypass the Court of

Appeals as to his appeal of additional judgments. Heard in the Supreme Court 13 February 2001.

Roy A. Cooper, Attorney General, by David Roy Blackwell, Special Deputy Attorney General, for the State.

Elizabeth G. McCrodden for defendant-appellant.

BUTTERFIELD, Justice.

Defendant Michael Lemark Ward was indicted on 21 January 1997 for first-degree murder of Patricia Smith King; conspiracy to commit first-degree murder; robbery with a dangerous weapon; felonious breaking and entering; felonious larceny; felonious possession of stolen goods; and conspiracy to commit breaking, entering, and larceny. Following a capital trial, the jury found defendant guilty of first-degree murder under the theory of felony murder. The jury also convicted defendant of conspiracy to commit murder; robbery with a dangerous weapon; felonious breaking or entering; felonious larceny; felonious possession of stolen goods; and felonious conspiracy to commit breaking or entering and larceny.

In a separate capital sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury found as aggravating circumstances that the murder was committed for the purpose of avoiding or preventing a lawful arrest, N.C.G.S. § 15A-2000(e)(4) (1999); that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); and that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). In mitigation, the jury found the existence of one of the four statutory mitigating circumstances submitted: that defendant committed the offense while under the influence of a mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2). One or more jurors also found to exist ten of the nineteen nonstatutory mitigating circumstances submitted. The jury recommended and the trial court imposed a sentence of death for the conviction of first-degree murder. Additionally, the trial court sentenced defendant to terms of imprisonment for his convictions for conspiracy to commit breaking, entering, and larceny; conspiracy to commit murder; felonious breaking and entering; and felonious larceny. The trial court arrested judgment on defendant's convictions for felonious possession of stolen goods and robbery with a dangerous weapon.

For the reasons hereinafter discussed, we discern no prejudicial error in the guilt-innocence phase of the trial. Accordingly, we uphold

defendant's conviction of first-degree murder. However, for errors committed during the sentencing proceeding, we remand for a new capital sentencing proceeding.

At trial, the State presented evidence tending to show that the victim, Patricia Smith King, suffered a brutal beating and sustained a fatal shotgun wound to the chest while in her home on the morning of 18 December 1996. The primary witnesses for the State were codefendants Edward Kenta Settles and Craig McKee Williams, who testified pursuant to plea arrangements. Settles testified that he came to know the King family through his girlfriend, Sharon Brown. According to Settles, Brown performed housekeeping work for the victim, and he periodically helped Brown with her duties. He stated that on one such occasion, while they were cleaning windows in an upstairs bedroom of the King home, he stole some money, and Brown stole several of the victim's checks. Brown subsequently forged the checks and was arrested when the Kings learned of her activities. At the time of the murder, the charges against Brown were still pending.

Settles further testified that he telephoned defendant on 17 December 1996 about a plan he had devised to steal money and guns from the King residence. Defendant told Settles that he was interested and later recruited the participation of his friend, Craig Williams.

The following morning, defendant and Williams met Settles and Roshene Mills at Settles' apartment. Defendant then drove the four men toward the King house. He parked the car—a blue Honda Accord belonging to his wife, Felicia—in a field beyond the house and tied a white rag on the passenger's door to give the impression that the car had stalled. The four men then walked along a wooded trail to a pond situated on the King property. From that locale, they had a clear view of the house and saw that the victim's car was parked at the front entrance. Settles, who insisted on remaining out of sight, told defendant and Williams to go to the door to determine whether the victim was at home. They did, and when the victim answered the door, they asked her for permission to fish in the pond, which she gave them. Defendant and Williams thanked her and returned to the pond, where Settles and Mills were waiting.

Their plan thwarted by the victim's presence, the four men started back toward the car. Williams, not ready to abandon the idea, made a comment to the effect that "there was no need for [them] to come down here to high society for nothing." In light of this remark,

the participants revised their plan. Williams testified that he and defendant were supposed to "break in and rob [King], knock her down or out, tie her up and open the backdoor for [Settles] and [Mills] so they could come in." Once all four men were inside, they were going to comb through the premises for items of value. Settles, however, expressed continued concerns about being identified by the victim. In response, defendant suggested, "a dead person can't talk." Taking the initiative, Williams stated, "I'd kill her, I'd kill her."

Defendant and Williams returned to the house, again leaving Settles and Mills waiting by the pond. When the victim answered the door this time, Williams said that they needed a bucket for their catch. As the victim was directing them to where they could find such a bucket, Williams kicked in the door. He then knocked the victim to the floor and hit her several times with the vacuum cleaner that stood next to the door. Defendant had also entered the house, and he too began pummeling the victim with a nearby piano stool. Defendant struck the victim with such force that the legs of the stool broke away from the seat bottom. He then picked up one of the legs and resumed his attack by striking the victim repeatedly on the head.

Williams testified that when he left the room to search for valuables, defendant was still attacking the victim. Williams stated that the victim fiercely fought for her life and that she struggled with her attacker as he bludgeoned her with the wooden leg. Williams said that he then went to the kitchen to get a knife, which he intended to give defendant "to do whatever [he had] to do" to take the victim's life. As he was returning to the front room with the knife, however, he heard two shotgun blasts. He dropped the knife and ran back into the front room, where he observed defendant standing over the victim with a double-barreled shotgun taken from the Kings' gun case. According to Williams, the victim was lying on the floor moaning and moving around.

Shortly thereafter, defendant and Williams fled the house carrying three guns that belonged to the Kings—the murder weapon, a single-barreled shotgun, and a .22-caliber rifle. The two men also absconded with the victim's purse and a few Christmas presents. When they reached the car, they discovered that Settles and Mills were gone. Settles testified that when he and Mills heard the victim's high-pitched screams, they ran all the way back to his home.

Defendant and Williams piled their loot into the car and drove toward Warrenton. Along the way, they hid the guns under an aban-

doned sofa off the highway. Williams threw the Christmas presents out the window after discovering that they contained only kitchenware. He then removed the wallet and money from the victim's purse and discarded it as well.

Luke King, age seventeen, and his brother, Robbie, age thirteen, left Halifax Christian Academy at or near 12:00 noon on Wednesday, 18 December 1996, to begin their Christmas break. They arrived home at approximately 12:30 p.m. and saw that the front screen door was detached from the structure, lying a couple of feet away from the entrance. Luke and Robbie also noticed that one of the glass panes in the front door was broken and that the bottom of the door was smeared and spattered with blood. When Luke opened the door, he saw the vacuum cleaner and piano stool lying near the entrance. Both items, he testified, were "busted up really good." He stated that he pushed the door open a little further and discovered his mother, Patricia Smith King, lying on the floor in a pool of blood. He said, "there was blood everywhere." He then dialed 9-1-1 while Robbie attempted to perform CPR on his mother. At the instruction of the 9-1-1 operator, Robbie rolled his mother onto her right side and saw a large gaping wound just under her left armpit that exposed her internal organs. After several futile attempts to revive his mother, Robbie covered her lifeless body with a blanket and waited for help to arrive.

Dr. Susan Phillips, a forensic pathologist at Nash General Hospital, performed an autopsy of the victim's body. The autopsy revealed that the victim had sustained "multiple lacerations over the top of the scalp that extended to the calvarium with avulsion of the scalp." Simply put, "there were lacerations on the skin of the scalp that extended all the way to the surface of the bone," and "[t]he injuries had caused the scalp to be detached from the skull." Dr. Phillips concluded that the victim's head injuries were caused by a blunt-type instrument.

The autopsy further disclosed multiple lacerations, bruises, and contusions on the victim's left shoulder, right and left lower arms, left thigh, and left breast. Her right little finger was lacerated to the bone, and her left wrist was broken. A shotgun entrance wound, 6.5 centimeters in diameter, was noted along the left lateral chest. The internal examination revealed that the shotgun projectile entered the body in a left to right pattern, traveling through the victim's left lung and heart and fracturing her fourth, fifth, sixth, and seventh ribs.

Based on these findings, Dr. Phillips determined that the victim had sustained a fatal shotgun wound to the left chest, multiple blunt-force injuries to the head, and multiple blunt-force defensive-type wounds. Dr. Phillips surmised that the victim was alive while she suffered the blunt-force injuries because there was hemorrhaging surrounding those injuries. The cause of death was listed as a gunshot wound to the chest.

The State's evidence further showed that on 20 December 1996, Settles went to defendant's place of employment to ask him what had transpired inside the King residence on the day of the murder. According to Settles, defendant stated that he had shot the victim because "the bitch wouldn't die." Defendant explained that he had beaten the victim with a furniture leg and that "he got tired of beating [her]," so he did "what he had to do."

Additionally, the State presented evidence that on 23 December 1996, defendant gave Williams $20.00 and sent him to Virginia to obtain a check-cashing identification ("ID") card depicting him as James King, the victim's husband. Defendant had acquired King's name and social security number from the victim's wallet. When Williams returned from Virginia, defendant, again driving his wife's dark blue Honda Accord, took Williams to a BB&T bank in Henderson. Williams entered the bank and, posing as King, attempted to withdraw $4,000 from the Kings' savings account using the fake ID. The branch manager, Lynn Stone, told Williams that she could not process the transaction because the check-cashing card was not an acceptable form of identification. After further inquiry, Williams told Stone that Sharon West, a customer service representative of BB&T in Littleton, could identify him as James King.

Stone called the Littleton branch and spoke with Ann Ellis, the branch manager. Ellis informed Stone that King was a white male, which alerted Stone to the fraud, since the man purporting to be King was black. Ellis also apprised Stone of the fact that King's wife had been murdered the previous week. After speaking with Ellis, Stone told Williams that West was at lunch and could not be reached and that he would have to return later. Once Williams left the branch, Stone accessed the Kings' account on her computer and saw that it had been flagged so as to prohibit debit transactions. She then telephoned another Henderson branch of BB&T, located on Dabney Drive, and learned that Williams was there, again trying to pass himself off as James King. Stone asked the branch manager to detain

Williams while she called 9-1-1. Officer S.M. Walker of the Henderson Police Department responded to the call and arrested Williams.

Williams had been in the Dabney Drive branch of BB&T approximately ten to fifteen minutes when tellers Judy Rudd and Tammy Manning observed another black male enter the bank, look around, and leave. According to Manning, the man was driving a blue Honda and had backed the car into a space near the rear door of Bullock's of Henderson, a gift shop across the parking lot from the bank. Manning subsequently identified the man as defendant. Later that day, Brian Hobgood, an employee of Bullock's, discovered a wallet under his automobile. The identification in the wallet belonged to the victim, Patricia Smith King.

Law enforcement officers arrested defendant on 24 December 1996. In his statement to the police, defendant denied his participation in the crimes. He stated that on the day of the murder, "[he] got up at about 7:45 a.m. . . . [and] stay[ed] with [his] father and [his] wife," who was nine months pregnant.

Defendant did not put on any evidence during the guilt-innocence phase of the trial. At sentencing, he presented the testimony of several ministers who were familiar with defendant and his family. This testimony revealed that defendant attended church services regularly and that he was a self-taught musician who played the keyboard for his church and other churches as well.

Defendant's siblings also testified on defendant's behalf during the sentencing proceeding. They stated that their parents, Willie and Mary Ward, disciplined all of the children by beating them with extension cords, pool sticks, belts, and tree branches, in other words, "anything that was in their sight." This abuse resulted in severe and permanent injuries to at least one of the children—defendant's half-brother, Gerald Horton, lost a testicle when his stepfather, Willie, stamped on his groin. Indeed, all of the minor children, except defendant, either left or were removed from the home because of the abuse. A social worker with the Halifax County Department of Social Services confirmed that allegations of child abuse were filed against defendant's father. None of the allegations, however, were substantiated.

A clinical psychologist, Dr. Andrew Short, conducted a psychological evaluation of defendant following his arrest. The evaluation comprised three ninety-minute interviews of defendant and inter-

views of defendant's wife, mother, father, and defense attorney. Dr. Short found that defendant had an IQ of 68 and that he performed in the mild range of mental retardation. Dr. Short determined that defendant's mental age was between ten and eleven years. Dr. Short opined that at the time of the murder, defendant was operating under the influence of a mental and emotional disturbance and that his "capacity to understand the criminality of his actions was impaired." Dr. Short further opined that defendant's ability to conform his conduct to the requirements of the law was impaired.

PRETRIAL ISSUES

[1] By his first two assignments of error, defendant challenges the constitutionality of the indictment charging him with first-degree murder. Prior to trial, defendant moved to dismiss the indictment on the ground that he was arbitrarily and capriciously selected for prosecution in violation of the guarantees of equal protection under the federal and state Constitutions. Defendant maintains that codefendant Settles, who planned the robbery, and codefendant Williams, who insisted that they follow through with the scheme, were similarly situated and that they were equally, if not more, responsible for the victim's murder. He argues that the State singled him out for prosecution on the charge of first-degree murder because of his mental retardation.

Under Article IV, Section 18 of the North Carolina Constitution, "[t]he District Attorney shall . . . be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district." N.C. Const. art. IV, § 18. "The clear mandate of that provision is that the responsibility and authority to prosecute all criminal actions in the superior courts is vested solely in the several District Attorneys of the State." *State v. Camacho*, 329 N.C. 589, 593, 406 S.E.2d 868, 871 (1991). The ability to be selective in determining what cases to prosecute and what charges to bring against a particular defendant is ancillary to the district attorney's prosecutorial authority. *See State v. Rorie*, 348 N.C. 266, 270, 500 S.E.2d 77, 80 (1998) (recognizing that "the district attorney has broad discretion to decide in a homicide case whether to try a defendant for first-degree murder, second-degree murder, or manslaughter"). As this Court has acknowledged, there are "no statutory or any other kind of guidelines [a prosecutor must] follow in making these decisions. Often [a prosecutor] declines to seek a first degree murder verdict and the death penalty because of a case's technical or evidentiary problems." *State*

v. Lawson, 310 N.C. 632, 643, 314 S.E.2d 493, 500 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985).

We note, however, that, at the time of defendant's trial, the prosecutor lacked the discretion to choose whether to seek the death penalty against a defendant tried for first-degree murder. *See* N.C.G.S. § 15A-2000 (1999); *Rorie*, 348 N.C. at 270-71, 500 S.E.2d at 80. If evidence of an aggravating circumstance existed, a defendant tried and convicted of first-degree murder would necessarily face a capital sentencing proceeding. *Rorie*, 348 N.C. at 271, 500 S.E.2d at 80. Recently, the legislature amended article 100 of chapter 15A of the General Statutes to include a new provision that grants the prosecutor this very discretion. Act of May 17, 2001, ch. 81, sec. 3, 2001 N.C. Sess. Laws 162, 163 (creating N.C.G.S. § 15A-2004, "Prosecutorial discretion"). Subsection (a) of the new statute pertinently provides that "[t]he State, in its discretion, may elect to try a defendant capitally or noncapitally for first degree murder, even if evidence of an aggravating circumstance exists." *Id.* This enactment became effective 1 July 2001 and was made applicable to pending and future cases. Ch. 81, sec. 4, 2001 N.C. Sess. Laws at 164. Therefore, N.C.G.S. § 15A-2004 does not apply to the case *sub judice* and has no bearing on our analysis of this issue.

The United States Supreme Court has recognized that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler v. Boles*, 368 U.S. 448, 456, 7 L. Ed. 2d 446, 453 (1962). "[T]here [must] be a showing that the selection was deliberately based upon 'an unjustifiable standard such as race, religion or other arbitrary classification.' " *State v. Cherry*, 298 N.C. 86, 103, 257 S.E.2d 551, 562 (1979) (quoting *Oyler*, 368 U.S. at 456, 7 L. Ed 2d at 453), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980), *quoted in Lawson*, 310 N.C. at 644, 314 S.E.2d at 501. Among the arbitrary classifications upon which the district attorney may not exercise his prosecutorial prerogative is "a defendant's decision to exercise his statutory or constitutional rights." *State v. Garner*, 340 N.C. 573, 588, 459 S.E.2d 718, 725 (1995), *cert. denied*, 516 U.S. 1129, 133 L. Ed. 2d 872 (1996). In order to prevail on a claim of selective prosecution, the defendant must demonstrate that his prosecution "was motivated by a discriminatory purpose and had a discriminatory effect." *Id.* (citing *Wayte v. United States*, 470 U.S. 598, 84 L. Ed. 2d 547 (1985)).

Upon careful examination of the record before us, we hold that the trial court properly denied defendant's motion to dismiss the

indictment. Defendant has presented no evidence establishing that any improper considerations influenced the district attorney's decision to prosecute him for first-degree murder. Indeed, defendant concedes that his argument on appeal is based on evidence that came to light during the trial and after the trial court denied the motion. He contends, nonetheless, that his mental retardation would have been apparent to law enforcement officers and the district attorney prior to the initiation of these proceedings against him. However, even assuming that defendant's contention is correct, there is nothing in the record to suggest that defendant's mental disability played any role in the district attorney's election to try him for first-degree murder. Therefore, defendant failed to make a threshold showing that his prosecution was motivated by a discriminatory purpose. Because defendant has not demonstrated that the indictment charging him with first-degree murder was unconstitutional, this assignment of error must fail.

[2] Defendant further contends that North Carolina's death penalty statute, N.C.G.S. § 15A-2000, is unconstitutional on its face and as applied in this case. This Court has repeatedly considered and rejected defendant's argument. *See, e.g., Garner*, 340 N.C. 573, 459 S.E.2d 718. In *Garner*, we noted that "[t]his Court has consistently recognized that a system of capital punishment is not rendered unconstitutional simply because the prosecutor is granted broad discretion." *Id.* at 588, 459 S.E.2d at 725; *accord State v. Noland*, 312 N.C. 1, 320 S.E.2d 642 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985); *Lawson*, 310 N.C. 632, 314 S.E.2d 493. Because defendant offers no compelling justification for this Court to reconsider its position on this point, defendant's assignment of error is overruled.

[3] By his next assignment of error, defendant contends that the trial court erred by permitting Deputy Nelson Puckett, who was listed as a prospective witness for the State, to serve as a custodian or officer in charge of the jury. Defendant argues that although the deputy was never called to testify, prejudice is conclusively presumed, and he is deserving of a new trial. We disagree.

This Court has consistently held that a witness for the State in a criminal trial may not serve as a custodian or officer in charge of the jury. *State v. Jeune*, 332 N.C. 424, 420 S.E.2d 406 (1992); *State v. Bailey*, 307 N.C. 110, 296 S.E.2d 287 (1982); *State v. Mettrick*, 305 N.C. 383, 289 S.E.2d 354 (1982); *State v. Macon*, 276 N.C. 466, 173 S.E.2d 286 (1970). Such dual roles, we have said, give rise to a con-

clusive presumption that the defendant suffered prejudice, which would entitle him to a new trial. *Jeune*, 332 N.C. at 431, 420 S.E.2d at 410; *Bailey*, 307 N.C. at 112, 296 S.E.2d at 289; *Mettrick*, 305 N.C. at 385, 289 S.E.2d at 356; *Macon*, 276 N.C. at 473, 173 S.E.2d at 290. Further, we extended the rule to prohibit immediate family members of the prosecutor, defendant, defense counsel, or material witnesses from overseeing jurors. *State v. Wilson*, 314 N.C. 653, 336 S.E.2d 76 (1985). The rationale behind this rule is to preserve the public's confidence in the integrity of our system of justice, attendant to which is the right to trial by an impartial jury. *Jeune*, 332 N.C. at 431, 420 S.E.2d at 410; *State v. Brown*, 315 N.C. 40, 57, 337 S.E.2d 808, 822 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). This Court has observed that:

> No matter how circumspect officers who are to be witnesses for the State may be when they act as custodians or officers in charge of the jury in a criminal case, cynical minds often will leap to the conclusion that the jury has been prejudiced or tampered with in some way.

Mettrick, 305 N.C. at 385, 289 S.E.2d at 356.

"To determine whether the State's witness . . . acted as a custodian or officer in charge of the jury, 'we look to factual indicia of custody and control and not solely to the lawful authority to exercise such custody or control.' " *Jeune*, 332 N.C. at 431, 420 S.E.2d at 410 (quoting *Mettrick*, 305 N.C. at 386, 289 S.E.2d at 356). In *Mettrick*, this Court concluded that two witnesses for the State, a sheriff and a deputy, acted in such a capacity when they drove jurors from Caldwell County to Ashe County at the beginning of the day, to lunch during the lunch recess, and back to Caldwell County at the end of the day. In arriving at this conclusion, we deemed it significant that the jurors "were in these law enforcement officers' custody and under their charge out of the presence of the court for protracted periods of time" and that "the jurors' safety and comfort were in the officers' hands during these periods of travel." *Mettrick*, 305 N.C. at 386, 289 S.E.2d at 356.

In the instant case, the record reveals that at the outset of the proceedings, Deputy Puckett was assigned to serve, and did briefly serve, as the courtroom bailiff. Upon discovering that he was listed as a potential witness for the State, defense counsel informed the trial court, who promptly replaced Deputy Puckett with another bailiff.

The record indicates, however, that after the jury was selected, the trial court called on Officer Puckett to coordinate the panel's transportation from Nash County to Halifax County, where the trial was held. While it is not clear from the record whether Deputy Puckett himself served as a driver or accompanied the jurors to and from the Halifax County courthouse, it is apparent that he was responsible for securing the drivers and for ensuring that the jurors arrived at the point of departure on time. Therefore, we conclude that as in *Mettrick*, there is sufficient "factual indicia of custody and control" to establish that he was, indeed, a custodian or officer in charge of the jury.

The record further reveals, and defendant concedes, that Deputy Puckett ultimately did not give testimony as a witness in this case. Nonetheless, defendant urges us to hold that prejudice to him is conclusively presumed, since the deputy had personal knowledge of facts relevant to the case, and Deputy Puckett's name surfaced during the course of the State's evidence. We decline to so hold because the mere mention of his name during the testimony of a State's witness does nothing to impugn the integrity of our jury system. These circumstances are not such as would "lead people to believe the jury may have been improperly influenced." *Brown*, 315 N.C. at 57-58, 337 S.E.2d at 822. Accordingly, prejudice cannot be conclusively presumed. Moreover, since defendant has made no showing of any actual prejudice, we overrule this assignment of error.

[4] We next consider defendant's argument that the trial court erroneously denied his motion for a mistrial after he was led by a deputy sheriff into the courtroom, wearing handcuffs in view of prospective jurors. Defendant contends that the trial court manifestly abused its discretion by failing to conduct a formal inquiry to determine whether the incident tainted defendant in the minds of the jurors and in failing to undertake adequate remedial measures to cure any prejudice defendant may have suffered. We must disagree.

N.C.G.S. § 15A-1061 provides that the trial court "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061 (1999). "A mistrial should be granted only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair

and impartial verdict." *State v. Laws*, 325 N.C. 81, 105, 381 S.E.2d 609, 623 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *and quoted in State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991). Whether to allow a motion for mistrial is a decision committed to the sound discretion of the trial court, and its decision in this regard will not be overturned on appeal unless an abuse of that discretion is established. *State v. Johnson*, 341 N.C. 104, 114, 459 S.E.2d 246, 252 (1995).

Generally, "a defendant is entitled to appear in court free from all bonds and shackles." *State v. Perry*, 316 N.C. 87, 108, 340 S.E.2d 450, 463 (1986). However, the trial court may, in the exercise of its discretion, require an accused to be physically restrained during his trial "when it is necessary to prevent escape, to protect others in the courtroom, or to maintain an orderly trial." *Id.* Nonetheless, physical restraint that denies the defendant a fair trial is prohibited by the due process guarantees of the federal and state Constitutions. *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976).

After examining the record in this case, we conclude that the incident, although regrettable, did not result in any actual prejudice to defendant. The record reveals that all, or nearly all, of the prospective jurors summoned for duty were seated in the spectator section of the courtroom when defendant was escorted into the courtroom wearing handcuffs. Defendant entered through a door to the right of the trial judge's entrance and was in a position to be seen by all of the prospective jurors. The record further shows that defendant moved no more than five or six feet into the courtroom when defense counsel noticed his appearance and approached the deputy about the problem. The deputy then immediately seated defendant and removed the handcuffs.

During his argument on the motion, defense counsel stated that, under the circumstances, any number of prospective jurors could have seen defendant in the restraints. The trial judge, who was not present in the courtroom when the incident occurred, acknowledged the possibility that defendant was observed, but denied the motion without further inquiry into the matter.

Defendant, relying on this Court's decision in *Johnson*, 341 N.C. 104, 459 S.E.2d 246, argues that the trial court was required to conduct a *voir dire* of the prospective jurors to determine whether they had witnessed defendant in handcuffs and to give curative instructions to remove any prejudice. In *Johnson*, this Court found that the

trial court committed no abuse of discretion in denying the defendant's motion for a mistrial after jurors witnessed him being escorted through the courtroom in handcuffs and shackles. The record in that case revealed that, upon the defendant's motion, the trial court conducted an extensive *voir dire* of the jurors, concluded that they had seen the defendant in restraints, gave repeated curative instructions, and further inquired as to whether the jurors had been prejudiced by what they had observed. In response to the court's inquiry, all of the jurors indicated that they could be fair and follow the trial court's instructions.

Contrary to defendant's contention, our decision in *Johnson* should not be construed to require the trial court to undertake a *voir dire* of an entire panel of prospective jurors whenever there is a possibility that one or more members of the panel observed the defendant in restraints. Rather, the crux of the holding was that the defendant, based on an examination of the record, suffered no " 'substantial and irreparable prejudice.' " *Id.* at 116, 459 S.E.2d at 252-53 (quoting N.C.G.S. § 15A-1061). We hold similarly in the instant case. The record reveals that defendant was not handcuffed during the course of the trial. Moreover, we note that the entire incident transpired within a matter of seconds and that the jurors could have seen no more than a glimpse of defendant's wrists in the handcuffs. Therefore, we believe that the trial court's decision not to conduct an inquiry, and thereby draw unwanted attention to the fact that defendant had been handcuffed, was a reasoned one.

As to defendant's claim of prejudice, we note that he has not shown that he lost favor with any of the jurors as a result of the restraints. Indeed, we are satisfied that no such prejudice occurred, since the jurors actually chosen to serve were repeatedly instructed that defendant was presumed innocent and that they were to base their decision solely on the evidence presented at trial. "Jurors are presumed to follow the instructions given to them by the court." *Id.* at 115, 459 S.E.2d at 252. Accordingly, we hold that the trial court properly denied defendant's motion for a mistrial.

[5] Defendant further complains that the trial court erred in denying his pretrial motion for disclosure of jury information known to the State. Defendant argues that the State's vast investigative resources enabled it to compile information concerning the prospective jurors' previous jury service and the verdicts rendered by the juries on which they served. Defendant contends that this information was

unattainable to him and, as a result, placed him at a disadvantage when questioning prospective jurors. The trial court's decision to deny the motion for disclosure, defendant argues, improperly deprived him of the "basic tools of an adequate defense." *Britt v. North Carolina*, 404 U.S. 226, 227, 30 L. Ed. 2d 400, 403 (1971). However, personal information about prospective jurors is not subject to disclosure by the State. *See* N.C.G.S. § 15A-903 (1999) (governing disclosure of evidence by the State). There has been no violation of defendant's discovery rights under N.C.G.S. § 15A-903; thus, his assignment of error is without merit.

JURY SELECTION

[6] By another assignment of error, defendant contends that the trial court erred in allowing the prosecutor to question prospective jurors in a manner that infringed upon his Fifth Amendment right to remain silent and to refrain from testifying at trial. Defendant did not object to the prosecutor's remarks, but argues that the trial court committed reversible error by failing to intervene *ex mero motu* to control the improper *voir dire*. We cannot agree.

A defendant who fails to interpose an objection at trial to statements made by the prosecutor must demonstrate on appeal "that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*." *State v. Mitchell*, 353 N.C. 309, 324, 543 S.E.2d 830, 839 (2001). " 'To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.' " *Id.* (quoting *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999)). Furthermore, "the comments must be viewed in the context in which they were made and in light of the overall factual circumstances to which they referred." *State v. Call*, 349 N.C. 382, 420, 508 S.E.2d 496, 519 (1998).

In our legal system, it is axiomatic that a criminal defendant is entitled under the Fifth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, to remain silent and to refuse to testify. *Griffin v. California*, 380 U.S. 609, 14 L. Ed. 2d 106 (1965). This right is also guaranteed under Article I, Section 23 of the North Carolina Constitution. *State v. Reid*, 334 N.C. 551, 554, 434 S.E.2d 193, 196 (1993). It is equally well settled that when a defendant exercises his right to silence, it "shall not create any presumption against him," N.C.G.S. § 8-54 (1999), and any

comment by counsel on a defendant's failure to testify is improper and is violative of his Fifth Amendment right, *Mitchell*, 353 N.C. at 326, 543 S.E.2d at 840.

> "The reason for the rule is that *extended comment* from the court or from counsel for the state or defendant would tend to nullify the declared policy of the law that the failure of one charged with crime to testify in his own behalf should not create a presumption against him or be regarded as a circumstance indicative of guilt or unduly accentuate the significance of his silence. . . .
>
> "While the mere statement by . . . counsel that the law says no man has to take the witness stand *would seem unobjectionable*, it is obvious that further comment or explanation might [be] violative of the rule established by the decisions of this Court."

State v. Banks, 322 N.C. 753, 763, 370 S.E.2d 398, 405 (1988) (quoting *State v. Bovender*, 233 N.C. 683, 689-90, 65 S.E.2d 323, 329-30 (1951), *overruled on other grounds by State v. Barnes*, 324 N.C. 539, 380 S.E.2d 118 (1989)) (first and fourth alterations in original).

Nevertheless, a comment implicating a defendant's right to remain silent, although erroneous, is not invariably prejudicial. *Mitchell*, 353 N.C. at 326, 543 S.E.2d at 841. Indeed, such error will not earn the defendant a new trial if, after examining the entire record, this Court determines that the error was harmless beyond a reasonable doubt. *Id.*; N.C.G.S. § 15A-1443(b) (1999).

During the *voir dire* of prospective jurors, the prosecutor questioned several members of the venire as to whether they understood defendant's right to refuse to put on evidence or to testify in his defense. In so doing, the prosecutor employed multiple versions of the following query:

> In addition to his decision, choice, privilege, whatever, to put on evidence, the defendant may also testify, put his hand on the Bible and testify. Again, that's his choice. Nobody can make him do it. He can do it if he wants to. If he doesn't want to he doesn't have to. Okay? Is there anything about that that bothers you, about whether or not he puts on evidence or whether or not he testifies? You understand that's his decision?

The record indicates that the prosecutor posed this question to at least sixteen of the prospective jurors.

Defendant contends that the prosecutor's remarks were, in essence, advance comments on his failure to take the stand. He argues that the problem with these comments is the prosecutor's reference to the Bible and the manner in which he juxtaposed defendant's choice not to testify against his ability to place his hand on the Bible. Defendant asserts that the prosecutor's statements violated his Fifth Amendment right to remain silent and warranted the trial court's intervention *ex mero motu*.

Viewing the prosecutor's remarks in the context in which they were made, we hold that they were not impermissible anticipatory comments on defendant's decision not to testify. Here, the prosecutor merely informed prospective jurors of the nature of defendant's right and described the testimonial process. Granted, the jurors could have taken the prosecutor's statements to mean that whether defendant chose to testify would depend on whether he could, in good conscience, place his hand on the Bible and swear to tell the truth. Certainly, repeated statements to this effect could very well plant such a notion in the minds of the jurors. However, that was not the case here. Pursuant to defendant's motion, the prospective jurors were sequestered, and *voir dire* was conducted individually. Thus, the instant facts do not present the sort of repetitious or "extended comment" or "explanation" that this Court would find objectionable. *See Banks*, 322 N.C. at 763, 370 S.E.2d at 405. However, we caution that comments concerning a defendant's right not to testify will be closely scrutinized by this Court.

Assuming, *arguendo*, that the prosecutor's statements crossed constitutional boundaries, we conclude that the error was harmless beyond a reasonable doubt. Regarding defendant's election not to testify, the trial court instructed the jury as follows:

> The defendant in this case has not testified. The law of North Carolina gives him this privilege. This same law also assures him that his decision not to testify creates no presumption against him. Therefore, his silence is not to influence your decision in any way.

This instruction cured any error that may have arisen by way of the trial court's failure to intervene *ex mero motu* and restrain the prosecutor's remarks. Given the overwhelming evidence of defendant's guilt and the curative instruction, defendant suffered no prejudice.

[7] Further, defendant contends that the trial court erred in failing to intervene *ex mero motu* to prevent the prosecutor from indoctrinating prospective jurors during *voir dire*. He argues that the prosecutor was permitted to instruct prospective jurors as to the manner in which they should respond to imminent questions from defense counsel under *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492 (1992). Allowing the alleged improper inquiry, defendant contends, violated his rights to due process and to a fair and impartial jury. We disagree.

"The goal of jury selection is to ensure that a fair and impartial jury is empaneled." *State v. Gell*, 351 N.C. 192, 200, 524 S.E.2d 332, 338, *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000). To that end, the trial court is vested with broad discretion to regulate the extent and manner of questioning by counsel during *voir dire*. *Id.* In order to demonstrate reversible error in this respect, the defendant must show that the trial court committed a clear abuse of discretion and that the defendant was prejudiced thereby. *State v. Meyer*, 353 N.C. 92, 110, 540 S.E.2d 1, 12 (2000), *cert. denied*, — U.S. —, 151 L. Ed. 2d 54, 70 U.S.L.W. 3235 (2001).

As regards the permissible scope of questioning during *voir dire*, this Court has said that:

> "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."

State v. Jones, 347 N.C. 193, 202, 491 S.E.2d 641, 647 (1997) (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)). Equally improper are efforts by counsel "to indoctrinate, visit with or establish 'rapport' with jurors." *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980).

In the present case, the prosecutor questioned one prospective juror in the following manner:

> Q. Okay. Now, upon determining the defendant's guilt in the non-capital cases, you understand the Judge would sentence him, okay? Upon determining the defendant's guilt in the first degree murder case, then that's when we go into the second phase, the sentencing phase.
>
> A. Right
>
> Q. Okay? So you may be asked this question so let me go ahead and deal with it now, okay, because if it's not a trick question, it's a tricky question, okay? And it's if the State convinced you beyond a reasonable doubt that the defendant was guilty of murder and you had returned that verdict of guilty, do you think at that time, now, see, when I say at that time, I'm talking about at the end of the guilt phase, okay? When you shouldn't be considering punishment.
>
> A. Right.
>
> Q. Okay. Second tricky question. If you sat on the jury and returned the verdict of guilty of first degree murder, would you then presume that the penalty should be death?
>
> A. Unt-uh.
>
> Q. Well, see if you didn't get the trick to that question you might say well, why are they talking about this at that time and then, see? These questions are all aimed at the end of the guilt phase.
>
> A. Right.
>
> Q. To see if you are ahead of yourself. You see what I mean?
>
> A. Right.

The prosecutor asked similar questions of five other prospective jurors, two of whom ultimately sat on the jury and decided defendant's fate. Defendant made no objections to this line of questioning during *voir dire*.

"In reviewing any jury *voir dire* questions, this Court examines the entire record of the *voir dire*, rather than isolated questions." *Jones*, 347 N.C. at 203, 491 S.E.2d at 647. Having done so, we hold that

the trial court did not abuse its discretion in permitting the prosecutor to question prospective jurors in the challenged manner. The questions were designed to determine whether the jurors would refrain from considering punishment until such time, if at all, as they reached the sentencing proceeding. The prosecutor did not question jurors as to how they would vote, nor did he instruct them on how they should vote, under a given set of facts. Furthermore, he did not misstate the law. He merely endeavored to determine whether the prospective jurors could follow the law and serve as fair and impartial decisionmakers. This, indeed, is the very purpose of *voir dire*. Defendant's assignment of error, therefore, must fail.

[8] By his next assignment of error, defendant contends that the trial court improperly restricted his *voir dire* of prospective jurors in violation of his federal and state constitutional rights. It is well established that "[t]he trial court has broad discretion to see that a competent, fair, and impartial jury is impaneled." *State v. Conaway*, 339 N.C. 487, 508, 453 S.E.2d 824, 837-38, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995). Furthermore, although counsel is entitled to "diligently inquire into a juror's fitness to serve, the extent and manner of that inquiry rests within the trial court's discretion." *State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989). We have said that "[o]n the *voir dire* . . . of prospective jurors, hypothetical questions so phrased as to be ambiguous and confusing or containing incorrect or inadequate statements of the law are improper and should not be allowed." *Vinson*, 287 N.C. at 336, 215 S.E.2d at 68. To demonstrate reversible error in the jury selection process, the defendant must show a manifest abuse of the court's discretion and prejudice resulting therefrom. *Parks*, 324 N.C. at 423, 378 S.E.2d at 787.

Defendant first contends that, in violation of *Morgan*, 504 U.S. 719, 119 L. Ed. 2d 492, the trial court prevented him from questioning several prospective jurors as to whether they believed that the death penalty would be the only appropriate punishment if they found defendant guilty of first-degree murder. Under *Morgan*, "a defendant in a capital trial must be allowed to make inquiry as to whether a particular juror would automatically vote for the death penalty." *State v. Robinson*, 336 N.C. 78, 102, 443 S.E.2d 306, 317 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995). The record reveals, however, that defendant was able to establish through a series of questions that the prospective jurors at issue could fairly consider a sentence of life imprisonment as a possible punishment. Additionally, the record shows that the trial court sustained objections to the form of

the challenged questions, but permitted defense counsel to rephrase the questions and obtain the jurors' responses. Thus, we hold that the trial court committed no abuse of its discretionary authority.

[9] Defendant further argues that the trial court precluded him from asking follow-up questions of jurors that would have helped counsel understand the jurors' beliefs about the death penalty. Contrary to defendant's contention, however, the record demonstrates that defense counsel was allowed to conduct an exhaustive examination into the prospective jurors' attitudes about the death penalty and whether those attitudes would interfere with their ability to serve. Therefore, on this point, we find no abuse of the trial court's discretion.

[10] Lastly, defendant contends that the trial court improperly limited questions designed to determine whether the members of the venire understood that defendant had no burden to put on evidence. Again, after carefully examining the transcript of the *voir dire*, we are satisfied that the trial court did not abuse its discretion. Furthermore, defendant has not made any showing of prejudice resulting from the allegedly erroneous rulings. Accordingly, we overrule defendant's assignment of error.

[11] By another assignment of error, defendant argues that the trial court erred in excusing several prospective jurors for cause based on their views about the death penalty. He contends that the trial court asked each juror a series of leading questions phrased in such a manner as to elicit answers expressing opposition to the death penalty. Further, he contends that these jurors' responses to inquiries about their views on the death penalty were equivocal and that defense counsel should have been afforded an opportunity to question and rehabilitate each of the challenged jurors. Again, we disagree.

The test for determining whether a prospective juror's views on capital punishment may properly serve as the basis of a challenge for cause is whether such views would " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *State v. Syriani*, 333 N.C. 350, 369, 428 S.E.2d 118, 128 (quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985)), *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993); *accord State v. Davis*, 325 N.C. 607, 621-22, 386 S.E.2d 418, 425 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990). A juror may not be excused for cause merely for "voic[ing] general objections to the death penalty or express[ing] conscientious or reli-

gious scruples against its infliction." *Witherspoon v. Illinois*, 391 U.S. 510, 522, 20 L. Ed. 2d 776, 785 (1968). Bias against the death penalty is seldom established with "unmistakable clarity," and in instances where a juror's opposition to the death penalty is not explicit, "reviewing courts must defer to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially." *Davis*, 325 N.C. at 624, 386 S.E.2d at 426. As the United States Supreme Court has noted,

> many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where a trial judge is left with a definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

Wainwright, 469 U.S. at 424-26, 83 L. Ed. 2d at 852-53 (footnote omitted).

The trial court asked each of the prospective jurors challenged by the prosecution a sequence of questions in an attempt to clarify each juror's position on the death penalty. The following exchange between the trial court and prospective juror Green is representative of the nature and extent of the trial court's examination of each member of the venire defendant contends was erroneously excused for cause:

> THE COURT: I just want to be sure I heard your responses to Mr. Caudle's [the prosecutor's] questions so I'm on solid ground. Okay?
>
> MS. GREEN: Yes, sir.
>
> THE COURT: I asked you a number of questions in a different form than he asked you and you gave me a different response. Okay?
>
> MS. GREEN: Yes, sir.
>
> THE COURT: Have you had time to reflect more about my questions now so if I ask you the same questions again—I think you told me a moment ago that you'd be able to follow the law and consider both possible punishments, life imprisonment and

death as possible punishments. You indicated to me when I questioned you that you could, is that right?

MS. GREEN: Yes, sir.

THE COURT: All right. Now, a moment ago, when Mr. Caudle questioned you, you turned it around and said no, you couldn't do that, is that right? So, you've given me conflicting responses and I need to know for myself where you are. Okay?

MS. GREEN: Okay.

THE COURT: The question, quite simply, is this. Is there any sort of circumstances you could think of, in any case, ma'am, where you could impose a sentence of death?

MS. GREEN: That I could impose on death?

THE COURT: If you were sitting on a jury, is there any circumstance you could think of, any case, any set of facts you could think of, where you'd be able to impose a sentence of death?

MS. GREEN: No, sir.

THE COURT: Okay. Is there any set of circumstances, if you were sitting on a jury, where you could think of a case where you might impose a sentence of life imprisonment?

MS. GREEN: Yes, I would.

THE COURT: Okay. So you have no problem with imposing a punishment of life imprisonment . . .

MS. GREEN: (Interjected) No, I do not.

THE COURT: But you would be unable under any circumstances that you could think of, [to] impose a sentence of death at any time.

MS. GREEN: Yes, sir.

THE COURT: Okay. So I take it then that between the time I questioned you and Mr. Caudle questioned you that you really thought a little more about these questions and this is now your answer at this point?

MS. GREEN: Yes, sir.

THE COURT: This is what you believe?

MS. GREEN: Yes, sir.

THE COURT: So it's not a flip-flop. It's just that you've thought about it and this is what you think?

MS. GREEN: Yes, sir.

Defendant argues that Ms. Green's responses—and the similar responses given by eighteen additional prospective jurors challenged for cause—were, at best, ambivalent. While it is true that many of the jurors so challenged were unable to articulate their biases against capital punishment clearly, their responses revealed either that they were predisposed to render a life sentence or that they could not envision any circumstances under which they could impose a sentence of death. This notwithstanding, defendant contends that further examination by defense counsel would have demonstrated each juror's fitness to serve on the jury. However, we have said that

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

State v. Oliver, 302 N.C. 28, 40, 274 S.E.2d 183, 191 (1981). Defendant has not shown that further questioning by defense counsel would likely have yielded different responses from the challenged jurors. Although the prospective jurors, at times, gave conflicting responses, at the heart of their answers were strong reservations about capital punishment that would substantially impair their abilities to fulfill their duties as jurors.

Moreover, we find no impropriety in the manner in which the trial court questioned the prospective jurors about their views. The questions were intended to extract definitive responses from the prospective jurors so that the trial court could fully and fairly assess the State's challenges for cause. Therefore, we conclude that the trial court committed no abuse of discretion and overrule this assignment of error.

GUILT-INNOCENCE PHASE

By further assignments of error, defendant contends that the trial court improperly limited his cross-examination of three witnesses for

the State, in violation of his Sixth Amendment right to confront the witnesses against him.

Under the Confrontation Clause of the Sixth Amendment to the United States Constitution, an accused is guaranteed the right to be confronted with his adverse witnesses. *State v. McNeil*, 350 N.C. 657, 677, 518 S.E.2d 486, 498 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000). "The principal purpose of confrontation is to secure to the defendant the right to test the evidence of the witnesses against him through cross-examination." *State v. Mason*, 315 N.C. 724, 729, 340 S.E.2d 430, 434 (1986). This right, however, is not without limits, and the trial court "retain[s] broad discretion to preclude cross-examination that is repetitive or that is intended to merely harass, annoy or humiliate a witness." *Id.* at 730, 340 S.E.2d at 434.

[12] Defendant initially complains that the trial court would not permit him to cross-examine Captain C.E. Ward of the Halifax Sheriff's Department about the contents of an SBI report unless defendant first introduced the report into evidence. The record reveals that defense counsel began his cross-examination by asking Captain Ward whether he had copies of the SBI reports with him. When Captain Ward responded affirmatively, defense counsel proceeded to direct the witness to a specific page of the report. At this point, the prosecutor objected, arguing that the document must be admitted into evidence if the defense intended to cross-examine the witness concerning its contents. Defense counsel responded, stating:

> I don't intend to introduce it. I'm just gonna ask him questions about it. If he wants to look at it, I'll ask him without him looking at it, but if he wants to look at it [to refresh his memory], I'm giving him notice to look at it, I'm not seeking him to introduce it.

The trial court then admonished defense counsel to refrain from specific references to the SBI report, but indicated that counsel was free to direct the witness to refer to the report to refresh his recollection.

The record reveals that throughout the defense's cross-examination, Captain Ward repeatedly stated that he could not answer questions concerning the results of the forensic analysis performed on several pieces of evidence "[w]ithout looking at [the SBI] report." Defense counsel, although permitted by the trial court to do so, never

instructed the witness to refer to the report for purposes of refreshing his recollection. Therefore, we find no merit in defendant's contention that the trial court improperly limited his cross-examination of Captain Ward, and this argument is overruled.

[13] Defendant further argues that the trial court prevented him from effectively cross-examining codefendants Williams and Settles about the events that took place on the day of the murder and about their respective plea arrangements. However, defendant's argument does not bear up under our examination of the record. Defense counsel was permitted to cross-examine each of the codefendants at great length. In those instances where the trial court sustained the prosecutor's objections to defense counsel's questions, the questions called for incompetent hearsay testimony, were unduly repetitive or argumentative, or were simply improper in form. Accordingly, the limits placed by the trial court on defendant's cross-examination of these witnesses was an appropriate exercise of its discretion. Defendant's assignments of error then must fail.

[14] By another assignment of error, defendant complains that the trial court improperly permitted the prosecutor to argue to the jury that defendant had a responsibility to put on evidence.

This Court has firmly established that "[t]he scope of jury arguments is left largely to the control and discretion of the trial court, and trial counsel will be granted wide latitude in the argument of hotly contested cases." *Call*, 349 N.C. at 419, 508 S.E.2d at 519. The evidence presented and all inferences reasonably drawn from the evidence are within the scope of permissible argument. *Id.* Furthermore, "[w]here, as here, defendant failed to object to any of the closing remarks of which he now complains, he must show that the remarks were so grossly improper that the trial court erred by failing to intervene *ex mero motu*." *Id.* at 419-20, 508 S.E.2d at 519.

Defendant takes issue with that portion of the prosecutor's argument pointing out that defendant had the power to subpoena witnesses to refute the State's evidence but failed to do so. Specifically, the prosecutor stated:

> And this evidence that you've heard over these three weeks, these eighty-two pieces of evidence and thirty-four witnesses, there is not a first one that has been refuted.

> The defendant has the same power of subpoena as the State. The defendant can call any witness that he chooses to refute any item of evidence. And ladies and gentlemen, it's a short walk from here to this witness stand up here (indicated), and you have not heard one witness, not one piece of evidence to refute the truth.
>
> . . . [N]ot one ounce, not one shred, not one piece of evidence, not one word of testimony refutes the State's case here. . . . This defendant has not called a single witness. Where is Felicia Ward to say well, wait a minute, wait a minute, Craig Williams went to Richmond, I didn't go with him. . . . Where is the defendant's father to say wait a minute now, Ken Settles never came by on the Friday after the murder to talk to my son. . . . So if you hear . . . this afternoon, why didn't the State do this or why didn't the State do that, why didn't the State call this witness or that witness, you ought to be asking yourself, why didn't you call them? Why didn't you call them? Because they got the same power to do it. If it's something wrong, or if somebody's told something wrong, or if there's some error here, you straighten it out, you've got the power, straighten it out, but don't whine about what the State didn't do. Fix it yourself.

Defendant contends that because he is the only witness who could have refuted the relevant evidence, this argument amounted to an improper comment on his failure to testify. Having carefully examined the prosecutor's argument, however, we find no merit to this contention. The prosecutor never directly commented on defendant's failure to testify, nor did he suggest that defendant should have taken the stand to refute the State's evidence. "This Court has repeatedly held that a prosecutor may properly comment on a defendant's failure to produce witnesses or evidence that contradicts or refutes evidence presented by the State." *Id.* at 421-22, 508 S.E.2d at 520. Accordingly, we find no gross improprieties in the prosecutor's argument deserving of *ex mero motu* intervention by the trial court.

[15] Defendant further argues that during the prosecutor's redirect examination of Captain Ward of the Halifax Sheriff's Department, the prosecutor improperly placed the burden on defendant to produce evidence to prove his innocence. On cross-examination by defense counsel, Captain Ward testified that certain forensic tests had been performed on the evidence. On redirect, the prosecutor asked Captain Ward whether defendant's attorneys had taken it upon them-

selves to have any of the relevant evidence tested or inspected. This line of questioning, defendant contends, was inappropriate.

However, defendant waived appellate review of this issue by failing to object to the prosecutor's questions at trial. "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). Furthermore, we note that defendant did not assert in this assignment of error that the prosecutor's questions warranted the trial court's intervention *ex mero motu*. Defendant's argument, therefore, is not properly before this Court. *See* N.C. R. App. P. 10(c)(4); *State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996).

[16] By an additional assignment of error, defendant contends that the trial court erred in failing to instruct the jurors at every recess regarding their conduct and duties in accordance with N.C.G.S. § 15A-1236. Defendant acknowledges, however, that he did not object to the trial court's failure to give the necessary instructions. Further, we note that while defendant argues plain error in his brief, he failed to include plain error as an alternative in his assignment of error in the record on appeal. Therefore, defendant has not properly preserved this argument for our review. *See* N.C. R. App. P. 10(c)(4) (providing that "a question which was not preserved by objection noted at trial . . . nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error"); *State v. Thibodeaux*, 341 N.C. 53, 62, 459 S.E.2d 501, 507 (1995) (stating that "defendant must object to any failure of the trial court to give the required admonitions to the jury in order to preserve this issue for appeal").

[17] Defendant's next assignment of error concerns the denial of his motion *in limine* to bar the testimony of a well-known criminal defense attorney, Gilbert Chichester, and his staff. Defendant argues that the testimony was inadmissible under North Carolina Evidence Rule 401. Alternatively, he contends that the testimony was substantially more prejudicial than probative and should have been excluded under Rule 403. We cannot agree.

Rule 401 of the North Carolina Rules of Evidence defines "relevant evidence" as that which has "any tendency to make the exist-

ence 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 (1999). "We have interpreted Rule 401 broadly and have explained on a number of occasions that in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994).

Under Rule 403, relevant evidence may be excluded, however, if the trial court determines that "its probative value is substantially outweighed by the danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403 (1999). Evidence that is probative of the State's theory of the case will necessarily be prejudicial to the defendant. *State v. Weathers*, 339 N.C. 441, 449, 451 S.E.2d 266, 270 (1994). "[T]he question is one of degree." *Id.* " 'Unfair prejudice,' as used in Rule 403, means 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.' " *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986) (quoting N.C.G.S. § 8C-1, Rule 403 official commentary (Supp. 1985)). Whether to exclude relevant evidence pursuant to Rule 403 is a decision within the trial court's discretion and will remain undisturbed on appeal absent a showing that an abuse of discretion occurred. *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985).

In the case *sub judice*, attorney Chichester and members of his staff were called to testify that defendant met with Chichester at approximately 10:00 a.m. on the morning of 18 December 1996. This evidence was offered to corroborate the testimony of codefendant Williams, a key witness for the State, as to the events leading up to the murder. As such, the evidence was relevant and admissible. Furthermore, defendant has not demonstrated that the jury's verdict was based on any unfair prejudice resulting from attorney Chichester's appearance on the witness stand. Accordingly, we detect no abuse of discretion in the trial court's decision to allow the testimony, and defendant's assignment of error fails.

SENTENCING PROCEEDING

[18] By assignment of error, defendant contends that, during sentencing arguments to the jury, the prosecutor improperly commented

on defendant's invocation of his constitutional right to remain silent. Defendant did not object to the prosecutor's remarks. Nonetheless, he argues that the trial court's failure to intervene *ex mero motu* to control the prosecutor's argument rendered the proceedings fundamentally unfair.

"As a general rule, counsel is allowed wide latitude in the jury argument during the capital sentencing proceeding." *State v. Smith*, 351 N.C. 251, 268, 524 S.E.2d 28, 41, *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100 (2000). Accordingly, counsel is entitled to argue all of the evidence presented at trial and all reasonable inferences drawn therefrom. *State v. Guevara*, 349 N.C. 243, 257, 506 S.E.2d 711, 721 (1998), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999). Whether counsel exceeded the latitude afforded him "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 [was] such gross impropriety in the argument as [was] likely to [have] influence[d] the verdict of the jury." *State v. Covington*, 290 N.C. 313, 328, 226 S.E.2d 629, 640 (1976)).

Where, as in this case, the defendant failed to object to the prosecutor's comments during the closing argument, the question for this Court is "whether the argument was so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Call*, 353 N.C. 400, 416-17, 545 S.E.2d 190, 201 (2001). We recognize that "the prosecutor in a capital case has a duty to strenuously pursue the goal of persuading the jury that the facts of the particular case at hand warrant imposition of the death penalty." *State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 41, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). Therefore, "only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996). Furthermore, statements made during closing arguments will not be examined in isolation. *Guevara*, 349 N.C. at 257, 506 S.E.2d at 721. " 'Instead, on appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred.' " *Id.* (quoting *Green*, 336 N.C. at 188, 443 S.E.2d at 41).

In the instant case, the prosecutor argued the following regarding defendant's post-arrest silence while at Dorothea Dix Hospital:

> He started out that he was with his wife and child or wife and children or something that morning. We know he could talk, but he decided just to sit quietly. He didn't want to say anything that would "incriminate himself." So he appreciated the criminality of his conduct all right.
>
> He was mighty careful with who [sic] he would discuss that criminality, wasn't he? He wouldn't discuss it with the people at Dix.

It is well established that a criminal defendant has a right to remain silent under the Fifth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and under Article I, Section 23 of the North Carolina Constitution. *Mitchell*, 353 N.C. at 326, 543 S.E.2d at 840. A defendant's decision to remain silent following his arrest may not be used to infer his guilt, and any comment by the prosecutor on the defendant's exercise of his right to silence is unconstitutional. *Id.* "A statement that may be interpreted as commenting on a defendant's decision [to remain silent] is improper if the jury would naturally and necessarily understand the statement to be a comment on the [exercise of his right to silence.]" *Id.* at 326, 543 S.E.2d at 840-41.

Applying these principles to the argument in question, we hold that the prosecutor impermissibly commented on defendant's silence in violation of his rights under the state and federal Constitutions. As we noted in *Mitchell*,

> district attorneys and assistant district attorneys have a duty as officers of the court and as advocates for the people to conduct trials in accordance with due process and the fair administration of justice and should thus refrain from arguments that unnecessarily risk being violative of a defendant's fundamental constitutional rights, thereby necessitating new trials.

Id. at 326-27, 543 S.E.2d at 841. Hence, the trial court's failure to intervene *ex mero motu* amounted to an abuse of discretion. Because we cannot conclude that this omission had no impact on the jury's sentencing recommendation, we set aside the sentence of death and remand for a new capital sentencing proceeding.

In light of our decision granting defendant a new sentencing hearing, we need not reach defendant's remaining assignments of error, as they are not likely to recur on remand.

We conclude that defendant received a fair trial, free from prejudicial error. However, because we find prejudicial error in the capital sentencing proceeding, we remand this case to the Superior Court, Halifax County, for a new sentencing proceeding on the first-degree murder conviction.

NO ERROR IN GUILT PHASE; DEATH SENTENCE VACATED; REMANDED FOR NEW CAPITAL SENTENCING PROCEEDING.

Chief Justice LAKE dissenting in part.

I concur in the majority opinion regarding the issues of guilt/innocence, but I respectfully dissent as to that portion of the opinion regarding the necessity for a new capital sentencing proceeding.

I do not agree with the majority's conclusion that the prosecutor's argument to the jury during the sentencing phase of the instant case was so grossly improper as to require the trial court to intervene *ex mero motu*. The majority points out that defendant did not object to the prosecutor's remarks. As this Court has observed many times, "only an *extreme impropriety* on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693 (emphasis added), *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996), *quoted in State v. Cummings*, 353 N.C. 281, 297, 543 S.E.2d 849, 859, *cert. denied*, — U.S. —, 151 L. Ed. 2d 286 (2001). The prosecutor's remarks, under the circumstances and in the context here given, do not rise to the level of an "extreme impropriety."

Taken in context, I do not believe that this closing argument during the capital sentencing proceeding was an improper comment on defendant's silence, in violation of his rights under the federal and state Constitutions. Defendant's guilt had already been established during trial. The prosecutor was not alluding to the trial, and he neither referenced defendant's failure to testify nor encouraged the jurors to utilize defendant's silence as an aggravating circumstance.

Rather, the entire context of this portion of the argument referred to defendant's conduct during his evaluation at Dorothea Dix Hospital. The prosecutor's remarks were intended to draw the jury's attention to testimony, which was admitted into evidence, that defendant spoke little to the doctors at the hospital, thereby raising at least the arguable inference that defendant did understand the nature of his circumstances and did, in fact, appreciate the criminality of his conduct. It is well settled that counsel may argue all evidence which has been presented as well as reasonable inferences which arise therefrom. *State v. McNeil*, 350 N.C. 657, 685, 518 S.E.2d 486, 503 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000).

In arguing that defendant "appreciated the criminality of his conduct" and "was mighty careful with who [sic] he would discuss that criminality," the prosecutor could only have been referencing and arguing against the (f)(6) mitigating circumstance. This portion of the argument was therefore intended to directly refute the (f)(6) mitigating circumstance sought by defendant. *See* N.C.G.S. § 15A-2000(f)(6) (1999). "[O]ur capital punishment statute provides that, during the sentencing phase, evidence may be presented 'as to any matter that the court deems relevant to sentence,' including matters relating to mitigating circumstances." *State v. Locklear*, 349 N.C. 118, 158, 505 S.E.2d 277, 300 (1998) (quoting N.C.G.S. § 15A-2000(a)(3) (1997)), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999). As such, the argument was clearly relating to evidence before the court and to a mitigating circumstance subject to consideration by the jury. The argument was therefore proper and in any event was not subject to *ex mero motu* intervention.

Justice WAINWRIGHT joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. CARLETTE ELIZABETH PARKER

No. 556A99

(Filed 9 November 2001)

1. Appeal and Error— statement of facts—transcript references

The Rules of Appellate Procedure require that each party's statement of the facts be supported by references to pages in the transcript, the record, or exhibits, and parties are encouraged to provide specific and continual transcript references.

2. Homicide— first-degree murder—premeditation and deliberation—circumstantial evidence—sufficient

The trial court did not err by refusing to dismiss first-degree murder charges for insufficient evidence of premeditation and deliberation where a plethora of individual circumstances joined together to indicate premeditation and deliberation in that the victim did not provoke defendant, defendant's conduct and statements after the killing showed premeditation and deliberation, defendant tried to conceal her involvement in the victim's death, there was significant evidence of brutality, there was lengthy mistreatment and concealment of the body, and defendant's clear motive to kidnap and kill the victim was money.

3. Kidnapping— first-degree—sufficiency of evidence of purpose—drive-through bank withdrawal

There was sufficient evidence to prove first-degree kidnapping based upon the purpose of obtaining property by false pretenses where defendant forced the victim to accompany her through a drive-in teller window while defendant withdrew $2500 from the victim's account. Although defendant argues that she made no false representation which deceived the bank, defendant clearly misrepresented to the bank that the victim was voluntarily present and consented to the transaction and could not have obtained the money had the bank known the truth.

4. Evidence— prior crimes and acts—admissible as motive and modus operandi—temporally related

The trial court did not err in the prosecution of defendant for kidnapping and killing an elderly woman by admitting evidence of defendant's prior unruly conduct at a bank which refused to cash her check or by admitting her prior felony convictions for forging the checks of an elderly woman for whom she provided care, a crime for which she had been put on probation and ordered to make restitution. The bank incident reveals defendant's frustration and need to find money, and her prior crimes are relevant as proof of motive as well as a similar modus operandi. Although the crimes were committed three years before the events in this case, defendant's restitution payments and probation were ongoing and the incident in the bank occurred four days before the kidnapping and murder. N.C.G.S. § 8C-1, Rule 404(b).

5. Evidence— pepper spray and stun gun—not tied directly to crime—admissible

The trial court did not err in a capital prosecution for first-degree murder and kidnapping by admitting pepper spray and a stun gun found in defendant's car where defendant contended that the weapons were connected to the crime only by speculation, but the pepper spray's potential to leave stains was proper to discredit defendant's explanation of why she disposed of the victim's shirt, and there was medical evidence of marks on the victim consistent with the use of a stun gun. The argument that the weapons cannot be directly tied to the crime goes to weight rather than admissibility.

6. Evidence— pathologist's testimony—use of "homicide"—not a legal conclusion

The trial court did not err in a capital first-degree murder prosecution by allowing an expert in pathology to testify that the victim's death was a homicide where the doctor did not use the word "homicide" as a legal term of art. The testimony conveyed a proper opinion for an expert in forensic pathology.

7. Evidence— tape recorded interrogation—officers' comments

There was no plain error in a capital first-degree murder prosecution in the admission of comments from police officers on a tape of defendant's interrogation. The statements served primarily to elicit from defendant an explanation of what occurred during the time surrounding the victim's death; the operative facts on which the jury based its verdict appear to be defendant's varying explanations of the day's events rather than the comments of the interrogating officers.

8. Criminal Law— prosecutor's argument—not speculative

The trial court did not err in a capital first-degree murder and kidnapping prosecution by not intervening ex mero motu in the prosecutor's closing argument where defendant contended that the prosecutor argued facts outside the record, but the prosecutor created a scenario based on evidence before the jury. It was up to the jury to decide whether to accept his interpretation and inferences.

9. Sentencing— capital—mitigating circumstances—no significant history of prior criminal activity—sixteen false pretense convictions

The trial court did not err in a capital sentencing proceeding by submitting the statutory mitigating circumstance that defendant had no significant history of prior criminal activity where defendant had pled guilty to sixteen counts of obtaining property by false pretenses arising from the fraudulent appropriation of money from an elderly woman in her care. These nonviolent property crimes apparently arose during one brief period in defendant's life, and the court instructed the jury that defendant did not request submission of this mitigator. A rational jury could have concluded that defendant had no significant history of prior criminal activity.

10. Sentencing— capital—proportionality review—standards not vague and arbitrary

North Carolina's standards for proportionality review in capital sentencing are not unconstitutionally vague and arbitrary. The standards have been clearly set forth in numerous cases and the process permits defendants to submit any evidence relevant to whether they have been sentenced by an aberrant jury. The process is not susceptible to exact definitions or precise numerical comparisons, but allows the State and the defendant to fully argue their positions and the Supreme Court to utilize its experienced judgment.

11. Sentencing— death penalty—not disproportionate

A sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the evidence fully supported the aggravating circumstances found by the jury. The sentence was not disproportionate in that defendant was convicted based on premeditation and deliberation, having kidnapped and eventually drowned a defenseless, elderly woman whose confidence defendant earned through her authority as a health-care provider. The victim undoubtedly experienced immeasurable terror throughout the kidnapping and murder, and, after the victim drowned, defendant washed the victim's clothes, re-dressed her, combed her hair, stuffed her body into a car, and attended a party, driving around for several hours the next morning with the corpse sitting next to her. The facts clearly distinguish this case from those in which a death sentence has been held disproportionate.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Smith (W. Osmond), J., on 1 April 1999 in Superior Court, Wake County, upon a jury verdict finding defendant guilty of first-degree murder. On 5 January 2001, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to her appeal of an additional judgment. Heard in the Supreme Court 12 September 2001.

Roy A. Cooper, Attorney General, by David Roy Blackwell, Special Deputy Attorney General, for the State.

Ann B. Petersen for defendant-appellant.

WAINWRIGHT, Justice.

On 22 June 1999, Carlette Elizabeth Parker (defendant) was indicted for first-degree murder and first-degree kidnapping. Defendant was capitally tried before a jury at the 8 March 1999 Criminal Session of Superior Court, Wake County. On 30 March 1999, the jury found defendant guilty of first-degree-kidnapping and of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. On 1 April 1999, after a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction, and the trial court entered judgment in accordance with that recommendation. The trial court also sentenced defendant to a term of 100-129 months' imprisonment for the kidnapping conviction.

The State's evidence at trial tended to show the following facts: On 12 May 1998, defendant kidnapped and drowned Alice Covington (the victim). At the time of her death, the victim was eighty-six years old, stood five feet one and one-half inches tall, and weighed eighty-eight pounds. Defendant was thirty-four years old and weighed approximately 230 to 240 pounds. From December 1996 to March 1997, defendant served as the home health-care worker for Charles Holtz, a close friend of the victim. The victim and Holtz were both residents at Springmoor Retirement Village in Raleigh.

On the morning of 12 May 1998, defendant and the victim saw each other at a Kroger parking lot on Creedmoor Road in Raleigh. Between 9:00 and 10:00 a.m., three witnesses saw the victim and a heavyset black woman struggling on Strickland Road. According to the witnesses, when the heavyset woman attacked the victim, the victim tried to get away by hitting the heavyset woman over the head with her purse.

Later that afternoon, against the victim's will, defendant drove the victim to the First Union Market Street teller window in Smithfield and withdrew $2,500 from the victim's account. A heavy-set black woman gave the teller a withdrawal slip and the victim's driver's license. The teller looked into the car and saw the victim in the passenger seat, leaning against the car door. The victim was not moving and appeared to be napping.

Defendant drove the victim back to the Kroger parking lot; moved her to defendant's Ford Fiesta hatchback; and drove to defendant's trailer in Angier, North Carolina, where the victim drowned in the bathtub. Defendant undressed the victim's body, washed the victim's clothes, redressed the body, and put the body in the hatchback of defendant's car. Defendant then left in a separate vehicle and drove to a family party. After leaving the party, defendant drove around for several hours.

The next morning, defendant returned to the Kroger parking lot and transferred the victim's body to the front seat of the victim's car. Defendant drove the victim's car around Raleigh, Hillsborough, and Burlington for several hours. Finally, defendant left the victim's body in the car on a dirt road in Morrisville. Defendant walked to Davis Drive and caught a ride to a gas station. Defendant took a cab back to her car, went home, and drank wine coolers.

On 14 May 1998, a passerby discovered the victim's body and notified the police. The victim's body was lying across the front seat, with her head propped against the driver's side door, her chest under the steering wheel, and her feet on the right front floorboard. Investigators found substantial bruising around the victim's face, neck, hands, upper part of both arms, upper left back and shoulder area, and left wrist. The victim also had a laceration on her left wrist and lower left leg. The victim was dressed in blue slacks and a light pink nylon jacket. There was reddish discoloration on the lower portion of the jacket. Testing conducted prior to trial revealed that a pepper-spray container found in defendant's car emitted spray that left a pink stain on a clean sheet.

During their investigation, police conducted a series of interviews with defendant. During the first interview, defendant stated she saw the victim on 12 May 1998 in a Kroger parking lot between 1:00 and 3:00 p.m. Defendant said she and the victim drove to a car wash and then to the victim's home. Defendant said she remained at the victim's home for two to three minutes and then left. After defendant

made this statement, SBI Agent M.B. East told defendant that the victim had been found dead in her car in Morrisville. Defendant, remaining calm and emotionless, responded, "Oh really?" At the conclusion of the interview, defendant denied killing the victim or knowing who did. Defendant also denied having recently been to Morrisville or any banks in Smithfield.

During the second interview, defendant's demeanor changed. At first, defendant was conversational. Agent East told defendant that witnesses saw her in an altercation with the victim on Strickland Road. East also showed defendant a copy of the $2,500 check drawn from the victim's account and told defendant that a teller described the person who accompanied the victim when the money was withdrawn. Defendant then became visibly nervous. Her leg shook, and her knee bounced up and down. Agent East again asked defendant if she knew who murdered the victim. The defendant responded, "Possibly." However, defendant denied assaulting or accidentally killing the victim. While taking defendant home after the interview, Agent East heard defendant say, "I'm going to lose my job," and "I won't be able to take care of old people anymore."

On 16 May 1998, police conducted two more interviews with defendant. Defendant told Agent East and Raleigh Police Detective K.W. Andrews that she had a story and it would be kind of "far-fetched" but that she wanted to come clean and say what had transpired. As in her first interview, defendant said she saw the victim at the Kroger parking lot, and they went to a car wash. At this second interview, defendant claimed she ran into the victim between 10:00 and 11:00 a.m. as opposed to between 1:00 and 3:00 p.m. Defendant's story also became ambiguous about whether she and the victim rode together to the victim's home or took separate cars. Defendant said that after going to the victim's house, she and the victim returned to the Kroger parking lot; got into defendant's car; and drove to the First Union in Smithfield, where defendant cashed a check for $2,500. Defendant claimed the victim gave her this money to help defendant with her doll business. Defendant claimed she never stopped on Strickland Road with the victim.

According to defendant, she then drove the victim to defendant's trailer in Angier. The victim sat on the commode in a bathroom, and defendant filled the bathtub with water. Defendant said she left the bathroom, and when she returned, the victim's head had fallen into the water. Defendant sat the victim up and left the room again. When she returned, the victim's head was submerged. Defendant said she

grabbed the victim by the hair, pulled her out of the water, and tore the victim's shirt. Defendant slapped the victim across the face a couple of times, but the victim did not respond. Defendant vaguely described how the victim's head then slammed into the floor. Defendant carried the victim into the living room and placed her on the floor. Defendant removed the victim's clothes, washed and dried them, and redressed the victim without the torn shirt.

Defendant said the victim was unresponsive but the victim's hand may have twitched. Defendant admitted she did not perform CPR or call 911 despite being trained as a health-care professional who was certified in CPR. Defendant put the body in the hatchback of her Ford Fiesta and drove her other automobile, a truck, to a party in Durham. Defendant left the party and drove around for several hours before returning home. Once at home, defendant got into her Ford Fiesta and drove to a hotel where her husband was staying on Highway 70 East. The victim's body was still in the hatchback. Defendant did not tell her husband what had happened that day.

Defendant said she returned to the Kroger parking lot the next morning around 6:45 a.m. and moved the victim's body to the front seat of the victim's car. Defendant said the victim's body smelled, so she put two pillows on it. Defendant drove around Hillsborough and Burlington, ending up on a dirt road in Morrisville around 1:00 or 2:00 p.m. According to defendant, the car got stuck in the road, and defendant left the victim's body in the car with the engine running. Defendant caught a ride to a gas station, called a cab, returned home, and drank wine coolers.

In an additional interview, defendant admitted throwing the victim's purse out of the car window near Falls Lake. Defendant said she was afraid her fingerprints might be lifted from the purse and she might be implicated in the victim's death. Further, although she had previously denied it, defendant admitted she had a confrontation with the victim on Strickland Road. Defendant initially said she merely stopped the car to adjust the victim's seat, get gas, and massage a cramp from the victim's leg. At this point in the interview, however, defendant paused to consult with her attorney. Defendant then admitted she forcefully took the victim to the bank and the trailer against the victim's will. Defendant also conceded that although the victim had previously voluntarily written the withdrawal slip defendant used in Smithfield, the victim changed her mind about giving defendant the money before defendant forcefully took her to Smithfield to withdraw it. Defendant stated she and the victim did

have a disagreement on Strickland Road and the victim hit defendant with her purse. Defendant admitted she then grabbed the victim by her shirt and threw her into the car. Defendant also said the victim's shirt was actually torn when defendant forced the victim back into the car.

Dr. James Ronald Edwards, who was accepted at trial as an expert in pathology, performed the first autopsy on the victim on 15 May 1998. The autopsy revealed no obvious cause of death. There was no visible sign of an acute heart attack, stroke, brain hemorrhage, blood clot, aneurysm, or external strangulation. Dr. Edwards noticed indications of external trauma, including bruises on the victim's right and left wrists, left shoulder, face, and left side of the neck. Dr. Edwards also noted the lungs were congested and edematous. He testified this fluid in the lungs could be caused by drowning. Dr. Edwards concluded that a natural cause of death was not documented, but that "some external trauma appears to be present" and that "additional history may be helpful in coming to a final conclusion."

Dr. Robert L. Thompson, who was accepted at trial as an expert in forensic pathology, performed a second autopsy. This autopsy revealed no obvious fatal injury and no evidence of strangulation or disease in the victim. Moreover, Dr. Thompson specifically testified the victim did not die of a heart attack. Dr. Thompson further testified that two small, round, sightly reddened areas on the surface of the victim's skin could have been caused by a stun gun found in defendant's possession. In an amendment to the death certificate, Dr. Thompson listed the immediate cause of death as "drowning" and the manner of death as "homicide."

Dr. Wells Edmunson, who was accepted at trial as an expert in internal medicine, was the victim's doctor for twelve years. Dr. Edmunson testified that the victim's overall physical and mental health was excellent. Dr. Edmunson stated that the victim was an especially vibrant person for her age and that her blood pressure, respiration, and cholesterol readings were normal at her most recent physical.

Defendant presented evidence from Dr. Page Hudson that prior EKGs performed on the victim indicated some heart abnormalities. Dr. Hudson opined the victim could have died from a cardiac arrhythmia. Dr. Hudson also stated, however, that cardiac arrhythmia could result from stress and that a stun gun would produce such stress in a

person. Dr. Hudson further testified that he had not read defendant's statement to police and that reading this statement would be helpful. Finally, Dr. Hudson testified, "[T]here's an excellent chance that [the victim] drowned."

The State also introduced evidence concerning defendant's criminal history and prior conduct at area banks. On 7 August 1995, defendant pled guilty to sixteen felony counts of obtaining property by false pretenses from eighty-five-year-old Catherine Stevenson, for whom defendant provided care. J.C. Holder, who worked in May 1995 as an investigator with NationsBank, testified that he had investigated unusual activity in Stevenson's account. Holder went to Stevenson's home and asked her to come talk to a customer representative at the bank about the rapid depletion of her account. Defendant was with Stevenson at the time and drove Stevenson to the bank. When she arrived at the bank, Stevenson appeared angry and upset with defendant and did not want defendant "to have anything to do with her." At the bank, defendant admitted forging unauthorized withdrawals. Defendant said she made the unauthorized withdrawals when Stevenson was in the car. The amount missing from Stevenson's account was around $44,000.

After defendant pled guilty to those charges, the trial court suspended defendant's sentence and put her on probation for forty-eight months. The trial court also ordered defendant to pay restitution in monthly payments of $920.43. By 1 April 1998, defendant was over $4,000 behind in restitution payments. Cathy Clayton, the chief probation and parole officer in Johnston County, testified defendant expressed concern about how she would make her payments.

On 30 April 1998, defendant cashed a $2,500 check signed by Alice Covington and drawn on her Merrill Lynch cash management account. The transaction occurred at the drive-through window of the Crabtree First Union. Defendant was alone when she cashed the check. Later that day, defendant brought three money orders to the probation office. The three orders totaled $2,000 and had been purchased at the Crabtree Post Office. This post office is within sight of the Crabtree First Union. When asked where she got so much money, defendant responded that she had been making a lot of dolls.

On 8 May 1998, defendant attempted to cash a $600.00 check at the drive-through window at a First Union in Dunn, North Carolina. The teller informed defendant that she could not cash the check because defendant's account showed a low balance. Defendant began

yelling, honking her horn, and causing a disturbance. The teller eventually had to walk away from the window. Defendant came inside the bank and was again advised the check could not be cashed. Defendant began cursing and screaming. The police were called, but defendant left before they arrived.

[1] As a preliminary matter, we note that North Carolina's Rules of Appellate Procedure require that each party's statement of the facts be "supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be." N.C. R. App. P. 28(b)(4); *see also* N.C. R. App. P. 28(c). In the present case, both the State and defendant failed to meet this requirement. The parties' statements of the facts at times go on for several pages before providing a transcript reference to several different volumes or to numerous consecutive pages in a volume. While we hold neither party in default in the present appeal, we encourage future parties to provide specific and continual transcript references.

GUILT-INNOCENCE PHASE

[2] Defendant first assigns error to the trial court's denial of her motion to dismiss the charges of first-degree murder and first-degree kidnapping. Defendant argues that the State's evidence was insufficient to permit a reasonable juror to find beyond a reasonable doubt that defendant committed first-degree murder or first-degree kidnapping.

The law governing a trial court's ruling on a motion to dismiss is well established. "[T]he trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995). In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. *State v. Gibson*, 342 N.C. 142, 150, 463 S.E.2d 193, 199 (1995). The trial court must also resolve any contradictions in the evidence in the State's favor. *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001). The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility. *Id.*

Defendant first contends the State's evidence was insufficient to prove defendant intentionally killed the victim with premeditation and deliberation. "Premeditation requires the act to have been thought out beforehand for some period of time, no matter how brief." *State v. Bates*, 343 N.C. 564, 580, 473 S.E.2d 269, 277 (1996), *cert. denied*, 519 U.S. 1131, 136 L. Ed. 2d 873 (1997). Deliberation requires " 'an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.' " *State v. Davis*, 349 N.C. 1, 33, 506 S.E.2d 455, 472 (1998) (quoting *State v. Brown*, 315 N.C. 40, 58, 337 S.E.2d 808, 822-23 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *and overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988)), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999).

Circumstantial evidence and direct evidence are subject to the same test for sufficiency, *State v. Sokolowski*, 351 N.C. 137, 143, 522 S.E.2d 65, 69 (1999), and the law does not distinguish between the weight given to direct and circumstantial evidence, *State v. Adcock*, 310 N.C. 1, 36, 310 S.E.2d 587, 607 (1984). " '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.' " *Sokolowski*, 351 N.C. at 144, 522 S.E.2d at 70 (quoting *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), *and overruled on other grounds by State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001)).

Circumstantial evidence is often made up of independent circumstances that point in the same direction. *Sokolowski*, 351 N.C. at 147, 522 S.E.2d at 71. These independent circumstances are like

> "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. . . . [E]very 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 [jurors] beyond a reasonable doubt."

Id. (quoting *State v. Austin*, 129 N.C. 534, 535, 40 S.E. 4, 5 (1901)).

When proving premeditation and deliberation, the strands in the rope of circumstantial evidence may include: (1) want of provocation on the part of the victim, *State v. Warren*, 348 N.C. 80, 103, 499 S.E.2d 431, 443, *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998); (2) defendant's conduct and statements before and after the killing, including attempts to cover up involvement in the crime, *Sokolowski*, 351 N.C. at 144-45, 522 S.E.2d at 70; *Rose*, 335 N.C. at 318-19, 439 S.E.2d at 527; (3) the manner in which or means by which the killing was done, including evidence that the killing was done in a brutal manner or with use of grossly excessive force, *State v. Truesdale*, 340 N.C. 229, 235, 456 S.E.2d 299, 302 (1995); *State v. Van Landingham*, 283 N.C. 589, 599, 197 S.E.2d 539, 545 (1973); and (4) unseemly conduct toward the victim's corpse, including concealment of the body, *Rose*, 335 N.C. at 318, 439 S.E.2d at 527.

In this case, no direct evidence shows defendant killed the victim after premeditating and deliberating. Instead, a plethora of individual circumstances join together to demonstrate defendant killed the victim with premeditation and deliberation.

First, the victim did not provoke defendant. The victim was a slight, elderly woman, while defendant was a large, young woman. Defendant weighed twice as much as the victim; the victim was more than twice defendant's age. Defendant knew the victim through defendant's work as a health-care provider for the victim's close friend. The victim and defendant ran into each other by chance on the morning of the murder. Defendant lured the victim by acting as though she wanted to help the victim and eventually forced the victim to go to the bank and to defendant's trailer.

Defendant's conduct and statements after the killing also show premeditation and deliberation. In interviews with police investigators, defendant's accounts conflicted concerning the events surrounding the victim's death. Initially, defendant gave investigators false statements about her involvement in order to cover up her actions, saying she did not know who could have harmed the victim. Defendant later changed her story, stating she and the victim went to the bank and to defendant's trailer. Eventually, defendant admitted she forced the victim to go to the bank and to the trailer.

Additionally, the State's evidence showed defendant tried to conceal her involvement in the victim's death. Defendant threw away the victim's purse and torn shirt for fear defendant would be linked to the crime. After the victim drowned, defendant washed and dried the vic-

tim's clothes, redressed her, and combed her hair. Defendant hid the victim's body in the trunk of her car. Defendant drove the victim's body around for hours, potentially destroying evidence of the crime as the body deteriorated. While defendant claimed she intended to call the police, she instead left the car and body on a dirt road, telling no one of the crime.

Further, significant evidence was presented to show the brutality of the crime. First, at some point on the day of the murder, defendant ripped the victim's shirt and bruised the victim's face, neck, hands, and head. The State presented additional evidence that defendant burned the victim's neck with a stun gun and sprayed her with pepper spray. Moreover, the events leading up to the murder were lengthy. The victim and defendant were together much of the day, and defendant attacked the victim as early as 9:00 a.m. Finally, the evidence shows defendant forced the victim to ride to the bank and then to defendant's trailer, where defendant overpowered and drowned the victim. Though trained as a health-care worker and in CPR, defendant did nothing to revive the victim after the drowning.

Defendant's lengthy mistreatment and concealment of the body are also evidence of premeditation and deliberation. After the victim drowned in the bathtub at defendant's trailer, defendant stripped the body and washed the victim's clothing. Defendant then redressed the corpse and stowed it in the hatchback of her car. That evening, defendant abandoned the body to go to a party. The next day, she removed the body from her car, propped it up in the passenger seat of the victim's car, and covered it with pillows because the body was beginning to smell. Defendant then drove around for several hours with the dead body sitting next to her.

Finally, defendant's clear motive to kidnap and kill the victim was to obtain money. Defendant previously worked as a caretaker for an elderly woman and withdrew money from that woman's bank account without her knowledge. Defendant was convicted of sixteen felony counts of false pretenses and was ordered to make restitution payments. Defendant was in arrears thousands of dollars for these payments. Defendant was anxious about these payments and recently had an outburst at a bank when the bank refused to cash her paycheck. Moreover, two weeks prior to the murder, defendant cashed a $2,500 check drawn on the victim's account and used this cash to make restitution payments.

Viewed in the light most favorable to the State, the evidence in this case was sufficient to permit a jury to find defendant killed the victim with premeditation and deliberation. Accordingly, defendant's argument is without merit.

[3] In this same issue, defendant also contends the State's evidence was insufficient to prove one of the elements of first-degree kidnapping. Because kidnapping was the predicate felony for defendant's felony murder conviction, defendant argues both the kidnapping and felony murder convictions must be reversed.

Our statute defining first-degree kidnapping provides as follows:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the *purpose* of:
>
> (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or
>
> (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

N.C.G.S. § 14-39(a), (b) (1999) (emphasis added).

Defendant argues the State provided insufficient evidence of the "purpose" strand in section 14-39(a)(1)-(4). The State argued at trial

and in its brief to this Court that defendant kidnapped the victim for the purpose of facilitating the felony of obtaining property by false pretenses. *See* N.C.G.S. § 14-39(a)(2). Specifically, the State argued defendant forced the victim to accompany her to the Smithfield bank so defendant could obtain money from the victim's account. Defendant then falsely represented to the bank that the transaction was being conducted with the victim's voluntary consent and presence. Defendant argues, however, that she made no false representation to the teller at the Smithfield bank that deceived the bank about the nature of the transaction. Accordingly, defendant contends the evidence is inadequate to show she obtained property by false pretenses, and the purpose element of the kidnapping charge is thus unsupported by the evidence.

Our statute defining obtaining property by false pretenses provides in pertinent part:

> (a) If any person shall knowingly and designedly by means of *any kind of false pretense whatsoever*, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony: Provided, . . . that it shall be sufficient in any indictment for obtaining or attempting to obtain any such money, goods, property, services, chose in action, or other thing of value by false pretenses to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the money, goods, property, services, chose in action or other thing of value; and upon the trial of any such indictment, it shall not be necessary to prove either an intent to defraud any particular person or that the person to whom the false pretense was made was the person defrauded, but *it shall be sufficient to allege and prove that the party accused made the false pretense charged with an intent to defraud.*

N.C.G.S. § 14-100(a) (1999) (emphasis added).

This Court has previously set out the elements of obtaining property by false pretenses:

> (1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.

State v. Cronin, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980). An essential element of the offense is that the defendant acted knowingly with the intent to cheat or defraud. *See State v. Blue*, 84 N.C. 807, 809 (1881). Moreover, the false pretense need not come through spoken words, but instead may be by act or conduct. *State v. Matthews*, 121 N.C. 604, 605, 28 S.E. 469, 469 (1897); *see also State v. Houston*, 4 N.C. App. 484, 486-87, 166 S.E.2d 881, 883 (1969).

Particularly instructive in the instant case is *State v. Dixon*, 101 N.C. 741, 7 S.E. 870 (1888). In *Dixon*, the defendant was convicted of obtaining property by false pretenses after he obtained $5.00 from another by falsely representing that a third party sent the defendant to obtain the money. *Id.* at 741, 7 S.E. at 870-71. In ruling the defendant's motion to arrest judgment was properly denied, this Court focused on the statutory language that a false pretense could occur " 'by means of any forged or counterfeited paper, in writing or in print, or by any false token, *or other false pretense, whatsoever*.' " *Id.* at 742, 7 S.E. at 871 (quoting 1 N.C. Code § 1025 (1883)) (alteration in original). This Court held the statutory prohibition on the use of any "other false pretense, whatsoever," gave the statute an extremely broad scope. *Id.* at 742-44, 7 S.E. at 871-72. Accordingly, the Court stated, "If one falsely and with fraudulent design represents to another that something material—something already said or done—is true, when the same is not true, and it is calculated to mislead, and does mislead," this representation is a false pretense. *Id.* at 742-43, 7 S.E. at 871.

Although our statutory provision defining false pretenses has been amended since *Dixon*, our statute still prohibits "*any kind of false pretense whatsoever*." N.C.G.S. § 14-100(a) (emphasis added). The statute thus retains the broad scope illustrated in *Dixon*. Further, like the defendant in *Dixon*, defendant's actions in the present case falsely represented material facts to the Smithfield bank—that the victim wanted the money withdrawn and that the victim was willingly present in the car at the drive-through window. In fact, the victim changed her mind about the withdrawal, and defendant forcefully put the victim in the car and made her go to the Smithfield bank so defendant could get money from the victim's account.

By passing the victim's driver's license to the bank teller while the victim sat trapped in the passenger's seat, defendant clearly misrepresented to the bank that the victim was voluntarily present and consented to the transaction. The bank teller's testimony indicates the materiality of defendant's misrepresentation: She proceeded with the transaction only after verifying that the identification provided matched the victim in the passenger's seat. Considering the evidence in the light most favorable to the State, it appears defendant's appropriation of money from the victim's account was possible solely because defendant misled the bank to believe the victim was voluntarily present and consenting to the transaction. Clearly, if the bank had known the truth, that defendant took the victim against her will and the victim no longer consented to the transaction, defendant could not have obtained the victim's money.

In short, when defendant presented the victim's withdrawal slip and driver's license to the Smithfield bank while holding the victim hostage in the passenger's seat, she made a false representation of a subsisting fact. Defendant falsely represented to the bank that the withdrawal was legitimate and had the continuing support of the victim. Because defendant's misrepresentation was clearly calculated to mislead and did in fact mislead, defendant's actions constituted a false pretense. Accordingly, because the "purpose" element of the kidnapping charge was satisfied, both the kidnapping and felony murder convictions were supported by sufficient evidence. Defendant's argument on this issue is without merit.

Defendant also briefly argues that even if the State presented sufficient evidence of kidnapping, the State failed to prove defendant murdered the victim in the course of the felony. Defendant makes this argument in a single sentence in her brief and offers no evidentiary support or legal citation for it. After reviewing the record and briefs in this case, we find defendant's argument is without merit. This assignment of error is overruled.

[4] Defendant next assigns error to the trial court's admission of evidence of defendant's conduct on 8 May 1998 and the details of her prior crimes. Defendant argues this evidence was relevant only as character evidence, and its admission affected the outcome of both phases of the trial.

North Carolina Rule of Evidence 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) (1999).

In essence, evidence of other offenses is admissible if it is relevant apart from showing a defendant's character. *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1999). Evidence showing other crimes, wrongs, or acts and a propensity to commit them is admissible if it is relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried. *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). The purposes set out in the statute are not exclusive. "[E]vidence 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).

Defendant first argues the State improperly introduced evidence of her unruly conduct on 8 May 1998 at a bank in Dunn, North Carolina. A bank teller testified defendant attempted to cash a payroll check at the teller window on that day. When the teller refused to cash the check, defendant became visibly upset, honked her horn, and created a disturbance. Defendant then parked the car, entered the bank, and was again told the bank could not cash her check. Defendant began cursing and screaming, creating such a disturbance that the teller called the police. Defendant left before the police arrived.

The bank incident reveals defendant's frustration and need to find money for her restitution payments on the Friday before the Tuesday killing. This was relevant and admissible and is some evidence of defendant's motivation to commit the crime. Accordingly, defendant's argument regarding the admission of her conduct at the bank is without merit.

Second, defendant argues that admission of her felony record was improper. In 1995, defendant was convicted of sixteen counts of

obtaining property by false pretenses for forging checks of an elderly woman for whom she provided care. Defendant was put on probation and was ordered to make restitution payments. Defendant was thousands of dollars in arrears. Defendant's prior crimes are thus relevant as proof of motive, plan, and preparation. Moreover, defendant's *modus operandi* was similar in the crimes committed three years prior to the murder. *See State v. Penland*, 343 N.C. 634, 653-54, 472 S.E.2d 734, 744-45 (1996), *cert. denied*, 519 U.S. 1098, 136 L. Ed. 2d 725 (1997). The crimes shed light on defendant's urgent need for funds to make her payments and on her motive for the kidnapping and the ultimate murder. Accordingly, defendant's argument regarding the admission of her prior crimes is also without merit.

Defendant also argues the evidence of the prior crimes and bad act was inadmissible because it was temporally removed from the killing. However, remoteness in time between evidence of other crimes, wrongs, or acts and the charged crime is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident. Indeed, " 'remoteness in time generally affects only the weight to be given such evidence, not its admissibility.' " *State v. White*, 349 N.C. 535, 553, 508 S.E.2d 253, 265 (1998) (quoting *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991)), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999). Here, the Friday bank incident occurred four days prior to the kidnapping and murder, providing close temporal proximity. The 1995 crimes were also temporally related. Although the conviction for obtaining property by false pretenses was three years before the events at issue here, defendant's restitution payments and probation were ongoing and explain her motive. Accordingly, we overrule this assignment of error.

[5] Defendant next assigns error to the trial court's admission of the pepper spray and stun gun found in defendant's car as well as evidence concerning how these weapons function. Defendant contends it was mere speculation that either weapon was connected to the offenses.

The law concerning the admissibility of a potential murder weapon is well established:

> "Under our rules of evidence, unless otherwise provided, all relevant evidence is admissible. N.C.G.S. § 8C-1, Rule 402 (1988). ' "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 (1988). In criminal cases, ' "[E]very circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury." ' *State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989) (quoting *State v. Hamilton*, 264 N.C. 277, 286-87, 141 S.E.2d 506, 513 (1965), *cert. denied*, 384 U.S. 1020, 16 L. Ed. 2d 1044 (1966))."

State v. DeCastro, 342 N.C. 667, 680-81, 467 S.E.2d 653, 659 (quoting *State v. Felton*, 330 N.C. 619, 638, 412 S.E.2d 344, 356 (1992), *overruled on other grounds by State v. Jackson*, 348 N.C. 644, 503 S.E.2d 101 (1998)), *cert. denied*, 519 U.S. 896, 136 L. Ed. 2d 170 (1996) (alteration in original).

Considering admission of the pepper spray, we note the State conducted a test to illustrate the pepper spray's use. This test revealed the pepper spray left a pink stain when sprayed on a clean sheet. Separate evidence showed the victim's jacket had a reddish stain on it that tested negative for blood. Moreover, defendant told investigators prior to trial that the victim's shirt ripped when defendant pulled the victim from the tub. Defendant stated she dried the victim's hair and washed the rest of her clothes but disposed of the victim's shirt. According to defendant, she disposed of the shirt because "the fingerprints would lift off of them quicker or whatever to implicate me or whatever."

Evidence is relevant if it negates a defendant's explanation of her actions. *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994). Evidence that pepper spray was found in defendant's car and that this spray could leave a stain on garments was thus admissible to discredit defendant's explanation of the victim's death and defendant's subsequent disposal of the victim's shirt. The State sought to prove that defendant did not rip the victim's shirt while pulling her from the tub. Instead, the shirt was stained when defendant sprayed the victim with pepper spray during the murder. Defendant was then forced to destroy the shirt to conceal evidence of her crime. Accordingly, admission of the pepper spray and its potential to leave stains was proper to negate defendant's statement to investigators that she disposed of the shirt to eliminate her fingerprints. The fact that the State's evidence failed to show with complete certainty that pepper spray was used in the killing "impacted the weight of the evidence, not its admissibility." *DeCastro*, 342 N.C. at 681, 467 S.E.2d at 659.

Turning to admission of the stun gun, the State offered evidence from Dr. Thompson that a stun gun's electrodes leave small red marks on the skin. After examining the stun gun found in defendant's car, Dr. Thompson testified that two sets of marks on the victim's neck were consistent with the use of the stun gun. *See id.* at 681, 467 S.E.2d at 659-60 (admission of knife held proper despite absence of bloodstains or fingerprint testing, where medical examiner testified some of fatal wounds were consistent with infliction by the knife). Again, while the State was unable to provide definitive evidence defendant used the stun gun on the victim, Dr. Thompson's testimony concerning the stun gun's potential use was relevant evidence admissible for the jury's consideration. *See id.* at 681, 467 S.E.2d at 659.

Accordingly, the trial court did not err in admitting the pepper spray and stun gun into evidence and allowing the prosecution to demonstrate their functioning to the jury. Defendant's argument that the weapons cannot be directly tied to the crime goes to the weight, rather than admissibility, of the evidence. We overrule this assignment of error.

[6] Defendant next assigns error to the trial court's decision to allow the expert testimony of Dr. Thompson that the victim's death was a homicide. Defendant argues this was prejudicial because the expert was no more qualified than the jury to reach a legal conclusion.

North Carolina Rule of Evidence 704 provides that "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C.G.S. § 8C-1, Rule 704 (1999). In interpreting Rule 704, this Court draws a distinction between testimony about legal standards or conclusions and factual premises. *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 586, 403 S.E.2d 483, 488-89 (1991). An expert may not testify regarding whether a legal standard or conclusion has been met "at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness." *State v. Ledford*, 315 N.C. 599, 617, 340 S.E.2d 309, 321 (1986); *State v. Smith*, 315 N.C. 76, 100, 337 S.E.2d 833, 849 (1985). Testimony about a legal conclusion based on certain facts is improper, while opinion testimony regarding underlying factual premises is allowable. *HAJMM*, 328 N.C. at 586, 403 S.E.2d at 488-89.

For example, an expert may not testify regarding specific legal terms of art including whether a defendant deliberated before committing a crime. *State v. Weeks*, 322 N.C. 152, 166-67, 367 S.E.2d 895,

904 (1988). Additionally, a medical expert may not testify as to the "proximate cause" of a victim's death. *Ledford*, 315 N.C. at 617, 340 S.E.2d at 322. There was no error, however, where an expert characterized a death with the term "homicidal assault." *State v. Flippen*, 344 N.C. 689, 699, 477 S.E.2d 158, 164 (1996). That term was "not a legal term of art, nor [did] it correlate to a criminal offense." *Id.*

Here, Dr. Thompson used the word "homicide" to explain the factual groundwork of his function as a medical examiner. Dr. Thompson did not use the word as a legal term of art. He explained how he determined the death was a homicide instead of death by natural causes, suicide, or accident. Dr. Thompson's testimony conveyed a proper opinion for an expert in forensic pathology, and the trial court properly allowed it. Defendant's assignment of error is without merit.

[7] Defendant also assigns error to the trial court's admission of hearsay statements of police officers recorded on the tape of the officers' interrogation of defendant. According to defendant, when tapes of defendant's interrogations were played at trial, the jury heard comments from the interrogating officers concerning what defendant had done and what might happen at trial. Defendant concedes no objection was made to admission of these statements at trial and so review by this Court is limited to plain error. Defendant also urges this Court, in light of the death sentence imposed, to analyze the officers' statements for any prejudicial error. *See State v. Warren*, 289 N.C. 551, 553, 223 S.E.2d. 317, 319 (1976).

For an error at trial to amount to plain error, an "appellate court must be convinced that absent the error the jury would have reached a different verdict." *State v. Reid*, 322 N.C. 309, 313, 367 S.E.2d 672, 674 (1988). Under this test, defendant must meet a significantly heavier burden than that placed on a defendant who preserved her rights via timely objection under N.C.G.S. § 15A-1443. *Id.*

In the present case, defendant fails to meet the standard for plain error. The officers' statements served primarily to elicit from defendant an explanation of what occurred at the time surrounding the victim's death. Defendant's varying explanations of that day's events, rather than the comments of the interrogating officers, appear to be the operative facts on which the jury based its verdict. In short, we cannot conclude that any potential error in admitting the officers' statements caused the jury to reach a different verdict. Similarly, our thorough review of the record reveals no prejudicial error. *See*

Warren, 289 N.C. at 553, 223 S.E.2d at 319. Accordingly, defendant's assignment of error is overruled.

[8] In another assignment of error, defendant asserts the prosecutor argued facts outside the record in closing argument. Because defendant failed to object at the time, the standard on appeal is whether the argument was so grossly improper as to call for corrective action by the trial judge *ex mero moto*. *State v. Oliver*, 309 N.C. 326, 334-35, 307 S.E.2d 304, 311 (1983). "[D]efendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *Davis*, 349 N.C. at 23, 506 S.E.2d at 467.

Trial counsel may argue every fact in evidence and any reasonable inference which arises therefrom, *State v. Call*, 353 N.C. 400, 417, 545 S.E.2d 190, 201 (2001), but arguments based on mere speculation are improper, *State v. Forney*, 310 N.C. 126, 132, 310 S.E.2d 20, 24 (1984). In the present case, during closing argument the prosecutor said:

> So think about this. 11:00 in the morning. When I ask you to think about this, you go back and think about the evidence, and you draw what conclusions you want to. Use your common sense. 11:00 in the morning. Strickland Road, an altercation. What does she do with Alice Covington at that point? She's certainly not going to carry her back in public. She certainly can't carry this woman to the bank in Smithfield unless by the time you get to the bank in Smithfield she's unconscious. But what happens during that six hours, 11:00 until 5:00 in the afternoon? What happens to her in that time? Maybe we go straight from Strickland Road to [defendant's] house. Maybe I drown her during that time. I've already gotten her to the point that she ain't saying nothing because she's given up on the struggle. Maybe I've hit her with the stun gun. Maybe I've hit her with the mace. Maybe I have bloodied her nose by that time, and now I'm going to drown her. But it don't all come off of her clothes, so I'm going to wash and dry those clothes and put her back out on the floor and comb her hair. Is there any reason to do that, other than to make her presentable so you can drive her right through that drive-in window when she's dead and prop her up in that corner over there? And [the teller] said she was just sitting over there, looked like she had nodded off. If at 11:00 in the morning Alice Covington has been kidnapped and this is 5:00 in the afternoon, Alice Covington

> is either going to be raising sand going through that drive-in window or she's going to be dead.

Here, the prosecutor created a scenario based on evidence already before the jury, presenting a possibility of how events unfolded. Using the word "maybe" several times, he urged the jury to "think about this," "draw what conclusions you want to," and "[u]se your common sense." His argument was not based on mere speculation, but on a framework of facts in evidence. It was up to the jury to decide whether to accept his interpretation and inferences. After review of the record and briefs, we conclude the trial court did not err and defendant's assignment of error fails.

SENTENCING PROCEEDING

[9] Defendant next assigns error to the trial court's submission, over defendant's objection, of the statutory mitigating circumstance that defendant had no significant history of prior criminal activity. *See* N.C.G.S. § 15A-2000(f)(1) (1999).

This Court recently addressed the standard applicable to submission of the (f)(1) mitigating circumstance:

> "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. 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."

State v. Greene, 351 N.C. 562, 569, 528 S.E.2d 575, 580 (quoting *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)), (citation omitted), *cert. denied*, 531 U.S. 1041, 148 L. Ed. 2d 543 (2000). If the trial court determines a rational jury could conclude defendant had no significant history of prior criminal activity, the trial court must submit the mitigating circumstance to the jury. *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988).

In the present case, the evidence warrants submission of the (f)(1) mitigator. Defendant pled guilty in 1995 to sixteen counts of obtaining property by false pretenses. These convictions stemmed from defendant's fraudulent appropriation of money from an elderly woman in defendant's care. These nonviolent property crimes apparently arose during one brief period in defendant's life. Moreover, the

trial court instructed the jury that defendant did not request submission of the (f)(1) mitigator but that submission of the mitigator was legally required.

Submission of the (f)(1) mitigator appears especially appropriate when defendant's criminal history is compared to prior cases where submission of (f)(1) was required. *See, e.g., State v. Rowsey*, 343 N.C. 603, 619-20, 472 S.E.2d 903, 911-12 (1996) (trial court properly submitted (f)(1) over defendant's objection where defendant had convictions for two counts of larceny, fifteen counts of injury to property, and an alcoholic beverage violation and where evidence showed defendant had been involved in various other crimes; trial court's reasoning included the fact that defendant's prior convictions were primarily for property crimes), *cert. denied*, 519 U.S. 1151, 137 L. Ed. 2d 221 (1997); *State v. Buckner*, 342 N.C. 198, 233-34, 464 S.E.2d 414, 434-35 (1995) ((f)(1) properly submitted over defendant's objection where defendant's criminal record included seven breaking and entering convictions, a common-law robbery conviction, and a drug-trafficking conviction), *cert. denied*, 519 U.S. 828, 136 L. Ed. 2d 47 (1996); *Wilson*, 322 N.C. at 142-43, 367 S.E.2d at 604 (trial court erred in failing to submit (f)(1) where defendant was previously convicted of second-degree kidnapping, stored illegal drugs, and was involved in a theft).

In the present case, a rational jury could have concluded defendant had no significant history of prior criminal activity. *Wilson*, 322 N.C. at 143-44, 367 S.E.2d at 604. Accordingly, the trial court properly submitted the (f)(1) mitigating circumstance to the jury. Defendant's assignment of error is without merit.

PRESERVATION ISSUES

Defendant raises four additional issues that she concedes this Court has previously decided contrary to her position: (1) the indictment failed to allege every element of first-degree capital murder, and this deprived defendant of her state and federal constitutional rights; (2) the trial court erred in instructing the jury that it had to unanimously find that the aggravating circumstance was not sufficiently substantial when considered with the mitigating circumstances to call for the imposition of the death penalty before it could answer Issue Four "no" and sentence defendant to life imprisonment without parole, and this violated defendant's state and federal constitutional rights; (3) the trial court's instruction to the jury in the penalty phase that it had the "duty" to impose the death penalty if it found that the

mitigating circumstances failed to outweigh the aggravating circumstance and that the aggravating circumstance was sufficiently substantial to call for the death penalty when considered with the mitigating circumstances, and this deprived defendant of her state and federal constitutional rights; and (4) the definition of mitigating circumstances in the trial court's charge to the jury was error, and this deprived defendant of her state and federal constitutional rights. Defendant makes these arguments to allow this Court to reexamine its prior holdings and to preserve these issues for any possible further judicial review. We have thoroughly 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

[10] Defendant next argues that this Court's standards for proportionality review are unconstitutionally vague and arbitrary.

After thoroughly reviewing our proportionality standards, we find they have been clearly set forth in numerous cases. *See, e.g., State v. Skipper*, 337 N.C. 1, 58-64, 446 S.E.2d 252, 284-88 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995). This Court's proportionality review process permits a capitally convicted defendant to submit any evidence that is relevant to this Court's determination as to whether defendant has been "sentenced to die by the actions of an aberrant jury." *Gregg v. Georgia*, 428 U.S. 153, 206, 49 L. Ed. 2d 859, 893 (1976).

We recognize the proportionality review process is not susceptible to exact definitions or precise numerical comparisons. *See Skipper*, 337 N.C. at 64, 446 S.E.2d at 287. Instead, the process must allow broad consideration of all evidence relevant to the defendant's death sentence. Through such a process, both the State and the defendant may fully argue their positions on proportionality, and Court members may utilize their experienced judgment to determine whether the death sentence imposed was proportionate. *Id.*

In short, this Court's standards governing proportionality are not vague or arbitrary but instead provide broad boundaries to ensure that death sentences may be fully evaluated. Defendant's assignment of error is without merit.

[11] Having concluded that defendant's trial and capital sentencing proceeding were free from prejudicial error, we are required to review and determine: (1) whether the evidence supports the jury's

finding of the aggravating circumstance upon which the sentence of death was based; (2) whether the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2).

In the present case, the jury convicted defendant of first-degree murder based on malice, premeditation, and deliberation, and under the felony murder rule. The jury also found defendant guilty of first-degree kidnapping. Following a capital sentencing proceeding, the jury found one aggravating circumstance: the murder of Alice Covington was committed for pecuniary gain. N.C.G.S. § 15A-2000(e)(6).

Three statutory mitigating circumstances were submitted for the jury's consideration: (1) defendant has no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); (2) the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); and (3) the catchall mitigating circumstance that there existed any other circumstance arising from the evidence that any juror deems to have mitigating value, N.C.G.S. § 15A-2000(f)(9). Of these statutory mitigating circumstances, the jury found only (f)(2) to exist. Of the five nonstatutory mitigating circumstances submitted by the trial court, the jury found two to exist: (1) defendant's mother died when defendant was five years old, which adversely affected her emotional development; and (2) defendant suffered and suffers from a mental defect and/or impairment.

After thoroughly examining the record, transcript, and briefs, and reviewing the oral arguments, we conclude the evidence fully supports the aggravating circumstance 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 turn then 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 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).

We have found the death sentence disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds 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 on the basis of malice, premeditation, and deliberation, and under the felony murder rule. "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 kidnapped and eventually drowned a defenseless, elderly woman. *See State v. Cummings*, 353 N.C. 281, 307, 543 S.E.2d 849, 865, *cert. denied*, —— U.S. ——, 151 L. Ed. 2d 286 (2001). The victim was eighty-six years old, five feet one and one-half inches tall, and weighed eighty-eight pounds. The victim's age and size made her no match for defendant, who was thirty-four years old and weighed approximately 230-240 pounds. *See State v. Carter*, 342 N.C. 312, 329, 464 S.E.2d 272, 283 (1995), *cert. denied*, 517 U.S. 1225, 134 L. Ed. 2d 957 (1996).

After establishing a relationship with the victim and earning the victim's confidence through defendant's authority as a health-care provider for the elderly, defendant used the victim's trust to kidnap and eventually kill the victim so that defendant could steal money from the victim's bank account. Further, the victim undoubtedly experienced immeasurable terror throughout the kidnapping and murder. She was driven a great distance with no idea what was in store for her, only to be sprayed with pepper spray, shocked with a stun gun, and eventually drowned in defendant's trailer. Moreover,

after the victim drowned, defendant, a trained health-care provider, neither administered CPR nor called 911. Instead, defendant washed the victim's clothes, put them back on her, combed the victim's hair, and then stuffed the victim's body in the back of her car so defendant could attend a party. The next morning, defendant carried the body from her car. Defendant propped the body up in the passenger seat of the victim's car. Defendant then covered the body with pillows because the body was beginning to smell. Defendant drove around for several hours with the dead corpse sitting next to her. These facts clearly distinguish this case from those in which this Court has held a death sentence disproportionate.

Defendant contends the present case is similar to *State v. Young*, 312 N.C. 669, 325 S.E.2d 181, one of the cases in which this Court found a death sentence disproportionate. In *Young*, the defendant was nineteen years old. *Id.* at 688, 325 S.E.2d at 193. The defendant and two companions robbed and killed the victim. *Id.* The defendant stabbed the victim twice, but one of his companions "finished" the victim by stabbing him several more times. *Id.*

In the present case, defendant's crime is clearly distinguishable from that in *Young*. First, while the defendant in *Young* was only nineteen, defendant in the present case was thirty-four years old at the time of the murder and held a position of trust as a health-care provider trained in lifesaving techniques. *See Carter*, 342 N.C. at 330, 464 S.E.2d at 283. Moreover, while the defendant in *Young* stabbed the victim twice but his accomplice actually "finished" the victim, defendant in this case kidnapped the victim, assaulted her with pepper spray and a stun gun, drowned her, and then drove her body around in a car. Further, while the victim in *Young* apparently died in a brief period of time without prolonged fear, it is unquestionable in the present case that the victim felt isolated and afraid for an extended period during the kidnapping and then endured a long, painful death. Accordingly, the present case is clearly distinguishable from *Young* and the other six cases where this Court held a death sentence disproportionate.

We also compare this case with the 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. Although we review all cases in the pool of "similar cases" when engaging in our statutorily mandated duty of proportionality review, "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.*; *accord State v. Gregory*, 348 N.C. 203, 213, 499 S.E.2d 753, 760, *cert. denied*, 525 U.S.

952, 142 L. Ed. 2d 315 (1998). After thoroughly analyzing the present case, we conclude 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.

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). Therefore, based upon the characteristics of this defendant and the crimes she committed, we are convinced the sentence of death recommended by the jury and ordered by the trial court in the instant case is not disproportionate.

Accordingly, we conclude defendant received a fair trial, free from prejudicial error. The judgments and sentences entered by the trial court, including the sentence of death for first-degree murder, must therefore be left undisturbed.

NO ERROR.

WESTMINSTER HOMES, INC.; JOHN AND SUSAN EVANS; BAKULESH AND VADANA NAIK, PETITIONERS v. TOWN OF CARY ZONING BOARD OF ADJUSTMENT, RESPONDENT, AND JEFF AND LEIGH THORNE, INTERVENOR/RESPONDENTS

No. 499PA00

(Filed 9 November 2001)

Zoning— municipal—conditional use permit—subdivision—installation of gates in a fence

The Court of Appeals did not err by concluding that a conditional use municipal zoning permit may not be construed to allow residents of a subdivision within the municipality to install gates in a fence that serves as part of a buffer area between the subdivision and an adjoining neighborhood in order to allow the residents access to portions of their property located within the buffer, because: (1) the term "fence" as defined in the ordinance does not specifically provide for gates, and the term "gate" is not defined in either the ordinance or the permit itself; (2) only one gate is expressly mentioned in the permit to allow access to an

easement for maintenance of the sewer by the Town, and petitioner corporation could have easily specified or bargained for additional individual access gates if it had originally so desired; (3) the permit states that the fence is to be the same architecturally as two existing fences, neither of which has a gate; (4) the language in the permit does not suggest the permission of residential access and use when it states the buffer will remain in its present natural and undisturbed condition except fencing and planting; (5) the language of the permit describes a desire for complete separation and privacy for the neighborhood; (6) the drawing of the fence which accompanied the plans submitted to the Town of Cary for the new subdivision did not include gates or an illustration of a gate; (7) the requirement of an undisturbed buffer strongly suggests that gates are not permitted; (8) even after petitioner corporation had subdivided the lots, it did not include gates for the anticipated homeowners until asked by the individual petitioners; (9) there is no reasonable basis for tort liability absent some willful action, and lack of access could potentially reduce petitioners' tax liabilities since the residential area of their lots is reduced in value; (10) as the property has now been subdivided and developed, residents of the subdivision would be left with substantially less than the privacy for which they bargained if gates were permitted under the permit after giving the full benefit of greater development to petitioners; (11) clear notice of the buffer area and fence was given in petitioners' deeds and the recorded plat; and (12) even if the issue of an unconstitutional taking of defendants' land was properly preserved, the Board's interpretation of this permit is not an unconstitutional taking of petitioners' private property since there was no imposition of new conditions on petitioners' use in this case.

Justice ORR dissenting.

Justice BUTTERFIELD 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, 140 N.C. App. 99, 535 S.E.2d 415 (2000), reversing and remanding an order signed 24 March 1999 by Cashwell, J., in Superior Court, Wake County. Heard in the Supreme Court 15 May 2001.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jim W. Phillips, Jr., and Kathleen M. Thornton, for petitioner-appellants.

Charles M. Putterman for intervenor/respondent-appellees.

The Brough Law Firm, by William C. Morgan, Jr., on behalf of the Town of Cary, amicus curiae.

LAKE, Chief Justice.

The question presented for review in this case is whether a conditional use municipal zoning permit may be construed to allow residents of a subdivision within the municipality to install gates in a fence that serves as part of a buffer area between the subdivision and an adjoining neighborhood, in order to allow the residents access to portions of their property located within the buffer. The Court of Appeals held that such gates are not permitted. *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 140 N.C. App. 99, 106, 535 S.E.2d 415, 419 (2000). For the reasons hereinafter set forth, we affirm.

In 1992, petitioner Westminster Homes, Inc., a residential housing developer, petitioned the Town of Cary to rezone various properties surrounding the Harmony Hill Lane neighborhood to allow for higher density residential subdivisions. Part of this property, designated Tract 3 on Wake County Tax Map 543, later became Westminster's Sherborne subdivision. Homeowners in the Harmony Hill neighborhood filed protest petitions against Westminster's request. After negotiations, which resulted in a formal legal agreement, Harmony Hill residents withdrew their protests, and Westminster agreed to certain developmental restrictions on Tract 3.

Westminster petitioned the Town to rezone its property in accordance with the agreement made with the residents of Harmony Hill. In February 1993, the Cary Town Council approved some of these restrictions as conditional use zoning permit Z-664-92-PUD. This permit provides, in part, as follows:

> 1. There shall be a 50 foot undisturbed buffer along the northern boundary of Tract 3 . . . . A seven-foot treated wood fence shall be constructed and maintained by the developer along the length of the undisturbed buffer where it adjoins Parcels 19, 20, 21, and 22, Wake County Tax Map 515. The fence shall be the same architecturally and of the same materials as the fence cur-

rently existing between Preston Woods and the McLaurin Tract. The fence shall be located 45 feet off the property line . . . and it shall be connected to the existing gate over the sewer easement. The fence shall be installed with the minimum of disturbance to the buffer environment. The fence shall be connected at each end to the fences to be constructed under the respective agreements with Hester and McLaurin in order to preserve continuity and integrity. The fence will always be 45 feet from the boundary line or any property corner, and shall intersect at right angles. This fence will be constructed at the time that a grading permit is issued by the Town of Cary and be completed prior to recording any final plats. The integrity and maintenance of this fence will be the responsibility of the developer of Tract 3 or new owner. A deed disclosure and recorded plat shall be made by the developer so as to inform all new residents of the placement, integrity and maintenance of the new fence. Furthermore, a disclosure as to maintenance responsibility shall be part of the recorded plat and be subject to approval of the Town Council of the Town of Cary.

2. There shall be no utility crossings, sewer lines, or greenways in the 50 foot buffer, except where the Town of Cary may require street or utility connections to Parcel 14, Wake County Tax Map 515. The buffer otherwise will remain in its present natural and undisturbed condition, except fencing and plantings.

3. . . . Fast growing and evergreen trees such as Leyland Cypress shall be planted in a type "A" buffer standard to provide both optical and acoustical screening in front of the fence.

Thus, the permit requires, *inter alia*, that a "50 foot undisturbed buffer" be maintained between the Harmony Hill neighborhood and Tract 3, and that this buffer include a seven-foot high wooden fence offset forty-five feet from the rear property line of Tract 3, which abuts Harmony Hill. The "developer of Tract 3 or new owner" is responsible for the "integrity and maintenance" of the fence, and all new residents are to be made aware of the fence restriction through a deed disclosure and the recorded plat.

With the parties having settled their preliminary differences, plans for the Sherborne development proceeded. On 18 November 1993, the Town of Cary approved a plan for the Sherborne subdivision. In October 1996, intervenor/respondents Jeff and Leigh Thorne moved into the adjacent Harmony Hill neighborhood. On 5 February

1997, Westminster filed the final subdivision plat for the Sherborne subdivision with the Register of Deeds. Both the plan approved in 1993 and the plat filed in 1997 showed that all the land in Tract 3, including the buffer zone, would be subdivided.[1]

In December 1997, petitioners John and Susan Evans and Bakulesh and Vadana Naik purchased lots and homes from Westminster in the Sherborne subdivision. Petitioners' lots abutted the intervenor/respondents' lot in the Harmony Hill neighborhood. Thus, the buffer zone runs along the back of and through petitioners' properties. Approximately one-half of the Evanses' lot and one-quarter of the Naiks' lot are part of the designated buffer area. Even so, these lots, excluding those portions which are in the buffer, are larger than many others in the Sherborne development.[2]

After the individual petitioners occupied their lots, they desired to access the portions of their respective lots located behind the fence in the buffer zone. In December 1997, petitioner Westminster, the developer of Sherborne, built a gate in the fence for the Naiks. On 13 January 1998, the Town staff with the Division of Planning and Zoning advised Westminster that gates were not permitted in the fence. In June 1998, the Evanses installed a gate in that portion of the fence in their backyard.

On 24 June 1998, a zoning enforcement officer for the Town of Cary sent letters to petitioners informing them that they were in violation of conditional use zoning permit Z-664-92-PUD because they had installed gates in the fence. Petitioners filed an appeal to the Town of Cary Zoning Board of Adjustment. On 10 August 1998, the Board of Adjustment held a hearing and heard evidence regarding the appeal, and residents of the Harmony Hill neighborhood, including intervenor/respondents, urged the Board not to allow gates in the fence. Ultimately, the Board upheld the zoning enforcement officer's

1. The Cary Zoning Ordinance now states that "[n]o buffer in a residential subdivision shall be wholly owned (in fee simple absolute) by the owner of an individual residential building lot zoned for single family uses. The buffers shall be owned by or be under the control of a homeowner's association or be owned outright or under an easement by a third party or the property rights shall be otherwise divided so that the property owner does not directly own the right to remove, modify or damage the buffer." Cary, N.C., Unified Development Ordinance § 14.1.5(o) (1995). This requirement was not in effect at the time conditional use permit Z-664-92-PUD was approved.

2. Of the eighteen lots that do not contain a portion of the buffer, eight are equal in size or smaller than the Evanses' lot discounting the buffer, and sixteen are equal in size or smaller than the Naiks' lot discounting the buffer.

interpretation of the conditional use permit and the determination that petitioners were in violation of the permit.

Petitioners appealed to Superior Court, Wake County. At this point, the Thornes formally intervened. After a hearing, the court overturned the Board's ruling and ordered that the Sherborne homeowners were permitted to install gates in the fence in order to access that portion of their property located beyond the fence in the buffer area. Intervenor/respondents appealed. The Court of Appeals reversed the trial court, holding that petitioners are prohibited from installing gates in the fence. *Westminster Homes*, 140 N.C. App. at 106, 535 S.E.2d at 419.

The only issue before this Court is whether petitioners, as residents of the Sherborne subdivision, may install individual access gates in the fence required under the conditional use zoning permit. Petitioners contend that the Board and the Court of Appeals erred in holding that such gates are prohibited under a proper construction of the conditional use zoning permit. We disagree.

"[C]onditional use zoning occurs when a governmental body, without committing its own authority, secures a given property owner's agreement to limit the use of his property to a particular use or to subject his tract to certain restrictions as a precondition to any rezoning." *Chrismon v. Guilford County*, 322 N.C. 611, 618, 370 S.E.2d 579, 583 (1988). "[T]he practice of conditional use zoning is an approved practice in North Carolina, so long as the action of the local zoning authority in accomplishing the zoning is reasonable, neither arbitrary nor unduly discriminatory, and in the public interest." *Id.* at 617, 370 S.E.2d at 583; *see also* N.C.G.S. §§ 160A-381, 160A-382 (1999). "[T]he only use which can be made of the land which is conditionally rezoned is that which is specified in the conditional use permit." *Hall v. City of Durham*, 323 N.C. 293, 300, 372 S.E.2d 564, 569 (1988).

Thus, a conditional use zoning permit is a specialized form of a municipal ordinance, and it follows that the same rules of construction apply to both. Courts apply the same rules of construction when construing both statutes and municipal zoning ordinances. *Cogdell v. Taylor*, 264 N.C. 424, 428, 142 S.E.2d 36, 39 (1965) ("The rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances."); *accord Coastal Ready-Mix Concrete Co. v. Board of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980); *George v. Town of Edenton*, 294 N.C. 679, 684, 242 S.E.2d 877, 880 (1978). "The basic rule is to ascer-

tain and effectuate the intention of the municipal legislative body." *George*, 294 N.C. at 684, 242 S.E.2d at 880.

> Intent is determined according to the same general rules governing statutory construction, that is, by examining (i) language, (ii) spirit, and (iii) goal of the ordinance. [*Coastal Ready-Mix Concrete Co.*, 299 N.C. at 629, 265 S.E.2d at 385.] Since zoning ordinances are in derogation of common-law property rights, limitations and restrictions not clearly within the scope of the language employed in such ordinances should be excluded from the operation thereof. *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966).

Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjust., 334 N.C. 132, 138-39, 431 S.E.2d 183, 188 (1993).

We also are mindful of several other principles of general statutory construction as we examine the issue before us. First, "[i]t is a well established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, other sections which are general in their application." *State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969); *accord Three Guys Real Estate v. Harnett County*, 345 N.C. 468, 474, 480 S.E.2d 681, 684 (1997); *Trustees of Rowan Technical Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985). Second, if the words of a statute are plain and unambiguous, the court need look no further. *Walker v. Board of Trustees of N.C. Local Governmental Employees' Ret. Sys.*, 348 N.C. 63, 65-66, 499 S.E.2d 429, 430-31 (1998); *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978). Finally, if the language is unclear, judicial construction may be required. *Banks*, 295 N.C. at 239, 244 S.E.2d at 388-89.

Petitioners present a number of arguments to support their position that individual access gates should be allowed in the fence required under the conditional use permit. Petitioners first argue that the Board and the Court of Appeals erred by failing to interpret the term "fence" consistently throughout the permit and with the Town of Cary Unified Development Ordinance. They contend that terms should be interpreted consistently throughout all zoning authorities and that the ordinance should provide a context for the conditional use permit, which would favor allowing individual access gates in all fences. Under the circumstances of this case, we do not agree.

The term "fence" is defined in the Cary Unified Development Ordinance as "[a] structure used to delineate a boundary or as *a barrier or means of protection, confinement, or screening.*" Cary, N.C., Unified Development Ordinance § 2.1.4 (1992) (emphasis added). The term "fence" is not expressly defined in permit Z-664-92-PUD. Neither the ordinance nor the permit defines the term "gate." The ordinance does contain, however, language which is instructive in this case. The ordinance states, under the heading "General Rules of Construction," that "[i]n the event of any conflict between the limitations, requirements, or standards contained in different provisions of this Ordinance and applying to an individual use or structure, the more restrictive provision shall apply." Unified Development Ordinance § 2.1.1(b).

We are unable to discover any provision in the Cary Unified Development Ordinance requiring terms to be defined in the exact same manner in both the ordinance and conditional use permits. Moreover, the more specific terms of the conditional use permit, by design, are meant to place additional restrictions on land use and control when applicable. *Id.; see also Chrismon*, 322 N.C. at 618, 370 S.E.2d at 583-84. Thus, the permit may provide for a fence without gates, even if the ordinance was clear that gates are usually part of a fence. Such is not the case here, as "gates" are not mentioned in the ordinance. The conditional use permit, relating to specific uses and conditions, does not necessarily have to be interpreted consistently with the more general ordinance.

Even if we assume, *arguendo*, that terms must be defined in the same manner throughout all zoning authorities, the ordinance is not specific in this case and thus does not control our understanding of the term "fence." The term "fence" as defined in the ordinance does not specifically provide for gates, and the term "gate" is not defined in either the ordinance or the permit itself.

Petitioners claim that, under this interpretation, there are possible challenges to countless conditional use rezoning permits. We do not agree. Our interpretation of the conditional use permit as specifically applied here and in relation to the ordinance in this regard will not apply more broadly to produce uncertainty and inconsistencies at the local level. Definitions found in conditional use zoning permits can be different from those found for the same terms in general ordinances because conditional use permits are necessarily more specific in application and restriction than general provisions. Conditional

use permit "inconsistencies" with more general ordinances are normally contemplated as an acceptable means to require more restrictive uses in a given specific area or location.

Petitioners further contend that, based on the plain language of the conditional use permit, gates are permitted in the fence at issue. They believe that nothing in the conditional use permit suggests that this fence was intended to block an owner's access to his property. As evidence in support of their interpretation, petitioners point to the fact that the Town approved the subdivision and sale of the buffer to homeowners. They contend that it is illogical to suggest that the Town intended to block access to this portion of their land. They argue that with a gate already allowed for the sewer easement, it is inconsistent to say that the continuity and integrity of the fence would be damaged by other gates. However, we believe a close reading of the entire permit suggests that its clear intention was to preclude all gates not expressly provided for in the document.

Thus, we do not agree with petitioners' understanding of the plain language of the permit. Only one gate is expressly mentioned in the permit. This gate was placed in the fence to allow access to an easement for maintenance of the sewer by the Town. The permit does not suggest a reason for any other gates in the fence. Westminster could have easily specified or bargained for additional individual access gates if it had originally so desired. It did not do so.

In addition, all other requirements in the permit support our interpretation that additional gates are not permitted. The permit states that the fence is to be the "same architecturally" as two existing fences, neither of which has a gate. The fence, together with "[f]ast growing and evergreen trees," is to provide "both optical and acoustical screening" between the neighbors. The fence also is connected to other existing fences "in order to preserve continuity and integrity." The language that "[t]he buffer otherwise will remain in its present natural and undisturbed condition, except fencing and plantings," likewise does not suggest the permission of residential access and use; rather, it implies the opposite. It is true that in 1993 the Town did approve Westminster's preliminary plan for Sherborne, which included the subdivision of the buffer area by extension of lateral boundary lines of lots to be sold into the buffer to the adjacent boundary with Harmony Hill. This fact, however, is not a persuasive indication of the intended extent of the permit to include individual access gates. When examined in context, the language of the condi-

tional use permit itself describes a desire for complete separation and privacy for the Harmony Hill neighborhood. Taken together, these requirements do not lead to or support petitioners' conclusion. The careful use of terms and language in the permit conveys a clear desire for privacy through a wide, comprehensive buffer which includes an architecturally compatible fence restricting residential access and use.

Several other facts support our interpretation of the zoning requirements. The drawing of the fence which accompanied the plans submitted to the Town for the Sherborne subdivision did not include gates or an illustration of a gate. The permit also required the fence to be set forty-five feet off the property line and the buffer itself to be left in an "undisturbed" state. The requirement of an "undisturbed" buffer strongly suggests that gates are not permitted. Easy access through such gates may ultimately lead to a change in the fundamental nature of the buffer area. For example, it is undisputed that the five feet of buffer zone on the inside, or petitioners' side, of the fence has not remained in the intended natural state and has gradually become part of petitioners' lawns. Allowing additional gates may, however unintentionally, lead to a gradual degradation of the environment specified in the permit. Taken together, these requirements appear entirely contrary to a desire to provide easy access for Sherborne residents. They do suggest, however, that additional gates are not to be installed in the fence and, perhaps, that the buffer was originally inadvertently subdivided as indicated above.

We also note that the fence, as originally built, contained only the one gate for the sewer easement. This fact is a strong indication of the intent and understanding of the nature of both the fence and the buffer area on the part of the Town and Westminster. *See Preyer v. Parker*, 257 N.C. 440, 446, 125 S.E.2d 916, 920 (1962) (stating that the conduct of the parties indicating the manner in which they themselves construe the agreement will be given weight in the interpretation of the instrument by the courts). It is quite unusual to build a fence with no gates if such gates were originally contemplated, so that one would have to return and, wastefully, tear the fence apart to later install gates. Even after Westminster had subdivided the lots, it did not include gates for the anticipated homeowners until asked by the individual petitioners. These facts, taken together with the plain language of the permit, are a strong indication that the parties themselves originally understood the permit to exclude individual access gates in the fence.

Petitioners further assert that a non-access interpretation will lead to absurd or illogical results. They argue that they will own inaccessible property for which they maintain tax and tort liability. However, without access petitioners will hardly be inviting or allowing other people to make use of the buffer area, and only trespassers would likely gain access to this undisturbed area. We thus conclude that under the circumstances here, there would be no reasonable basis for tort liability absent some willful action. *See Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998). With regard to tax liability, the lack of access could potentially reduce petitioners' tax liabilities, in that the residential area of their lots is reduced in value.

Next, petitioners contend that the proper interpretation of the conditional use permit, and zoning ordinances in general, should favor the free use of property. *See Yancey*, 268 N.C. at 266, 150 S.E.2d at 443. Petitioners thus assert that zoning ordinances should be strictly construed in favor of the landowner and that courts should not presume intent to impose property restrictions beyond those clearly set forth in the permit. While ambiguous zoning statutes should be interpreted to permit the free use of land, as discussed above, no such ambiguity exists here. Even though the buffer and the fence restrict the use of part of these lots, this limitation is permitted under the circumstances. The permit is clear in its restrictions as to use of the buffer area. It is to be "undisturbed."

The permit is a result of a compromise bargain, an agreement for higher density development by Westminster in exchange for additional privacy protection for Harmony Hill. Westminster could not have subdivided the property for the Sherborne subdivision without this bargain, which removed respondents' protests to Westminster's proposed rezoning. As the property has now been subdivided and developed, Harmony Hill residents would be left with substantially less than the privacy for which they bargained if gates were permitted under the permit, after giving the full benefit of greater development to Westminster and petitioners.

Furthermore, clear notice of the buffer area and fence was given in petitioners' deeds and the recorded plat. Westminster's sale of the buffer area, not the Board's interpretation of the ordinance, resulted in the contended claim which petitioners now assert. Under the circumstances, the expressed intentions of the permit for an extensive, composite privacy buffer must control. Like the Board, we interpret the zoning ordinance as not permitting additional gates in the fence,

even if it restricts the use of land in the Sherborne subdivision in this case.

Petitioners finally assert that if gates are not permitted, this amounts to an unconstitutional taking of their land by the Board. Petitioners raise this issue for the first time on appeal to this Court. This Court has long held that issues and theories of a case not raised below will not be considered on appeal, *see, e.g., Smith v. Bonney*, 215 N.C. 183, 184-85, 1 S.E.2d 371, 371-72 (1939); *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934), and this issue is not properly before this Court. In any event, we do not consider the Board's interpretation of this permit to be an unconstitutional "taking" of petitioners' private property since there was no imposition of new conditions on petitioners' use in this case, in that the Board merely applied already-existing conditions. Further, this permit was not imposed by a legislative or regulatory body, but was requested and negotiated by the parties. Here, Westminster voluntarily assumed these restrictions as a compromise that allowed it to request a higher density residential zoning. " '[O]ne who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens.' " *Bailey v. State*, 348 N.C. 130, 147, 500 S.E.2d 54, 64 (1998) (quoting *Convent of Sisters of St. Joseph v. City of Winston-Salem*, 243 N.C. 316, 324, 90 S.E.2d 879, 885 (1956)).

We conclude that the additional, individual access gates sought by petitioners are not permitted under conditional use zoning permit Z-664-92-PUD. The Board has interpreted the existing conditions of the permit consistently over time,[3] and we hold that its interpretation is reasonable in light of all the circumstances of this case. From the language of the permit, as well as the surrounding facts and circumstances, it is clear that gates, other than the one specified for the sewer easement, are not permitted in the fence. In this case, we are compelled to agree with intervenor/respondents that "[g]ood fences make good neighbors." Robert Frost, *Mending Wall*, *in* The Poetry of Robert Frost 33, 33-34 (Edward Connery Lathem ed., Holt, Rinehart and Winston 1969) (1914). Thus, for the reasons discussed above, the decision of the Court of Appeals is

3. In May 1997, a gate was added to the fence between the Harmony Hills neighborhood and the Providence Commons subdivision. The Town determined that, under the Z-664-92-PUD conditions, additional gates were not permitted. Providence Commons residents did not appeal this determination. Instead, an application to amend the zoning conditions was submitted to the Cary Town Council. The application was later withdrawn.

AFFIRMED.

Justice ORR dissenting.

The bottom line of the majority opinion is, in effect, to totally deprive a property owner of access to a portion of that owner's land despite the fact that the owner continues to pay taxes on and be liable for that property. In order to reach this result, the majority concludes that a clearly ambiguous ordinance is not ambiguous and that it is permissible for a term to have different meanings and application within the same ordinance without the ordinance ever specifying that such is the case. I conclude for the reasons set forth below that the Cary ordinance in question does not prohibit the petitioners from putting a gate in the fence. Furthermore, even though the constitutionality of this action by the Town of Cary was not raised below, I disagree with the majority that it is "not an unconstitutional taking." I therefore respectfully dissent from this unwarranted disregard for private property rights.

The majority holds that the term "fence" in the conditional use ordinance has a meaning different from the meaning in the Cary ordinance and in the language of Z-664-92-PUD itself. However, such reasoning is contrary to an established canon of statutory interpretation, which also applies to the interpretation of municipal ordinances. *See Woodhouse v. Board of Comm'rs of Nags Head*, 299 N.C. 211, 225, 261 S.E.2d 882, 891 (1980). The rules of statutory interpretation require statutes to be "construed as a whole, and not by the wording of any particular section or part." *McLeod v. Board of Comm'rs of Carthage*, 148 N.C. 77, 85, 61 S.E. 605, 607 (1908). Thus, words that carry a specific definition in one part of a statute are presumed to carry that same definition in all other parts. As the intervenor concedes, the conditional use permit is part of the Cary ordinance. Therefore, unless the language expressly states otherwise, we must presume that the application of the definition of "fence" in the conditional use ordinance is consistent with its definition in the Cary ordinance. If you can have a gate in your fence under the Cary ordinance in other situations, then you can have one under these facts unless something to the contrary specifically states otherwise.

Following this canon of statutory interpretation, the term "fence" in the ordinance must include gates. The term "fence" as used throughout the Cary ordinance indicates the Town's intent to allow gates. For example, the ordinance requires solid fences around play areas at day-care homes. Cary, N.C., Unified Development Ordinance

§§ 13.1.7, 13.1.8 (1992). These sections do not mention gates. However, gates must be included in the term "fence"; otherwise, children would have to be dropped over the fence in order to access the playground.

Language included in the Cary ordinance after Z-664-92-PUD was passed also provides insight on the definition of fence. The ordinance now provides that "[n]o sign or logo shall be permitted to be located on a fence." Cary, N.C., Unified Development Ordinance § 13.1.10(d) (1992). This language does not specifically prohibit signs and logos on gates, but the drafters clearly intended to do so. Any other interpretation would result in allowing signs and logos on gates but not on fences. The language of these two sections indicates that the term fence in the Cary ordinance includes gates installed within a fence. Because we must construe statutes as a whole and because the conditional use permit is part of the Cary ordinance, we must assume that the term "fence" as used in Z-664-92-PUD is defined consistent with that term's usage throughout the general zoning ordinance.

Aside from this established canon of statutory interpretation, the language of the conditional use ordinance itself indicates Cary's specific intent to define terms in the conditional use ordinance consistently with the zoning ordinance. The conditional use ordinance refers to at least one definition in the Cary ordinance, providing that trees in the undisturbed buffer area should be of the "type 'A' buffer standard." Reference to a "type 'A' buffer standard" is hopelessly unclear unless it was meant to carry the same meaning as those terms in the town ordinance. Thus, since Cary meant to use that term consistently, it follows that, absent language to the contrary, Cary intended to use "fence" consistently as well.

The assumption that terms carry the same meaning in the Cary ordinance and the conditional use ordinance can, however, be overcome by a clear indication that the terms were meant to have different meanings. That simply was not done in this case. The intervenors argue that the language of Z-664-92-PUD clearly indicates an intent to use a definition of fence that does not include gates. I disagree. The intervenors contend that because the land is an "undisturbed buffer," it should not be accessible. However, the text of Z-664-92-PUD indicates that the Town anticipated access to the buffer zone. Z-664-92-PUD requires the fence to be maintained and trees to be planted and replaced if necessary. Planting trees and maintaining a fence require people to walk in the buffer zone, thus showing that the Town anticipated some access to the buffer zone.

Furthermore, after Z-664-92-PUD was passed, Cary defined "undisturbed buffer" as a "unit of land containing sufficient quality and quantity of vegetation to meet the requirements of Chapter 14, Part 1 of this Ordinance. Such buffer shall not be graded, nor shall any development occur within such buffer." Cary, N.C., Unified Development Ordinance § 2.1.4 (1992). Therefore, "undisturbed buffer" means that the land may not be graded, or developed, but it does not mean that access to the land is prohibited.

The intervenors contend that the conditional use ordinance requires the fence to preserve "continuity" and that a fence with gates is not continuous. However, "continuity" refers to the requirement that the fence connect at each end to already existing fences. They also argue that the fence must be the "same architecturally" as the Preston Woods fence and that because the Preston Woods fence has no gates, neither may the petitioners' fence. However, the installation of gates does not prevent a fence from being the same architecturally. In fact, the gates at issue in this case are made of the same materials, are the same size, and are thus identical architecturally to the rest of the fence.

The intervenors further contend that since Z-664-92-PUD specifies one gate, additional gates are excluded. They argue the canon of *expressio unius est exclusio alterius*—"to express or include one thing implies the exclusion of the other," Black's Law Dictionary 602 (7th ed. 1999)—but this canon applies only when the thing mentioned and the thing excluded are sufficiently similar to warrant the inference. The gate mentioned in the ordinance is for city sewer access and was required, while the gates at issue here are for private use and are optional. The gates at issue in this case differ too much from the sewer gates to apply the canon of *expressio unius est exclusio alterius*. Instead of prohibiting other gates, I believe specifying one gate indicates that gates are permissible. Had the Town intended to prohibit other gates, it could have easily done so by providing the appropriate language.

Finally, this Court has held that " '[z]oning regulations are in derogation of common law rights and they cannot be construed to include or exclude by implication that which is not clearly their express terms.' " *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966) (quoting 1 E.C. Yokley, *Zoning Law and Practice* § 184 (2d. ed. Supp. 1962)). Because Z-664-92-PUD does not expressly prohibit gates, we cannot imply such a restriction, nor can we guess at what was intended.

While the majority quotes Robert Frost that "[g]ood fences make good neighbors," I fail to see how a solid, seven-foot tall, wooden fence with no gates or other means of access to the owner's property on the other side (short of pole-vaulting over the fence) is very neighborly. Perhaps the property owners from Sherborne subdivision can drive around to Harmony Hill subdivision, stop in front of their neighbors' homes and gaze longingly at the fifty-foot strip of their property to which they have no access. Maybe even on a good day, they will be invited to walk across their neighbor's backyard to actually stand on the property they own. Under the majority's view, that is their only hope.

Justice Butterfield joins in this dissenting opinion.

HUGH A. WELLS, JUDGE OF THE NORTH CAROLINA COURT OF APPEALS (RETIRED) v. CONSOLIDATED JUDICIAL RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION; BOARD OF TRUSTEES OF THE TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE; AND THE STATE OF NORTH CAROLINA

No. 156A00

(Filed 9 November 2001)

Pensions and Retirement— overlapping judicial and executive service

The Board of Trustees of the Teachers' and State Employees' Retirement System of North Carolina (TSERS) did not err by suspending plaintiff's benefits under the Consolidated Judicial Retirement System of North Carolina (CJRS) where plaintiff was appointed Chair of the Utilities Commission after retiring from the judiciary. TSERS was created in 1941, CJRS was created in 1974, and the General Assembly eventually codified the Retirement System in Chapter 35 of the General Statutes, incorporating both TSERS (Article 1) and CJRS (Article 4). N.C.G.S. § 135-52 mandates that the provisions of Article 1 affect the benefits of CJRS members who return to service, and Article 1 prohibits simultaneous contribution to TSERS and receipt from the Retirement System. Article 4 contains no exception to that principle; N.C.G.S. § 135-71 addresses only retired CJRS members returning as contributing members of CJRS. Statutory amend-

ments and the Board's long-standing administrative interpretation strengthen this construction.

Justice ORR dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 136 N.C. App. 671, 526 S.E.2d 486 (2000), affirming a judgment entered 29 March 1999 by Cashwell, J., in Superior Court, Wake County. On 4 May 2000 the Supreme Court granted discretionary review of additional issues. Heard in the Supreme Court 13 September 2000.

Boyce & Isley, PLLC, by G. Eugene Boyce, Philip R. Isley, and Laura B. Isley; and Schiller Law Firm, LLP, by Marvin Schiller and David G. Schiller, for plaintiff-appellant.

Michael F. Easley, Attorney General, by Alexander McC. Peters, Special Deputy Attorney General, for defendant-appellees.

MARTIN, Justice.

Plaintiff served on the North Carolina Utilities Commission (NCUC) from 1 January 1970 to 30 April 1975 and from 1 July 1977 through 17 August 1979. During his tenure at the NCUC, plaintiff was a member of the Teachers' and State Employees' Retirement System of North Carolina (TSERS).

Plaintiff served as a judge on the North Carolina Court of Appeals from 29 August 1979 to 30 June 1994. During his tenure at the Court of Appeals, plaintiff was a member of the Consolidated Judicial Retirement System of North Carolina (CJRS).[1] His judicial retirement benefits vested in August 1984, following five years of creditable service. Upon his retirement from the judiciary in 1994, plaintiff applied for and received a judicial service retirement allowance from the CJRS for the month of July 1994.

In July 1994 the Governor of North Carolina appointed plaintiff as Chair of the NCUC. As a result of this appointment, plaintiff again received a monthly salary from the State of North Carolina and again became a member of the TSERS. Plaintiff's monthly CJRS retirement

1. The name of the Judicial Retirement System was changed in 1985 from the "Uniform Judicial Retirement System" to the "Consolidated Judicial Retirement System." Except where otherwise noted, our references to the "CJRS" apply generally to the Judicial Retirement System and not to the system in place at any particular time.

allowance was suspended from August 1994 through December 1996 during his service as Chair of the NCUC. On 31 December 1996 plaintiff resigned from the NCUC, and his CJRS retirement allowance was restored effective 1 January 1997.

On 30 September 1997 plaintiff brought suit against the CJRS, the Board of Trustees of the TSERS (Board), and the State of North Carolina on the ground that he was entitled to receive his monthly retirement allowance under the CJRS while he was earning a salary as Chair of the NCUC and contributing to the TSERS. On 5 June 1998 an administrative law judge determined that plaintiff's judicial retirement allowance was properly suspended while he worked at the NCUC. On 4 August 1998 the Board accepted that recommendation and entered its final agency decision. On 29 March 1999 the trial court affirmed the final agency decision and entered summary judgment in favor of defendants.

On 7 March 2000, the Court of Appeals, in a split decision, affirmed the trial court. *Wells v. Consolidated Jud'l Ret. Sys. of N.C.*, 136 N.C. App. 671, 526 S.E.2d 486 (2000). The Court of Appeals held that the Board properly suspended plaintiff's retirement allowance for the period of time he served as Chair of the NCUC. *Id.* at 677, 526 S.E.2d at 491. The majority based its decision on an interpretation of the interplay of several statutes elaborating the TSERS and the CJRS. *Id.* at 673-77, 526 S.E.2d at 488-91. Judge Horton dissented on the grounds that the "restored to service" provision in Article 1 of the Retirement System applied only to retirees under the TSERS and could not be applied to plaintiff, a retiree under the CJRS. *Id.* at 678, 526 S.E.2d at 491 (Horton, J., dissenting).

The General Assembly codified the Retirement System within Chapter 135 of the General Statutes of North Carolina. Chapter 135, entitled "Retirement System for Teachers and State Employees; Social Security; Health Insurance Program for Children," incorporates, among other things, both the TSERS in Article 1 and the CJRS in Article 4. The General Assembly enacted Article 1 in 1941 and Article 4 in 1974. Because this case turns upon the interpretation of and interplay among sections within Chapter 135, it is instructive to set out preliminarily the provisions of the CJRS in Article 4 and the

TSERS in Article 1 relevant to our inquiry.[2] At the time plaintiff retired and received his first judicial retirement check under the CJRS, Article 4 provided in pertinent part:

> The retirement benefits of any person who becomes a justice or judge on or after January 1, 1974, shall be determined solely in accordance with the provisions of this Article.

N.C.G.S. § 135-51(c) (1981). Also, section 135-71 of Article 4 provided at that time:

> In the event that a retired former member should at any time return to service as a justice or judge, his retirement allowance shall thereupon cease and he shall be restored as a member of the Retirement System.

N.C.G.S. § 135-71(a) (1981). At the time plaintiff's benefits vested, Article 1 provided, in pertinent part:

> Should a beneficiary who retired on an early or service retirement allowance be restored to service for a period of time exceeding six calendar months, his retirement allowance shall cease, he shall again become a member of the Retirement System and he shall contribute thereafter at the uniform contribution rate payable by all members.

N.C.G.S. § 135-3(8)(c) (Supp. 1983).

Our review of the statutory scheme leads us to conclude that the legislature anticipated the possibility that recipients under the Retirement System might return to active employment on behalf of the State of North Carolina. *See* N.C.G.S. § 135-3(8)(c) (Supp. 1983); N.C.G.S. § 135-71(a) (1981). If a former member of the TSERS is restored to service as an employee or teacher, N.C.G.S. § 135-3(8)(c) provides for the cessation or suspension of retirement benefits while the person contributes to the TSERS. The retirement allowance of a former member of the CJRS who returns to active judicial service is likewise suspended under N.C.G.S. § 135-71.

The narrow question presented by this appeal is whether plaintiff's monthly CJRS retirement allowance was properly suspended

2. We apply the version of our General Statutes in effect when plaintiff's retirement benefits vested in August 1984. *See Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N.C.*, 345 N.C. 683, 690, 483 S.E.2d 422, 427 (1997); *Simpson v. N.C. Local Gov't Employees' Ret. Sys.*, 88 N.C. App. 218, 224, 363 S.E.2d 90, 94 (1987), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988).

during his active employment as Chair of the NCUC. Stated alternatively, the question is whether a contributing member of the TSERS can simultaneously draw a retirement allowance from the CJRS. We affirm the Court of Appeals and hold that the Board properly suspended plaintiff's retirement allowance during his service as Chair of the NCUC.

Section 135-52 makes the provisions of Article 1 applicable to the other articles in Chapter 135. N.C.G.S. § 135-52 (1981). That section provides in relevant part as follows:

> References in Article 1 of this Chapter to the provisions of "this Chapter" shall not necessarily apply to . . . Article [4]. However, *except as otherwise provided in this Article, the provisions of Article 1 are applicable and shall apply to and govern the administration of the Retirement System established hereby.* Not in limitation of the foregoing, the provisions of G.S. 135-5(h), 135-5(n), 135-9, 135-10, 135-12 and 135-17 are specifically applicable to the Retirement System established hereby.

N.C.G.S. § 135-52(a) (1981)(emphasis added). This section mandates that the provisions of Article 1, including the "beneficiary return to service" provision of N.C.G.S. § 135-3(8)(c), affect the benefits of CJRS members who return to service as employees, "except as otherwise provided" by Article 4. *Id.*

Article 1, section 135-3(8)(c) prohibits simultaneous contribution into the TSERS and receipt from the Retirement System. N.C.G.S. § 135-3(8)(c) (Supp. 1983). An examination of Article 4 reveals no exception to that principle. Plaintiff argues that section 135-71 provides such an exception. That section contemplates only an individual's return to service "as a justice or judge." Section 135-3(8)(c), on the other hand, refers to all returning "beneficiaries." "Beneficiary" is defined in section 135-1(6) as "any person in receipt of a pension, an annuity, a retirement allowance or other benefit as provided by *this Chapter*." N.C.G.S. § 135-1(6) (1981) (emphasis added). The legislature tailored the language of section 135-71 to address only retired CJRS members returning as contributing members of the CJRS. In contrast, the language of section 135-3(8)(c) casts a wider net, applying broadly to all recipients of Retirement System benefits under Chapter 135 who return as contributors to the TSERS. N.C.G.S. § 135-3(8)(c) (Supp. 1983); N.C.G.S. § 135-71 (1981). Plaintiff fits squarely into this latter category.

Our interpretation of N.C.G.S. § 135-3(8)(c) is further strengthened by review of amendments to that section since 1984, when plaintiff's entitlement to a retirement allowance vested. Later statutory amendments provide useful evidence of the legislative intent guiding the prior version of the statute. *See Childers v. Parker's, Inc.*, 274 N.C. 256, 260, 162 S.E.2d 481, 484 (1968) (an amended version of a statute may not necessarily be a departure from the old law but rather a clarification of what was previously intended). The present version of N.C.G.S. § 135-3(8)(c), recodified as Article 1, Section 135-3(8)(d), provides, in part, as follows:

> Should a beneficiary who retired on an early or service retirement allowance *under this Chapter* be restored to service as an employee or teacher, then the retirement allowance shall cease as of the first of the month following the month in which the beneficiary is restored to service and the beneficiary shall become a member of the Retirement System and shall contribute thereafter as allowed by law at the uniform contribution payable by all members.

N.C.G.S. § 135-3(8)(d) (1999) (emphasis added). The addition of the words "under this Chapter" as a qualifier to "early or service retirement allowance" clarifies that this provision was intended to apply to each of the articles within Chapter 135.

Relying on Judge Horton's dissent, plaintiff further argues that an interpretation of N.C.G.S. § 135-3(8)(c) that covers judges in Article 4 renders N.C.G.S. § 135-71 meaningless. Plaintiff argues that section 135-71, by its very terms, is an exception to section 135-3(8)(c), specifically directed only at members of the CJRS who return to service in a position included in the Chapter. *See Wells*, 136 N.C. App. at 682, 526 S.E.2d at 494 (Horton, J., dissenting).

Section 135-71 was intended to, and does, apply to one specification: when a retired member of the CJRS returns to active membership *in the CJRS*. Section 135-71 therefore effects a valid legislative purpose. The definitional precision of section 135-71 leaves no room for the inclusion of judges who elect to become contributing members of TSERS. Accordingly, section 135-71 does not act as the type of exception contemplated by section 135-52. Rather, N.C.G.S. § 135-3(8)(c) applies to Article 4 and prevents plaintiff from drawing a retirement allowance from the CJRS while contributing to the TSERS.

Plaintiff contends that the absence of N.C.G.S. § 135-3(8)(c) (designated as subsection (8)(d) in the 1994 version of the statute) from the list of six statutory provisions specifically referenced in N.C.G.S. § 135-52 indicates that the legislature intended N.C.G.S. § 135-3(8)(c) not to apply to Article 4. This interpretation is without merit because it ignores the words "not in limitation of," which indicate that the list of specifically applicable provisions is not exclusive. N.C.G.S. § 135-52.

Plaintiff further contends that application of N.C.G.S. § 135-3(8)(c) to CJRS recipients is inconsistent with the requirement of N.C.G.S. § 135-51 that the retirement allowance of any judge be determined solely in accordance with the provisions of Article 4. N.C.G.S. § 135-51(c). According to plaintiff, this inconsistency provides an exception to section 135-52. We disagree. The suspension of a monthly retirement allowance when a retiree again becomes a contributing member of the Retirement System is not inconsistent with Article 4. Service retirement benefits under the CJRS were, and still are, determined in accordance with sections 135-58 and 135-71(b) of Article 4. N.C.G.S. § 135-58 (1981 & 1999); N.C.G.S. § 135-71(b) (1981 & 1999).

We emphasize that the agency established to administer the retirement statutes has adhered to the same interpretation on this matter since the 1970s, which was corroborated in the deposition of Timothy Bryan, Deputy Director of the Retirement Systems Division of the Department of State Treasurer. *See, e.g., Thornburg v. Consolidated Jud'l Ret. Sys. of N.C.*, 137 N.C. App. 150, 150-51, 527 S.E.2d 351, 352 (2000) (observing suspension of Judge Thornburg's CJRS retirement benefits by CJRS officials during his service as Attorney General of North Carolina from 1985 through 1992). The legislature is presumed to act with full knowledge of prior and existing law. *Polaroid Corp. v. Offerman*, 349 N.C. 290, 303, 507 S.E.2d 284, 294 (1998), *cert. denied*, 526 U.S. 1098, 143 L. Ed. 2d 671 (1999). When the legislature chooses not to amend a statutory provision that has been interpreted in a specific way, we assume it is satisfied with the administrative interpretation. *Id.* Nevertheless, it is ultimately the duty of courts to construe administrative statutes; courts cannot defer that responsibility to the agency charged with administering those statutes. *State ex rel. Util. Comm'n v. Public Staff*, 309 N.C. 195, 306 S.E.2d 435 (1983).

This does not mean, however, that courts, in construing those statutes, cannot accord great weight to the administrative interpreta-

tion, especially when, as here, the agency's position has been long-standing and has been met with legislative acquiescence. *Polaroid Corp.*, 349 N.C. at 303, 507 S.E.2d at 294 (citing *State v. Emery*, 224 N.C. 581, 587, 31 S.E.2d 858, 862 (1944)); *see Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (holding that the interpretation of a statute given by the agency charged with carrying it out is entitled to great weight). Moreover, according great weight to the administrative interpretation in the face of legislative acquiescence is all the more warranted when, as in the instant case, the subject is a complex legislative scheme necessarily requiring expertise. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 129 L. Ed. 2d 405, 415 (1994).[3]

In upholding the Board's long-standing administrative interpretation, we express no opinion concerning the wisdom of the statutory prohibition on "double-dipping"—as this public policy determination was properly resolved by the General Assembly. *See In re Appeal of Philip Morris U.S.A.*, 335 N.C. 227, 231, 436 S.E.2d 828, 831 (1993) (whether to prohibit or allow contingent fee arrangements for private tax auditors is a public policy determination for the General Assembly), *cert. denied*, 512 U.S. 1228, 129 L. Ed. 2d 2726 (1994); *State v. Ballance*, 229 N.C. 764, 767, 51 S.E.2d 731, 733 (1949) ("[A] court is not concerned with what the law ought to be, but its function is to declare what the law is."). In any event, if the legislature chooses to permit "double-dipping" by those individuals who receive judicial retirement benefits and who return to active service as state employees, it may do so. *See Martin v. N.C. Housing Corp.*, 277 N.C. 29, 41, 175 S.E.2d 665, 671-72 (1970) (holding that the General Assembly is to establish the public policy of this state). Indeed, it is clear from the ratification and subsequent repeal of N.C.G.S. § 135-72 that the legislature knows how to modify the administrative interpretation of a retirement statute when it wishes to do so.

For the reasons stated, the Court of Appeals properly affirmed the trial court's decision to affirm the Board's suspension of plaintiff's CJRS benefits during his service as Chair of the North Carolina Utilities Commission from 1 August 1994 through 31 December 1996.

---

3. We recognize that, when the language of the statute is clear and unambiguous, the court must give effect to its meaning because the plain language evincing the intent of the legislature cannot be evaded by an administrative body or a court under the guise of construction. *See Davis v. N.C. Dep't of Human Res.*, 349 N.C. 208, 212, 505 S.E.2d 77, 79 (1998); *Watson Indus. v. Shaw*, 235 N.C. 203, 211, 69 S.E.2d 505, 511 (1952). The retirement statutes at issue, however, are neither clear *nor* unambiguous.

AFFIRMED.

Justice ORR dissenting.

The majority in this case strains mightily to construct a statutory rationale for depriving plaintiff, Judge Hugh Wells, of his retirement benefits earned under the Consolidated Judicial Retirement System. Because of his subsequent service as Chairman of the North Carolina Utilities Commission, the majority concludes that Judge Wells had to forgo receiving those benefits during that period of time. In its effort to appease a purported legislative intent to thwart such conduct, the majority ignores the plain language of the applicable statutes, applies provisions that have no bearing on benefits earned by plaintiff, and constructs a veritable house of legal cards that is held up more by hot air than substance.

In an overview, this case deals with two separate retirement systems created by the General Assembly over thirty years apart. The Teachers' and State Employees' Retirement System ("TSERS") was passed in 1941 and applied to those two categories of individuals—our public school teachers and state employees. In 1974, the General Assembly created a separate retirement system for members of the judiciary—the Uniform Judicial Retirement System, which was changed in 1985 to the Consolidated Judicial Retirement System ("CJRS"). As would be expected, CJRS has its own independent comprehensive statutory framework for its application and implementation. TSERS was included in Chapter 135 of the General Statutes as Article 1, and years later, CJRS was added to that Chapter as Article 4.

As noted by the majority, plaintiff retired in 1994 after fourteen years as a judge on the North Carolina Court of Appeals. As such, he was eligible for and received retirement benefits under CJRS. Upon being requested by Governor Hunt to chair the North Carolina Utilities Commission, plaintiff accepted that appointment and thereupon was deprived of his right to draw retirement benefits that he had previously earned (including substantial portions that he had contributed himself). The majority says that such a result is mandated by the laws of this state. I strongly disagree and therefore dissent.

The premise relied on by the majority to the effect that N.C.G.S. § 135-52(a) under Article 4 and CJRS as set out below "mandates" that the "beneficiary return to service" provision

of N.C.G.S. § 135-3(8)(c) applies to Judge Wells' case, sinks like an anchor under close examination. The majority's statement is totally conclusory and without foundation.

> (a) References in Article 1 of this Chapter to the provisions of "this Chapter" shall not necessarily apply to this Article. However, except as otherwise provided in this Article, the provisions of Article 1 are applicable and shall apply to and govern the administration of the Retirement System established hereby. Not in limitation of the foregoing, the provisions of G.S. 135-5(h), 135-5(n), 135-9, 135-10, 135-12 and 135-17 are specifically applicable to the Retirement System established hereby.

N.C.G.S. § 135-52(a) (1981 & 1999). This statute controls the interaction between Article 4 and Article 1 but in no way stands as controlling authority for the position taken by the majority. N.C.G.S. § 135-52(a) provides that (1) use of the term "this Chapter" in Article 1 does not necessarily apply to Article 4; (2) Article 1 merely governs the *administration* of CJRS, and only does so if Article 4 fails to provide otherwise; and (3) certain sections of Article 1 dealing with administration of the plan are applicable to CJRS, and by naming these sections specifically, other sections dealing with administration are not precluded from applying.

The effort by those in the majority to expand the reach and scope of Article 1's interplay with Article 4 is critical to their reasoning because they must rely on a provision in Article 1 if they are to successfully deprive Judge Wells of his benefits obtained under Article 4. The provision in question is section 135-3(8)(c) of Article 1 (later amended and recodified as section 135-3(8)(d)), which provides in pertinent part:

> Article 1.
>
> Retirement System for Teachers and State Employees.
>
> . . . .
>
> **§ 135-3. Membership.**
>
> The membership of this Retirement System shall be composed as follows:
>
> . . . .

(8) The provisions of this subsection (8) shall apply to any member whose membership is terminated on or after July 1, 1963 and who becomes entitled to benefits hereunder in accordance with the provisions hereof.

c. Should a beneficiary who retired on an early or service retirement allowance be restored to service for a period of time exceeding six calendar months, his retirement allowance shall cease, he shall again become a *member* of the *Retirement System* and he shall contribute thereafter at the uniform contribution rate payable by all members.

N.C.G.S. § 135-3(8)(c) (Supp. 1983) (emphasis added).

Even if the effort to apply section 135-3(8)(c) to Article 4 could be done in some sort of general fashion, the specific language of the section clearly precludes it from applying to any benefits received under Article 4 and thus from applying to Judge Wells. First and foremost, the introductory language in subsection (8) categorically applies its terms to any "member" entitled to benefits. "Member" is defined in Article 1 as "any teacher or State employee included in the membership of the System as provided in G.S. 135-3 and 135-4." N.C.G.S. § 135-1(13) (1981 & 1999). Thus, subsection (8) by its very terms does not apply to someone with retirement benefits under CJRS but instead applies only to those deriving benefits under TSERS. The definition of "Retirement System" in N.C.G.S. § 135-1(22) specifically limits this term to the Teachers' and State Employees' Retirement System.

Secondly, the language in (8)(c) relied on by the majority specifically applies to "a beneficiary" *restored* to service as an "employee" or "teacher." The word "restored" is defined as "[t]o put (someone) back in a former position." *The American Heritage Dictionary of the English Language* 1538 (3d ed. 1992). Judge Wells could not be restored as an employee or teacher because the definition of "employee" in Article 1 specifically excludes someone covered under CJRS, and Judge Wells was obviously not a teacher.

Thirdly, N.C.G.S. § 135-3(8)(c) does not apply because a full reading of subsection (c) shows that the purpose of this section is not to prevent a beneficiary like Judge Wells from drawing the retirement benefits he earned under CJRS, after his retirement from that system and while working for the Executive Branch and contributing to

TSERS. *Instead*, the purpose of subsection (8)—from before the time Judge Wells vested and through the present—is to calculate retirement benefits under TSERS when someone restored under TSERS goes back into service and then later re-retires. The fact that Judge Wells served several years under TSERS while Chairman of the Utilities Commission in no way affected any calculation of his benefits earned under CJRS.

The majority makes several efforts to bolster its result. They can be summarily disposed of as follows:

(1) The majority relies in part on the expansive definition of "beneficiary" in N.C.G.S. § 135-1(6) to validate its enlarged scope of application of N.C.G.S. § 135-3(8)(c). However, Article 4 has its own definition of "beneficiary" in N.C.G.S. § 135-53(3), which includes only persons receiving benefits under CJRS. Thus, this definition in Article 4 must prevail over the definition in Article 1, and the Article 1 definition of "beneficiary" does not apply to Judge Wells.

(2) The majority relies on the amendment to N.C.G.S. § 135-3(8)(c) in 1993, which added the language "under this Chapter." The majority says that this clarifies that the provision was intended to apply to each of the articles within Chapter 135 and that Judge Wells was restored as an "employee." However, as previously noted, this section merely serves to clarify the retirement benefits someone receives under TSERS, *after retiring under* TSERS, coming back to work under TSERS, and then retiring again under TSERS. There is no provision that suggests the calculation of a judicial retirement allowance under CJRS changes because of any later benefits earned under TSERS. Likewise, as previously noted, Judge Wells was not *restored* to TSERS because his retirement benefits were based on service under CJRS.

(3) The majority also relies on *Thornburg v. Consolidated Jud'l Ret. Sys. of N.C.*, 137 N.C. App. 150, 527 S.E.2d 351 (2000), to support the proposition that the administrators of the various retirement systems have interpreted the statutes consistent with the majority's position. While *Thornburg* as a case has no relevance to the issue before us, the opinion does include a statement that Thornburg's benefits under CJRS were suspended while Thornburg was Attorney General of North Carolina. That the interpretation of this statute has been interpreted that way for a number of years by the personnel administering the system is not contested. What is contested is whether that interpretation is correct. I conclude that it is not.

What is perfectly clear is that there is absolutely no language in Article 1 or Article 4 that says someone going to work under TSERS loses retirement benefits earned under CJRS while so employed. Article 1 says you cannot retire from TSERS and go back to work under TSERS and still draw a retirement benefit, N.C.G.S. § 153-3(8)(d) (1999); N.C.G.S. § 135-3(8)(c) (Supp. 1983), and Article 4 says you cannot retire from CJRS and go back to work under CJRS and draw a retirement benefit, N.C.G.S. § 135-71 (1999). Nothing says, however, that you cannot move from one retirement system to another and still draw a retirement benefit previously earned.

This Court has stated numerous times that " '[w]hen 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.' " *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 811, 517 S.E.2d 874, 878 (1999), quoting *Lemons v. Old Hickory Council, BSA, Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988)). As a necessary corollary, the doctrine of administrative deference has no application to a clear and unambiguous statute. *See Watson Indus. v. Shaw*, 235 N.C. 203, 211, 69 S.E.2d 505, 511 (1952) (interpretation of statute by agency charged with its enforcement entitled to deference only in case of ambiguity); *see also In re Total Care, Inc.*, 99 N.C. App. 517, 520, 393 S.E.2d 338, 340, *disc. rev. denied*, 327 N.C. 635, 399 S.E.2d 122 (1990).

In conclusion, whatever the General Assembly may have intended either in the past or the present, it surely has failed to specifically address by statute the scenario now before us. How very simple to say that a person cannot draw a retirement benefit from *any* retirement system enacted by the state while working for the state. As previously noted, the General Assembly has specifically said that a person cannot draw benefits from TSERS and go back to work under TSERS, and it has specifically said that a person cannot draw benefits under CJRS and go back to work under CJRS. If the General Assembly intended to prohibit moving from one system to another and still draw retirement benefits, it clearly could have said so, but the General Assembly did not. The only relationship between Article 1 and Article 4 deals with the administration of the two distinct systems. Otherwise, each retirement system is independent with different definitions of terms and provisions governing the respective operations. In fact, N.C.G.S. § 135-51(c) specifically says: "The retirement benefits of any person who becomes a justice or judge, district attorney, or solicitor on and after January 1, 1974, or clerk of superior

court on and after January 1, 1975, shall be determined *solely* in accordance with the provisions of this Article." N.C.G.S. § 135-51(c) (1999) (emphasis added).

On 30 June 1994, at the age of seventy-two, Judge Hugh Wells retired after a distinguished career of public service including fourteen years as a judge on the North Carolina Court of Appeals. Having done so, he could have easily retired to his home in Shelby, done nothing, and still draw a monthly retirement income of $5,182, a substantial portion of which he contributed from his salary over the years. He also could have drawn additional salary by becoming "of counsel" to a law firm, by teaching at a private law school, or by engaging in any other type of business in the private sector and still continue to draw his retirement benefits. However, heeding the request of Governor Hunt, Judge Wells opted instead to continue working in public service as Chairman of the North Carolina Utilities Commission, despite a steadily debilitating fight with Parkinson's disease. His salary in this new position was $6,781 per month.

Judge Wells served as Chairman of the Utilities Commission from July of 1994 until December of 1996. As a result, the practical effect of suspending his judicial retirement benefits for that period of two and a half years is that Judge Wells worked full-time for our state in a challenging and difficult position for a net increase in income of less than $1,600 per month over what he could have drawn in retirement income back home relaxing in Shelby. If this is the public policy intended by the legislature, interpreted by the bureaucracy, and endorsed by the majority of this Court, then I find it a poor policy and of little, if any, benefit to the public. The broad result of such a policy is to penalize a public servant of our state willing to move from one branch of our government to another under entirely distinct and separate retirement systems while imposing no such penalty on any other person coming to work in state government with retirement benefits from another state, the federal government, or private industry. All those persons could serve as Chairman of the Utilities Commission without loss of retirement benefits—but, according to the majority, Judge Hugh Wells could not. Judge Wells died on 4 December 2000, having drawn his full judicial retirement for only four years, despite having contributed to the Judicial Retirement System for fourteen years. His commendable service to this state was dutifully noted at his passing. It is now dutifully noted that the retirement benefits he earned and paid for in part will not be paid because he heeded the request of the Governor of this state and

chose to continue serving his fellow North Carolinians after retiring from the judiciary.

The majority has misconstrued the law of our state and imputed a bad public policy to the General Assembly. Therefore, I dissent.

THE ESTATE OF KENNETH B. FENNELL, BY AND THROUGH ITS ADMINISTRATOR, ANNIE B. FENNELL, AND ANNIE B. FENNELL v. RICHARD L. STEPHENSON, IN HIS PERSONAL AND OFFICIAL CAPACITY; THE NORTH CAROLINA STATE HIGHWAY PATROL; AND OTHER UNKNOWN NORTH CAROLINA STATE HIGHWAY PATROL EMPLOYEES IN THEIR PERSONAL AND OFFICIAL CAPACITIES

No. 267PA00

(Filed 9 November 2001)

1. Statute of Limitations— unconstitutional detention—state trooper—suit in official capacity

Although plaintiffs contend in their claim for unconstitutional detention that defendant state trooper while acting in his official capacity unconstitutionally detained or seized decedent who was shot and killed by the state trooper during a traffic stop, plaintiffs failed to name the state trooper as a party in his official capacity within the three-year time period of the statute of limitations under N.C.G.S. § 1-52(13) that began to run the day the trooper stopped and killed decedent.

2. Statute of Limitations— sovereign immunity—constitutional claims

The Court of Appeals erred by reversing the trial court's finding that sovereign immunity precluded plaintiffs' constitutional claim against the State Highway Patrol in an incident where a state trooper shot and killed an individual during a traffic stop, because: (1) the claim was filed after the expiration of the applicable statute of limitations when the complaint was filed more than five years after the decedent was stopped and killed, more than two years after the statute of limitations expired on any constitutional claims, and over three years after the statute of limitations had passed for wrongful death actions; (2) the addition of the State Highway Patrol in the amended state complaint does not relate back to the original state complaint; and (3) timely fil-

ing in federal court within the statute of limitations has no effect on the claim against the Highway Patrol in our state courts when the Highway Patrol was never named as a party in the original federal complaint.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 137 N.C. App. 430, 528 S.E.2d 911 (2000), affirming in part and reversing in part an order entered by Eagles, J., on 15 February 1999 in Superior Court, Guilford County. Heard in the Supreme Court 12 March 2001.

McSurely & Osment, by Alan McSurely and Ashley Osment, for plaintiff-appellees.

Roy A. Cooper, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Patricia A. Duffy, Assistant Attorney General, for defendant-appellants Richard Stephenson and the North Carolina State Highway Patrol.

Patterson, Harkavy & Lawrence, L.L.P., by Martha A. Geer, on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

American Civil Liberties Union of North Carolina Legal Foundation, by Seth H. Jaffe, amicus curiae.

ORR, Justice.

On 30 August 1993, Kenneth Fennell was shot and killed by North Carolina State Trooper R.L. Stephenson during a traffic stop. In particular, the evidence tended to show that Mr. Fennell, an African-American male in his early twenties, was driving on Interstate 85 in Guilford County when he was pulled over by Defendant, who was working in "drug interdiction" efforts on the Interstate in Guilford County. Sometime after issuing Mr. Fennell a traffic citation for driving without a license, an altercation between the two ensued, quickly escalated and ultimately culminated in Mr. Fennell being shot numerous times. He died on the scene. In May of 1994, the Guilford County district attorney announced that his investigation had led him to conclude that "the homicide of . . . Fennell was justified."

Mr. Fennell's parents initially brought a lawsuit on 25 August 1995 on their own behalf and as coadministrators of the estate of Kenneth B. Fennell in United States District Court against "R. L. STEPHENSON, in his personal capacity; GORDON B. ARNOLD, in his

personal capacity; and OTHER UNKNOWN STATE OFFICIALS, in their personal capacities." Included in this complaint were causes of action alleging violations of the plaintiff Kenneth Fennell's constitutional rights under the United States and North Carolina Constitutions, a conspiracy to deprive and cover up deprivation of constitutional rights, and a wrongful death claim.

In an order signed 29 July 1997, United States District Judge William Osteen granted defendants' summary judgment motion on all of plaintiffs' federal claims. The grounds stated in the memorandum opinion by Judge Osteen entered contemporaneously with his order included:

> As a result of Plaintiffs' failure to file a timely response to Stephenson's Motion for Summary Judgment, the court must accept the uncontested facts as stated in Stephenson's motion. The facts do not establish a genuine issue of material fact as to either of the two elements which Plaintiffs have the burden of establishing to defeat Stephenson's motion.

Having disposed of plaintiffs' federal claims, Judge Osteen declined to "exercise supplemental jurisdiction over plaintiffs' pending state claims for wrongful death pursuant to Chapter 28 of the North Carolina General Statutes, common law civil conspiracy, and claims for deprivation of equal protection brought under the North Carolina Constitution." Those claims were dismissed without prejudice pending their timely refiling in a proper state forum.

Plaintiffs then appealed the summary judgment ruling by Judge Osteen and on 21 July 1998, the United States Court of Appeals for the Fourth Circuit unanimously affirmed the order dismissing plaintiffs' federal claims. *Estate of Fennell v. Stephenson*, 155 F.3d 558 (4th Cir. 1998) (per curiam). Three days after the Fourth Circuit ruling, a new complaint (the "state complaint") was filed in Superior Court in Guilford County by Anne B. Fennell and the Estate of Kenneth B. Fennell, by and through its administrator, Anne B. Fennell. The named defendants in this complaint were: "RICHARD L. STEPHENSON, in his personal and official capacity, and OTHER UNKNOWN STATE EMPLOYEES in their personal and official capacities."

On 24 September 1998, plaintiffs filed an amended complaint (the "amended state complaint") in which the new caption reflected the

following defendants: "RICHARD L. STEPHENSON, in his personal and official capacity; THE NORTH CAROLINA STATE HIGHWAY PATROL; and OTHER UNKNOWN STATE HIGHWAY PATROL EMPLOYEES in their personal and official capacities." In both the original state complaint and the amended state complaint, plaintiffs alleged violations of Kenneth Fennell's rights under the North Carolina Constitution, a conspiracy to deprive and cover up deprivation of constitutional rights, conspiracy to deprive the victim of a crime and his family rights under the North Carolina Constitution, and a wrongful death claim.

On 12 February 1999, the trial court granted defendant Stephenson's motion to dismiss, stating:

> **THIS CAUSE** was heard by the undersigned judge at the February 1, 1999 Session of Superior Court on motion of defendant Stephenson to dismiss the plaintiff's complaint on the basis of the statute of limitations, failure to state a claim, and collateral estoppel, the court finds and concludes that Claims I, II and III of the plaintiff's complaint are barred by the statutes of limitation. In the alternative, that Claims I and II fail to state a claim for which relief can be granted against defendant Stephenson. Claim III for wrongful death is barred by the doctrine of collateral estoppel based upon the judgment of the United States District Court for the Middle District of North Carolina, The Estate of Fennell v. Stephenson, 2:95 CV 00795.
>
> It is therefore **ORDERED** that the plaintiff's complaint against defendant Stephenson be dismissed.

On the same day, the trial court also entered an order granting the North Carolina State Highway Patrol's motion to dismiss, stating:

> **THIS CAUSE** coming on to be heard and being heard by the undersigned judge presiding at the February 1, 1999 Session of Superior Court on the motion of the North Carolina State Highway Patrol to dismiss on the basis of sovereign immunity. This court finds and concludes that the claims against the North Carolina State Highway Patrol are barred by the doctrine of sovereign immunity.
>
> It is therefore ORDERED that plaintiff's complaint against the North Carolina State Highway Patrol be dismissed.

Plaintiffs appealed the trial court's orders to the North Carolina Court of Appeals, arguing four issues. In an opinion filed 18 April 2000, the Court of Appeals affirmed the orders of the trial court in part and reversed in part. In all, there were only two issues upon which plaintiffs prevailed in the Court of Appeals opinion: (1) the statutes of limitation for their state claims against defendant Stephenson were tolled pending appeal to the Fourth Circuit, and thus plaintiffs had thirty days (from the date of the Fourth Circuit opinion) to timely file their complaint in state court; and (2) their constitutional claim against the North Carolina State Highway Patrol was not barred by the doctrine of sovereign immunity.

In part I of the Court of Appeals' opinion, the court determined that "[b]ecause the period of limitations for Plaintiffs' claims was tolled for thirty days subsequent to the 21 July 1998 decision, Plaintiffs' claims, which were filed three days after the federal court of appeals decision, were timely filed." *Estate of Fennell*, 137 N.C. App. at 435, 528 S.E.2d at 914. However, in part III, the Court of Appeals also concluded that: (1) all the constitutional claims against defendant Stephenson *in his personal capacity* were properly dismissed; and (2) all the constitutional claims against defendant Stephenson *in his official capacity* were properly dismissed except one—the claim for unconstitutional detention. *Id.* at 437, 528 S.E.2d at 915. Moreover, in part IV, the Court of Appeals affirmed the trial court's dismissal of plaintiffs' wrongful death claim against defendant Stephenson. *Id.* at 440, 528 S.E.2d at 917.

A summary of the Court of Appeals decision reveals that plaintiffs were afforded the chance to pursue but one claim, unconstitutional detention, against defendant Stephenson, while acting in his official capacity. The decision also permitted plaintiffs to pursue an equal protection claim against a second defendant, the State Highway Patrol.

Thus, having lost on all issues but the aforementioned two, plaintiffs could have pursued any of the following options: (1) give notice of appeal to this Court where appropriate; (2) file a petition for discretionary review; or (3) in response to defendants' petition for discretionary review, bring forward additional issues for this Court's consideration pursuant to Rule 15(d) of the North Carolina Rules of Appellate Procedure. Plaintiffs have done none of the above. Therefore, this Court's review of the Court of Appeals decision is limited to the issues raised by defendants' petition for discretionary

review, made pursuant to N.C.G.S. § 7A-31. Although defendants raise a variety of far-reaching issues in their petition, we confine our analysis to those holdings adverse to defendants' interests—in sum, the two issues upon which plaintiffs prevailed. For the reasons outlined below, we hold that the statute of limitations serves as a bar to both the claim against defendant Stephenson and the claim against defendant State Highway Patrol. As a consequence of so holding, none of plaintiffs' state claims survive.

[1] We turn first to the claim that Trooper Stephenson, while acting in his official capacity, unconstitutionally "detained or seized . . . Kenneth Fennell." Assuming, without deciding, that this claim was properly defined by the Court of Appeals, we note that the lower court did not address whether plaintiffs named Trooper Stephenson as a party in his official capacity within the period of the applicable statute of limitations. As a matter of law, we hold that plaintiffs did not.

In North Carolina, it is well-established law that if a plaintiff does not name the party responsible for his alleged injury before the statute of limitations runs, his claim will be dismissed. *See, e.g., Crossman v. Moore*, 341 N.C. 185, 459 S.E.2d 715 (1995). The statute of limitations for plaintiff's alleged claim of unconstitutional detention is three years, as defined in N.C.G.S. § 1-52(13). *See Fowler v. Valencourt*, 334 N.C. 345, 350, 435 S.E.2d 530, 533 (1993) ("N.C.G.S. § 1-52(13) deals expressly with claims arising out of assault, battery, and false imprisonment by a public officer acting under color of his office . . . ."). The alleged claim at issue is premised on events that occurred on 30 August 1993, the day Trooper Stephenson stopped and killed Mr. Fennell, and that is when any applicable statutes of limitation began to run. *See Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 214, 171 S.E.2d 873, 884 (1970) (holding that a statute of limitation begins to run when the plaintiff's right to maintain an action for the wrong accrues). Plaintiffs, therefore, were required to file their state constitutional claims against the proper parties within three years of that date, a deadline they failed to meet.

Plaintiffs did file the federal complaint on 25 August 1995, which stated clearly that the plaintiffs sued Officer Stephenson and other state officials in their personal capacities *and only in* their personal capacities. It read:

THE ESTATE OF KENNETH B. FENNELL, by and through its co-administrators, Norwood F. Fennell, and Annie B. Fennell,

Plaintiffs,

v.

R.L. STEPHENSON, in his *personal capacity*; GORDON B. ARNOLD, in his *personal capacity*; and OTHER UNKNOWN STATE OFFICIALS, in their *personal capacities*;

Defendants.

(Emphasis added.)

Long-standing North Carolina law has established that law enforcement officers such as Trooper Stephenson are state officers. *See Isenhour v. Hutto*, 350 N.C. 601, 517 S.E.2d 121 (1999) ("[t]his Court has previously recognized that police officers are public officials" [and not] "public employees"); *see also State v. Hord*, 264 N.C. 149, 155, 141 S.E.2d 241, 245 (1965) (holding that police officers are considered state officers). This Court has also clearly stated that when a plaintiff sues a state officer for violating the North Carolina Constitution, he must sue the officer in his official capacity. "In light of the purpose and language of the [North Carolina] Constitution, plaintiff cannot rely on the Constitution to support a claim for money damages against individuals, acting in their personal capacities . . . . [I]t is the state officials, acting in their official capacities, that are obligated to conduct themselves in accordance with the Constitution. Therefore, plaintiff may assert his [constitutional rights] only against state officials, sued in their official capacity." *Corum v. University of N.C.*, 330 N.C. 761, 788, 413 S.E.2d 276, 293, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992).

The *Corum* rule is not merely a pleading convention; there is a real difference in choosing between capacities. *See Meyer v. Walls*, 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997) (holding that "[a] suit against a defendant in his individual capacity means that the plaintiff seeks recovery from the defendant directly; a suit against a defendant in his official capacity means that the plaintiff seeks recovery from the entity of which the public servant defendant is an agent"). Thus, when a plaintiff seeks recovery from the state for state constitutional violations, and when he does so by suing a state officer, he must name the state officer in his official capacity. Naming the officer in his personal capacity is simply not enough.

Plaintiffs in this action for the first time sought recovery from the state by suing Trooper Stephenson, in his official capacity, and the State Highway Patrol, for violations of their son's rights under the North Carolina Constitution. Their counsel filed a lawsuit alleging the violation of Kenneth Fennell's constitutional right to be free of unreasonable detention. As discussed above, any claim asserting the deprivation of such a right can be enforced only against state officials who are acting in their official capacity. *Corum*, 330 N.C. at 788, 413 S.E.2d at 293. Thus, if plaintiffs and their counsel intended to sue Trooper Stephenson for violating Kenneth Fennell's constitutional rights, they needed to sue him in his official capacity. *Id.* Plaintiffs failed, however, to name Trooper Stephenson in his official capacity until the state complaint on 24 July 1998, almost five years after the cause of action accrued, and almost two years *after* the statute of limitations had expired. Thus, their constitutional claim for unreasonable detention against Trooper Stephenson in his official capacity is barred by the statute of limitations.

[2] Defendants next argue that the Court of Appeals erred when it reversed the trial court's finding that sovereign immunity precluded plaintiffs' constitutional claim against the State Highway Patrol. While we agree with defendants' contention that the trial court's dismissal was correct, we do so on different grounds. In our view, dismissal was proper because, as defendants pointed out in paragraph number 3 of their 16 November 1998 motion to dismiss, the claim was filed well beyond the expiration of the applicable statute of limitations.

Assuming without deciding that the Court of Appeals correctly concluded that sovereign immunity cannot serve as a shield against alleged deprivations of constitutional rights, *see id.* at 786, 413 S.E.2d at 292 ("when there is a clash between . . . constitutional rights and sovereign immunity, the constitutional rights must prevail"), plaintiffs nevertheless failed to name the State Highway Patrol as a party to their lawsuit until the amended state complaint on 24 September 1998. Thus, the complaint was filed more than five years after Mr. Fennell was stopped and killed, more than two years after the statute of limitations expired on any constitutional claims, and over three years after the statute of limitations had passed for wrongful-death actions. Moreover, despite the contentions of plaintiffs' counsel, the addition of the State Highway Patrol in the amended state complaint does not relate back to the original state complaint. This Court has directly and explicitly stated that while Rule 15 of the

North Carolina Rules of Civil Procedure permits the relation-back doctrine to extend periods for pursuing claims, it does not apply to parties. *Crossman*, 341 N.C. at 187-88, 459 S.E.2d at 717. Furthermore, even if the naming of the North Carolina State Highway Patrol as a party did somehow relate back to the original state complaint, the addition would not rectify the fact that the original state complaint was not filed until 24 July 1998, nearly five years after Mr. Fennell was killed and *almost two years after* the statute of limitations for the claim had expired.

We additionally note that while plaintiffs had originally filed their claims in federal court within the statute of limitations period, such timely filing has no effect on their claim against the Highway Patrol in our state courts. Although 28 U.S.C. § 1367(d) provides that "[t]he period of limitations for any claim [over which a federal court has supplemental jurisdiction] that is voluntarily dismissed . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed," the statute *does not toll claims against parties not named in the federal lawsuit.* Thus, 28 U.S.C. § 1367(d) did not toll claims against the Highway Patrol, which was never named as a party in the original federal complaint.

In sum, for the aforementioned reasons, we reverse the Court of Appeals on the two issues presented, thereby reinstating the trial court's order dismissing all claims against Trooper Stephenson and the Highway Patrol. We also hold that we improvidently allowed discretionary review on any additional issues not specifically addressed in this opinion.

REVERSED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

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

PIEDMONT TRIAD AIRPORT AUTHORITY v. KENT W. URBINE, ANTHONY J. LOSITO, TRUSTEE, THE MONEY STORE/NORTH CAROLINA, INC., S.C. JACKSON, TRUSTEE, AND COMMERCIAL CREDIT LOANS, INC.

No. 367PA00

(Filed 9 November 2001)

1. Eminent Domain— taking by airport authority—standard of review

The appropriate standard of review for a taking of land under N.C.G.S. § 40A-47 by an airport authority was de novo.

2. Eminent Domain— public purpose and public use—distinguished

Although the terms "public purpose" and "public use" have been used almost synonymously, there is a distinction; the term "public purpose" pertains to governmental expenditures of tax monies, while the term "public use" pertains to the exercise of eminent domain.

3. Eminent Domain— taking by airport authority for Federal Express—public use

A taking of land by an airport authority for the exclusive use of Federal Express was for a public use under the two prong test of *Maready v. Winston-Salem*, 342 N.C. 708, where the airport authority's master plan called for the acquisition of the property from as early as 1990, with the 1994 master plan stating that the purpose was the future expansion and development of cargo facilities, showing a reasonable connection with the convenience and necessity of the particular municipality; and the activity benefits the public generally rather than special interests in that Federal Express will be a tenant rather than an owner of the property and the condemnation will advance the goal of better seaports and airports expressed in a recent constitutional amendment. However, not all actions purporting to be taken under N.C. Const. art. V, § 13(1)(a) would necessarily be for a public purpose or public use.

4. Constitutional Law— Commerce Clause—not a defense to condemnation

The Commerce Clause is not a sustainable defense to the condemnation of real property.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of an order entered on 20 April 2000 by DeRamus, J., in Superior Court, Guilford County. Heard in the Supreme Court 14 March 2001.

Smith Helms Mulliss & Moore, L.L.P., by James G. Exum, Jr., Bruce P. Ashley, and Michael C. Mascia; and Cooke & Cooke, L.L.P., by William O. Cooke, Jr., for plaintiff-appellee.

Law Offices of William F. Maready, by William F. Maready and Celie B. Richardson, for defendant-appellant Kent Urbine.

Office of the City Attorney, Rebecca K. Cheney, Assistant City Attorney, on behalf of City of Charlotte; and Moore & Van Allen, PLLC, by James M. Tatum and James W. Dymond, on behalf of Raleigh-Durham Airport Authority, amici curiae.

BUTTERFIELD, Justice.

The Piedmont Triad Airport Authority (PTAA), located in Guilford County, instituted a condemnation action on 14 December 1998 to acquire 2.326 acres of land owned in fee simple by Kent W. Urbine, subject to liens held by the other named defendants. In his answer to PTAA's complaint, defendant challenged PTAA's assertion that the condemnation is for a public purpose. On appeal, defendant specifically alleges that his property is being condemned for the exclusive use of Federal Express Corporation (Federal Express), a current tenant of PTAA.

Pursuant to N.C.G.S. § 40A-47, a hearing was held at the 20 March 2000 Civil Session of Superior Court, Guilford County, to determine issues other than compensation. On 20 April 2000, the trial court entered an order in which it ruled that plaintiff had the authority to condemn the property, ruled that the taking was for a public purpose and use, determined all issues other than that of just compensation in favor of plaintiff, vested plaintiff with fee simple title to the property, granted plaintiff the right to immediate possession of the property, and dismissed defendant Urbine's counterclaim with prejudice. On 20 December 2000, this Court granted defendant-appellant Kent Urbine's petition for discretionary review prior to a determination by the Court of Appeals.

Defendant presents three questions for this Court's consideration: first, whether the trial court committed reversible error in ruling that the condemnation of defendant's property was for a public

purpose and, thus, not violative of Article V, Section 2(1) of the Constitution of North Carolina; second, whether the trial court committed reversible error in ruling that the economic incentives proposed to Federal Express were immaterial to this action and provided no defense to the condemnation; and third, whether the trial court committed reversible error in ruling that the condemnation was authorized by PTAA's charter.

Defendant focuses his first arguments upon the public purpose clause of Article V, Section 2(1) of the Constitution of North Carolina, which provides that "[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away." N.C. Const. art. V, § 2(1). Defendant argues that PTAA's exercise of eminent domain here is not for a public purpose and is, therefore, unconstitutional.

[1] In the recent condemnation case of *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 543 S.E.2d 844 (2001), we established that *de novo* review is the appropriate standard of review for a hearing pursuant to N.C.G.S. § 40A-7(a). In that case, we stated the following:

> It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated. *See, e.g., State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 674-75 (2000) (whether to grant a motion to continue is in the trial court's discretion; however, when a constitutional question is implicated, de novo review is appropriate); *see also Ornelas v. United States*, 517 U.S. 690, 696-97, 134 L. Ed. 2d 911, 918-19 (1996) (in reviewing constitutional standards that are not "finely-tuned," de novo review is necessary for appellate courts to maintain control of and clarify the legal principles, to "unify precedent," and to provide a defined set of rules).

Piedmont Triad Reg'l Water Auth., 353 N.C. at 348, 543 S.E.2d at 848. In *Piedmont Triad Reg'l Water Auth.*, this Court examined a taking under N.C.G.S. § 40A-7(a) where the condemnor sought to condemn an entire tract of land that included a 97-acre portion acquired in excess of the public use. In the instant case, we are examining similar constitutional questions and pertinent statutes that call upon us to be "mindful of our duty to construe the statute[s], if possible, in a constitutional fashion." *Id.* Therefore, we hold that *de novo* review is the appropriate standard of review applicable to the case *sub judice.*

[2] We must clarify two terms that have recently been treated almost synonymously. There remains a distinction between the terms "public purpose" and "public use." Although the analysis in determining both is often similar, the term "public purpose" pertains to governmental expenditures of tax monies, while the term "public use" pertains to the exercise of eminent domain. This Court noted the distinction in *City of Charlotte v. Heath*, 226 N.C. 750, 40 S.E.2d 600 (1946), by stating, "[I]n any proceeding for condemnation under the power of eminent domain, what is a public purpose, or, more properly speaking, a public use, is one for the Court." *Id.* at 754, 40 S.E.2d at 604. Here, we will apply the term "public use" in its relation to the exercise of eminent domain. However, we cannot escape some mentioning of the related term "public purpose" as we refer to prior holdings. These holdings remain pertinent in the application of the public purpose clause of Article V, Section 2(1).

[3] Defendant correctly notes that the power of eminent domain can be used to condemn private property only if it is for a public use. *Piedmont Triad Reg'l Water Auth.*, 353 N.C. at 346, 543 S.E.2d at 847. As we stated in *Maready v. City of Winston-Salem*, 342 N.C. 708, 720, 467 S.E.2d 615, 623 (1996), "[t]his Court is no stranger to the question of what activities are and are not a public purpose." Nonetheless, as Justice (later Chief Justice) Sharpe wrote in *Mitchell v. N.C. Indus. Dev. Fin. Auth.*, 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968), "[a] slide-rule definition to determine public purpose for all time cannot be formulated." Our recent holdings in *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989), and *Maready* have employed a two-prong analysis to aid the determination of public purpose in each case before us. Relying on *Madison Cablevision*, this Court in *Maready* stated, " '[t]wo guiding principles have been established for determining that a particular undertaking by a municipality is for a public purpose: (1) it involves a reasonable connection with the convenience and necessity of the particular municipality; and (2) the activity benefits the public generally, as opposed to special interests or persons.' " *Maready*, 342 N.C. at 722, 467 S.E.2d at 624 (quoting *Madison Cablevision*, 325 N.C. at 646, 386 S.E.2d at 207 (citations omitted)). This analysis is equally applicable in determining what is and what is not a public use. We will apply the same two-prong analysis to the instant case.

Under the first prong of the analysis, the taking must have " 'a reasonable connection with the convenience and necessity of the particular municipality' "—here, an airport authority. *Id.* (quoting

Madison Cablevision, 325 N.C. at 646, 386 S.E.2d at 207). PTAA's master plan has called for the acquisition of defendant's property from as early as 1990. A revised master plan in 1994 also called for the property's acquisition. The purpose, under the 1994 master plan, of acquiring defendant's property was the future expansion and development of cargo facilities. The convenience and necessity of having an air-cargo facility adjacent to existing airport runways and facilities is undisputed. The obvious nature of PTAA's designs for expansion and improvement of the airport satisfies the first prong of our analysis.

The second prong of our analysis requires us to determine whether " 'the activity benefits the public generally, as opposed to special interests or persons.' " *Id.* (quoting *Madison Cablevision*, 325 N.C. at 646, 386 S.E.2d at 207). PTAA was created under N.C.G.S. § 63-4, which allows municipalities to join together in establishing airports. N.C.G.S. § 63-4 (1999) (this statute was enacted in 1929 and has not been amended since its enactment). PTAA's supplementary enabling legislation, or charter, provides that "[a]ny lands acquired, owned, controlled or occupied by the said Airport Authority shall, and are hereby declared to be acquired, owned, controlled and occupied for a public purpose" and expressly authorizes the use of eminent domain. Act of June 6, 1980, ch. 1078, sec. 3(g)-(h), 1979 N.C. Sess. Laws (2d Sess. 1980) 1, 4. In a case dealing with the same airport authority at issue here, although then named differently, we stated the following:

> The public statute, G.S.[] 63-4, permitting the three municipalities concerned to act jointly is not repealed or modified, or its authority in any way affected by the supplementary acts under which the purpose and policy of the public statute are carried out in the creation of a single Airport Authority to serve all three municipalities—obviously the only way in which it could be done.

Greensboro-High Point Airport Auth. v. Johnson, 226 N.C. 1, 10, 36 S.E.2d 803, 810 (1946). The *Greensboro-High Point* holding that N.C.G.S. § 63-4 and the airport authority's charter operate in tandem is significant for the purposes of N.C.G.S. § 63-5, which provides as follows:

> Any lands acquired, owned, controlled, or occupied by such cities, towns, and/or counties, for the purposes enumerated in G.S. 63-2, 63-3 and 63-4 [permitting municipalities to join together in establishing airports], shall and are hereby declared to be

> acquired, owned, controlled and occupied for a public purpose, and such cities, towns and/or counties shall have the right to acquire property for such purpose or purposes under the power of eminent domain as and for a public purpose.

N.C.G.S. § 63-5 (1999).

Any determination of what is a public use must rest upon the notions of the types of activities in which governmental bodies are to be engaged. Significantly, we must take notice of declarations expressed by the people of this state when they amend their constitution. We note that a recent amendment bears directly on the issues raised in the present action. The ratified amendment to Article V of the Constitution of North Carolina reads, in pertinent part:

> **Sec. 13. Seaport and airport facilities.**
>
> (1) Notwithstanding any other provision of this Constitution, the General Assembly may enact general laws to grant to the State, counties, municipalities, and other State and local governmental entities all powers useful in connection with the development of new and existing seaports and airports, and to authorize such public bodies:
>
> (a) to acquire, construct, own, own jointly with public and private parties, lease as lessee, mortgage, sell, lease as lessor, or otherwise dispose of lands and facilities and improvements, including undivided interest therein[.]

N.C. Const. art. V, § 13(1)(a). This provision of the Constitution of North Carolina expresses the clear public sentiment that the governmental entities named within Article V, Section 13(1) should be engaged in developing and improving airports. However, we believe that not all actions purporting to be taken under the provision would necessarily be for a public purpose or for a public use.

Article V, Section 13(1) starts by stating, "Notwithstanding any other provision of this Constitution." *Id.* We read this language to supersede any other provision of the Constitution that may be in conflict with the provisions of Article V, Section 13(1)(a). We must, therefore, determine whether Article V, Section 2(1) is in conflict with Article V, Section 13(1)(a). We do not believe that it is.

Article V, Section 2(1) does not conflict with Article V, Section 13(1)(a) in such a manner that the airport and seaport facilities pro-

vision cannot be implemented as envisioned by the people of this state. In *Lacy v. Fidelity Bank of Durham*, 183 N.C. 373, 111 S.E. 612 (1922), this Court stated that "a constitution shall be construed on broad and liberal lines[] and so as to give effect to the intention of the people who have adopted it" and that a constitution "should be considered as a whole and construed to allow significance to each and every part of it, if this can be done by any fair and reasonable intendment." *Id.* at 380, 111 S.E. 615. The public purpose clause of Article V, Section 2(1) acts in concert with Article V, Section 13(1)(a). All endeavors pursuant to Article V, Section 13(1)(a) can be fully realized insofar as they are for a public purpose or a public use. Article V, Section 2(1) does not act as a prohibition against developing and improving airports and seaports under Article V, Section 13(1)(a). Rather, Article V, Section 2(1) acts as a qualifier upon such undertakings.

Reading the Constitution of North Carolina as a whole and giving significance to each part, we believe that the people did not intend to abrogate the public purpose doctrine upon the adoption of Article V, Section 13. Article V, Section 2(1) and Article V, Section 13 operate concurrently. To hold otherwise would create a *per se* presumption of public purpose and public use under Article V, Section 13 for any and all undertakings. This would be inconsistent with this Court's holdings that public purpose and public use cases are to be decided on a case-by-case basis. *See, e.g.*, *Maready*, 342 N.C. at 716, 467 S.E.2d at 620.

The significance of Article V, Section 13 under the second prong of our analysis is the clear desire of the people for governmental involvement in the development and improvement of airports and seaports. While the legislative declarations of public purpose and the people's desire under Article V, Section 13 influence our determination, we must still examine the particular use for defendant's property.

We are aware that the timing of the events surrounding this condemnation proceeding point to an inference that the property is being acquired to prepare for the accommodation of an expanded Federal Express facility. Our review of the facts leads us to the conclusion, consistent with that of the trial court, that the condemnation proceeding arises from PTAA's long-range plan to develop air-cargo facilities as called for in the master plan. While the overtures from Federal Express may have hastened the timing of this development, they are not the genesis of PTAA's actions.

Defendant contends that the property subject to the taking will be for the exclusive use and benefit of Federal Express, thereby making PTAA's actions a condemnation for a private rather than public use. The record reveals that Federal Express, which currently rents space at the airport, will pay for the cost of the facility's construction and will then pay rent to PTAA while a tenant. This is not an uncommon arrangement for PTAA and its tenants. Federal Express will not become the owner of defendant's property. If the facility is built, Federal Express will continue to be a tenant of PTAA, except that Federal Express will be in a larger facility that it will help construct. We believe that the concepts of improvement and development envision the physical expansion of such facilities. This is consistent with the public desire under Article V, Section 13, to improve existing airports. The arrangement advances the primary goal of giving effect to the people's general desire for better seaports and airports. As such, the greater benefits flow to the people, as they have constitutionally directed, with their understanding that there will be incidental benefits to private companies involved. Under these facts, the legislative declarations of public purpose, and the constitutional directives of the people, we are persuaded that both prongs of our analysis are satisfied.

Defendant also alleges that the taking violates the Fifth Amendment to the United States Constitution but makes no argument further on this point. Therefore, we deem this contention to be abandoned. N.C. R. App. P. 28(b)(5).

For the reasons above, we believe that PTAA's condemnation of defendant's property pursuant to PTAA's master plan is for a public use and does not violate Article V, Section 2(1) of the Constitution of North Carolina. Therefore, we hold that the trial court did not err in its ruling that the taking was for a public use and was not violative of Article V, Section 2(1), and we overrule this assignment of error.

[4] Defendant next challenges this condemnation proceeding by alleging that PTAA offered Federal Express numerous unconstitutional incentives to build its air cargo hub at the airport. Defendant classifies the condemnation as one of the incentives. Specifically, defendant contends that the proposed incentives violate Article I, Section 8, Clause 3[1] (the Commerce Clause) of the United States

1. In his brief, defendant referred to Article I, Section 8, Clause 2 but quoted the language of Clause 3. It is clear from the context, however, that defendant meant to refer to Clause 3.

Constitution; the Fourteenth Amendment to the United States Constitution; and Article V, Section 2(1) of the Constitution of North Carolina. Defendant cites no authority in support of his Article V, Section 2(1) or Fourteenth Amendment arguments. Therefore, we deem them to be abandoned. N.C. R. App. P. 28(b)(5).

The only portion of this issue properly before this Court is the condemnation of defendant's property. Defendant's challenge to the "package" of economic incentives, apart from the use of eminent domain, pertains to offers by entities not parties to this action and is outside the scope of our review. Thus, the only remaining question presented in this issue is whether the Commerce Clause is a sustainable defense to the condemnation proceeding. The dormant, or negative, Commerce Clause is awakened only when Congress has not acted "to regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. We find no case law that supports the proposition that the Commerce Clause is a sustainable defense to the condemnation of real property. This assignment of error is overruled.

Lastly, defendant maintains that PTAA's charter does not authorize PTAA's condemnation of defendant's property and subsequent development and leasing of the property. For the reasons previously stated elsewhere in this opinion, we find this assignment of error without merit.

Accordingly, we affirm the order of the trial court.

AFFIRMED.

WAYNE AUSTIN, EMPLOYEE v. CONTINENTAL GENERAL TIRE, SELF-INSURED, EMPLOYER

No. 73A01

(Filed 9 November 2001)

Workers' Compensation— asbestosis—statutory compensation—removal from employment

The decision of the Court of Appeals in a workers' compensation asbestosis case is reversed for the reasons stated in the dissenting opinion in the Court of Appeals that an employee must be "removed" from his employment as a prerequisite to receiving

the 104 weeks of compensation provided by N.C.G.S. § 97-61.5, that an employee who is no longer employed at the time he is diagnosed with asbestosis thus may not proceed with a workers' compensation claim under this statute, and that N.C.G.S. § 97-64 provides plaintiff's sole remedy for his alleged asbestos-related disorder.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 141 N.C. App. 397, 540 S.E.2d 824 (2000), affirming an opinion and award entered by the North Carolina Industrial Commission on 18 December 1998. Heard in the Supreme Court 18 October 2001.

Wallace and Graham, P.A., by Mona Lisa Wallace and Richard L. Huffman, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by J.A. Gardner, III, and Jeff Kadis, for defendant-appellant.

Parker, Poe, Adams & Bernstein, L.L.P., by Josephine H. Hicks and Anna L. Baird, on behalf of North Carolina Citizens for Business and Industry, amicus curiae.

The Jernigan Law Firm, by Leonard T. Jernigan, Jr., on behalf of Workplace Injury Litigation Group, Inc., amicus curiae.

Johnston, Allison & Hord, PA, by James W. Allison, on behalf of Carolinas AGC, Inc., amicus curiae.

Teague, Campbell, Dennis & Gorham, L.L.P., by Thomas M. Clare and Tracey L. Jones, on behalf of N.C. Association of Defense Attorneys, amicus curiae.

PER CURIAM.

For the reasons stated in the dissenting opinion by Judge Greene, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the North Carolina Industrial Commission for proceedings not inconsistent with this opinion and Judge Greene's dissent below.

REVERSED AND REMANDED.

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

HOWARD, STALLINGS, FROM & HUTSON, P.A. v. FRANK DOUGLAS

No. 223A01

(Filed 9 November 2001)

Judgments— default judgment—letter by counsel—not appearance

The decision of the Court of Appeals in an action to recover legal fees is reversed for the reason stated in the dissenting opinion in the Court of Appeals that a letter sent by defendant's attorney to plaintiff's attorney after the complaint was filed but before service of the complaint was not an appearance which required three days' notice to defendant before default judgment could be entered against him.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 143 N.C. App. 122, 545 S.E.2d 470 (2001), reversing and remanding an order entered 2 March 2000 by Gessner, J., in District Court, Wake County. Heard in the Supreme Court 17 October 2001.

Howard, Stallings, From & Hutson, P.A., by E. Cader Howard, John N. Hutson, Jr., and Colleen M. Crowley, for plaintiff-appellant.

Rudolph Maher Widenhouse & Fialko, by Thomas K. Maher, for defendant-appellee.

PER CURIAM.

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

REVERSED.

ROY E. BAGGETT AND PATRICIA BAGGETT, INDIVIDUALLY AND D/B/A BOUTIQUE HOUSE-PORT OF SWANSBORO v. SUMMERLIN INSURANCE AND REALTY, INC., CHARLES W. SUMMERLIN, AND CHARLES W. SUMMERLIN, JR., D/B/A SUMMERLIN INSURANCE CENTER AND CHARLES W. SUMMERLIN, JR.

No. 248A01

(Filed 9 November 2001)

Insurance— flood coverage—agent's failure to procure—summary judgment for defendants

A decision of the Court of Appeals holding that the trial court erred by granting summary judgment for defendant insurance agent and defendant insurance agency in an action for negligent failure to obtain flood insurance for plaintiffs is reversed for the reasons stated in the dissenting opinion in the Court of Appeals that defendants satisfied their duty to procure an insurance policy with similar coverage to plaintiffs' existing all-risk policy which specifically excluded flood coverage and that plaintiffs were contributorily negligent in failing to read the policy obtained for them by defendants.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 143 N.C. App. 43, 545 S.E.2d 462 (2001), reversing and remanding an order for summary judgment entered 7 February 2000 by Cobb, J., in Superior Court, Onslow County. Heard in the Supreme Court 18 October 2001.

Ellis, Hooper, Warlick & Morgan, L.L.P., by John D. Warlick, Jr., for plaintiff-appellees.

Manning, Fulton & Skinner, P.A., by Michael T. Medford, for defendant-appellants.

Bailey & Dixon, L.L.P., by Gary S. Parsons and Dayatra T. King, on behalf of Nationwide Mutual Insurance Company, amicus curiae.

PER CURIAM.

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

REVERSED.

KEVIN E. HILL v. ROBERT L. HILL AND BOB HILL ENTERPRISES, INC.

No. 236A01

(Filed 9 November 2001)

Gifts— sufficient evidence of gift—malicious prosecution—abuse of process

The decision of the Court of Appeals in this case is reversed for the reasons stated in the dissenting opinion in the Court of Appeals that plaintiff's evidence was sufficient for the jury to find that defendant father gifted a business and all of its assets to plaintiff son and to support submission to the jury of plaintiff's claims for malicious prosecution and abuse of process; therefore, the case is remanded to the Court of Appeals for consideration of defendants' remaining assignments of error.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 142 N.C. App. 524, 545 S.E.2d 442 (2001), reversing a judgment entered 28 September 1999 and an amended judgment entered 12 November 1999 by Tilghman, J., in Superior Court, Carteret County. Heard in the Supreme Court 17 October 2001.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C.R. Wheatly, Jr., and Stevenson L. Weeks, for plaintiff-appellant.

Mason & Mason, P.A., by L. Patten Mason, and Ward and Smith, P.A., by Kenneth R. Wooten, for defendant-appellees.

PER CURIAM.

For the reasons stated in section one of the dissenting opinion by Judge Tyson, the decision of the Court of Appeals is reversed and this case is remanded to that court to address defendants' remaining assignments of error.

REVERSED AND REMANDED.

CHAPEL HILL CINEMAS, INC., A NORTH CAROLINA CORPORATION v. CECIL W. ROBBINS AND FAYE ELOISE ROBBINS

No. 337A01

(Filed 9 November 2001)

Landlord and Tenant— breach of lease—increased rental costs—mitigation of damages—jury question

The decision of the Court of Appeals in this action by plaintiff lessee to recover damages for defendant lessor's breach of a notification of sale and right of first refusal provision of a lease is reversed for the reasons stated in the dissenting opinion in the Court of Appeals that the trial court erred in granting a directed verdict in favor of plaintiff for $159,600 in damages for increased rental costs because the jury was entitled to determine whether plaintiff exercised reasonable diligence to mitigate its damages for increased rental payments, and that this issue was properly preserved for appellate review.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 143 N.C. App. 571, 547 S.E.2d 462 (2001), finding no error in part and ordering a new trial in part of an order granting directed verdict and a judgment entered 26 July 1999 by Mills, J., in Superior Court, Orange County. Heard in the Supreme Court 15 October 2001.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Reid L. Phillips and Jennifer T. Harrod, for plaintiff-appellees.

Eisele, Ashburn, Greene & Chapman, P.A., by Douglas G. Eisele; and Levine & Stewart, by John T. Stewart, for defendant-appellants.

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion of Judge Tyson.

REVERSED.

STATE OF NORTH CAROLINA v. KENDALL JERMAINE BARNETT

No. 64A01

(Filed 9 November 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 141 N.C. App. 378, 540 S.E.2d 423 (2000), finding no error in a judgment imposing a sentence of life imprisonment without parole entered by Caldwell, J., on 2 December 1998 in Superior Court, Gaston County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 18 October 2001.

Roy A. Cooper, Attorney General, by Anne M. Middleton, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Anne M. Gomez, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

AFFIRMED.

LINDA BURGESS, JOY CLEMENT, BONNIE EDDLEMAN, META FISHER, TERRY KESLER, TOMMY KNOX, GENE MOORE AND MARK SIDES v. MERLE RUDY BUSBY

No. 196PA01

(Filed 9 November 2001)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 142 N.C. App. 393, 544 S.E.2d 4 (2001), affirming in part and reversing and remanding in part an order entered 23 August 1999 by McHugh, J., in Superior Court, Rowan County. Heard in the Supreme Court 17 October 2001.

Donaldson & Black, P.A., by Arthur J. Donaldson and Rachel Scott Decker, for plaintiff-appellees.

Morris York Williams Surles & Barringer, LLP, by John H. Capitano and John P. Barringer, for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

WILLIAM DONALD BRITT v. GEORGE DOUGLAS HAYES

No. 115PA01

(Filed 9 November 2001)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 142 N.C. App. 190, 541 S.E.2d 761 (2001), reversing and remanding an order for summary judgment entered 7 April 1999 and an order denying plaintiff's motion for a new trial signed 3 May 1999 by Gore, J., in Superior Court, Bladen County. On 3 May 2001, the Supreme Court allowed plaintiff's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court 15 October 2001.

Hester, Grady, Hester & Payne, by H. Clifton Hester, for plaintiff-appellant and -appellee.

Anderson, Daniel & Coxe, by Bradley A. Coxe, for defendant-appellant and -appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. JAKIE HAMMONDS

No. 65A01

(Filed 9 November 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 141 N.C. App. 152, 541 S.E.2d 166 (2000), finding no error in a judgment imposing a sentence of life imprisonment entered by Hooks, J., on 10 March 1997 in Superior Court, Robeson County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 15 October 2001.

Roy A. Cooper, Attorney General, by Steven M. Arbogast, Special Deputy Attorney General, for the State.

Staples Hughes, Appellate Defender, by Janet Moore, Assistant Appellate Defender, for defendant-appellant.

American Civil Liberties Union of North Carolina Legal Foundation, Inc., by Seth H. Jaffe, amicus curiae.

PER CURIAM.

AFFIRMED.

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

STATE OF NORTH CAROLINA v. STEVEN MURRAY GROVER, SR.

No. 198A01

(Filed 9 November 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 142 N.C. App. 411, 543 S.E.2d 179 (2001), ordering a new trial of judgments entered 8 March 1999 by Spencer, J., in Superior Court, Granville County. Heard in the Supreme Court 18 October 2001.

Roy A. Cooper, Attorney General, by Celia Grasty Lata, Assistant Attorney General, for the State-appellant.

Thomas L. Currin for defendant-appellee.

PER CURIAM.

AFFIRMED.

DEMERY v. PERDUE FARMS, INC.

[354 N.C. 355 (2001)]

ERNESTINE DEMERY, EMPLOYEE v. PERDUE FARMS, INC., EMPLOYER; SELF-INSURED/CRAWFORD & COMPANY, SERVICING AGENT

No. 281A01

(Filed 9 November 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 143 N.C. App. 259, 545 S.E.2d 485 (2001), reversing an opinion and award entered by the North Carolina Industrial Commission on 19 November 1999. Heard in the Supreme Court 17 October 2001.

Daniel F. Read for plaintiff-appellant.

Haynsworth Baldwin Johnson & Greaves, LLC, by Brian M. Freedman and J. Mark Sampson, for defendant-appellee.

PER CURIAM.

AFFIRMED.

IN RE DULA

[354 N.C. 356 (2001)]

IN THE MATTER OF: MICAH STORM DULA, A MINOR CHILD

No. 266A01

(Filed 9 November 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 143 N.C. App. 16, 544 S.E.2d 591 (2001), reversing and remanding an order entered 10 January 2000 by Jones (Jonathan L.), J., in District Court, Caldwell County. Heard in the Supreme Court 16 October 2001.

Elizabeth M. Spillman for petitioner-appellee Caldwell County Department of Social Services.

Austen D. Jud for respondent-appellant Davida Dula.

PER CURIAM.

AFFIRMED.

THOMAS M. ROUSE, SANDY ROUSE, AND FEDERAL INSURANCE COMPANY v. WILLIAMS REALTY BUILDING COMPANY, INCORPORATED

No. 263A01

(Filed 9 November 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 143 N.C. App. 67, 544 S.E.2d 609 (2001), affirming an order for summary judgment entered 25 October 1999 by Stephens (Ronald L.), J., in Superior Court, Wake County. Heard in the Supreme Court 16 October 2001.

Everett Gaskins Hancock & Stevens, by E.D. Gaskins, Jr., and K. Matthew Vaughn, for cross-claim plaintiff-appellees Thomas and Sandy Rouse.

Brown, Crump, Vanore & Tierney, L.L.P., by Andrew A. Vanore, III, and Christopher G. Lewis, for cross-claim defendant-appellant Federal Insurance Company.

PER CURIAM.

AFFIRMED.

RICKY JOHNSON, EMPLOYEE v. LOWE'S COMPANIES, INC., EMPLOYER, SELF-INSURED (GAB ROBINS, SERVICING AGENT)

No. 286A01

(Filed 9 November 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 143 N.C. App. 348, 546 S.E.2d 616 (2001), affirming an opinion and award entered by the North Carolina Industrial Commission on 2 November 1999. Heard in the Supreme Court 18 October 2001.

Franklin Smith for plaintiff-appellant.

McElwee Firm, PLLC, by Karen Inscore McElwee, for defendant-appellees.

PER CURIAM.

AFFIRMED.

IN RE POPE

[354 N.C. 359 (2001)]

IN THE MATTER OF: EVA LEVONIA GRACE POPE, MINOR CHILD

No. 345A01

(Filed 9 November 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 144 N.C. App. 32, 547 S.E.2d 153 (2001), affirming a judgment signed 9 May 2000 by Brown (Shirley H.), J., in District Court, Buncombe County. Heard in the Supreme Court 16 October 2001.

Charlotte A. Wade for petitioner-appellee Buncombe County Department of Social Services.

Michael E. Casterline for respondent-appellant Rachel Pope.

Cindy Sellars, Guardian ad Litem, by Attorney Advocate Judy N. Rudolph, appellee.

PER CURIAM.

AFFIRMED.

BRIDGESTONE/FIRESTONE, INC. v.
OGDEN PLANT MAINT. CO. OF N.C.

No. 439A01

Case below: 144 N.C. App. 503

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 8 November 2001.

CAROLINA WATER SERV., INC. OF N.C. v.
TOWN OF PINE KNOLL SHORES

No. 431P00-2

Case below: 145 N.C. App. 686

Petition by plaintiff and intervenor for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

CHRISTOPHER v. CHERRY HOSP.

No. 524P01

Case below: 145 N.C. App. 427

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

COUNCILL v. TOWN OF BOONE BD. OF ADJUST.

No. 577P01

Case below: 146 N.C. App. 103

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

DOLLAR v. TOWN OF CARY

No. 584PA01

Case below: Court of Appeals (COAP01-740)

Motion by plaintiff for shortened response time by respondent allowed 18 October 2001. Motion by plaintiff for expedited consideration and determination allowed 18 October 2001. Petition by plaintiff for writ of certiorari to review the order of the North Carolina Court of Appeals is allowed 22 October 2001 for the limited purposes of (1) dissolving the writ of supersedeas issued by the Court of Appeals and (2) lifting the Court of Appeals' stay of the preliminary injunction entered by Judge Donald W. Stephens on 6 September 2001.

DURHAM VIDEO & NEWS, INC. v. DURHAM BD. OF ADJUST.

No. 486P01

Case below: 144 N.C. App. 236

Notice of appeal by plaintiff pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 8 November 2001. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

FISHER v. FISHER

No. 551P01

Case below: 145 N.C. App. 715

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

IN RE APPEAL OF OWENS

No. 406P01

Case below: 144 N.C. App. 349

Notice of appeal by petitioners pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 8 November 2001. Petition by petitioners for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

IN RE ECKARD

No. 415P01

Case below: 144 N.C. App. 187

Petition by Guardian ad Litem for discretionary review pursuant to G.S. 7A-31 allowed 8 November 2001 for the limited purpose of remanding this case to the North Carolina Court of Appeals for reconsideration in light of *In re Dula*, 354 N.C. 356, —— S.E. 2d —— (2001) and *In re Pope*, 354 N.C. 359, —— S.E. 2d —— (2001).

IN RE MILLER

No. 556P01

Case below: 145 N.C. App. 715

Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

IN RE STUMBO

No. 321A01

Case below: 143 N.C. App. 375

Notice of appeal by respondents (James and Mary Ann Stumbo) pursuant to G.S. 7A-30 (substantial constitutional question) retained by order of the Court 5 November 2001.

INTERSTATE GLASS, INC. v. CREATIVE ARCHITECTURE, P.A.

No. 400P01

Case below: 144 N.C. App. 448

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

KNIGHT v. ABBOTT LABS.

No. 399P01

Case below: 144 N.C. App. 448

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001. Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 November 2001. Conditional petition by defendants for discretionary review pursuant to G.S. 7A-31 dismissed as moot 8 November 2001.

LAKE MARY LTD. PART. v. JOHNSON

No. 555P01

Case below: 145 N.C. App. 525

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

LASSITER v. CECIL

No. 552P01

Case below: 145 N.C. App. 679

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

LIPE v. STARR DAVIS CO.

No. 152P01

Case below: 142 N.C. App. 213

Petition by defendant (Starr Davis Company) for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001. Motion by plaintiff to dismiss petition for discretionary review dismissed as moot 8 November 2001. Justice Edmunds recused.

MALLOY v. COOPER

No. 595PA01

Case below: 146 N.C. App. 66

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 8 November 2001.

MERRICK v. PETERSON

No. 392P01

Case below: 143 N.C. App. 656

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

MILON v. DUKE UNIV.

No. 549A01

Case below: 145 N.C. App. 609

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 8 November 2001. Conditional petition by defendants for discretionary review pursuant to G.S. 7A-31 dismissed as moot 8 November 2001.

MORRIS COMMUNICATIONS CORP. v. CITY OF ASHEVILLE

No. 558PA01

Case below: 145 N.C. App. 597

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 8 November 2001.

MUSCATELL v. MUSCATELL

No. 428P01

Case below: 145 N.C. App. 198

Petition by defendant (Rande J. Muscatell) for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

OCCANEECHI BAND OF THE SAPONI NATION v.
N.C. COMM'N OF INDIAN AFFAIRS

No. 527P01

Case below: 145 N.C. App. 649

Petition by defendant for writ of supersedeas denied 8 November 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001. Motion by defendant for temporary stay dissolved 8 November 2001.

REID v. TOWN OF MADISON

No. 459PA01

Case below: 145 N.C. App. 146

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 8 November 2001.

ROYAL v. HARTLE

No. 470P01

Case below: 145 N.C. App. 181

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 23 October 2001.

SESSLER v. MARSH

No. 463P01

Case below: 144 N.C. App. 623

Motion by defendant for temporary stay allowed 4 October 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001. Petition by defendant for writ of supersedeas denied and temporary stay dissolved 8 November 2001.

SHAMMA v. ALKHALDI

No. 590P01

Case below: 146 N.C. App. 447

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

SIGMA CONSTR. CO. v. GUILFORD CTY. BD. OF EDUC.

No. 347P01

Case below: 144 N.C. App. 376

Motion by plaintiff to amend petition for discretionary review denied 8 November 2001. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 dismissed as moot 8 November 2001.

STATE v. ALLEN

No. 398P01

Case below: 144 N.C. App. 386

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 8 November 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

STATE v. ALSTON

No. 452P01

Case below: 145 N.C. App. 204

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

STATE v. BAKER

No. 562A01

Case below: 146 N.C. App. 110

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 8 November 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

STATE v. CHAPMAN

No. 379P01

Case below: 143 N.C. App. 569

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 November 2001.

STATE v. DAVIS

No. 517P01

Case below: 145 N.C. App. 503

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

STATE v. DAVIS

No. 386P01

Case below: Yadkin County Superior Court

Motion by defendant pro se to grant an evidentiary hearing upon all factual issues denied 8 November 2001.

STATE v. DUKE

No. 422A01

Case below: Gaston County Superior Court

Motion by Attorney General to vacate order determining defendant's motion to suppress allowed 2 November 2001. Motion by defendant for a new trial allowed 8 November 2001.

STATE v. GIBSON

No. 531P01

Case below: 145 N.C. App. 503

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 November 2001.

STATE v. HEATWOLE

No. 119A89-4

Case below: Moore County Superior Court

Motion by Attorney Eddie Meacham for appropriate relief denied 8 November 2001.

STATE v. HOOKER

No. 516P01

Case below: 145 N.C. App. 504

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

STATE v. JOHNSON

No. 233P01

Case below: 143 N.C. App. 186

Petition by Attorney General for writ of supersedeas denied 8 November 2001. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001. Temporary stay dissolved 8 November 2001. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 8 November 2001.

STATE v. LEGRANDE

No. 462A01-5

Case below: Stanly County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Stanly County, denied 8 November 2001.

STATE v. NOLEN

No. 391P01

Case below: 144 N.C. App. 172

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 8 November 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

STATE v. OLLIS

No. 582P01

Case below: 146 N.C. App. 111

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 November 2001.

STATE v. PEARSON

No. 541A01

Case below: 145 N.C. App. 506

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 8 November 2001. Accordingly, only those issues which are the basis of the dissenting opinion in the Court of Appeals shall be presented to this Court in briefs.

STATE v. RIDGILL

No. 443P01

Case below: 142 N.C. App. 707

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 November 2001.

STATE v. ROBINSON

No. 544A01

Case below: 145 N.C. App. 658

Motion by defendant (Carlyle Poindexter, Surety) to withdraw appeal allowed 8 November 2001.

STATE v. RUDD

No. 429P01

Case below: 144 N.C. App. 723

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

STATE v. SMITH

No. 521A01

Case below: 146 N.C. App. 1

Petition by Attorney General for writ of supersedeas allowed 8 November 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

STATE v. STAMPER

No. 440P01

Case below: 144 N.C. App. 723

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

STATE v. WARD

No. 158A92-9

Case below: Pitt County Superior Court

Application by defendant for writ of habeas corpus denied 11 October 2001.

STATE v. WILLIAMS

No. 366P01

Case below: 143 N.C. App. 719

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

STATE AUTO PROP. AND CAS. INS. CO. v. SOUTHARD

No. 408P01

Case below: 144 N.C. App. 438

Petition by defendant (Southard) for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

SUMNER v. LAW OFFICES OF KATHLEEN G. SUMNER

No. 574P01

Case below: 146 N.C. App. 111

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 8 November 2001.

TRUJILLO v. VICK

No. 409P01

Case below: 143 N.C. App. 719

Petition by defendant (Donald Ray Vick) for discretionary review pursuant to G.S. 7A-31 denied 22 October 2001.

VINCENT v. CSX TRANSP., INC.

No. 497P01

Case below: 145 N.C. App. 700

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

WEBB v. McKEEL

No. 412P01

Case below: 144 N.C. App. 381

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 November 2001.

WILLIS v. TOWN OF BEAUFORT

No. 343P01

Case below: 143 N.C. App. 106

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 10 October 2001.

WOODY v. THOMASVILLE UPHOLSTERY INC.

No. 596A01

Case below: 146 N.C. App. 187

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 8 November 2001.

STATE OF NORTH CAROLINA v. WILLIAM TODD ANTHONY

183A00

(Filed 18 December 2001)

1. Appeal and Error— preservation of issues—constitutional arguments—not raised at trial

Constitutional components to assignments of error were not preserved for appellate review where they were not preserved at trial, not argued on appeal, and no supporting cases were cited.

2. Discovery— evidence admissible under Rules 803, 804 and 404

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by denying defendant's motion to compel disclosure of evidence the State intended to offer pursuant to N.C.G.S. § 8C-1, Rules 803(24), 804(b)(5), and 404(b). Rules 803(24) and 804(b)(5) contain notice requirements and an order compelling disclosure would be redundant; moreover, the State here provided the particulars of the hearsay statements to defendant and defendant did not move to continue or assert surprise. Rule (404)(b) is not a discovery statute and there is no support for the assertion that disclosure of Rule (404)(b) evidence is required.

3. District Attorneys— recusal—former defense attorneys joining prosecutor's office

The trial court in a capital prosecution for first-degree murder properly denied defendant's motion to recuse the district attorney's office because two of defendant's attorneys at the public defender's office had joined the district attorney's office. The two attorneys were reassigned by the public defender's office before they obtained confidential information, neither discussed the case with other prosecutors at their new employment, and the attorneys acted properly in avoiding all contact with the case after changing jobs. Defendant failed to show the actual conflict of interest required by *State v. Camacho*, 329 N.C. 589.

4. Jury— selection—instructions—capital sentencing

The trial court did not err in a capital prosecution for first-degree murder by denying defendant's motion for instructions explaining the capital sentencing process to prospective jurors.

The instruction given was in accord with pattern jury instructions previously approved and correctly instructed prospective jurors as to the law governing the capital sentencing process.

5. Criminal Law— sequestration of witnesses—lack of specificity in motion—better practice

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by denying defendant's motion for sequestration of witnesses where defendant gave no specific reason to suspect that the State's witnesses would tailor their testimony to fit a consensus, defendant did not point to any instance in the record where a witness conformed his or her testimony to that of another witness, and defendant argued on appeal only that the trial court was biased because facilities were available to sequester the witnesses. However, it was noted that the better practice is to sequester witnesses on the request of either party unless there is a reason not to do so. N.C.G.S. § 15A-1225.

6. Jury— selection—capital trial—rehabilitation

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by denying defendant's request to rehabilitate prospective jurors where the jurors sooner or later unequivocally stated that they could not recommend the death penalty under any circumstances.

7. Criminal Law— improper comments by court—not established

The defendant in a capital prosecution for first-degree murder did not establish that the trial court improperly expressed an opinion or made inappropriate comments. N.C.B.S. §§ 15A-1222, 15A-1230.

8. Evidence— hearsay—excited utterance—homicide victim's last statements

Statements by a first-degree murder victim begging for her life and expressing concern for her children were spontaneous and fell within the excited utterance exception to the hearsay rule.

9. Evidence— hearsay—statement admitted for another purpose

A statement in a first-degree murder prosecution from the victim's mother that the victim had not wanted her estranged hus-

band (defendant) to see their children before they left for school because it was upsetting to them was not hearsay where it was admitted because it was offered to explain the grandfather's action in keeping defendant from the children on the morning of the killing rather than to establish that the children became agitated. Moreover, the grandfather's actions contributed to defendant's motive for the shooting later that day.

10. Evidence— hearsay statement by murder victim to officer—restraining order against her husband—state of mind exception

Statements by a first-degree murder victim to an officer concerning a restraining order against her estranged husband (defendant) and her intent to go to court the next day to get it extended related directly to a feared confrontation with defendant and were properly admitted as evidence of the victim's state of mind, her then-existing plan to engage in a future act, and to show a relationship with defendant contrary to defendant's version. The probative value of the evidence outweighed any potential prejudice.

11. Evidence— habit—speculation into thoughts

There was no prejudicial error in a prosecution for first-degree murder in the admission of testimony that the victim expected her estranged husband (defendant) to return their children to their grandparent's house. Although there was sufficient evidence of habitual behavior in picking up and dropping off the children to satisfy N.C.G.S. § 8C-1, Rule 406, this question invited speculation into the victim's thoughts rather a description of her actions. However, there was no prejudice in light of the evidence against defendant.

12. Evidence— testimony by officer concerning domestic violence protective order—not a legal opinion

The trial court did not err in a first-degree murder prosecution by admitting the testimony of an officer concerning a domestic violence protective order taken out against defendant where the officer described the evidence available to him at the time, paraphrased the statute in neutral terms, and gave an opinion that the facts provided to him by the victim's father provided probable cause for arrest. He was offering an explanation of his actions rather then an interpretation of the law.

13. Appeal and Error— preservation of issues—evidence elsewhere admitted without objection—cross-examination

The admission of evidence concerning a bumper sticker on defendant's truck was properly preserved for appeal where the State contended that defendant waived review by not objecting to the same evidence during the State's cross-examination of defendant. Defendant did not waive his objection by seeking to explain, impeach, or destroy the value of the evidence by explaining the bumper sticker's meaning on cross-examination.

14. Evidence— bumper sticker on defendant's truck—not relevant—not prejudicial

Testimony about a bumper sticker on a truck driven by the defendant in a first-degree murder prosecution was not prejudicial where there was no indication that defendant placed the bumper sticker on the truck and the testimony about the bumper sticker did not go to prove the existence of any fact of consequence to the determination of defendant's guilt, but the evidence of defendant's guilt was overwhelming.

15. Appeal and Error— preservation of issues—evidence elsewhere admitted without objection

A defendant in a first-degree murder prosecution waived appellate review of whether the trial court erred by allowing the State to ask a witness about a 911 call where the 911 recordings were played in their entirety without objection.

16. Witnesses— redirect examination—scope—wounds not instantly fatal

There was no prejudice in a first-degree murder prosecution where the court overruled defendant's objection to testimony from a pathologist on redirect examination that the victim's wounds were not instantly fatal. Although defendant had asked on cross-examination whether the wounds were of equal severity and did not seek information about the length of time the victim remained conscious, the State on redirect asked only three questions on this topic, one of the answers was only partially responsive, and there was evidence from other witnesses that the victim remained conscious for several minutes after being shot. There was no prejudice from this abbreviated exchange.

17. Evidence— testimony of deputy of clerk of court—personal knowledge

There was no error in a first-degree murder prosecution from the admission of testimony from a deputy clerk about a complaint and motion for a domestic violence protective order filled out by the victim before her murder. The testimony was competent and helpful to the jury and, although defendant argues that the clerk lacked personal knowledge, he cites no testimony to support his contention and it is apparent from the testimony that she did possess personal knowledge.

18. Appeal and Error— preservation of issues—no offer of proof after objection

The trial court did not err in a first-degree murder prosecution by sustaining the State's objections to the testimony of defendant's psychiatric expert about alcoholism, Xanax, and addiction where defendant made no offer of proof.

19. Trials— objection—not sustained before jury

There was no error in a first-degree murder prosecution where defendant contended that the court erroneously sustained the State's objection to a question to an expert psychiatrist on voir dire, but the record indicates that the court did not sustain the State's objection when it was asked in the presence of the jury.

20. Evidence— evidentiary errors—cumulative effect

The cumulative effect of alleged evidentiary errors in a capital first-degree murder prosecution did not deprive defendant of a fair trial where the Supreme Court did not, in fact, find such errors.

21. Evidence— relevancy—first-degree murder—threats by victim—self-defense not alleged

The trial court did not err in a capital first-degree murder prosecution by excluding testimony from defendant's mother about statements made by the victim where defendant did not assert self-defense. Alleged threats by the victim were not relevant.

22. Appeal and Error— preservation of issues—opened door—no objection to same evidence

A first-degree murder defendant lost the benefit of his objection to testimony that defendant had been known to torment and kill cats when growing up where defendant had opened the door by asking the witness whether she had ever known defendant to be violent; furthermore, defendant did not object to admission of the same testimony from a psychiatrist.

23. Evidence— rebuttal questions—within the scope of rebuttal

The trial court did not abuse its discretion in a prosecution for first-degree murder by overruling defendant's objections to rebuttal testimony where defendant argued that the prosecutor exceeded the scope of rebuttal. The challenged questions were properly formulated to rebut matters presented during defendant's case-in-chief. N.C.G.S. §15A-1226.

24. Witnesses— hypothetical—witness who had examined defendant

There was no error in a first-degree murder prosecution where the State was allowed to ask one of its rebuttal witnesses, Dr. Robbins, hypothetical questions which defendant alleged were not proper for an expert who had examined defendant. There is no authority for the contention that these questions should not have been asked, and the questions were based upon facts supported by the evidence, the answers were not so equivocal as to render them without probative value, and the responses did not improperly embrace legal terms.

25. Evidence— cumulative effect—not prejudicial

The cumulative effect of any erroneous evidentiary rulings during a capital first-degree murder prosecution did not entitle defendant to a new trial given the greater weight of evidence against defendant.

26. Criminal Law— prosecutor's argument—based on evidence—voice of community

The trial court did not err by not intervening ex mero motu during two portions of the prosecutor's closing argument in the guilt phase of a capital first-degree murder prosecution where the first portion of the argument quoted testimony verbatim and was therefore based on the evidence, and the second portion of the

argument merely reminded the jury that it was the voice of the community.

27. Criminal Law— flight—evidence sufficient—instruction proper

The evidence was sufficient to support an instruction on flight in a capital first-degree murder prosecution where defendant entered his car immediately after shooting the victims, drove quickly from the crime scene without rendering assistance or seeking to obtain medical aid for the victims, and passed one officer without flagging him down. This evidence was sufficient to show that defendant did more than merely leave the scene of the crime; furthermore, the court's instruction accurately informed the jury that proof of flight alone was insufficient to establish guilt and would not be considered as evidence of premeditation and deliberation.

28. Criminal Law— prosecutor's argument—victim's experience

The trial court did not err in a capital sentencing proceeding by not intervening ex mero moto when the prosecutor asked jurors to think of what the victim went through as she lay dying. The prosecutor focused on what the victim may have been thinking and the argument was based upon the evidence at trial, did not manipulate or misstate the evidence, and did not urge the jurors to put themselves in the victim's place.

29. Criminal Law— defendant's argument—reading from appellate opinion

The trial court did not err in a capital sentencing proceeding by sustaining the State's objection to portions of defendant's closing argument in which his counsel sought to read the facts and the holding from a North Carolina Supreme Court case regarding the especially heinous, atrocious, or cruel aggravating circumstance.

30. Sentencing— capital—aggravating circumstance—hindering government function

The trial court did not err in a capital sentencing proceeding by submitting to the jury the aggravating circumstance that the murder was committed to disrupt or hinder the lawful exercise of a governmental function where a domestic violence protective order had been issued after the victim had filed a complaint against defendant, the victim was scheduled to return to court

the next day to obtain an extension, defendant was aware of the hearing and had asked that the date be changed, statements by defendant both before and after the shooting reflected his belief that the victim was keeping his children from him, and a restraining order so upset defendant that he ripped the papers and threw the pieces at the door of the victim's apartment. The jury could reasonably find that one reason defendant killed his wife was to stop this proceeding. N.C.G.S. § 15A-2000(e)(7).

31. Sentencing— capital—aggravating circumstance—victim's exercise of official duty as witness

The trial court did not err in a capital sentencing proceeding by submitting the aggravating circumstance that the murder was committed because of the victim's exercise of her official duty as a witness where she had previously obtained an ex parte domestic violence protection order, she was scheduled to testify against defendant the day after her murder, defendant had been upset for some time over his separation from the victim and the custody of their children, defendant's own testimony reflected his frustration and anger over these issues, and defendant was aware of the ex parte order and that the victim was going to testify. A reasonable jury could conclude that one reason defendant killed his wife was that she obtained the protective order as an aspect of her official duty as a witness against him. N.C.G.S. § 15A-2000(e)(8).

32. Sentencing— capital—two aggravating circumstances—same evidence

There was no prejudicial error in a capital sentencing proceeding where the trial court submitted two aggravating circumstances, that the murder was committed to hinder a governmental function and because of the witness's performance of her official duty as a witness, where both of these circumstances referred to the same domestic violence protective order. While there was sufficient evidence to support submission of either circumstance, it was error to submit both; however, there was no prejudice because the jury rejected the circumstance that the murder was committed to disrupt or hinder the lawful exercise of a governmental function. N.C.G.S. § 15A-2000(e)(7); N.C.G.S. § 15A-2000(e)(8).

33. Sentencing— capital—aggravating circumstance—especially heinous, atrocious or cruel

The trial court did not err in a capital sentencing proceeding by submitting the especially heinous, atrocious, and cruel aggravating circumstance where the evidence showed that the victim's death was physically agonizing, involved psychological torture, and was conscienceless. There was evidence which included the victim being helpless to prevent her impending death between the time defendant first shot her and when he flipped her over to shoot her a second time, defendant killing the victim in the presence of her parents, and statements by defendant to several witnesses indicating that she feared defendant, as well as the fact that she had taken out a domestic violence order against him.

34. Sentencing— capital—definition of mitigating circumstances

The trial court did not err in a capital sentencing proceeding by giving instructions on the definition of mitigating circumstances which were in accord with the pattern jury instructions and which are virtually identical to instructions approved elsewhere. Moreover, the court's additional instructions on mitigating circumstances were also in accord with the pattern jury instructions and were given in cases in which similar arguments were rejected.

35. Sentencing— capital—mitigating circumstances—nonstatutory circumstances combined

There was no error in a capital sentencing proceeding where the trial court combined various nonstatutory mitigating circumstances that defendant had requested be submitted separately. The jury was not prevented from considering any potential mitigating evidence; the circumstances proffered by defendant were subsumed in the circumstances submitted by the court; the court's language was identical to defendant's in many instances and, where it was not, the jury was required to address all of the points proposed by defendant; defendant was able to present evidence on each proffered circumstance and to argue the weight of that circumstance to the jury; and the court carefully instructed the jury not to apply a mathematical approach.

36. Sentencing— capital—nonstatutory mitigating circumstances—father's drinking

The trial court did not err in a capital sentencing proceeding by not submitting nonstatutory mitigating circumstances dealing

with the effects on defendant of his father's drinking problem where those circumstances either were not supported by the evidence or were subsumed in other mitigating circumstances submitted to the jury.

37. Sentencing— capital—nonstatutory mitigating circumstance—defendant's potential for rehabilitation—subsumed in other circumstances

The trial court did not err in a capital sentencing proceeding by not submitting the nonstatutory mitigating circumstance that defendant's prospect for rehabilitation is excellent where that circumstance was subsumed in two of the circumstances submitted.

38. Sentencing— capital—mitigating circumstances—instructions

The trial court did not commit reversible error in light of *McKoy v. North Carolina*, 494 U.S. 433, when it instructed the jury that it must be unanimous in its answers to Issues Three and Four on the Issues and Recommendation as to Punishment form.

39. Sentencing— capital—mitigating circumstance—impaired capacity—consideration by jury

The jury in a capital sentencing proceeding did not fail to consider the impaired capacity mitigating circumstance where no juror found it to exist. Although defendant contended that the jury must have failed to consider it because the testimony of his psychiatrist was uncontested, the evidence was in fact contested by lay testimony and defendant did not request a peremptory instruction. Moreover, the jury could have considered that the defense expert interviewed defendant for little more than an hour on one occasion. Finally, the statutory circumstances found by the jury indicate that they considered the evidence with discrimination and not arbitrarily. N.C.G.S. § 15A-2000(f)(6).

40. Sentencing— capital—nonstatutory mitigating circumstances—submitted with peremptory instruction—not found

There was no error in a capital sentencing proceeding where the jury did not find three of the nine nonstatutory mitigating circumstances submitted with peremptory instructions. A reasonable juror could have concluded that these mitigating circumstances had no mitigating value; the fact that the jury found six

out of the nine submitted indicates that it considered the evidence and the circumstances submitted.

41. Sentencing— death sentence—not disproportionate

A sentence of death was not disproportionate where defendant shot his wife while her family watched; inflicted a second wound while the victim begged for her life; reloaded and shot the victim's father and attempted to shoot her mother; there was abundant evidence that he had been considering the shootings for a long time; defendant is an adult and there is no indication that he suffers from diminished capacity; and the especially heinous, atrocious, or cruel aggravating circumstance has been sufficient to support the death penalty even standing alone.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Seay, J., on 3 June 1999 in Superior Court, Gaston County, upon a jury verdict finding defendant guilty of first-degree murder. On 3 August 2000, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of an additional judgment. Heard in the Supreme Court 12 March 2001.

Roy Cooper, Attorney General, by Robert C. Montgomery, Assistant Attorney General, for the State.

Sue A. Berry for defendant-appellant.

EDMUNDS, Justice.

On 7 July 1997, defendant William Todd Anthony was indicted for first-degree murder of Semantha Belk Anthony[1] and for assault with a deadly weapon with intent to kill inflicting serious injury on John Edward Belk. Defendant was tried capitally before a jury at the 3 May 1999 Criminal Session of Superior Court, Gaston County. On 27 May 1999, the jury found defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation, but not on the basis of felony murder. The jury also returned a verdict of guilty of assault with a deadly weapon with intent to kill inflicting serious injury. Following a capital sentencing proceeding, the jury recommended a sentence of death for the murder. On 3 June 1999, the trial court sentenced defendant to death for the first-degree murder conviction and

1. Although the victim's name is incorrectly spelled "Samantha" in the indictment, the prosecutor advised the trial court that the correct spelling is "Semantha." In testimony, witnesses frequently referred to her as "Sandy."

seventy-three to ninety-seven months' imprisonment for the assault conviction. Defendant appeals his conviction for first-degree murder and his sentence of death to this Court as a matter of right. On 3 August 2000, we allowed defendant's motion to bypass the Court of Appeals as to his appeal of the assault conviction. For the reasons that follow, we conclude that defendant's trial and capital sentencing proceeding were free from prejudicial error and that defendant's sentence of death is not disproportionate.

At defendant's trial, the State presented evidence that defendant and Semantha Belk Anthony were married on 26 October 1985 and that two children were born of the marriage. Defendant and Semantha separated for several months in 1992. During this separation, defendant wrecked Semantha's vehicle with his truck and grabbed her after allegedly seeing her with another man. Defendant was charged with communicating a threat and with assault on a female as a result of this incident, but the charges were subsequently dropped. Defendant and Semantha temporarily reconciled but separated again in March 1997, as detailed below. Semantha told her mother, Martha Belk, that she was leaving defendant because her sons "were being abused" and "she was scared of [defendant]." Similarly, she told her father, John Edward Belk, that she was separating from defendant because "she was afraid he was going to kill her and the boys."

On 15 March 1997, Semantha met with attorney Jay Stroud, who prepared a separation agreement. This agreement, which defendant and Semantha signed on 19 March 1997, gave Semantha primary custody of the children and entitled defendant, in part, to visitation with the children twice a week and on alternate weekends. Thereafter, Semantha and the children left the marital residence. Semantha stayed with her parents briefly, then moved into an apartment. The children slept at the Belks' home.

A week after signing the separation agreement, defendant contacted Susan Russell, a legal assistant for attorney Stroud, to complain about Semantha's failure to remove the remainder of her property from the marital residence. Ms. Russell contacted Semantha, who responded that defendant had been harassing her since they signed the separation agreement. She further explained that she had not yet acted because she was afraid of defendant and was trying to find someone to accompany her when she retrieved her property. In fact, on 16 March 1997, the day after Semantha visited

attorney Stroud, the Gaston County Police Department had been dispatched to the marital residence in response to a domestic dispute. Defendant told the responding officer that he had a gun but had thrown it in the woods behind the house at Semantha's request.

On 9 April 1997, Semantha filed a "Complaint and Motion for a Domestic Violence Protective Order" against defendant in which she stated, "4-8-97. Has threatened to kill me, constantly follows me at different times, carries a gun. I fear for my life." That same day, a judge signed an "Ex Parte Domestic Violence Protective Order" and set a hearing in the matter for 16 April 1997.

On the morning of Tuesday, 15 April 1997, defendant arrived at the Belks' home to visit his children. Although in the past defendant had been welcome do to so whenever he wanted, Semantha instructed her parents no longer to allow defendant to see the children before school because his visits upset them. However, when Mr. Belk told defendant that he could not see his children, defendant pushed him aside and entered the house. Defendant was crying at the time, and his children became agitated while talking to him. After defendant left, Mr. Belk reported the incident to the police, and J.T. Welch, an officer with the Mount Holly Police Department, responded. He testified that Mr. Belk described the incident to him and stated that defendant had at some point made threats that he would kill the whole family. Mr. Belk appeared troubled and said that he did not know what defendant was capable of doing. He added that he thought his daughter had obtained a restraining order against defendant.

Officer Welch advised Scott Wright, an officer with the Mount Holly Police Department, of the incident and of a possible restraining order against defendant. Officer Wright went to the Belks' home to speak with Semantha, who told him about the incident that morning and added that defendant had been following her and threatening to "blow her f—ing head off." After speaking with Semantha, Officer Wright confirmed that an "Ex Parte Domestic Violence Protection Order" had been issued.

Officer Wright saw Semantha later that day at a hair salon. While speaking with her, she exclaimed, "There he is, there he is," and she and the officer watched as defendant drove slowly past the salon. Afterwards, Officer Wright visited Semantha at her residence, where she told him that defendant was supposed to bring the children to her parents' home later that day. She requested that a police officer come

by during that time because she thought there would be trouble and added, "He'll kill me if he gets a chance."

That same day, Semantha also called legal assistant Russell to report that defendant had hired an attorney who was going to attempt to have the 16 April 1997 domestic violence hearing postponed because defendant was scheduled to undergo surgery. During their conversation, Semantha told Ms. Russell that she recently had purchased a gun because she was afraid to stay in her residence without protection and that her children were sleeping at her parents' home because she was fearful something would happen.

Defendant went back to the Belks' home on the afternoon of 15 April 1997, bringing flowers for Semantha and steaks for the Belks as an apology for the encounter that morning. Although defendant left after several minutes, events rapidly took an ominous turn. Defendant's stepfather, Johnny Kendall, testified that he later told Mount Holly Police Officer Barry Colvard that he thought he had talked defendant out of doing something he would regret but that when defendant grabbed several shotgun shells and ran out of the house, Mr. Kendall called 911. He told the operator that defendant had left his home with a gun to shoot Semantha. Randy Carter, a neighbor of the Kendalls, testified that Mrs. Kendall came to his house on 15 April 1997 just prior to the shootings and asked him to calm defendant. Defendant told Mr. Carter that he could not take it anymore and was going to kill Semantha. While Mr. Carter was speaking with defendant, defendant was searching for something in three rooms and the attic of the Kendalls' house. When defendant left, Mr. Carter observed a shotgun in the back of defendant's truck.

Approximately one hour after leaving the Belks' home, defendant returned. Semantha, who was there waiting for defendant to drop off the children, ran outside when she heard defendant blow his horn. Mr. Belk, who had seen defendant drive down the street, was outside talking with his neighbor James Fitcher. Several minutes later, Mr. Belk heard someone yell, "Todd's got Sandy, dragging Sandy out front, he's got a gun." Mr. Belk ran inside his home to find something with which to defend himself. When he emerged, he saw that defendant was wielding a shotgun while holding the crouching or kneeling Semantha by her hair. Defendant told Semantha, "Hold still, b——. I'm going to kill you," while she pleaded with defendant to let her go. When Mr. Belk told defendant not to hurt his daughter, defendant became distracted and Semantha was able to break free and run.

Defendant chased her and shot her in the back. He then reloaded his shotgun and, as the wounded Semantha lay on the ground begging for her life, flipped her over with his foot; said, "Hold still, b——"; and shot her again. Defendant reloaded; aimed his shotgun at Mr. Belk; said, "You're next, old man"; and shot Mr. Belk in the shoulder. Defendant next aimed at Mrs. Belk, who was standing on her front porch. Although defendant apparently pulled the trigger, his weapon failed to fire. Defendant threw the shotgun in the back of his truck; said, "Now I can go to jail"; then sped away, scattering gravel. Several neighbors, including James Fitcher, Kimberly Fitcher, Brenda Cagle, Bobbie Auten, and Gloria Jenkins, witnessed the shootings and corroborated the testimony of Mr. and Mrs. Belk.

After shooting Semantha and Mr. Belk, defendant drove to his parents' house. Defendant told Mr. Carter that he had shot Semantha and asked Mr. Carter to drive him to the jail. As Mr. Carter was driving, defendant repeatedly stated, "Why did she do this to me? Why? Why? Why?" Mr. Carter saw several patrol vehicles and flagged down Mount Holly Police Officer B.G. Summey. As Officer Summey approached, defendant spontaneously stated, "I did it. I shot them. I couldn't take it anymore." Defendant identified himself and while being handcuffed said, "I shot her twice. Is she all right?" After advising defendant of his *Miranda* rights, Officer Summey searched defendant and found several Xanax tablets in defendant's pocket. Defendant then told Officer Summey that the murder weapon was in the back of his truck at his parents' home.

Defendant was taken to the Mount Holly Police Department, where he consented to a search of his truck and his parents' home. When asked to sign a waiver of rights form, defendant responded, "Yes, I'm guilty. I'll sign whatever." Defendant said that he had not slept in three to four weeks and that he had taken several Xanax pills before the shootings. When Officer Summey informed defendant that his wife had died and that he was under arrest for her murder, defendant responded, "I know I'm guilty." Thereafter, defendant was transported to the Gaston County Police Department to be fingerprinted and photographed. While entering the patrol vehicle, defendant responded to an officer's caution to watch his head by saying, "I just killed my wife. My head's the last of my worries." While en route, defendant asked, "Is she still alive?" and "Can I get the death penalty for this?"

Once at the Gaston County Police Department, defendant explained that he killed his wife because she was seeing other men

and was not going to let him visit his children. He stated that Semantha had called his mother that day and told her she was never going to let defendant see his children again, she wished defendant was dead, and she would not even visit defendant's grave if he died. Defendant was then taken to the magistrate's office. On the way, defendant commented, "One of the bullets was meant for me, and the old man confronted me so I shot him too," and "I pulled the trigger. I'm guilty. Go ahead and give me the death penalty." Defendant told the magistrate, "I didn't mean to do it but she kept using the kids against me."

Several witnesses testified as to statements defendant made prior to the murder indicating his intention to kill his wife. Benny Hale, owner of Benny's Fishing Lake, testified that defendant was a frequent customer. He noticed a change in defendant in February 1997. Approximately two weeks before Semantha's murder, defendant told Mr. Hale that he was experiencing problems with his wife because she would not let him see his children as often as he wanted. During this conversation, defendant became upset; began to cry; and stated to Mr. Hale, "Benny, I'm thinking about killing the b——." On 10 April 1997, defendant told Kimberly Fitcher, the Belks' neighbor, that Semantha had served papers at his place of employment and was opposing his efforts to obtain joint custody of their children. Ms. Fitcher testified that defendant said "he would hurt anyone who stood in his way of him being with his kids." Gordon Arnold, manager of Mount Holly Farm Supply, testified that defendant entered his store on 14 April 1997. When Mr. Arnold asked defendant, "Can I help you?" defendant, who was visibly upset, responded, "You can't help me with my problems. . . . My wife left me. She is running around on me. She won't let me see my kids. I am going to kill her and if her old man gets in my way, I'm going to kill him, too." Finally, Carl Barker, who had been defendant's supervisor at work for approximately ten years, testified that defendant had not been himself for six months prior to Semantha's murder. On several occasions, including 15 April 1997, defendant told him that "he was going to kill the b——."

Dr. Peter Wittenberg, the pathologist at Gaston Memorial Hospital who autopsied Semantha, testified that her death was caused by bleeding from the lungs and wounds in her chest. He described her death as not immediate and "very painful." Dr. Timothy Carr, an emergency physician at Gaston Memorial Hospital, treated Mr. Belk on 15 April 1997 and described his injuries as life-threatening. Ronald Marrs, a special agent with the North Carolina State

Bureau of Investigation, was accepted as an expert in firearms and tool-mark examinations and identifications. He identified the twenty-gauge shotgun retrieved from defendant's truck as the weapon used in the shootings and determined from examination of Semantha's clothing that defendant was twelve to twenty-one feet away from her when he fired the first shot and six to twelve feet away from her when he fired the second shot.

Defendant presented evidence at the guilt-innocence phase of his trial to establish a history of tension in his relationship with Semantha. He testified that various individuals told him that she was having affairs and that he had seen her kiss another man during their first separation. He claimed that after their March 1997 separation Semantha attempted to prevent him from seeing his children.

On the day of the shootings, defendant was upset about his separation from Semantha and his inability to see his children. He consumed beer, vodka, and Xanax to deal with this distress, and as a result could not remember what happened at the Belks' home and thereafter. Numerous witnesses corroborated defendant's claim to have consumed intoxicants, including defendant's father, Tony Anthony; his mother, Diane Kendall; and his stepfather, Johnny Kendall. Vivian Daley, a nurse at the Gaston County jail, testified that when she saw defendant on 16 April 1997, less than twenty-four hours after the shootings, he "was staring straight ahead and he was crying. . . . [I]n my professional opinion, he did not seem to know where he was." She noted that defendant's eyes were dilated and that he smelled of alcohol. Terry Wellman, a nurse at the Gaston County Police Department, observed defendant on 16 April 1997 shortly after his apparent attempt to commit suicide in jail. Because defendant was crying incoherently and his eyes were dilated, she requested a drug test. The results were positive for Xanax even though the test was administered twenty hours after the murder.

Dr. Roy J. Mathew, who was tendered and accepted as an expert in psychiatry specializing in the fields of addiction medicine and addiction psychiatry, testified as to the effects of Xanax and alcohol on the human brain. Dr. Mathew was of the opinion that defendant's claimed memory loss of the murder was valid, and characterized what happened to defendant as a "black-out." He also believed that defendant's suicide attempt in the Gaston County jail was consistent with ingestion of Xanax. As to defendant's mental condition on the day of the murder, Dr. Mathew stated, "I think he was significantly impaired. He was significantly intoxicated at the time of the alleged

crime with alcohol and Xanax. It's very difficult to separate one from the other because, as I indicated earlier, they do more or less the same thing in the brain." When asked whether defendant's mind and reason were so completely intoxicated and impaired that he could not form a specific intent to kill, Dr. Mathew responded, "I feel that he was significantly intoxicated by Xanax, alcohol, and both; that it would have been difficult for him to think rationally and clearly."

Additional evidence was presented during the capital sentencing proceeding. This evidence will be discussed below as necessary to address sentencing issues.

[1] We note at the outset that defendant has presented ninety-seven assignments of error. For convenience, clarity, and continuity, we have grouped related assignments of error in our opinion. We also note that, while defendant includes a constitutional component to almost all his assignments of error, in most instances he failed to preserve the constitutional issues at trial and has provided no argument and cited no cases in support of his constitutional arguments here. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal," *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001), and assignments of error in support of which no argument or authority is stated will be taken as abandoned, *id.* (quoting N.C. R. App. P. 28(b)(5)). Accordingly, we will consider only his properly preserved arguments.

PRETRIAL ISSUES

[2] Defendant first contends that the trial court erred in denying his motion to compel the State to disclose whether it intended to offer evidence pursuant to Rules 803(24), 804(b)(5), and 404(b) of the North Carolina Rules of Evidence. Defendant filed his motion to compel on 2 February 1998, asserting that: (1) Rule 404(b) evidence "is rarely found in pre-trial discovery," and he "will likely not have the chance to meet any such evidence at trial without prior notice"; and (2) he "is entitled to try to avoid 'trial by ambush' with respect to the evidence admissible under" Rules 803(24) and 804(b)(5). On 5 February 1998, the trial court orally denied defendant's motion, stating:

> The Court in its discretion on [defendant's] motion to compel [the] State to disclose whether it intends to offer evidence under Rules 803[(24)], 804(b)(5) and 404(b) of the North Carolina Rules of Evidence, the Court in its discretion will deny this motion. The

> Court further notes that both Rules 803[(24)] and 804(b)(5) have separate provisions which require the State to provide notice in advance. Therefore, that is dealt with in the rule itself. The Court therefore in its discretion will deny that motion.

Thereafter, on 5 May 1999, the State filed notice of its intention to offer hearsay pursuant to Rules 803(24) and 804(b)(5), including statements made by Semantha before her death to Officer B.S. Wright and Susan Russell, as well as to the Gaston County Clerk of Superior Court's office in statements contained in Semantha's "Complaint and Motion for Domestic Violence Protective Order."

Rules 803 and 804 of the North Carolina Rules of Evidence provide for the admissibility of hearsay statements. Rule 803 addresses situations where the availability of the declarant is immaterial, while Rule 804 deals with situations where the declarant is unavailable. Each rule contains the following identical provision:

> However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

N.C.G.S. § 8C-1, Rules 803(24), 804(b)(5) (1999). Because notice requirements are contained in the rules themselves, an order compelling such disclosure would be redundant. Therefore, we hold the trial court did not abuse its discretion in denying defendant's motion to compel early disclosure of hearsay statements under Rules 803(24) and 804(b)(5).

Defendant argues that the State, by disclosing the hearsay statements only after jury selection began, "was allowed to sand-bag" defendant with the result that "[t]he spirit, along with the letter of the rule, is lost." Defendant did not raise this issue at trial or as an assignment of error, thereby precluding review. N.C. R. App. P. 10(a), (b)(1). Nonetheless, we observe that the State complied with the requirements of the rules by providing the particulars of the hearsay statements in its notice to defendant and by disclosing the statements five days before opening arguments and testimony began. Defendant did not make a motion to continue based on any untimeliness of the State's notice, nor did he assert that he was surprised by the state-

ments. *See State v. Garner*, 330 N.C. 273, 283, 410 S.E.2d 861, 866 (1991).

As to defendant's arguments pertaining to Rule 404 of the North Carolina Rules of Evidence, that rule provides in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1999). We find no support for defendant's assertions that disclosure of Rule 404(b) evidence is required by North Carolina law, nor does defendant refer to any. To the contrary, we have previously held that Rule 404(b) " 'addresses the admissibility of evidence; it is not a discovery statute which requires the State to disclose such evidence as it might introduce thereunder.' " *State v. Ocasio*, 344 N.C. 568, 576, 476 S.E.2d 281, 285 (1996) (quoting *State v. Payne*, 337 N.C. 505, 516, 448 S.E.2d 93, 99 (1994), *cert. denied*, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995)). Accordingly, the trial court did not err in denying defendant's motion to compel disclosure of evidence offered pursuant to Rules 803(24), 804(b)(5), and 404(b). This assignment of error is overruled.

[3] Defendant next contends that the trial court erred in denying his motion to recuse the district attorney's office from prosecuting his case. Defendant filed his recusal motion on 18 March 1999, asserting that the Gaston County District Attorney's Office had a conflict in prosecuting his case because two of defendant's former attorneys at the Gaston County Public Defender's Office had joined the Gaston County District Attorney's Office by the time of trial. The trial court conducted a hearing on defendant's motion and considered the testimony of John Greenlee and James Jackson, the attorneys in question. Attorney Greenlee stated that he was assigned to represent defendant along with Public Defender Kellum Morris prior to joining the district attorney's office. However, he testified that he did not obtain any confidential information as a result of his representation of defendant:

> Q: Mr. Greenlee, since you—do you recall what involvement you had as Mr. Anthony's attorney?
>
> A: All I remember is that after the Rule 24 Hearing, which I was not present for, Mr. Morris told me I was assigned second chair. I

believe I requested that a copy of the file be provided to me at some point. I don't recall if one was ever provided to me, I assume it was, but I never read it. Never met Mr. Anthony, never spoke with Mr. Anthony, and didn't gain any knowledge or do any investigations into the case.

. . . .

Q: Have we—have I ever asked you any of the facts of the case or anything you may have learned in regards to defending Mr. Anthony?

A: No.

Q: Have you talked with any member of the District Attorney's Office about anything that you ever learned as—in your defense of Mr. Anthony?

A: No.

Attorney Jackson testified that he was also assigned to represent defendant along with Public Defender Kellum Morris prior to joining the district attorney's office. As with attorney Greenlee, however, he did not gain any confidential information as a result of his representation of defendant:

Q: Mr. Jackson, after you were told that you would be becoming involved with the Anthony case to you making the decision to come to the District Attorney's Office was how long a period of time?

A: I would say that would have been anywhere from a week to two weeks because shortly—it was very, very briefly after Mr. Greenlee made that decision that I made mine. I would have said no more—no more than two weeks.

Q: Did you ever talk with Mr. Anthony?

A: I've never spoken with Mr. Anthony.

Q: And you said that you may have had access to the file but, to your knowledge, did you ever read the file?

A: I do not—I can't recall ever reading the file or looking at the file. I don't know any specifics about this particular situation. I know the general allegations.

. . . .

Q: Have you ever talked with me about any aspect of the Anthony case?

A: I have never spoken with you or anyone else.

Q: Ever talked with anyone who is involved in the actual trial of Mr. Anthony?

A: Never. I haven't . . . spoken to any witnesses; I haven't spoken to Mr. Anthony; I haven't taken any phone calls regarding Mr. Anthony; nothing.

After the hearing, the trial court entered an order in which it set out the following pertinent findings of fact:

13. That during the time Mr. Greenlee and Mr. Jackson were appointed to represent the Defendant, they did not meet the Defendant, talk with the Defendant, or appear in court on behalf of the Defendant.

14. That neither Mr. Greenlee nor Mr. Jackson recalled seeing the Defendant's case file while at the Public Defender's Office.

15. That neither Mr. Greenlee nor Mr. Jackson obtained confidential information about the Defendant while in the Public Defender's Office which could be used to the Defendant's detriment in the trial of this matter.

The trial court concluded that an actual conflict of interest did not exist and denied defendant's motion. On appeal, defendant does not challenge the trial court's findings of fact, nor does he maintain that an actual conflict of interest exists. Rather, he argues that the trial court should have granted his motion to "avoid the appearances of impropriety."

This issue is controlled by our holding in *State v. Camacho*, 329 N.C. 589, 406 S.E.2d 868 (1991). In that case, an attorney who had been employed as an assistant public defender with the Mecklenburg County Public Defender's Office, which was representing the defendant on murder and robbery charges, left to become an assistant district attorney with the Mecklenburg County District Attorney's Office, which was prosecuting the defendant. The defendant filed a motion to recuse the entire District Attorney's Office from prosecuting his case. At a subsequent hearing, the attorney in question testified that although she had assisted other attorneys in preparing a motion for

the defendant alleging ineffective assistance of counsel, she had not been assigned to the defendant's case while in the public defender's office. During that time, she had not been involved in any substantive aspect of the case, nor had she seen any of the files concerning the defendant. Although she recalled some discussion regarding the defendant's case while at the public defender's office, she could not remember the details of the conversation and had not revealed any information about the defendant's case to anyone at the district attorney's office. The trial court granted the defendant's motion.

We reversed, holding that

> a prosecutor may not be disqualified from prosecuting a criminal action in this State unless and until the trial court determines that an actual conflict of interests exists. In this context, an "actual conflict of interest[]" is demonstrated where a District Attorney or a member of his or her staff has previously represented the defendant with regard to the charges to be prosecuted and, as a result of that former attorney-client relationship, the prosecution has obtained confidential information which may be used to the defendant's detriment at trial. Even then, however, any order of disqualification ordinarily should be directed only to individual prosecutors who have been exposed to such information.

Id. at 601, 406 S.E.2d at 875. If a trial court finds an actual conflict of interest to exist, "the trial court may disqualify the prosecutor having the conflict from participating in the prosecution of a defendant's case and order that prosecutor not to reveal information which might be harmful to the defendant." *Id.* at 602, 406 S.E.2d at 876; *see also State v. Reid*, 334 N.C. 551, 561, 434 S.E.2d 193, 200 (1993).

In the case at bar, the two attorneys were initially assigned to be co-counsel for defendant but resigned prior to obtaining any confidential information about the case. Neither discussed the case with other prosecutors at their new employment. The attorneys acted properly in avoiding all contact with the case after changing jobs, and defendant has failed to show the actual conflict of interest required by *State v. Camacho.*

Defendant also asserted in his recusal motion and in this assignment of error that the personal relationship that arose between the elected district attorney and the father of the deceased should have barred the district attorney's office from prosecuting the case. Because defendant did not set out any argument or authority for this

position in his appellate brief, we deem this issue abandoned. N.C. R. App. P. 28(b)(5). This assignment of error is overruled.

[4] Defendant next contends that the trial court erred in denying his motion for instructions to explain the capital sentencing process to prospective jurors. Defendant filed a pretrial motion on 2 February 1998, requesting the trial court to inform prospective jurors of the process of finding, evaluating, and weighing the evidence of aggravating and mitigating circumstances. On 3 May 1999, the trial court orally denied defendant's motion, stating that it intended to follow the statutory provisions and the North Carolina pattern jury instructions. Although the trial court gave defendant an opportunity to object, he declined. The trial court then instructed the jury in accord with criminal instruction 106.10. N.C.P.I.—Crim. 106.10 (1994).

A trial court has broad discretion to see that a competent, fair, and impartial jury is impaneled, and its rulings concerning jury selection will be reversed only upon a showing of abuse of discretion. *State v. Meyer*, 353 N.C. 92, 104, 540 S.E.2d 1, 8 (2000), *cert. denied*, —— U.S. ——, 151 L. Ed. 2d 54 (2001). We previously have addressed the issue raised by defendant, noting:

> "We find no abuse of discretion by the trial court in refusing to give the defendant's requested preliminary instruction. By utilizing the pattern instruction, a trial court accurately and sufficiently explains the bifurcated nature of a capital trial, avoids potential prejudice to the defendant, and helps to insure the uniformity of jury instructions for all trials."

State v. Steen, 352 N.C. 227, 250, 536 S.E.2d 1, 15 (2000) (quoting *State v. Jones*, 339 N.C. 114, 143, 451 S.E.2d 826, 841 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995)), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001).

In this case, the trial court correctly instructed the prospective jurors as to the law governing the capital sentencing process. Because the trial court's instructions were in accord with the pattern jury instructions that have been approved previously by this Court, *see, e.g.*, *State v. Artis*, 325 N.C. 278, 295, 384 S.E.2d 470, 479 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), we do not agree with defendant's assertion that the trial court failed to provide the jury with an understandable explanation of the law governing capital sentencing. This assignment of error is overruled.

[5] Defendant also contends that the trial court erred in denying his "Motion for Sequestration and Segregation of State's Witnesses During Trial." On 2 February 1998, defendant filed the motion, requesting sequestration of the State's witnesses for three reasons: (1) to prevent the witnesses from altering their testimony or previous statements to conform to that of other witnesses; (2) to prevent an unduly persuasive effect upon the minds of jurors as a result of the extensive number of witnesses by the State, particularly law enforcement officers; and (3) to prevent loss of individual recollection of the witnesses in favor of a "consensus recollection" resulting from the gathering of the State's witnesses during a lengthy trial. On 3 May 1999, the trial court denied defendant's motion.

The statute regarding sequestration of witnesses at trial provides in pertinent part: "Upon motion of a party the judge may order all or some of the witnesses other than the defendant to remain outside of the courtroom until called to testify." N.C.G.S. § 15A-1225 (1999); *see also* N.C.G.S. § 8C-1, Rule 615 (1999). Because the North Carolina rule is permissive, a ruling on a motion to sequester witnesses pursuant to this statute " 'rests within the sound discretion of the trial court, and the court's denial of the motion will not be disturbed in the absence of a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Hyde*, 352 N.C. 37, 43, 530 S.E.2d 281, 286 (2000) (quoting *State v. Call*, 349 N.C. 382, 400, 508 S.E.2d 496, 507-08 (1998)), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001).

In his motion to sequester, defendant gave no specific reason to suspect that the State's witnesses would tailor their testimony to fit within a general consensus. Defendant has not pointed to any instance in the record where a witness conformed his or her testimony to that of another witness, and he argues on appeal only that the trial court was biased against him in denying his motion even though facilities were available to accommodate sequestered witnesses. We see no abuse of discretion in the trial court's ruling.

Nevertheless, we observe that the commentary to N.C.G.S. § 8C-1, Rule 615 provides: "[T]he [better] practice should be to sequester witnesses on request of either party unless some reason exists not to." Particularly in cases as consequential as a capital murder trial, judges should give such motions thoughtful consideration. *See State v. Wilds*, 133 N.C. App. 195, 210, 515 S.E.2d 466, 477-78 (1999) (Edmunds, J., concurring). This assignment of error is overruled.

JURY SELECTION

[6] In his only assignment of error relating to jury selection, defendant contends that the trial court erred in denying his requests to rehabilitate seven prospective jurors, Deborah Mull, John White, Frankie Davis, Daria Ragan, Brenda Fortenberry, Allen McDuffie, and Robert Hill, who were challenged for cause on the basis of their views of the death penalty. A juror properly may be excused for cause in a capital case if his or her views regarding the death penalty would " 'prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)). However,

> "[a] defendant is not allowed to rehabilitate a juror who has expressed unequivocal opposition to the death penalty in response to questions propounded by the prosecutor and the trial court. The reasoning behind this rule is clear. It prevents harassment of the prospective jurors based on their personal views toward the death penalty."

State v. Fleming, 350 N.C. 109, 124, 512 S.E.2d 720, 731 (quoting *State v. Cummings*, 326 N.C. 298, 307, 339 S.E.2d 66, 71 (1990)), *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999); *see also State v. Warren*, 347 N.C. 309, 326, 492 S.E.2d 609, 618 (1997) ("A defendant has no absolute right to question or to rehabilitate prospective jurors before or after the trial court excuses such jurors for cause."), *cert. denied*, 523 U.S. 1109, 140 L. Ed. 2d 818 (1998). "The decision whether to allow a defendant an opportunity to rehabilitate a prospective juror challenged for cause rests within the sound discretion of the trial court." *State v. Call*, 349 N.C. at 401, 508 S.E.2d at 508. "The trial court does not abuse its discretion by refusing to allow a defendant an attempt to rehabilitate a juror unless the defendant can show that further questions would have produced different answers by the juror." *State v. Blakeney*, 352 N.C. 287, 301, 531 S.E.2d 799, 811 (2000), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001). We consider the *voir dire* of each juror in light of these general principles.

Prospective Jurors Mull, White, and Davis

Prospective jurors Mull, White, and Davis were considered together. When questioned by the State, Ms. Mull and Mr. White

immediately announced that their views on the death penalty would prevent them from being able to consider a capital sentence. Although Ms. Davis also stated initially that "I don't know—well, I'm against the death penalty," her subsequent answers under further questioning were somewhat equivocal. Nevertheless, she later indicated that "saying he deserves death, I—I just don't believe in that," and that her views would substantially impair her performance as a juror. When the trial court asked each of these jurors clarifying questions to confirm their opposition to the death penalty, each was resolute in his or her refusal to consider the death penalty under any circumstances.

Prospective Juror Ragan

Prospective juror Ragan initially stated that she had "mixed feelings" about and was "troubled by" the death penalty. When asked if she could consider a sentence of death if the jury found defendant guilty, she said, "I could consider [the death penalty], but I would have a hard time—well, I would weigh both sides of it, but I think I would have a very hard time actually saying yes to the death penalty." She later added, "I have a hard time imagining something that I would think so awful that I would go with the death penalty." The trial court asked Mrs. Ragan several clarifying questions, to which she responded in part,

> [t]he whole issue of the death penalty has troubled me for a long time, and it's not something I have absolutely formed an opinion about even before I ever walked into this courtroom today. It has always been something that I thought should only be imposed under extreme circumstances. . . . I have a very difficult time coming up with aggravating circumstances so great that I would feel that the death penalty would need to be imposed.

The trial court then denied the State's challenge for cause, stating, "I don't really know or understand what her position is on what." Thereupon, the prosecutor asked several additional questions of juror Ragan:

> [PROSECUTOR]: Have you already formed an opinion as to what—
>
> MRS. RAGAN: Yes, I've already formed an opinion. Yes.
>
> [PROSECUTOR]: If he was found guilty of first-degree murder?

MRS. RAGAN: Yes. I would want to go with life in prison, I'm afraid.

The trial court then allowed the State's challenge for cause.

Prospective Juror Fortenberry

Prospective juror Fortenberry expressed reservations about imposing the death penalty and was challenged for cause by the prosecutor. Before ruling on the challenge, the trial court asked additional questions. That series of questions ended with the following exchange:

THE COURT: . . . [I]s it that your feelings and your beliefs toward the death penalty would prevent you from doing that?

MRS. FORTENBERRY: My beliefs as a Christian would have—I would have a hard time with it. No, sir, I will not—I would not go with the death penalty.

THE COURT: You just plain flat would not?

MRS. FORTENBERRY: I don't—no.

THE COURT: Not equivocal about it at all?

MRS. FORTENBERRY: No, sir.

The trial court then allowed the motion to excuse Mrs. Fortenberry for cause.

Prospective Juror McDuffie

During the State's preliminary questioning of prospective juror McDuffie, he stated, "I don't believe in the death penalty." In response to that answer, the following colloquy took place:

[PROSECUTOR]: . . . Are you saying that you would automatically vote against the death penalty no matter what evidence was presented?

MR. MCDUFFIE: Well, yeah, basically.

[PROSECUTOR]: That you would automatically vote for life imprisonment no matter what evidence was presented?

MR. MCDUFFIE: Yes.

After some additional questioning, the prosecutor challenged Mr. McDuffie for cause. Before ruling on the motion, the court conducted its own inquiry:

> THE COURT: Your position is somewhat difficult for me to understand. Is it that your feeling or your belief or what-have-you is such that you would be unable to consider the evidence, apply to that evidence the law of the Court, and make—under any circumstances make a recommendation that the punishment be death?
>
> MR. MCDUFFIE: No. I don't think I could sentence anybody to death. I really don't.
>
> THE COURT: You know, you said a minute ago you weren't going to be—that it wasn't that way. Your testimony has been somewhat contradictory. Is that right?
>
> MR. MCDUFFIE: I don't know. If somebody went out and killed fifty kids, I might slightly consider it, but that would be about the only way. You know, something like that. It would have to be pretty bad. I don't think I could do it though. I really don't.
>
> THE COURT: But then you could then under certain circumstances consider a recommendation of death?
>
> MR. MCDUFFIE: Possibly. Very doubtful.
>
> THE COURT: Mister Solicitor, I believe I'm not going to challenge [sic] him for cause. He says he can possibly do it. I don't understand what he's—what your definition of the word possibly is, but you must as a juror in fairness to the defendant and the State follow the law and the evidence.
>
> MR. MCDUFFIE: Okay. I can't. I'm sure I couldn't do it. I'm sure I couldn't do it.
>
> THE COURT: You just changed your mind as you sat here. Is that the idea?
>
> MR. MCDUFFIE: No, because I don't—I just don't believe in the death penalty. I wouldn't have any problem sentencing to life in prison without parole or whatever, but I just don't believe in the death penalty.

The trial court then allowed the State's challenge for cause.

Prospective Juror Hill

Finally, when prospective juror Hill was first asked by the prosecutor whether he had an opinion as to whether the sentence should be death or life if the jury found defendant guilty, he responded that he had no such opinion. However, when the prosecutor returned to the sentencing issue in more detail, the following exchange took place:

[PROSECUTOR]: Now, Mr. Hill, do you have any opinions against the death penalty?

MR. HILL: I've never really given it any thought.

[PROSECUTOR]: You never gave it any thought?

MR. HILL: No. Never been put in this position.

[PROSECUTOR]: I understand that. Do you feel you would be able to consider—if Mr. Anthony was found guilty of first-degree murder that you would be able to consider both possible sentences in this case—life imprisonment or death?

MR. HILL: It's kind of hard to say whether a person live [sic] or die. It would be hard for me to say.

[PROSECUTOR]: It would be hard for you to make a decision on the sentencing phase?

MR. HILL: Yes.

[PROSECUTOR]: Would you automatically vote against a sentence of death?

MR. HILL: Yes, I would.

[PROSECUTOR]: You would?

MR. HILL: Yes, I would.

The trial court then allowed the State's challenge for cause.

This record demonstrates that each of these jurors sooner or later unequivocally stated that he or she could not recommend the death penalty under any circumstances. In light of these responses, we hold that the trial court did not abuse its discretion in denying defendant's requests to attempt to rehabilitate these jurors. This assignment of error is overruled.

GUILT-INNOCENCE PHASE

[7] In his first assignment of error relating to the guilt-innocence phase of his trial, defendant contends that the trial court failed to preside impartially by improperly expressing an opinion, denigrating jurors and defense counsel, and commenting on witnesses and testimony, violating N.C.G.S. §§ 15A-1222 and 15A-1232 and depriving defendant of a fair trial. Although this assignment of error also refers to comments made by the court during jury selection and the sentencing proceeding, the majority of the comments to which defendant refers occurred during the guilt-innocence phase. Accordingly, we address this assignment of error here.

Section 15A-1222 of the North Carolina General Statutes 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." N.C.G.S. § 15A-1222 (1999). Similarly, section 15A-1232 of the North Carolina General Statutes requires that "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C.G.S. § 15A-1232 (1999). In applying these statutes, we have stated 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.

State v. Gell, 351 N.C. 192, 207, 524 S.E.2d 332, 342, *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000).

Defendant cites thirty-nine instances in which he alleges that the trial court made improper expressions of opinion and inappropriate comments. We have reviewed each comment in context and conclude that defendant has failed to establish any impropriety by the trial court. This assignment of error is overruled.

[8] Defendant next argues that the trial court erred in overruling his objections to questions eliciting four statements Semantha Anthony made prior to her murder. Defendant first addresses two statements made by Semantha after she had been shot. The first statement came into evidence through the testimony of Semantha's father, John Belk.

Mr. Belk testified over objection that before defendant shot Semantha a second time, she begged for her life and stated, "Please, Todd, no." The second statement came into evidence through the testimony of James Fitcher, the Belks' neighbor who stayed by Semantha after she had been shot. Mr. Fitcher was asked by the State, "And as you were talking with Sandy she said what to you?" The trial court overruled defendant's objection, and Mr. Fitcher responded that Semantha told him, "Take care of my boys."

Assuming that these statements were hearsay, both fit within the excited utterance exception to the hearsay rule. Although as a general rule hearsay is inadmissible at trial, N.C.G.S. § 8C-1, Rule 802 (1999), an "excited utterance," which is a statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," N.C.G.S. § 8C-1, Rule 803(2), is not excluded by the hearsay rule. For a statement to qualify as an excited utterance, the statement must be: " '(1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication.' " *State v. Maness*, 321 N.C. 454, 459, 364 S.E.2d 349, 351 (1988) (quoting *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985)). Semantha's statement begging for her life and her statement expressing concern for her children after her death were spontaneous reactions made after she had been wounded. Accordingly, these statements fit within the excited utterance exception. *See State v. Gaines*, 345 N.C. 647, 672, 483 S.E.2d 396, 411 (testimony of officers that victim, after being shot, stated, "Tell Hilda that I love her," "Am I going to die?" and "I'm going to die," fit within excited utterance exception to hearsay rule and were admissible at trial), *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). Moreover, the statements are not so inflammatory as to be unfairly prejudicial pursuant to N.C.G.S. § 8C-1, Rule 403. Accordingly, these statements were admissible at trial.

[9] Defendant next contends that Mrs. Belk's statement that Semantha did not want defendant to see their children before they left for school "[b]ecause they would get upset and be crying every time when they started to go to school" did not fit within any exception to the hearsay rule and was therefore inadmissible. However, this statement was not hearsay. It was offered not to establish that the children became agitated, but to explain why Mr. Belk tried to prevent defendant from seeing the children on the morning of the killing. "[O]ut of court statements offered for purposes other than to

prove the truth of the matter asserted are not considered hearsay." *State v. Thomas*, 350 N.C. 315, 339, 514 S.E.2d 486, 501, *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999). In addition, we have held that "statements of one person to another to explain subsequent actions taken by the person to whom the statement was made are admissible as nonhearsay evidence." *Id.* Mr. Belk's actions upset defendant and contributed to his motive for the shootings later that day. Accordingly, this testimony was relevant and not unduly prejudicial. The trial court properly admitted the statement.

[10] The remaining statements to which defendant points were admitted through the testimony of Officer Scott Wright, who spoke with Semantha after another officer briefed him about the domestic violence restraining order. The statements in question pertained to the victim's state of mind:

> A: She said that she thought she had a restraining order but she didn't know if it was active, but she had a court date the next day which was April 16th. So I got a description of Mr. Anthony's vehicle and a description of him and I told her I would go by the police department and check on the restraining order and get back with her.
>
> . . . .
>
> A: She told me that he followed her around, threatening her, basically annoyed her a lot.
>
> . . . .
>
> A: She said that he told her he would blow her f—ing head off.
>
> . . . .
>
> A: [As to the restraining order, which was to expire on 16 April 1997,] [s]he said she was going to court the next day and she would get it taken care of then.
>
> . . . .
>
> A: I spoke with her and she stated that Mr. Anthony was supposed to come either to pick up the kids or drop them off at her father's house, and that she would like for a police officer to come stand by when they did that because she felt like there would be trouble.
>
> . . . .

A: She said she had a court date the next day and she would get the restraining order taken care of, get it extended or reinstated, whatever she had to do.

Rule 803 of the North Carolina Rules of Evidence provides, in pertinent part, as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (3) Then Existing Mental, Emotional, or Physical Condition.—A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health).

N.C.G.S. § 8C-1, Rule 803(3). "Evidence tending to show the victim's state of mind is admissible so long as the victim's state of mind is relevant to the case at hand." *State v. Stager*, 329 N.C. 278, 314, 406 S.E.2d 876, 897 (1991). " 'Any evidence offered to shed light upon the crime charged should be admitted by the trial court.' " *Id.* (quoting *State v. Meekins*, 326 N.C. 689, 695-96, 392 S.E.2d 346, 349 (1990)). Also, statements by a victim of her then-existing intent and plan to engage in a future act are admissible. *State v. Taylor*, 332 N.C. 372, 386, 420 S.E.2d 414, 422 (1992). Here, Semantha's statements made on the day of her murder reflected her state of mind and were relevant because they related directly to circumstances giving rise to a feared confrontation with defendant on the day she was murdered. Also, Semantha's statements that she intended to go to court the next day in relation to the domestic violence protective order and restraining order are admissible as her then-existing intent and plan to engage in a future act. These statements also were relevant "to show a relationship between defendant and the victim which was more favorable to the State and contrary to defendant's version of this relationship, which was more favorable to defendant." *State v. Meekins*, 326 N.C. at 696, 392 S.E.2d at 350. In addition, the probative value of this evidence substantially outweighs any potential prejudice to defendant. This assignment of error is overruled.

[11] By his next assignment of error, defendant contends that the trial court erred in overruling his objection and permitting Mrs. Belk on direct examination to respond to the prosecutor's question, "Sandy expected [defendant] to bring the boys back to your house?"

Defendant contends that the question called for speculation and permitted the State to argue that the victim was lured out of the house by defendant when he brought their children to the Belks' house on the day of the murder.

The State argues that the question was permissible to describe Semantha's habit. Rule 406 of the North Carolina General Statutes provides:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

N.C.G.S. § 8C-1, Rule 406 (1999). Under this rule, the instances of specific conduct must be sufficiently numerous and regular to warrant an inference of systematic conduct and to outweigh the danger, if any, of prejudice and confusion. *State v. Hill*, 331 N.C. 387, 408, 417 S.E.2d 765, 775 (1992) ("Mere evidence of intemperance ordinarily does not meet the 'invariable regularity' standard required of evidence of habit."), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993). Although we agree with the State that sufficient evidence was presented of defendant's and Semantha's habitual behavior in picking up and dropping off the children to satisfy the requirements of Rule 406, the particular question was objectionable because it improperly invited speculation into Semantha's thoughts rather than a description of her actions. Nevertheless, admission of this statement was harmless error, not a " '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnote omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). In light of the evidence against defendant, improper admission of the answer to this question did not prejudice defendant. This assignment of error is overruled.

[12] By his next assignment of error, defendant contends that the trial court erred by overruling his objections to the testimony of Officer J.T. Welch because the testimony improperly concerned matters that required legal interpretation. On direct examination, Officer Welch testified that he responded to a call from Mr. Belk after defendant pushed past Mr. Belk to see his children on the morning of the murder:

Q: How did you have an occasion to meet Mr. John Belk the morning of April 15, 1997?

A: We had a call to 113 Adcock Street in reference to a subject trespassing.

Q: What did you do, Officer?

A: I responded to the call. When I got there I spoke with Mr. Belk. Mr. Belk advised me that Todd Anthony had been there but he had left. His daughter had a restraining order against Mr. Anthony. He told me that Mr. Anthony was there because he wanted to see his kids. . . .

. . . .

A: . . . I told him since Todd Anthony did violate a restraining order that we would be looking for him the rest of the day to try to arrest him for violation of a restraining order and I also notified the officer that rode that area, which was officer Wright, about the incident.

Q: Why would Mr. Anthony's presence at Mr. Belk's house be a violation of the restraining order?

. . . .

A: Okay. It is a 50(b) order, the State of North Carolina. If you take this out on a person they have certain restrictions. They can't be anywhere near where the—you know, where the person that has the restraining order against them. They can't be anywhere near them. They can't contact them by phone or anything like that. If they do so, the police have the authority to arrest them.

Q: At that point had you formed an opinion that you had the authority to arrest Mr. Anthony?

. . . .

A: Yes, ma'am.

The trial court overruled defendant's general objections to this testimony.

Although opinion testimony may embrace ultimate issues in a case, the opinion should not be phrased using a legal term of art carrying a specific legal meaning not readily apparent to the witness.

State v. Rose, 327 N.C. 599, 602-04, 398 S.E.2d 314, 315-17 (1990). However, where the witness uses a term as a shorthand statement of fact rather than as a legal term of art or an opinion as to the legal standard the jury should apply, the testimony is admissible. *State v. White*, 340 N.C. 264, 295, 457 S.E.2d 841, 859, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995).

Here the questions posed to Officer Welch called upon his legal knowledge and police training. An officer is entitled to arrest a person "without a warrant or other process" if the officer has probable cause to believe the person has violated a domestic violence protective order. N.C.G.S. § 50B-4.1(b) (1999). Officer Welch described the evidence available to him at the time; paraphrased the statute in neutral terms; then gave the opinion that under the statute, the facts described to him by Mr. Belk provided probable cause to arrest defendant. In so doing, Officer Welch was not providing an interpretation of the law as forbidden in *State v. Ledford*, 315 N.C. 599, 617, 340 S.E.2d 309, 321 (1986). Instead, he was offering an explanation of his actions. This assignment of error is overruled.

[13] Defendant next argues that the court erred in admitting irrelevant evidence of a bumper sticker on the truck driven by defendant at the time of the murder. The State introduced evidence of the bumper sticker through the testimony of C.E. Putnam of the Gaston County Police Department. Officer Putnam testified that the bumper sticker read, "I don't play well with others. It seems others have a problem with losing." The trial court overruled defendant's timely objection to this evidence.

The State argues that defendant waived his right to review of this issue because the same evidence was later admitted without objection during the State's cross-examination of defendant. However, the record reflects that defendant at that time attempted to undermine the effect of Officer Putnam's previous testimony by stating, "I've lost plenty. I don't get mad and fight over it, but, I mean, I don't—I don't guess nobody [sic] likes to lose." An objecting party does not waive its objection to evidence the party contends is inadmissible when that party seeks to explain, impeach, or destroy its value on cross-examination, *State v. Adams*, 331 N.C. 317, 328, 416 S.E.2d 380, 386 (1992), and we interpret this testimony as defendant's explanation of the bumper sticker's meaning. Accordingly, defendant has preserved the right to raise this objection on appeal.

[14] Rule 401 of the North Carolina Rules of Evidence provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1999). The testimony regarding the bumper sticker did not go to prove the existence of any fact of consequence to the determination of defendant's guilt. In fact, there is no indication that defendant even placed the bumper sticker on the vehicle. Accordingly, Officer Putnam's testimony about the bumper sticker should not have been admitted.

However, in order to show that the trial court committed reversible error in allowing the challenged evidence, defendant must demonstrate that the admission of Officer Putnam's testimony was prejudicial. *See* N.C.G.S. § 15A-1443(a) (1999). We conclude that the erroneous admission of this testimony was not prejudicial in light of the overwhelming evidence of defendant's guilt. This assignment of error is overruled.

[15] Defendant next argues that the trial court erred in overruling his objection and allowing the prosecutor to ask Randy Carter on direct examination, "Did Mr. Kendall tell 911 in your presence . . . 'I think I'm trying to commit—stop somebody from getting killed?' " Defendant contends that the prosecutor was attempting to elicit impermissible hearsay. The State appears to concede error, but argues that because Mr. Carter responded, "I don't know," any error was harmless. However, because the 911 recordings, which contained Mr. Kendall's report including the above statement, were played in their entirety to the jury without objection by defendant prior to Mr. Carter's testimony, defendant has waived appellate review of this issue. "Where 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. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995). This assignment of error is overruled.

[16] Defendant next contends that the trial court erred in overruling his objection to particular testimony of Dr. Peter Wittenberg, the State's expert witness, during his redirect examination. Defendant argues that Dr. Wittenberg's testimony impermissibly exceeded the proper scope of redirect examination and was used simply to repeat and bolster his testimony on direct examination. During Dr. Wittenberg's redirect testimony, he stated:

Q: Dr. Wittenberg, you indicated earlier that neither of these wounds were instantly fatal; is that correct?

A: Correct.

Q: So after the first wound would it be your opinion that Ms. Anthony would be aware and conscious?

. . . .

A: Yes. She would be conscious, yes.

Q: And would she be conscious after the second wound, also?

A: Yes.

Q: And by being conscious would [she] be aware of her surroundings and what was happening?

A: As I mentioned, both of those wounds were not fatal so she would be—for a period of time she would be aware of her surroundings. I believe, you know, she bled a little bit slower from the wound on the left side than she did on the right. The right was a more severe wound.

The trial court overruled defendant's objection to this testimony.

We have recognized that

"the calling party is ordinarily not permitted . . . to question the witness on entirely new matters" on redirect examination. *State v. Weeks*, 322 N.C. 152, 169, 367 S.E.2d 895, 905 (1988). However, the decision whether to allow testimony on redirect examination involving matters beyond the scope of the witness' testimony on direct and cross-examination is a matter left to the sound discretion of the trial court.

State v. Barton, 335 N.C. 696, 708, 441 S.E.2d 295, 301 (1994). Our review of the transcript reveals that defendant asked Dr. Wittenberg on cross-examination whether the wounds inflicted on the victim were of equal severity. The State was entitled to address on its redirect examination evidence first elicited by defendant during his cross-examination. *See, e.g., State v. Bright*, 320 N.C. 491, 495, 358 S.E.2d 498, 500 (1987). Accordingly, we discern no impropriety in the State's questions about the wounds. Although defendant did not seek information about the length of time the victim would remain conscious, the State on redirect asked only three questions pertaining to this topic, and one of the witness' answers was only partially respon-

sive. Because there was evidence from other witnesses that the victim remained conscious for several minutes after being shot, we do not believe that defendant was prejudiced by this abbreviated exchange between the prosecutor and Dr. Wittenberg. This assignment of error is overruled.

[17] Defendant next contends that the trial court erred in permitting Amy Mitchell, an employee of the Gaston County Clerk of Superior Court, to testify to matters surrounding the complaint and motion for a domestic violence protective order filled out by Semantha Anthony before her murder. Defendant argues that Ms. Mitchell lacked the personal knowledge required to describe in general terms what would happen in court in a case involving a domestic violence protective order, much less the case instituted by the victim. None of defendant's objections to Ms. Mitchell's testimony related to the witness' lack of personal knowledge.

Ms. Mitchell testified that she was a deputy clerk and was familiar with procedures relating to 50B orders. When asked, she described how such orders are handled in court. We have stated that

> [u]nder the Rules of Evidence, a witness may testify as to any relevant matter about which he has personal knowledge. N.C.G.S. § 8C-1, Rule 602 (1992). Furthermore, a lay witness may testify as to his or her opinion, provided that the opinion is rationally based upon his or her perception and is helpful to the jury's understanding of the testimony. N.C.G.S. § 8C-1, Rule 701 (1992).

State v. Strickland, 346 N.C. 443, 460-61, 488 S.E.2d 194, 204 (1997), *cert. denied*, 522 U.S. 1078, 139 L. Ed. 2d 757 (1998). Applying these factors to the case at bar, we conclude that Ms. Mitchell's testimony was competent and helpful to the jury. Although defendant argues that she lacked personal knowledge, he cites no testimony to support this contention. It is apparent from Ms. Mitchell's testimony that she did possess personal knowledge of such procedures. This assignment of error is overruled.

[18] By his next assignment of error, defendant contends that the trial court erred in sustaining numerous objections raised by the State during direct examination of defendant's expert witness Dr. Roy Mathew. We address these objections *seriatim*.

Defendant questioned Dr. Mathew as to whether a genetic link to alcoholism exists and whether defendant was predisposed to alco-

holism. The court sustained the State's objections to these questions and also sustained the State's objections to defendant's questions as to whether Dr. Mathew was personally aware of cases where Xanax had created a violent reaction in those who had taken it. Finally, the court sustained the State's objections to defendant's questions of Dr. Mathew pertaining to certain aspects of a letter to the editor in the *American Journal of Psychiatry*. Defendant contends that the testimony sought was within the general theory of addiction medicine or the facts of the case and that the letter in question was one document that Dr. Mathew testified contributed to his opinion in the case. As to each series of questions, defendant made no offer of proof as to what Dr. Mathew's answers would have been had he been permitted to respond to defendant's questions.

We have observed that

> "in order for a party to preserve for appellate review the exclusion of eviden[ce], 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*. . . . [T]he essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred."

State v. Mackey, 352 N.C. 650, 660, 535 S.E.2d 555, 560 (2000) (quoting *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985)) (second alteration in original); *see also State v. Hardy*, 353 N.C. 122, 134, 540 S.E.2d 334, 344 (2000) (Because "defendant made no offer of proof to show the content of the excluded conversation, this Court is precluded from evaluating the import of the excluded evidence. By failing to make an offer of proof, defendant has failed to properly preserve this issue for appellate review, pursuant to N.C.G.S. § 8C-1, Rule 103(a)(2)."), *cert. denied*, —— U.S. ——, 151 L. Ed. 2d 56 (2001). Accordingly, defendant has failed to preserve this issue for appellate review.

[19] As to the final set of objections, defendant points to questions posed to Dr. Mathew on *voir dire* as to whether he found anything significant in defendant's past. However, our review of the record indicates that the trial court did not sustain the State's objection to this question when it was asked in the presence of the jury. Instead, Dr. Mathew was permitted to give a lengthy answer in response to defense counsel's question, "Dr. Mathew, based upon your interview with the Defendant and your review of the several additional

materials provided to you, did you find anything significant in Mr. Anthony's past?" This assignment of error is overruled.

[20] In a related assignment of error, defendant contends that he was deprived of a fair trial because of the cumulative effect of the alleged errors arising from the court's rulings as to the testimony of Dr. Mathew. Because we do not find any such errors, these assignments of error are overruled.

[21] Defendant next argues that the trial court erred in excluding certain testimony of defendant's mother, Diane Kendall, regarding statements allegedly made by Semantha Anthony several hours prior to her murder. Ms. Kendall gave the following *voir dire* testimony:

> Q: Ms. Kendall, just tell the Judge what Ms. Anthony told you after you arrived at her apartment and after she locked the doors. What did she tell you?
>
> . . . .
>
> A: Okay. She told me that she hated me and she hated me for giving birth to Todd, that he was a weakling and that he was a weak—like wimpy and that she wanted to see him dead and that she wanted to see me destroyed and bury him. She also told me that—
>
> . . . .
>
> Q: What else did Sandy tell you, Ms. Kendall?
>
> A: She told me that I better not make her angry or displease her because if I did, none of us would ever see the children, we wouldn't be allowed to see the boys . . . again. She told me that all the times that she had called the police and took the Restraining Order, that she had—was going to lure Todd and that she had complete control over his mind; that he would do whatever she wanted him to do and that she was going to shoot him and she was going to kill him and that she was going to get away with it.
>
> Q: Now did she show you a weapon?
>
> A: She tried to in her bedroom.
>
> Q: Did you—did you look at it?

A: No, I didn't. I did not step all the way in the bedroom when she pulled out the drawer. And I turned and went to the front door and told her to unlock the door and let me out.

. . . .

Q: Would you describe her as being scared?

A: No.

The State objected to Ms. Kendall's proposed testimony on the grounds that the testimony was hearsay that did not fit within any exception to the hearsay rule, that it was irrelevant in that defendant did not have knowledge of the full conversation, and that the only reason the testimony was being offered was to prejudice the jury against the victim. The trial court sustained the State's objections, and Ms. Kendall was not permitted to testify as to the victim's statements to her. Defendant contends that Ms. Kendall's statements were admissible to rebut evidence presented during the State's case-in-chief that Semantha was afraid of defendant.

We recently have held that "in the absence of evidence that the defendant shot the victim in self-defense, 'evidence of the victim's prior [violent act] . . . [is] not relevant to the killing of the victim.' " *State v. Lloyd*, 354 N.C. at 95, 552 S.E.2d at 612 (quoting *State v. Strickland*, 346 N.C. at 456, 488 S.E.2d at 201) (where there was no evidence that defendant shot the victim in self-defense, evidence of the victim's statements to defendant regarding her killing another man were not relevant to the killing of the victim) (alterations in original); *see also State v. Leazer*, 337 N.C. 454, 458, 446 S.E.2d 54, 56-57 (1994) (where defendants did not contend they killed in self-defense, evidence that the victim had been convicted of two prior murders would be more prejudicial than pertinent). Because defendant has not asserted self-defense either at trial or on appeal, any alleged threats the victim made to defendant's mother are not relevant to the murder of the victim. Accordingly, the trial court did not err in preventing the jury from hearing this portion of Ms. Kendall's testimony. This assignment of error is overruled.

[22] By his next assignment of error, defendant contends that the trial court impermissibly allowed defense witness Angie Thompson to testify on cross-examination that she "was told by a person that grew up with [defendant] that he would torment cats in the neighborhood and kill cats when he was growing up." The trial court overruled defendant's objections to this testimony, noting that Ms. Thompson's

statement was contained in one of the documents that defendant's expert witness, Dr. Mathew, referred during his direct examination. Defendant argues that Ms. Thompson's statement was both inadmissible hearsay and improperly prejudicial.

During direct examination of Ms. Thompson, defendant asked, "Had you ever known Todd Anthony to be violent?" to which she responded negatively. By so questioning Ms. Thompson, defendant opened the door for the State to rebut her answer. Indeed,

> "[t]he law 'wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself.' " *State v. Warren*, 347 N.C. 309, 317, 492 S.E.2d 609, 613 (1997) (quoting *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981)), *cert. denied*, 523 U.S. 1109, 140 L. Ed. 2d 818 (1998). "Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." *Albert*, 303 N.C. at 177, 277 S.E.2d at 441.

State v. McNeil, 350 N.C. 657, 682, 518 S.E.2d 486, 501 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000).

Moreover, prior to Ms. Thompson's testimony, Dr. Mathew, was cross-examined on the issue of whether defendant had killed cats when he was young. Specifically, Dr. Mathew testified:

> Q: Now did you look at—at an interview with Angie Thompson? Is that part of the things that you looked at?
>
> A: I do not remember all the names, there are so many of them. You are probably correct. I'd have to go through the stack. Angie Thompson?
>
> . . . .
>
> Q: Doesn't it state that she had heard that when Todd grew up, that Todd killed cats when he was young?
>
> A: Yes.
>
> Q: Did you read that?
>
> A: Yes.
>
> Q: And that didn't have any bearing in you reaching your opinion?

A: No. Here it says, "She had heard from guys that he grew up with." We don't know who these guys are, how reliable they are that Todd killed cats when he was young; whether he killed one cat, whether the cat was sick, whether the cat was a menace to the neighborhood. We don't have any information and killing a cat when you are young doesn't mark you as somebody with a temper problem, in my view.

Defendant did not object to this testimony. "Where 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. Alford*, 339 N.C. at 570, 453 S.E.2d at 516. Defendant also failed to object to the testimony of William Bush, who was asked on cross-examination, "Do you know about what [defendant] would do with cats?" Mr. Bush responded, "I don't know if he would ever kill any cats, but . . . I've heard of him taking a dog and put over in a cat—with a lot that had cats in it. The dog would get mad at the cats and, you know, kill them or hurt them or something." Accordingly, we hold that defendant has lost the benefit of his objection to Ms. Thompson's testimony on this issue. This assignment of error is overruled.

[23] Next, in three related assignments of error, defendant contends that the trial court erred by overruling his objections during the rebuttal testimony of State's witnesses Randy Carter, Officer Kevin Murphy, and Carl Barker. As to each of these witnesses, defendant argues that the prosecutor was permitted to ask questions that exceeded the proper scope of rebuttal.

Defendant first points to Randy Carter's rebuttal testimony. When Mr. Carter was called as a rebuttal witness and asked what Ms. Kendall, defendant's mother, had said to him, defendant immediately objected, arguing that the question had been asked and answered previously. The State reminded the trial court that Mr. Carter had not testified to this information previously in the State's case-in-chief, but that during defendant's case-in-chief, Ms. Kendall had testified as to what she told Mr. Carter on the date in question. After instructing the parties to avoid repetition, the trial court determined that the questioning was a proper rebuttal area. Mr. Carter then testified:

Q: Mr. Carter, what did Ms. Kendall say to you at your house when she came over to your house on April the 15th, 1997?

A: Just to go over there and see if I could talk to Todd, settle him down.

Q: And why did she say she wanted you to go settle him down?

. . . .

A: Because he was upset.

Q: And did she say what he was saying over there?

. . . .

A: No.

Q: She didn't?

A: No, she didn't.

Q: Did you make a statement to the investigator for the Public Defender's Office?

. . . .

A: Could you repeat it again?

Q: Did you make a statement to an investigator, Ross English, for the Public Defender's Office—for the Defense counsel?

A: I don't recall.

Q: Do you recall Ross English coming to talk to you at your home?

A: No, he didn't.

Q: He didn't. Did he talk to you over the phone?

A: Yes, he did.

Q: And did you tell Mr. English that Ms. Kendall asked you to go over to her house to talk to Mr. Anthony to calm him down?

A: Yes.

Q: And that Mr. Anthony was saying he was going to kill his wife?

. . . .

A: No, I didn't, not that part, no. Nothing about killing a wife; no.

Q: She didn't say anything about him committing suicide?

A: No.

. . . .

Q: I'll show you what's been marked as State's Exhibit 65 and ask you to look over and read it.

. . . .

Q: Does that refresh your memory?

A: Somewhat, yes.

Q: Did Ms. Kendall tell you that Todd Anthony was threatening to kill his wife and that's why she wanted you to go over to the house to talk to him?

. . . .

A: I do not recall. As soon as she asked me to go over there, I ran over there to him.

Q: You do not recall.

A: No, I do not.

Defendant objected seven times during this questioning, and the trial court overruled each objection.

Defendant next objected to the rebuttal testimony of Officer Kevin Murphy, in which Officer Murphy described a domestic violence call he received on 16 March 1997 involving defendant and the victim:

Q: Were you so employed on-duty on March the 16th, 1997?

A: Yes, I was.

Q: And on that date, did you have reason to go to 5250 Hickory Grove Road?

A: Yes, I did.

Q: And what was the reason for your call on March 16th to 5250 Hickory Grove Road?

. . . .

A: On that date we were dispatched out to that residence in reference to a domestic between a man and his wife.

Q: What do you mean by a domestic?

A: The call came in to our Communications Center that a female had called in—

. . . .

Q: What was—why were you dispatched to 5250 Hickory Grove Road?

A: We were dispatched there to where a female had called in and stated that there was—

. . . .

A: Her husband was there. She and her husband were having a domestic, there was an argument, and there was a gun involved in which he had at the time. And, therefore, we responded to that residence.

Defendant objected three times during this questioning; however, none of the objections raised the argument he now presents, that the questioning went beyond the scope of proper rebuttal testimony. The trial court overruled defendant's objections.

Finally, defendant objects to the testimony of his former co-worker, Carl Barker, who described an alleged extramarital affair between defendant and Tammie Meroney:

Q: Did you ever talk to Mr. Anthony about what his relationship with Ms. Meroney was?

A: Yes, ma'am.

Q: What did Mr. Anthony tell you his relationship was with Ms. Meroney?

. . . .

A: He said that he had met her.

Q: Did he say anything that they were doing?

. . . .

A: Yes, ma'am.

Q: What did he say, sir?

A: He said they went off together.

Q: Did he say what they did when they went off together?

A: Yes, ma'am.

Q: What did he say, sir?

A: He said they had sex.

Although defendant objected twice to this testimony, neither objection was based on the contention that the testimony exceeded the proper scope of rebuttal testimony. The trial court overruled defendant's objections.

This issue is governed by section 15A-1226 of the North Carolina General Statutes, which provides:

> (a) Each party has the right to introduce rebuttal evidence concerning matters elicited in the evidence in chief of another party. The judge may permit a party to offer new evidence during rebuttal which could have been offered in the party's case in chief or during a previous rebuttal, but if new evidence is allowed, the other party must be permitted further rebuttal.
>
> (b) The judge in his discretion may permit any party to introduce additional evidence at any time prior to verdict.

N.C.G.S. § 15A-1226 (1999). This statute "is clear authorization for a trial judge, within his discretion, to permit a party to introduce additional evidence at any time prior to the verdict." *State v. Quick*, 323 N.C. 675, 681, 375 S.E.2d 156, 159 (1989).

Our review of the record indicates that the challenged questions posed to these rebuttal witnesses were properly formulated to rebut matters presented during defendant's case-in-chief. *See State v. Johnston*, 344 N.C. 596, 605, 476 S.E.2d 289, 294 (1996) ("The State has the right to introduce evidence to rebut or explain evidence elicited by defendant although the evidence would otherwise be incompetent or irrelevant."). The questions presented to Mr. Carter were intended to highlight inconsistencies in Ms. Kendall's testimony about what she told Mr. Carter shortly before the murder. The testimony of Officer Murphy addressed defendant's own testimony in which he stated that he was good to the victim and that although they argued some, he "was scared to argue" with her. The domestic violence incident of 16 March 1997 also was presented on cross-examination of defendant, and Officer Murphy's testimony rebutted defendant's statements that he "did not do anything to [the victim]" on that date. Finally, Mr. Barker's testimony rebutted defendant's

statements that he was faithful during his marriage to the victim and that it was the victim who had extramarital affairs.

In addition, it appears from the record that the quoted rebuttal testimony of witnesses Carter and Murphy would have been admissible on direct examination. *See* N.C.G.S. § 15A-1226. "It is within the trial judge's discretion to admit evidence on rebuttal which would have been otherwise admissible, and the appellate courts will not interfere absent a showing of gross abuse of discretion." *State v. Carson*, 296 N.C. 31, 44, 249 S.E.2d 417, 425 (1978). Furthermore, there is nothing in the record that suggests that defendant was prevented from presenting additional rebuttal evidence. *State v. Quick*, 323 N.C. at 682, 375 S.E.2d at 159. We hold that the trial court did not abuse its discretion in allowing the State to question these rebuttal witnesses.

These assignments of error are overruled.

[24] In his next assignment of error, defendant argues that the State's questions to one of its rebuttal witnesses, Dr. Robert Rollins, "included an assumption that the jury found one or the other State witness[es] credible regarding certain facts[] to determine whether that affected [Dr. Rollins'] opinion as to the Defendant's 'ability to form specific intent on April 15th.' " Defendant contends that the State's questions were impermissible because hypothetical questions can be posed only to an expert who has not examined defendant, that Dr. Rollins' responses were too equivocal to have probative value, and that Dr. Rollins' responses impermissibly embraced legal terms.

Examples of questions asked of Dr. Rollins to which defendant objects include:

> Q: Now assuming, Dr. Rollins, that the jury believes an officer that testified that the Defendant said immediately after this incident, "One of the bullets was meant for me and the old man confronted me, so I shot him, too," does that affect your opinion as to Mr. Anthony's ability to form specific intent on April 15th?
>
> . . . .
>
> Q: Let's assume the jury finds that a police officer is credible when he states that he handcuffed Mr. Anthony and heard him say, "I shot her twice, is she all right"; and then Mr. Anthony was advised of his rights and asked, "You shot your wife, also," and he

> replied, "Yes, sir," how, if at all, does that affect your opinion as to whether or not Mr. Anthony had the specific intent and ability to plan on April 15th, 1997?
>
> . . . .
>
> Q: Dr. Rollins, assume the jury finds that approximately three weeks before the murder that he states to a friend of his who owns a fishing establishment that, "I am going to kill her," how, if at all, does that affect your opinion that Mr. Anthony was able to form specific intent and have the ability to plan on April 15th, 1997?

Throughout this questioning, defendant made general objections, which the trial court overruled.

"[A]n expert witness may express an opinion based on facts within his own knowledge or based on facts not within his knowledge but incorporated into hypothetical questions." *State v. Young*, 312 N.C. 669, 679, 325 S.E.2d 181, 188 (1985). Hypothetical questions "should include only those facts supported by the evidence already introduced or those facts which a jury might logically infer from the evidence." *State v. Boone*, 302 N.C. 561, 566, 276 S.E.2d 354, 358 (1981). Such questions "should not contain repetitions, slanted or argumentative words or phrases." *Id.* In addition, a hypothetical question must be "sufficiently explicit for the witness to give an intelligent and safe opinion." *State v. Dilliard*, 223 N.C. 446, 448, 27 S.E.2d 85, 87 (1943).

Defendant does not allege that the facts were misstated in the hypothetical questions posed to Dr. Rollins. Instead, he argues that hypothetical questions should not be asked to an expert who has interviewed a defendant. However, we find no authority for defendant's contention, and defendant points us to none. *See State v. Boone*, 302 N.C. at 566, 276 S.E.2d at 358 (hypothetical questions posed to expert who had interviewed criminal defendant). After a review of the ten hypothetical questions posed to Dr. Rollins, we conclude that they were based upon facts supported by the evidence. In addition, we conclude that Dr. Rollins' answers were not so equivocal as to render them without probative value. In fact, all of his answers were certain and consistently reflected his opinion "that Mr. Anthony was able to make plans and carry out actions." In addition, these responses did not improperly embrace legal terms. *State v. Hedgepeth*, 330 N.C. 38, 46, 409 S.E.2d 309, 314 (1991) (no error in

admission of Dr. Rollins' testimony that defendant was capable of forming the specific intent to kill). This assignment of error is overruled.

[25] Defendant argues that the cumulative effect of evidentiary rulings during the guilt phase of his trial entitles him to a new trial. In light of the great weight of evidence against defendant presented at trial, we hold that the combined effect of any erroneous evidentiary rulings was not prejudicial to defendant. This assignment of error is overruled.

[26] In his next assignment of error, defendant contends that the trial court failed to intervene *ex mero motu* during the prosecutor's guilt phase closing arguments. First, defendant specifies a portion of the prosecutor's argument that refers to the testimony of Mr. Fitcher, who was at the scene of the murder and stayed with the victim until she was removed by emergency personnel: "[Defendant] tells you that Ms. Anthony wasn't a good mother, but the last breath from her mouth was, 'take care of my boys.' " Defendant contends that the prosecutor here inaccurately paraphrased Mr. Fitcher's testimony. Second, defendant calls our attention to a portion of the prosecutor's argument that refers to the jury's role in the case:

> Ladies and gentlemen, you are the voice of this community. You have sat here and you have heard the evidence and you have listened patiently. I ask, ladies and gentlemen, that you tell Mr. William Todd Anthony that the citizens of Gaston County will not stand for this behavior; that this community and this county will not tolerate people who decide to blow other people's lives away because they're not getting their way.

Defendant claims that the prosecutor inappropriately appealed to the jury's emotions in making such an argument.

Because defendant did not object to either argument, the standard of review is whether "the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*." *State v. Mitchell*, 353 N.C. 309, 324, 543 S.E.2d 830, 839, *cert. denied*, —— U.S. ——, —— L. Ed. 2d —— (Oct. 29, 2001) (No. 01-6002). "To establish such an abuse, 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, 23, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). "[T]he impropriety of the argument must be

gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979).

As to the prosecutor's recitation of Mr. Fitcher's testimony, we have held that "[c]losing argument may properly be based upon the evidence and the inferences drawn from that evidence." *State v. Diehl*, 353 N.C. 433, 436, 545 S.E.2d 185, 187 (2001). Here, Mr. Fitcher testified that the victim said, "Take care of my boys," as she lay dying in front of her parents' home. The prosecutor's argument to the jury quoted Mr. Fitcher's testimony verbatim and therefore was properly based on the evidence at trial.

As to the prosecutor's second argument, we have held that it is not improper for a prosecutor to argue that the jurors " 'are the voice and conscience of the community,' " *State v. McNeil*, 350 N.C. at 687-88, 518 S.E.2d at 505 (quoting *State v. Brown*, 320 N.C. 179, 204, 358 S.E.2d 1, 18, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987)). Here, the prosecutor merely reminded the jury that it was the voice of the community, and we consistently have upheld such arguments on appeal. *See, e.g.*, *State v. Peterson*, 350 N.C. 518, 531, 516 S.E.2d 131, 139 (1999), *cert. denied*, 528 U.S. 1164, 145 L. Ed. 2d 1087 (2000); *State v. Locklear*, 349 N.C. 118, 153, 505 S.E.2d 277, 297 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999). Accordingly, the trial court did not err in failing to intervene *ex mero motu* during these portions of the prosecutor's closing argument. This assignment of error is overruled.

[27] Finally, defendant argues that the evidence was insufficient to support the trial court's instruction on flight. The trial court's instruction was in accord with the North Carolina pattern jury instructions as follows:

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

and deliberation. Therefore it must not be considered by you as evidence of premeditation and deliberation.

N.C.P.I.—Crim. 104.36 (1994). During the charge conference defendant objected to the trial court's giving a flight instruction.

"[A] trial court may not instruct a jury on defendant's flight unless 'there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged.' " *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 433-34 (1990) (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)). "Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991); *see also State v. Grooms*, 353 N.C. 50, 80, 540 S.E.2d 713, 732 (2000) (noting that "[t]he relevant inquiry is whether the evidence shows that defendant left the scene of the crime and took steps to avoid apprehension"), *cert. denied*, — U.S. —, 151 L. Ed. 2d 54 (2001).

The evidence presented in this case, when considered in a light most favorable to the State, was sufficient to warrant the trial court's instruction on flight. After shooting Semantha and her father in front of witnesses, defendant immediately entered his car and quickly drove away from the crime scene without rendering any assistance to the victims or seeking to obtain medical aid for them. Defendant passed Mount Holly Police Officer D.B. Duckworth who was en route to the scene of the shooting in response to a dispatcher's call, but did not flag the officer down. Only later did Mr. Carter, who was taking defendant to the police station, stop an officer so defendant could surrender. We hold that this evidence was sufficient to establish that defendant did more than merely leave the scene of the crime. *See State v. Lloyd*, 354 N.C. at 120, 552 S.E.2d at 626 (trial court did not err in instructing jury on flight where defendant left crime scene hurriedly without providing medical assistance to the victim and soon thereafter called the Burlington Police Department to turn himself in); *State v. Reeves*, 343 N.C. 111, 113, 468 S.E.2d 53, 55 (1996) ("In this case, there was evidence tending to show that defendant, after shooting the victim, ran from the scene of the crime, got in a car waiting nearby, and drove away. This is sufficient evidence of flight to warrant the instruction."); *State v. Sweatt*, 333 N.C. 407, 419, 427 S.E.2d 112, 119 (1993) (no error in trial court's instruction on flight

where "[t]he State presented evidence that shortly after the victim was murdered, defendant passed Officer Foley on the highway traveling at a very high rate of speed. This was evidence from which the jury could draw a reasonable inference that defendant fled the scene."). Furthermore, the trial court's instruction accurately informed the jury that proof of flight alone was insufficient to establish guilt and would not be considered as evidence of premeditation and deliberation. *State v. Grooms*, 353 N.C. at 81, 540 S.E.2d at 732. Accordingly, the trial court properly instructed the jury on flight. This assignment of error is overruled.

Based upon the foregoing, we find no prejudicial error in the guilt-innocence phase of defendant's trial.

CAPITAL SENTENCING PROCEEDING

[28] In his first assignment of error relating to his capital sentencing proceeding, defendant contends that the trial court erred in allowing the prosecutor to make an improper jury argument at the penalty proceeding, during which defendant claims the prosecutor asked jurors to put themselves in the place of Semantha Anthony. The prosecutor argued to the jury:

> Now I'm going to start the watch and I want you to be thinking, ladies and gentlemen, thinking of what she is going through. This five minutes was the last five minutes of her life. And, ladies and gentlemen, she could have lived ten minutes, Dr. Wittenburg said five to ten minutes. I don't want to make you sit here for that long. And when you go back in the deliberation room, ladies and gentlemen, you may think, I can't believe that [prosecutor] made us sit there for five minutes. But think, when you remember that, that's Sandy laying [sic] on the ground agonizing, in pain, hurting, suffering, feeling her life's blood draining from her.
>
> I'm going to start it in the first minutes of her death. She's still trying to breathe, ladies and gentlemen, burning, searing pain in her chest and in her back. Somewhere in there she hears boom, a third shot; Is that my dad or is that my mom? This hurts so bad, I can't breathe. I've never felt this before. I've never felt this, this hurt, this is killing me. She's probably thinking at this point, Am I going to die? That's the first minute of her death; the first minute of the last five minutes of her life.
>
> Maybe as she's laying there now in pain, she's thinking [about her children]. I remember when we went to McDonald's, I remem-

ber when we went to the park. And then maybe she's thinking, I don't want to die, I don't want to die. I want to see [my children] become teenagers. I want to see them have their own families. This is hurting so bad, I can't breathe. Maybe by now some people have come over to her and they're rubbing her face and they're telling her, help is on the way, Sandy, hang in, Sandy. She goes, I'm trying, I'm trying really hard to hang in here, but it's hard. It hurts and I can't breathe very well. Mr. Fitcher, as he told you, he's sitting there going, "Sandy, you've got to stay for the boys. Who's going to raise the boys?" And she says, that's what I've been thinking of. And all she can get out is, take care of my boys, take care of my boys. I'm dying. By now don't you think she knows? I'm dying.

Ladies and gentlemen, as she's laying there feeling the pain, she's got two minutes left. Can you imagine that as she's laying there what's going through her mind? What goes through a person's mind the last two minutes of their life? Five minutes is a long time when you're dying isn't it. She's got a minute and a half left. The pain is not getting any better, it's getting worse. Probably at this point there's so much blood gone that she can't talk any longer. She's trying, she's moving her lips, she's trying to say whatever it is she feels. She's probably hoping and praying that her boys are going to be all right without her. She's still thinking, "I don't want to die." She's still trying to breathe, making a concerted effort to breath; what you and I take for granted. She has 50 seconds left to live, ladies and gentlemen. Twenty seconds left to live. This is when her life is over. To that last breath, ladies and gentlemen. That's a long time to lay there and know that you are dying.

Because defendant failed to object to this argument at trial, our review is limited to whether the argument was so grossly improper as to warrant the trial court's intervention *ex mero motu*. *State v. Cummings*, 353 N.C. 281, 296-97, 543 S.E.2d 849, 859, *cert. denied*, —— U.S. ——, 151 L. Ed. 2d 286 (2001). Under this standard, "[o]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996). "[D]efendant 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. at 23, 506 S.E.2d at 467.

Although "[a]n argument 'asking the jurors to put themselves in place of the victims will not be condoned,' " *State v. McCollum*, 334 N.C. 208, 224, 433 S.E.2d 144, 152 (1993) (quoting *United States v. Pichnarcik*, 427 F.2d 1290, 1292 (9th Cir. 1970)), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994), "this Court has consistently allowed arguments where the prosecution has asked the jury to imagine the emotions and fear of a victim," *State v. Wallace*, 351 N.C. 481, 529, 528 S.E.2d 326, 356, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000); *see also State v. Grooms*, 353 N.C. at 82, 540 S.E.2d at 733 (noting that "we have previously reviewed closing arguments that suggested what a victim may have been thinking as he or she was dying and concluded that they were not grossly improper"). Arguments urging the jury to appreciate the circumstances of the crime also have been approved by this Court. *State v. Gregory*, 340 N.C. 365, 426, 459 S.E.2d 638, 673 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996); *see also State v. Artis*, 325 N.C. at 323-25, 384 S.E.2d at 496-97 (no error where prosecutor asked jurors to hold their breath for as long as they could over four-minute period so they could understand dynamics of manual strangulation).

In the present case, the prosecutor focused on what Semantha may have been thinking as she lay dying. The prosecutor's argument was based upon the evidence at trial and did not manipulate or misstate the evidence, nor did it urge the jurors to put themselves in Semantha's place. In a similar case, *State v. Jones*, 346 N.C. 704, 487 S.E.2d 714 (1997), the prosecutor described what the victim may have seen and felt as she was being murdered and asked the jury to imagine what she may have been thinking during the five-minute period after the defendant inflicted her wounds. We held that the prosecutor's description of what the victim's thoughts may have been was based on evidence presented at trial, and, citing *State v. King*, 299 N.C. 707, 264 S.E.2d 40 (1980), we concluded that the prosecutor's argument was not so grossly improper as to require the trial court to intervene *ex mero motu*. *State v. Jones*, 346 at 714, 487 S.E.2d at 720-21; *see also State v. Grooms*, 353 N.C. at 82-83, 540 S.E.2d at 733 (no error for trial court to fail to intervene *ex mero motu* where prosecutor described what victim may have been thinking and pain she was experiencing during rape and murder because argument was based on evidence at trial and prosecutor did not ask jurors to put themselves in place of victim); *State v. Cummings*, 352 N.C. 600, 622,

536 S.E.2d 36, 52 (2000) (prosecutor's argument as to what victim was thinking at time of death was not improper because it was fairly premised on testimony of witnesses who found victim's body and did not misstate the evidence), *cert. denied*, —— U.S. ——, 149 L. Ed. 2d 641 (2001); *State v. Elliott*, 344 N.C. 242, 274-75, 475 S.E.2d 202, 216-17 (1996) (trial court did not err by failing to intervene *ex mero motu* where prosecutor got on table, lying on his stomach, with legs up and arms behind his back, and described what child victim may have been thinking as defendant beat her in "punishment position"), *cert. denied*, 520 U.S. 1106, 137 L. Ed. 2d 312 (1997). Accordingly, we hold here that the trial court did not err in failing to intervene *ex mero motu* during the prosecutor's argument to the jury. This assignment of error is overruled.

[29] In his next argument, defendant contends that the trial court erred in sustaining the State's objection to portions of his closing argument in which his counsel sought to read to the jury facts from a published North Carolina Supreme Court case regarding the especially heinous, atrocious, or cruel aggravating circumstance, N.C.G.S. § 15A-2000(e)(9) (1999). Specifically, defendant's counsel argued to the jury:

> [The prosecutor] stood before you for five minutes talking to you about suffering and pain, whatever she imagined was taking place with Sandy Anthony during the last moments of her life. In the case of State vs. Hamlette, [302 N.C. 490, 504, 276 S.E.2d 338, 347 (1981),] the North Carolina Supreme Court said, "According to the evidence in the present case, Defendant, after riding around and drinking beer most of the evening, saw the victim and shot him three times from behind—"

At this point, the State objected and made a motion to strike, and the trial court sustained the objection and granted the motion to strike. Defendant's counsel continued:

> The Court went on to talk about that and said, "This was heinous, but not especially heinous, within the meaning of that term as used in the statute." It went on to say, "In comparison with other capital cases we have decided, it was not—"

The State again objected, and the trial court again sustained the objection, telling the jury that defense counsel could "read the law, but not the facts."

Section 7A-97 of the North Carolina General Statutes, entitled "Court's Control of Argument," provides that "[i]n jury trials the whole case as well of law as of fact may be argued to the jury." N.C.G.S. § 7A-97 (1999). In interpreting N.C.G.S. § 84-14, the predecessor to the current statute, we held:

> N.C.G.S. § 84-14 grants counsel the right to argue the law to the jury which includes the authority to read and comment on reported cases and statutes. *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977). There are, however, limitations on what portions of these cases counsel may relate. For instance, counsel may only read statements of the law in the case which are relevant to the issues before the jury. In other words, "the whole *corpus juris* is not fair game." *State v. McMorris*, 290 N.C. 286, 287, 225 S.E.2d 553, 554 (1976). Secondly, counsel may not read the facts contained in a published opinion together with the result to imply that the jury in his case should return a favorable verdict for his client. *Wilcox v. [Glover Motors Inc.]*, 269 N.C. 473, 153 S.E.2d 76 (1967). Furthermore, counsel may not read from a dissenting opinion in a reported case. *See Conn v. [Seaboard Air Line Ry. Co.]*, 201 N.C. 157, 159 S.E. 331 (1931). Consequently, these limitations show that simply because a statement is made in a reported decision does not always give counsel the right to read it to the jury in his closing argument under N.C.G.S. § 84-14.

State v. Gardner, 316 N.C. 605, 611, 342 S.E.2d 872, 876 (1986); *see also State v. Braxton*, 352 N.C. 158, 222, 531 S.E.2d 428, 465 (2000) ("The facts of . . . other cases are not pertinent to any evidence presented in this case and are, thus, improper for jury consideration."), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001).

Here, we hold that defendant's attempt to read the facts from *State v. Hamlette*, 302 N.C. 490, 276 S.E.2d 338, along with the holding in that case for the purpose of urging the jury to not find the especially heinous, atrocious, or cruel aggravating circumstance was improper. Accordingly, the trial court did not err in sustaining the State's objections in this regard. This assignment of error is overruled.

[30] Defendant next argues that the trial court improperly submitted to the jury as an aggravating circumstance that the "murder was committed to disrupt or hinder the lawful exercise of a governmental function." *See* N.C.G.S. § 15A-2000(e)(7). At trial, the trial court instructed the jury as to this circumstance:

"Was this murder committed to disrupt or hinder the lawful exercise of a governmental function?" A murder is committed for such purpose if the Defendant's purpose at the time he killed is, by that killing, to disrupt or hinder the exercise by some branch or agency of government or some lawful function, specifically in this case, the proceeding in the District Court on the Domestic Violence Order.

"In determining whether there is sufficient evidence to submit an aggravating circumstance, the trial court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom." *State v. Carter*, 342 N.C. 312, 323, 464 S.E.2d 272, 279 (1995), *cert. denied*, 517 U.S. 1225, 134 L. Ed. 2d 957 (1996). " 'If there is substantial evidence of each element of the [aggravating] issue under consideration, the issue must be submitted to the jury for its determination.' " *State v. Moose*, 310 N.C. 482, 494, 313 S.E.2d 507, 516 (1984) (quoting *State v. Stanley*, 310 N.C. 332, 347, 312 S.E.2d 393, 401 (1984) (Martin, J., dissenting)).

Here, a domestic violence protective order had been issued after Semantha filed a domestic violence complaint against defendant. Semantha was scheduled to return to court on 16 April 1997, the morning after her murder, to obtain an extension of the order. Defendant was aware of this hearing. He testified that he had hired an attorney to represent him in the separation and had asked the attorney to have the date of the hearing on the domestic violence order changed so he could have scheduled surgery. Statements made by defendant both before and after shooting Semantha reflect his belief that she was keeping the children from him. In addition, a restraining order to prevent defendant from approaching Semantha before the hearing was served on him at his place of employment, so upsetting him that he ripped the papers up and threw the pieces at the door of Semantha's apartment. Based on this evidence, the jury could reasonably find that one reason defendant killed his wife was to stop this proceeding. *See State v. Gray*, 347 N.C. 143, 183, 491 S.E.2d 538, 556 (1997) (no error for trial court to submit (e)(7) aggravating circumstance where defendant's murder of his wife stopped divorce proceedings), *cert. denied*, 523 U.S. 1031, 140 L. Ed. 2d 486 (1998). This assignment of error is overruled.

[31] Defendant also argues that the trial court improperly submitted to the jury the aggravating circumstance that the "murder was com-

mitted against a witness because of the exercise of her official duty as a witness." *See* N.C.G.S. § 15A-2000(e)(8). As to this circumstance, the trial court instructed the jury:

> The second aggravating—alleged aggravating circumstance reads as follows: "Was this murder committed against a witness because of the exercise of her official duty as a witness?" A murder is so committed when the victim is a witness or a former witness in a domestic violence proceeding against the Defendant; and at some time prior to the killing, the victim exercised one of her official duties as a witness testifying against the Defendant; and the fact that she had done so constituted the Defendant's motive for killing her. An official duty is anything which is necessary for a witness spouse to do as a witness in a domestic violence proceeding in the District Court.

"This Court has said that the (e)(8) aggravating circumstance reflects the General Assembly's recognition of the 'common concern' that 'the collective conscience requires the most severe penalty for those who flout our system of law enforcement.' " *State v. Burke*, 343 N.C. 129, 163, 469 S.E.2d 901, 919 (quoting *State v. Brown*, 320 N.C. at 230, 358 S.E.2d at 33), *cert. denied*, 519 U.S. 1013, 136 L. Ed. 2d 409 (1996). Here, as detailed above, Semantha previously obtained an "Ex Parte Domestic Violence Protection Order" from a judge and was scheduled to testify against defendant the day after her murder in the domestic violence hearing. Evidence at trial established that defendant had been upset for some time over his separation from Semantha and the custody of their children; even defendant's own testimony reflected his frustration and anger over these issues. In addition, the evidence established that defendant was aware that Semantha had obtained the *ex parte* order and was going to testify. Based on this evidence, we conclude that a reasonable juror could have found that one reason defendant killed his wife was because she obtained the protective order as one aspect of her official duty as a witness against him. *State v. Gray*, 347 N.C. at 183, 491 S.E.2d at 556; *State v. Long*, 354 N.C. 534, 557 S.E.2d 89 (2001).

[32] Nevertheless, defendant contends that the trial court erroneously erred in submitting both the (e)(7) and (e)(8) aggravating circumstances because both circumstances were based on the same evidence. Defendant's argument is well-founded. We have held that "[i]n a capital case the trial court may not submit multiple aggravating circumstances supported by the same evidence." *State v.*

Lawrence, 352 N.C. 1, 29, 530 S.E.2d 807, 825 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001). The submission of two aggravating circumstances based upon the same evidence is impermissible "double counting." *State v. Kandies*, 342 N.C. 419, 450, 467 S.E.2d 67, 84, *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996). "Where, however, there is separate evidence supporting each aggravating circumstance, the trial court may submit both 'even though the evidence supporting each may overlap.' " *State v. Rouse*, 339 N.C. 59, 97, 451 S.E.2d 543, 564 (1994) (quoting *State v. Gay*, 334 N.C. 467, 495, 434 S.E.2d 840, 856 (1993)), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995); *see also State v. Call*, 349 N.C. at 426, 508 S.E.2d at 523 ("[S]ome overlap in the evidence supporting each aggravating circumstance is permissible so long as there is not a complete overlap of evidence.").

Our research has revealed only one case in which we approved submission of both the (e)(7) and (e)(8) aggravating circumstances. *State v. Gray*, 347 N.C. at 180-81, 491 S.E.2d at 554-55. In that case, as here, a husband shot his wife. Although the evidence for submission of the (e)(7) and (e)(8) circumstances overlapped, we found no error in *State v. Gray* because the governmental function to which the (e)(7) circumstance referred was a show cause order served on the defendant for an accounting of marital monies in the parties' upcoming divorce, while the (e)(8) circumstance applied to a pending criminal case in which the victim was to be a witness against the defendant. By contrast, in the case at bar, the (e)(7) and (e)(8) circumstances both referred to the domestic violence matter previously initiated by Semantha and scheduled for hearing the day after the murder. The relationship between defendant, victim Semantha, and their children was a reason Semantha had instituted the action and was to be a witness at the upcoming hearing. Consequently, we hold that while there was sufficient evidence to support submission of either aggravating circumstance, it was error to submit both.

Nevertheless, "the erroneous submission of an aggravating circumstance in a capital sentencing procedure is not reversible *per se*, but rather, is subject to a harmless error analysis." *State v. Alston*, 341 N.C. 198, 255, 461 S.E.2d 687, 719 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996). In the case at bar, the evidence indicated that defendant planned to shoot his wife, shot her twice, shot her father, and attempted to shoot her mother. As in *State v. Alston*, the jury found the murder to be especially heinous, atrocious, or cruel. *Id.* (Assuming *arguendo* that the trial court erred by submitting

the pecuniary gain and former witness aggravating circumstances, "it is unreasonable to believe that absent a finding that the victim was a former witness or that the defendant killed the victim for . . . money . . . , the jury would have ignored the fact that the defendant mercilessly and brutally killed the victim and thus would have found that the death penalty was not justified."). Although the jurors here unanimously found that the (e)(8) circumstance existed, they rejected the (e)(7) circumstance. Based upon this evidence and this record, it is unreasonable to believe that the jury would have returned a different sentencing recommendation if the trial court had submitted only one of these two circumstances.

These assignments of error are overruled.

[33] Defendant next contends that the trial court erred when it submitted to the jury the aggravating circumstance that the "murder [was] especially heinous, atrocious or cruel." *See* N.C.G.S. § 15A-2000(e)(9). Specifically, defendant argues that there was insufficient evidence to support submission of this aggravating circumstance.

"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, and discrepancies and contradictions resolved in favor of the State." *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). In addition, "determination of whether submission of the (e)(9) aggravating circumstance is warranted depends on the particular facts of each case." *State v. Call*, 353 N.C. at 424, 545 S.E.2d at 205.

We have held that three types of murders warrant the submission of the (e)(9) aggravating circumstance. *Id.* at 425, 545 S.E.2d at 206.

> The first type consists of those killings that are physically agonizing for the victim or which are in some other way dehumanizing. *State v. Lloyd*, 321 N.C. 301, 319, 364 S.E.2d 316, 328, *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988). The second type includes killings that are less violent but involve infliction of psychological torture by leaving the victim in his or her "last moments aware of but helpless to prevent impending death," *State v. Hamlet*, 312 N.C. [162,] 175, 321 S.E.2d [837,]

> 846 [(1984)], and thus may be considered "conscienceless, pitiless, or unnecessarily torturous to the victim," *State v. Brown*, 315 N.C. 40, 65, 337 S.E.2d 808, 826-27 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *and overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). The third type includes killings that "demonstrate[] an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder[s]." *Id.* at 65, 337 S.E.2d at 827.

State v. Lloyd, 354 N.C. at 122, 552 S.E.2d at 627-28 (alterations in original).

In the present case, defendant's murder of Semantha easily fits within the first two types of killings and displays aspects of the third. First, the evidence tended to show that Semantha's death was physically agonizing. Dr. Wittenberg testified that Semantha slowly bled to death and could have survived five to ten minutes after being shot. He also added that her wounds would be "very painful" and that she would have been conscious of her surroundings at this time.

Semantha's murder also involved psychological torture and was conscienceless. The evidence tended to show that defendant dragged Semantha by her hair in her parents' front yard while wielding a shotgun. He then shot Semantha once in the back as she tried to run from him, then shot her a second time at close range as she lay helpless, begging for her life. We have held that the shooting of a victim who is pleading not to be killed is merciless or pitiless. *State v. Pinch*, 306 N.C. 1, 35, 292 S.E.2d 203, 228 (the murder "was merciless and conscienceless in that defendant shot [the victim] as he begged and pleaded for his life"), *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *and overruled on other grounds by State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543, *by State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995), *and by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988). This evidence also shows that Semantha was helpless to prevent her impending death between the time when defendant first shot her and when he flipped her over to shoot her a second time. *See State v. Holman*, 353 N.C. 174, 182, 540 S.E.2d 18, 24 (2000) ("the victim would have feared for her life between the time when defendant first shot her and when he shot her the second time from his car"), *cert. denied*, — U.S. —, — L. Ed. 2d —, 70 U.S.L.W. 3242 (2001). In addition, defendant killed Semantha in the presence of her parents and then shot her

father, leaving Semantha uncertain of whether her father survived the attack. This certainly contributed to her psychological pain. *See State v. Syriani*, 333 N.C. at 393, 428 S.E.2d at 142 (the victim "suffered and endured psychological torture or anxiety not only for herself but for her young son who was sitting beside her trying to stop his father"). After the shootings, defendant said, "Now I can go to jail," and drove away without providing any assistance to the victims. This comment demonstrates that defendant then felt no remorse for shooting his victims.

In addition, the evidence showed that Semantha had an *ex parte* domestic violence order served on defendant shortly before her murder and made statements to several witnesses that defendant had threatened and followed her and that she feared him. Semantha even saw defendant slowly driving past the hair salon she was patronizing just hours before her murder. This evidence supports the inference that Semantha experienced psychological unease and fear before her murder. *See id.* at 393, 428 S.E.2d at 141-42 (jury could reasonably infer that victim, upon seeing defendant prior to and during the attack, endured psychological torture or anxiety where defendant had previously threatened to kill her and she had an *ex parte* domestic violence order served on him just two weeks prior to her murder).

Viewed in the light most favorable to the State, this evidence supports the trial court's submission of the (e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel. This assignment of error is overruled.

[34] Next, defendant argues that the trial court's definition of "mitigating circumstance" in its charge to the jury was incomplete and misleading to the jury. When instructing the jury during the sentencing proceeding, the trial court defined "mitigating circumstance" as follows:

> A mitigating circumstance is a fact or a group of facts which do not constitute a justification or excuse for a killing or reduce it to a lesser degree of crime in First-Degree Murder, but which may be considered as extenuating or reducing the moral culpability of the killing and making it less deserving of extreme punishment than other First-Degree murders.

This instruction is in accord with the North Carolina pattern jury instructions, N.C.P.I.—Crim. 150.10 (2000), and is virtually identical to the instructions approved by this Court in *State v. Williams*,

350 N.C. 1, 33, 510 S.E.2d 626, 647, *cert. denied*, 528 U.S. 880, 145 L. Ed. 2d 162 (1999). *See also State v. Cagle*, 346 N.C. 497, 510, 488 S.E.2d 535, 544, *cert. denied*, 522 U.S. 1032, 139 L. Ed. 2d 614 (1997); *State v. Harden*, 344 N.C. 542, 564, 476 S.E.2d 658, 669 (1996), *cert. denied*, 520 U.S. 1147, 137 L. Ed. 2d 483 (1997). Moreover, after the above instruction was given, the trial court additionally instructed the jury as follows:

> Our law indicates several possible mitigating circumstances; however, in considering Issue 2, it would be your duty to consider . . . as a mitigating circumstance any aspect of the Defendant's character or record or any of the circumstances of this murder that the Defendant contends is a basis for a sentence less than death and any other circumstances arising from the evidence which you deem to have mitigating value.

The jury was then instructed that it should consider "all of the mitigating circumstances listed on the form and any others which you deem to have mitigating value." These additional instructions also are in accord with the pattern jury instructions and were given in *State v. Conaway*, 339 N.C. 487, 533-34, 453 S.E.2d 824, 853-54, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995), and *State v. Robinson*, 336 N.C. at 121-22, 443 S.E.2d at 327-28, in which we rejected a similar argument. Defendant did not object to any of these instructions. We hold that these instructions were adequate and gave defendant the full benefit of relevant mitigating evidence.

Although defendant now argues that the State belittled his mitigating evidence during closing arguments, defendant did not assign error to this issue. In addition, defendant provides no case law in support of this contention, nor does he point to any reference in the State's closing argument where such deprecation occurred. This assignment of error is overruled.

[35] In twenty-eight related assignments of error, defendant contends that the trial court erred when it combined various nonstatutory mitigating circumstances that defendant had requested be submitted separately to the jury. The gist of defendant's argument is that the jury would have given more value to separate mitigating circumstances and that the court's combining different facets of his character and defense into single circumstances precluded the jury's full consideration of mitigating evidence. We review defendant's claims in detail.

During trial, defendant requested in writing that three statutory mitigating circumstances and thirty-four nonstatutory mitigating circumstances be submitted to the jury. At the charge conference held after the close of evidence, the trial court indicated that it would combine several of defendant's separate requests. Thereafter, the trial court submitted the three statutory mitigating circumstances in addition to the catchall circumstance and nine nonstatutory mitigating circumstances. The nonstatutory mitigating circumstances given to the jury encompassed nine categories, including: (1) defendant's good character and employment; (2) defendant's low self-esteem, intellect, and education; (3) defendant's completion requirements to receive his high-school diploma; (4) defendant's abusive upbringing; (5) the role of defendant's grandparents in his life; (6) defendant's positive parenting of his children; (7) defendant's cooperation upon and after his arrest with law enforcement; (8) defendant's remorse and good conduct in jail; and (9) defendant's support group and likelihood of committing another crime.

As to the first category, defendant included five related requests: (1) defendant is a person of good character with a good reputation in his community; (2) defendant was always willing to and did in fact, help others; (3) defendant is a trusted and well loved friend to many people; (4) defendant was gainfully employed at the time of the murder and was a good worker; and (5) defendant worked at the same job for over ten years. The trial court condensed four of the requested circumstances into the following: "That the defendant was a person of good character and reputation in his community, willing to help others and employed at the same job for over 10 years and was a good worker."[2] At least one juror subsequently found this circumstance to exist and to have mitigating value.

As to the second category, defendant requested that the trial court submit as two separate circumstances that defendant has low self-esteem and defendant is a person of limited intellect and education. The trial court combined these two circumstances into one and submitted to the jury: "That the defendant has low self esteem and is of low intellect and limited education." No juror found this circumstance to exist or to have mitigating value.

---

2. Defendant contends that the trial court also combined into this category his proffered circumstance, "Todd Anthony is a trusted and well loved friend to many people." However, our review of the record reflects that the trial court instead refused to submit this circumstance.

As to the third category, defendant requested the trial court submit as separate circumstances that defendant quit school when he was sixteen to go to work and support himself, and defendant has attempted to better himself educationally and has obtained his GED. The trial court condensed these circumstances and submitted to the jury: "That the defendant quit school when he was 15 years old and later obtained a GED." At least one juror subsequently found this circumstance to exist and to have mitigating value.

As to the fourth category, defendant requested as four separate circumstances that defendant came from a broken home, defendant was abused emotionally by his parents, defendant's mother abandoned him when he was nine years old, and defendant's father was an alcoholic who never could be a father figure to him. The trial court combined these circumstances and instructed the jury: "That the defendant came from a broken home, was abused emotionally by parents, was abandoned by mother at age 9 and his father was an alcoholic." No juror found this circumstance to exist or to have mitigating value.

Defendant made two separate requests as to the fifth category, that defendant was raised by his elderly grandparents and defendant suffered greatly when his grandparents died almost at the same time. The trial court combined these requests and submitted to the jury: "That the defendant, after age 9, was raised by his paternal grandparents and grieved at their death[s]." At least one juror found this circumstance to exist and to have mitigating value.

As to the sixth category, defendant requested four related circumstances: defendant is a good father to his children and loves them very much, defendant coached his children's sports teams, defendant taught his children to hunt and fish, and defendant has voluntarily signed over any and all property and assets that he had to a trust for his children. The trial court condensed these requests into one circumstance: "That the defendant is a good father who loves his children and coached their sports teams and taught them to hunt and fish and has placed all his assets in a trust for his children." At least one juror subsequently found this circumstance to exist and to have mitigating value.

Defendant requested three related circumstances as to the seventh category: defendant offered no resistance upon his arrest and turned himself in to the police, defendant confessed his participation in the offenses to law enforcement officers shortly after the crimes,

and defendant cooperated with law enforcement officers. The trial court distilled these requests into one: "That the defendant surrendered himself, was cooperative with law enforcement officers and confessed to the crimes involved." No juror found this circumstance to exist or to have mitigating value.

As to the eighth category, defendant requested as separate circumstances that defendant is remorseful and deeply regrets his actions on 15 April 1997, defendant has exhibited good conduct in jail following his arrest and has been a model prisoner, and defendant has exhibited religious beliefs and practices since incarceration. The trial court combined these three factors into one and submitted: "That the defendant was remorseful, regretted his actions, and exhibited good conduct in jail and practiced religious beliefs since his incarceration." At least one juror subsequently found this circumstance to exist and to have mitigating value.

Finally, as to the ninth category, defendant requested the trial court submit separately that defendant's character, habits, and mentality are such that he is unlikely to commit another crime, and defendant has a strong support network in the community. The trial court joined these circumstances and submitted: "That the defendant is unlikely to commit another crime and has support in his community." At least one juror subsequently found this circumstance to exist and to have mitigating value.

> [W]here a defendant makes a timely *written* request for a listing *in writing* on the form of possible nonstatutory mitigating circumstances that are supported by the evidence and which the jury could reasonably deem to have mitigating value, the trial court must put such circumstances in writing on the form.

State v. Cummings, 326 N.C. at 324, 389 S.E.2d at 80. Furthermore, "[a] jury in a capital case must 'not be precluded from considering as a mitigating factor[] any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " *State v. Meyer*, 353 N.C. at 108, 540 S.E.2d at 10 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 990 (1978)) (second alteration in original). However, we have also held that trial courts may combine related mitigating circumstances. In *State v. Greene*, 324 N.C. 1, 376 S.E.2d 430 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), the trial court refused to submit three of the

defendant's proposed circumstances to the jury as independent mitigating circumstances. We noted:

> Defendant's argument is rooted in the notion that the jury would have been more impressed with the mitigating value of the proffered evidence if it had been categorized into three separate mitigating circumstances rather than consolidated into the two statutory mitigating circumstances and the "catch-all" circumstance. We reject this "mechanical[,] mathematical approach" to capital sentencing.

Id. at 21, 376 S.E.2d at 442 (quoting *State v. McDougall*, 308 N.C. 1, 32, 301 S.E.2d 308, 326, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983)) (alteration in original). We also observed that "[t]he trial court recognized the danger of a numerical approach when it instructed the jury: . . . '[Y]ou are not applying a mathematical formula. . . . You may very properly emphasize one circumstance more than another in a particular case.' " *Id.* Accordingly, we held that "[t]he refusal to submit the proposed circumstances separately and independently was within the dictates of constitutional precedent and was not error." *Id.* at 21, 376 S.E.2d at 443.

Similarly, in the present case, the jury was not prevented from considering any potential mitigating evidence. The circumstances proffered by defendant were subsumed in the circumstances submitted by the trial court; in many instances, the court's language was identical to that requested by defendant. *See State v. Daughtry*, 340 N.C. 488, 523, 459 S.E.2d 747, 766 (1995) ("Trial judges may consolidate related mitigating circumstances to eliminate redundancy."), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996). Even where the language was not precisely that requested by defendant, the jury nonetheless was required to address all points proposed by defendant in his written request. Defendant was able to present evidence on each of his proffered circumstances and to argue the weight of that evidence to the jury. Furthermore, as in *State v. Greene*, the trial court carefully instructed the jury not to apply a mathematical approach:

> When deciding this issue, each juror may consider any mitigating circumstance or circumstances that the juror determines to exist by a preponderance of the evidence in Issue 2. 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 aggra-

> vating circumstances and mitigating circumstances; rather, you must decide from all the evidence what value to give each circumstance and then weigh the aggravating circumstances[']sole value against the mitigating circumstances[']sole value and finally determine whether the mitigating circumstances are insufficient to outweigh the aggravating circumstance or circumstances.
>
> . . . .
>
> After considering the totality of the aggravating and mitigating circumstances, each of you must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in this case before you can answer the issue "Yes." In so doing, you are not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. You may very properly give more weight to one circumstance than another.

Finally, the jury was always free to consider any evidence under the catchall mitigating circumstance and to give that evidence mitigating value. *See State v. Meyer*, 353 N.C. at 108, 540 S.E.2d at 11; *State v. Cummings*, 352 N.C. at 645, 536 S.E.2d at 66.

These assignments of error are overruled.

[36] Defendant also challenges the trial court's failure to submit the four following nonstatutory mitigating circumstances requested by defendant: (1) defendant had to protect and care for his alcoholic father, (2) defendant was troubled and ashamed of his father's drinking problems and was emotionally ill-equipped to handle that situation, (3) defendant assumed the role of caretaker as he attempted to protect his grandparents from abuse by his father, and (4) defendant's prospect for rehabilitation is excellent. To demonstrate that the trial court erred in failing to submit his requested nonstatutory mitigating circumstances, defendant must establish that the circumstances are ones that the jury reasonably could have found to have mitigating value and that there was sufficient evidence of the existence of the circumstances to have required them to be submitted to the jury. *State v. Benson*, 323 N.C. at 325, 372 S.E.2d at 521. "Upon such showing by the defendant, the failure by the trial judge to submit such nonstatutory mitigating circumstance[s] to the jury for its determination raises federal constitutional issues." *Id.* Defendant fails to meet his

burden here because these circumstances either were not supported by sufficient evidence or were subsumed in other mitigating circumstances submitted to the jury.

As to the requested circumstance that defendant had to protect and care for his alcoholic father, defendant contends that the testimony of his aunt, Jocyln Broome, "disclosed the role . . . Defendant fulfilled in the family by buffering the trouble between his alcoholic father and grandparents." Broome testified, in pertinent part:

> Q: Now you say Todd's father is your brother?
>
> A: Yes, sir.
>
> Q: How would you describe your brother's relationship with his son, Todd?
>
> A: Well, my brother had a drinking problem, like it was said, and Todd was sort of caught in the middle all the time with his dad and my mom and dad. But he was—he was very respectful to my mother and daddy. He never gave them not one thing to worry about. He was always well-behaved.
>
> Q: When you say he was in the middle, what do you mean?
>
> A: Well, his dad drunk [sic] a lot and he would rant and rave and cuss and Todd would be always trying to protect my mom and dad from this. So he wasn't a very happy little boy.

Nothing in this testimony suggests that defendant protected his father or cared for him. Accordingly, there was insufficient evidence of the existence of this circumstance, and the trial court did not err by failing to submit it. *See State v. Strickland*, 346 N.C. at 465-66, 488 S.E.2d at 207; *State v. Daughtry*, 340 N.C. at 523, 459 S.E.2d at 765.

As to the requested circumstance that defendant was troubled and ashamed of his father's drinking problems and was emotionally ill-equipped to handle that situation, defendant claims the testimony of various family and friends "disclosed the difficulty and shame . . . Defendant felt because of his father's alcohol abuse." In addition to the testimony of Jocyln Broome quoted above, defendant cites us to testimony given by Betty Lanham, Lonnie Broome, Sheri Broome, and Melody Huff. Betty Lanham testified:

Q: What was Todd like as a child?

A: A very good child.

Q: Could you describe his relationship with his father?

A: He was kind of—he had a good relationship with his father except for when he was drinking.

Q: How would Todd react to that?

A: Nervous.

Lonnie Broome testified:

Q: Do you have occasion to know of Todd playing ball and things like that?

A: Well, yes. I coached against Todd years and years ago. I was the coach of one team and he played for this other team in Little League, which he was about ten years old maybe.

Q: Do you know how Todd felt about his father's inability to participate in those kinds of activities?

. . . .

A: Well, I believe it hurt him. I believe it hurt him to—there were so many kids—it seemed like maybe their parents did and his didn't. So he was a little envious.

Sheri Broome testified:

Q: What did you notice about the way [defendant] grew up?

A: I'm sure Todd had a bad childhood and, more or less, adulthood.

Q: Why is that?

A: Well, I know there was a lot of problems with his dad drinking. I remember a lot of them.

Finally, Melody Huff testified:

A: [Defendant's father] has been an alcoholic for many, many years. He's had a very bad alcohol problem. He's a good person, but he's got a bad problem. He quit drinking years ago, but it's still

not been good. I mean, the whole time that Todd was growing up, Tom drank and drank heavily.

. . . .

Q: Do you know how that affected Todd?

A: I know that Todd didn't want to have anything to do with alcohol and didn't. I never knew Todd to take a drink, even.

Although this testimony is sufficient to establish that defendant's father had problems with alcohol, it does not support the circumstance that defendant was ashamed and troubled by these problems or was emotionally ill-equipped to handle them. Moreover, the circumstance was subsumed by the mitigating circumstance given to the jury, "[t]hat the defendant came from a broken home, was abused emotionally by parents, was abandoned by mother at age 9, and his father was an alcoholic." "A trial court's failure or refusal to submit a defendant's proposed nonstatutory mitigating circumstances separately or independently is not error where requested mitigating circumstances are subsumed in submitted mitigating circumstances." *State v. Brewington*, 352 N.C. 489, 521, 532 S.E.2d 496, 515 (2000), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001). Accordingly, we hold that any error in not submitting this circumstance was harmless.

As to the requested circumstance that defendant assumed the role of caretaker as he attempted to protect his grandparents from abuse from his father, defendant points to the above-quoted testimony of both Jocyln and Lonnie Broome and to the testimony of Debbie Hampton, a longtime neighbor of defendant's family, who testified:

Q: Could you tell—tell the jury what his relationship was with his dad when he was a young child.

A: Todd—well, Tom was an alcoholic and Todd was almost like—well, he—Mr. and Mrs. Anthony more or less raised Todd, I would say. And Tom, of course, lived there with them, but it was like they were brothers. I mean, my daughter even made a statement one day that she didn't know that Tom and Todd were father and son. She thought they were brothers.

Despite defendant's contention that this testimony supports the proffered circumstance, we find nothing in the record to indicate that defendant protected and cared for his alcoholic father. Although Ms.

Broome testified that defendant sought to keep his grandparents from hearing defendant's alcoholic father as he ranted, raved, and cursed, this testimony does not support an inference that defendant's father would have abused the grandparents but for defendant's intervention. Because the evidence was insufficient to support submission of this mitigating circumstance, we hold that the trial court properly refused to submit it.

[37] Finally, as to the requested circumstance that defendant's prospect for rehabilitation is excellent, defendant cites the testimony of Monica Steward, J.R. Hughes, and Tom Bradley, employees of the Gaston County Sheriff's Department who worked in the jail division. All three testified that defendant had been a polite and respectful inmate while at the Gaston County jail. In addition, Ms. Steward described defendant as a "model inmate" who looked out for others in the jail. Mr. Hughes described defendant as a "good, respectable inmate," and Mr. Bradley testified that defendant "would be helpful of other individuals."

This circumstance was subsumed within two circumstances submitted to the jury: "That the defendant was remorseful, regretted his actions, and exhibited good conduct in jail and practiced religious beliefs since his incarceration"; and "That the defendant is unlikely to commit another crime and has support in his community." Because "[a] trial court's failure or refusal to submit a defendant's proposed nonstatutory mitigating circumstances separately or independently is not error where requested mitigating circumstances are subsumed in submitted mitigating circumstances," *id.*, we hold that the trial court's failure to submit this circumstance was not error.

These assignments of error are overruled.

[38] In his next assignment of error, defendant contends that the trial court committed reversible error in light of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), when it instructed the jury that it must be unanimous in its answers to Issue Three and Issue Four on the "Issues and Recommendation as to Punishment" form. Defendant argues that the trial court's instructions misled the jury to believe that a life sentence could be imposed only upon the jury's unanimous recommendation.

Issue Three on the "Issues and Recommendation as to Punishment" form submitted to the jury provided: "Do you unanimously find beyond a reasonable doubt that the mitigating circum-

stance or circumstances found is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?" As to this issue, the trial court instructed the jury:

> If you unanimously find beyond a reasonable doubt that the mitigating circumstances found are insufficient to outweigh the aggravating circumstance or circumstances found, you would answer Issue 3 "Yes." If you unanimously fail to do so, you would answer Issue Number 3 "No." If you answer Issue Number 3 "No," it would be your duty to recommend that the Defendant be sentenced to life imprisonment. If you answer Issue 3 "Yes," you must consider Issue Number 4.

Issue Four on the "Issues and Recommendation as to Punishment" form provided: "Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances you found is, or are, 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?" As to this issue, the trial court instructed the jury:

> [I]f you find beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty when considered with the mitigating circumstances found by one or more of you, it would be your duty to answer the issue "Yes." If you unanimously fail to so find, it would be your duty to answer the issue "No."
>
> . . . .
>
> . . . [I]t is not enough for the State to prove from the evidence beyond a reasonable doubt the existence of one or more of the aggravating circumstances. It must also prove beyond a reasonable doubt that such aggravating circumstances are sufficiently substantial to call for the death penalty. And before you may answer Issue 4 "Yes," you must agree unanimously that they are.
>
> If you answer Issue Number 4 "No," you must recommend that the Defendant be sentenced to life imprisonment. If you answer Issue Number 4 "Yes," it would be your duty to recommend that the Defendant be sentenced to death.

These instructions were correct. We analyzed this issue in *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), where we held:

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). 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. 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."

State v. McCarver, 341 N.C. at 389-90, 462 S.E.2d at 39 (citations altered). In light of this unambiguous holding, this assignment of error is overruled.

[39] Defendant next argues that the jury failed to consider the statutory mitigating circumstance, "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was impaired." *See* N.C.G.S. § 15A-2000(f)(6). The trial court submitted this circumstance to the jury, but no juror found the circumstance to exist. Defendant contends that because Dr. Mathew's testimony was uncontested, the jury must have failed to consider the circumstance at all. However, defendant never requested a peremptory instruction on the (f)(6) circumstance. Moreover, the record reveals that the evidence was not uncontroverted. Various witnesses, including Martha Belk, testified that they did not believe defendant was impaired by alcohol or any controlled substance on the day of the shootings. This lay evidence conflicted with Dr. Mathew's testimony. *See State v. Payne*, 337 N.C. at 534-35, 448 S.E.2d at 110-11 (jury's failure to find (f)(6) mitigating circumstance not arbitrary in light of fact that evidence on that circumstance was controverted and jurors could have found testimony of experts not to be inherently credible). In addition, in weighing Dr. Mathew's testimony, the jury could have considered that Dr. Mathew interviewed defendant for little more than an hour on but one occasion. *See id.*

Out of the three statutory circumstances submitted to the jury, the jury found two: that defendant has no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); and that the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2). These findings indicate that the jury considered the evidence with discrimination and did not, as defendant contends, decide the case arbitrarily. This assignment of error is overruled.

[40] In related assignments of error, defendant contends that the jury's failure to find three nonstatutory mitigating circumstances was arbitrary. At trial, the trial court submitted nine nonstatutory mitigating circumstances to the jury and gave a peremptory instruction as to each. Among the nine circumstances were the following:

> (5) That the defendant has low self esteem and is of low intellect and limited education.
>
> . . . .

(7) That the defendant came from a broken home, was abused emotionally by parents, was abandoned by mother at age 9, and his father was an alcoholic.

. . . .

(10) That the defendant surrendered himself, was cooperative with law enforcement officers and confessed to the crimes involved.

The jury found all the nonstatutory mitigating circumstances submitted by the judge on defendant's behalf to exist with the exception of the three listed above. Although defendant concedes that the jury may have rejected these circumstances because it found that each lacked mitigating value, defendant argues that it is unconstitutional for a jury to fail to give automatic mitigating value to relevant and uncontested nonstatutory mitigating circumstances. Accordingly, defendant contends, the "jurors' rejection of this mitigating evidence was error, regardless of why they do so."

"This Court has reviewed and consistently upheld the constitutionality of a jury rejecting a nonstatutory mitigating circumstance if none of the jurors find facts supporting the circumstance *or* if none of the jurors deem the circumstance to have mitigating value." *State v. Cummings*, 352 N.C. at 647, 536 S.E.2d at 67. 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), we addressed a similar argument and held that

> [a] jury could rationally have rejected these nonstatutory mitigating circumstances on the basis that they had no mitigating value. We believe that the jury's written responses on the Issues and Recommendations form submitted to it show that it considered and rejected the mitigating circumstances. It is not our role to second-guess the jury under these circumstances. In the absence of contradictory evidence, we must assume that the jury comprehended the trial court's instructions and the Issues and Recommendations form. The fact that the jury in this case considered and rejected all of the mitigating circumstances submitted to it does not indicate a violation of defendant's constitutional rights.

Id. at 28-29, 478 S.E.2d at 177.

In this case, a reasonable juror could have concluded that these mitigating circumstances had no mitigating value. The fact that the

jury found six out of the nine nonstatutory mitigating circumstances submitted supports that it did consider the evidence and circumstances submitted. We will not second-guess the jury's decision.

These assignments of error are overruled.

PRESERVATION ISSUES

Defendant raises several additional issues that he concedes have been decided against him by this Court. Defendant argues that the trial court erred in denying defendant's motion *in limine* to disclose prior criminal records of all the State's witnesses. We have held that such disclosure is not required. *State v. Walls*, 342 N.C. 1, 26, 463 S.E.2d 738, 749 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996). Defendant contends that the trial court erred in denying his motion to disclose the theory upon which the State seeks a conviction of first-degree murder. We have held that the State is not required to elect its legal theory prior to trial. *State v. Wingard*, 317 N.C. 590, 594, 346 S.E.2d 638, 641 (1986). Defendant claims that the trial court erred in denying his motion to prohibit consideration of the death penalty by the jury. We have previously found no error in the denial of such motions. *State v. Davis*, 349 N.C. at 58, 506 S.E.2d at 487. Defendant argues that the trial court erred in denying his motion to prohibit the use of the aggravating circumstance that the murder was "especially heinous, atrocious, or cruel," pursuant to N.C.G.S. § 15A-2000(e)(9). We have held that this aggravating circumstance is constitutional. *State v. Syriani*, 333 N.C. at 389, 428 S.E.2d at 139. Defendant argues that the trial court erred in denying his motion for individual *voir dire* of prospective jurors and sequestration of prospective jurors during *voir dire*. We have held that a trial court's denial of similar motions is not an abuse of discretion. *State v. Hyde*, 352 N.C. at 46, 530 S.E.2d at 286. Defendant contends the trial court improperly denied his motion to permit *voir dire* of prospective jurors regarding their conceptions of parole eligibility on a life sentence. We have previously held that this issue is not a matter properly before a jury. *State v. Billings*, 348 N.C. 169, 176, 500 S.E.2d 423, 427, *cert. denied*, 525 U.S. 1005, 142 L. Ed. 2d 431 (1998). Defendant maintains that the trial court erroneously instructed the jury that his burden of proof to establish mitigating circumstances was evidence that "satisfies you" of the existence of such a circumstance. We have previously approved similar instructions to the jury. *State v. DeCastro*, 342 N.C. 667, 697, 467 S.E.2d 653, 669, *cert. denied*, 519 U.S. 896, 136 L. Ed. 2d 170 (1996). Defendant argues that the trial court erred in

instructing the jury on Issues Three and Four that each juror "may" consider any mitigating circumstance or circumstances that he or she determines to exist. We have approved similar language as being consistent with the statutory requirements. *State v. Gregory*, 340 N.C. at 418-19, 459 S.E.2d at 668-69. Finally, defendant contends that the trial court erred in instructing the jury that it could reject nonstatutory mitigating circumstances on the grounds that the circumstances had no mitigating value. We have held that such an instruction is not error. *State v. Jaynes*, 353 N.C. 534, 564, 549 S.E.2d 179, 201 (2001).

After the briefs were filed in this case, defendant filed a "Motion to Dismiss 97 CRS 11653 For Lack Of Jurisdiction, Or, In The Alternative, To Amend Record And Brief To Include Lack Of Jurisdiction As Reason For Relief, Or, In The Alternative, Petition For Writ Of Certiorari To Consider Dismissal Of 97 CRS 11653." The basis of this filing is defendant's contention that he was not properly charged with first-degree murder because a short-form indictment was used. We will allow defendant's motion to amend the record and brief to include lack of jurisdiction as a ground for relief. However, we have held consistently that a short-form indictment is adequate to charge first-degree murder. *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428; *State v. Lawrence*, 352 N.C. 1, 530 S.E.2d 807. Accordingly, this additional assignment of error is overruled.

Defendant raises these issues for the purposes of urging this Court to reexamine its prior holdings and preserving the issues for any necessary federal *habeas corpus* review. We have considered defendant's arguments on these additional issues and find no compelling reason to depart from our prior holdings.

These assignments of error are overruled.

PROPORTIONALITY REVIEW

[41] We now turn to our duties under section 15A-2000(d)(2), which requires that we ascertain: (1) whether the record supports the jury's findings of the aggravating circumstances in the case; (2) whether the death sentence was entered upon the influence of passion, prejudice, or other arbitrary consideration; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2). We have conducted a full and careful review of the record in this case and conclude that the evidence

entirely supports the aggravating circumstances found by the jury. In addition, we discern no suggestion that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration.

Our final responsibility is the proportionality review, in which we compare the case at bar with other cases in which we have found the death sentence to be disproportionate. *State v. McCollum*, 334 N.C. at 239, 433 S.E.2d at 161. In undertaking this review, we are mindful of several salient aspects of the case at bar. The jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation but not under the theory of felony murder. The jury found three aggravating circumstances: that the murder was committed against a witness because of the exercise of her official duty as a witness, N.C.G.S. § 15A-2000(e)(8); that the killing was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and that the killing was part of a course of conduct that included crimes of violence against another, N.C.G.S. § 15A-2000(e)(11). At least one juror also found eight of the thirteen mitigating circumstances that were submitted, including that defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); and the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2). No juror found the submitted mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(6). The jury also found defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury on Mr. Belk.

This Court has found the death penalty disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. 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; *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). None of these cases involve a domestic killing, and of the seven, only *State v. Benson* is somewhat factually analogous in that the defendant shotgunned the victim. However, the motive in that case was robbery, and the evidence suggested that the defendant did not intend the victim's death. Indeed, the defendant was con-

victed under the theory of felony murder. We have reviewed the other cases in which we found the death penalty disproportionate and have found that all may be distinguished from the case at bar.

Our analysis also permits an examination of cases where the death penalty has been found to be proportionate. *State v. McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. In *State v. Holman*, 353 N.C. 174, 540 S.E.2d 18, the defendant's marriage had deteriorated to the point where his wife was terrified of him. Finally, he shot her twice with a shotgun, fatally wounding her. The jury found as aggravating circumstances that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9), and that the murder was part of a course of conduct in which the defendant committed other crimes of violence against other persons, N.C.G.S. § 15A-2000(e)(11). The jury found as a statutory mitigating circumstance that the murder was committed while the defendant was under the influence of a mental or emotional disturbance. N.C.G.S. § 15A-2000(f)(2). It also found as nonstatutory mitigating circumstances that the defendant suffered from depression and that his efforts to reconcile with his wife failed. We held that the death penalty in *State v. Holman* was not disproportionate.

In *State v. Gregory*, 348 N.C. 203, 499 S.E.2d 753, *cert. denied*, 525 U.S. 952, 142 L. Ed. 2d 315 (1998), the defendant fatally shot his seventeen-year-old girlfriend, who was the mother of their eighteen-month-old child. At the same time, he shot and critically injured the victim's fifteen-year-old brother. The defendant then drove to his grandfather's house, and the grandfather drove the defendant to the police station where the defendant confessed. The defendant was found guilty on the basis of premeditation and deliberation, in addition to assault with a deadly weapon with intent to kill inflicting serious injury, and felonious breaking and entering. The jury found the course of conduct aggravating circumstance, N.C.G.S. § 15A-2000(e)(11). One or more jurors found as mitigating circumstances that the defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); that the offenses were committed while the defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); that the 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 five other nonstatutory mitigating circumstances. We held that the death penalty imposed in *State v. Gregory* was not disproportionate.

In the case at bar, defendant shot his wife while her family watched. He inflicted a second wound while she begged for her life. He then reloaded, shot the victim's father, and attempted to shoot her mother. Abundant evidence was presented that defendant had been considering these shootings for some time. "We find it significant that in none of the cases in which this Court has found the death penalty disproportionate were there multiple victims or multiple major felonies committed during the crime." *State v. Gregory*, 348 N.C. at 213, 499 S.E.2d at 760. In addition, defendant is an adult and there is no indication in the evidence that he suffers from diminished intelligence. Finally, the especially heinous, atrocious, or cruel aggravating circumstance has been found sufficient to support the death penalty even when standing alone. *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).

We have considered all these factors in carrying out our " 'independent consideration of the individual defendant and the nature of the crime or crimes which he has committed.' " *State v. Robinson*, 336 N.C. at 139, 443 S.E.2d at 337 (quoting *State v. Pinch*, 306 N.C. at 36, 292 S.E.2d at 229). Based on this record, we conclude that the death penalty imposed in the case at bar is not disproportionate.

Defendant received a fair trial and capital sentencing proceeding, free from prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. ANDRE LAQUAN FLETCHER

No. 117A96-2

(Filed 18 December 2001)

1. Jury— selection—consideration of life sentence—stake-out questions

The trial court did not err in a capital first-degree murder resentencing proceeding by allegedly preventing defendant from fully exploring whether a prospective juror could consider a life sentence given the circumstances of this case, including a first-degree burglary conviction, because: (1) stake-out questions

based on a specific aggravating circumstance are improper, and jurors should not be asked what kind of verdict they would render under certain named circumstances; and (2) defendant could have properly asked whether the prospective juror could consider all aggravating and mitigating circumstances presented to the jury.

2. Jury— selection—religious views

The trial court did not err in a capital first-degree murder resentencing proceeding by allegedly preventing defendant from exploring a prospective juror's religious views, because: (1) defendant was prevented from asking the prospective juror whether he believed in "an eye for an eye," rather than whether his religious views would impair his ability to follow the law; and (2) the fact that one prospective juror volunteers such personal information in response to a permissible question does not make it proper for counsel to specifically ask another prospective juror to reveal that same information.

3. Jury— selection—death penalty—bias—voir dire—leading questions

The trial court did not abuse its discretion in a capital first-degree murder resentencing proceeding by allowing the prosecutor to question prospective jurors in a manner allegedly designed to avoid disclosure of their bias regarding the death penalty, denying defendant's pretrial motions for individual and sequestered jury selection, and failing to prevent the prosecutor from asking leading questions during voir dire, because: (1) defendant does not claim that the prosecutor misstated the law in any way during the prosecutor's opening comments to the jury venire, and defendant did not object to the statement; (2) it is not error to allow leading questions during a jury voir dire; (3) defendant has failed to show any specific harm resulting from a collective voir dire; and (4) nothing prevented the prosecutor from stopping his inquiry once a prospective juror indicated a propensity to impose death.

4. Sentencing— capital—defendant's argument—someone else committed murder—residual doubt as a mitigating circumstance

The trial court did not abuse its discretion in a capital first-degree murder resentencing proceeding by preventing defendant from presenting evidence and arguing during closing arguments

that someone else had committed the murder based on the fact that the evidence was improper as residual doubt, because: (1) although a jury may not be prevented from considering any aspect of defendant's character or record and any of the circumstances of the crime as mitigating evidence, this rule in no way mandates reconsideration by capital juries in the sentencing phase of their residual doubts over a defendant's guilt; (2) defendant was convicted of premeditated and deliberate first-degree murder, and no evidence tended to show that defendant acted in concert with another person; (3) defendant may not argue residual doubt as to a basis underlying the first-degree murder conviction, such as premeditation and deliberation; (4) defendant was not deprived of his right to counsel and the right to present a defense since counsel was only prevented from making improper arguments to the jury; and (5) defendant's contention that residual doubt cannot exist in a case before a resentencing jury is meritless.

5. Sentencing— capital—defendant's argument—someone else committed murder—residual doubt as a mitigating circumstance—State's failure to object to evidence

The trial court did not abuse its discretion in a capital first-degree murder resentencing proceeding by preventing defendant from arguing during closing arguments that someone else had committed the murder even though defendant contends the State did not object when the evidence was presented through defendant's testimony, because: (1) the North Carolina Supreme Court already held that residual doubt is not relevant to mitigation, and to allow such argument would have served only to confuse the jury and eviscerate the rule prohibiting presentation of residual doubt as a mitigating circumstance; and (2) any error was harmless beyond a reasonable doubt since defendant was not actually prevented from testifying that someone else had committed the murder.

6. Sentencing— capital—mitigating circumstances—acting under duress or under domination of another person

The trial court did not abuse its discretion in a capital first-degree murder resentencing proceeding by failing to submit to the jury the requested statutory mitigating circumstance under N.C.G.S. § 15A-2000(f)(5) that defendant was acting under duress or under the domination of another person, because: (1) no evidence was presented to warrant submission of the (f)(5) mitigat-

ing circumstance; (2) at most, defendant's testimony shows his girlfriend suggested commission of the crime and that defendant readily agreed and participated; and (3) the State's evidence showed that defendant was alone with the victim at the time of the crime.

7. Sentencing— capital—mitigating circumstances—accomplice in or accessory to the capital felony committed by another person—relatively minor participation

The trial court did not err in a capital first-degree murder resentencing proceeding by failing to submit to the jury the statutory mitigating circumstance under N.C.G.S. § 15A-2000(f)(4) that defendant was an accomplice in or accessory to the capital felony committed by another person and that his participation was relatively minor, because no substantial evidence supported a finding that defendant's participation was minor.

8. Sentencing— capital—nonstatutory mitigating circumstances—remorse—dominated or influenced by another

The trial court did not err in a capital first-degree murder resentencing proceeding by failing to submit to the jury the requested nonstatutory mitigating circumstances that defendant told the circumstances surrounding the murder to explain his sense of remorse and that defendant was dominated or influenced by his girlfriend who is approximately fifteen years older, because: (1) any error was harmless beyond a reasonable doubt since the jury heard defendant's testimony supporting the circumstance explaining defendant's sense of remorse, the jury was able to consider this alleged mitigating evidence and was encouraged to do so by counsel's closing argument, and the trial court submitted the catchall mitigating circumstance under N.C.G.S. § 15A-2000(f)(9); and (2) all the evidence considered in the light most favorable to defendant showed that defendant exhibited strong will with respect to his girlfriend.

9. Sentencing— capital—acting in concert—*Enmund/Tison* instruction—defendant's state of mind

The trial court did not err in a capital first-degree murder resentencing proceeding by failing to require the jury to make a factual determination of defendant's state of mind concerning the murder pursuant to an *Enmund/Tison* instruction, because: (1) defendant's interpretation would permit a resentencing jury to completely retry the issue of guilt even though the case was

remanded pursuant to a holding that error occurred only in the sentencing proceeding; and (2) where the guilt-phase jury found defendant guilty of first-degree murder based on premeditation and deliberation without an instruction on acting in concert, an *Enmund/Tison* instruction is not required at sentencing.

10. Constitutional Law— effective assistance of counsel— defense counsel's statement that murder was especially heinous, atrocious, or cruel—tactical decision

A defendant was not denied his Sixth Amendment right to effective assistance of counsel in a first-degree murder resentencing proceeding even though defense counsel made the statement during closing arguments that the murder was especially heinous, atrocious, or cruel, because: (1) the decision to make this concession was agreed to by defendant and did not fall below the required objective standard of reasonableness; and (2) the evidence in the case leaves little doubt that this murder was especially heinous, atrocious, or cruel, and counsel could reasonably have decided upon a strategy of conceding this aggravating circumstance to gain credibility with the jury.

11. Criminal Law— prosecutor's argument—general deterrence—voice and conscience of community

The trial court did not abuse its discretion in a capital first-degree murder resentencing proceeding by overruling defendant's objection to the prosecutor's closing argument allegedly urging the jury to consider the general deterrence value of capital punishment, because the portion of the prosecutor's argument where defendant objected urges the jury to act as the voice and conscience of the community and does not improperly argue general deterrence.

12. Criminal Law— prosecutor's argument—jury should send a message with its verdict—voice and conscience of community

The trial court did not abuse its discretion in a capital first-degree murder resentencing proceeding by failing to intervene ex mero motu during the prosecutor's argument that the jury should send a message with its verdict to defendant and any who would follow in his footsteps because: (1) although the statement is arguably a reference to general deterrence, the offending comment was brief and its overall significance to the entire closing argument was minimal; and (2) the comment

was made in the context of a proper voice and conscience of the community argument.

13. Criminal Law— prosecutor's argument—victim was tortured and begged for her life

The trial court did not abuse its discretion in a capital first-degree murder resentencing proceeding by failing to intervene ex mero motu during the prosecutor's argument stating that the victim was tortured and begged for her life, because the prosecutor did not ask the jurors to imagine themselves or a loved one as a victim, but merely asked them to imagine the fear and pain that the victim must have felt.

14. Criminal Law— prosecutor's argument—home broken into by defendant could have been the home of the jurors

The trial court did not abuse its discretion in a capital first-degree murder resentencing proceeding by failing to intervene ex mero motu during the prosecutor's argument stating that the home broken into by defendant could have been the home of the jurors, because the prosecutor did not ask the jurors to put themselves in the victim's place, but reiterated the random arbitrariness of the crime.

15. Criminal Law— prosecutor's argument—victim was tortured and begged for her life

The trial court did not err by failing to intervene ex mero motu in a capital first-degree murder resentencing proceeding by allegedly allowing the prosecutor to inflame the passion of the jury by stating the victim was forced and literally tortured into giving up the location of her valuables, and probably begged for her life and asked for mercy, because the statements were reasonable inferences from the evidence.

16. Sentencing— capital—death penalty proportionate

The trial court did not err by imposing the death penalty in a first-degree murder case, because: (1) defendant was convicted of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule; (2) defendant was also convicted of first-degree burglary and robbery with a dangerous weapon; (3) the jury found the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the murder was committed while defendant was engaged in the commission of a burglary; (4) the jury found the N.C.G.S. § 15A-2000(e)(9) aggravating circum-

stance that the murder was especially heinous, atrocious, or cruel; and (5) defendant broke into an elderly victim's home at night, stabbed and beat her in various rooms in the house, and left her to die.

Justice EDMUNDS concurring.

Justices ORR and BUTTERFIELD join in concurring opinion.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a 9 December 1999 judgment imposing a sentence of death entered by Lamm, J., at a resentencing proceeding held in Superior Court, Rutherford County, upon defendant's conviction of first-degree murder. Heard in the Supreme Court 10 September 2001.

Roy A. Cooper, Attorney General, by G. Patrick Murphy, Special Deputy Attorney General, for the State.

Kathryn L. VandenBerg for defendant-appellant.

PARKER, Justice.

Defendant Andre Laquan Fletcher was indicted on 7 September 1994 for first-degree murder, first-degree burglary, and robbery with a dangerous weapon. He was tried capitally and, on 15 February 1996, was found guilty of first-degree murder on the basis of malice, premeditation, and deliberation and under the felony murder rule. He was also found guilty of first-degree burglary and robbery with a dangerous weapon. Following a capital sentencing proceeding, the jury recommended a sentence of death for the murder; and the trial court entered judgment accordingly. For the first-degree burglary and robbery with a dangerous weapon convictions, the trial court entered consecutive sentences of fifty years' and forty years' imprisonment, respectively.

On appeal this Court affirmed the convictions but granted defendant a new capital sentencing proceeding based upon the trial court's failure to submit two mitigating circumstances to the jury in the sentencing proceeding. *State v. Fletcher*, 348 N.C. 292, 329, 500 S.E.2d 668, 690 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 113 (1999) (*Fletcher* I). Following a second capital sentencing proceeding, upon the jury's recommendation the trial court entered judgment sentencing defendant to death for the first-degree murder conviction.

The State's evidence at the resentencing hearing was substantially the same as the State's evidence in *Fletcher* I. On 17 August 1994 during a rainstorm, eighty-three year old Georgia Ann Dayberry Hamrick ("victim") was beaten and knifed to death in her home in Spindale, Rutherford County, North Carolina. The State's evidence tended to show that defendant broke into the victim's home, beat her to coerce her into disclosing the location of valuables, and then cut her throat. Defendant stole a number of rings, two of which he and his girlfriend, Lisa Hill, sold. The police recovered additional rings belonging to the victim at the places defendant said he had put them.

At his first trial and sentencing hearing, defendant did not testify but presented evidence tending to show that a man wearing a yellow raincoat who was seen in the neighborhood by several witnesses that evening committed the crime but was never found or identified by the police. Defendant's defense was that the evidence linking him to the burglary and murder was insufficient.

At the resentencing hearing defendant testified that he met Lisa Hill in 1994, when defendant was twenty years old and Hill was thirty-four years old. Defendant moved into Hill's home, located near the victim's home, a couple of months before the killing. On the night of the murder, defendant and Hill were at home smoking marijuana mixed with cocaine. They began arguing when defendant refused to give more drugs to Hill, explaining that "you can't do drugs and sell drugs, too, and make a profit." Defendant told Hill he was going to the store for cigarettes, and Hill followed.

Hill continued asking for drugs, whereupon defendant told her, "You got to go out and get your own money however you want to do it if you want to support your habit." Hill then suggested that they break into a house. Hill and defendant approached the victim's house; and when no one responded to the doorbell, defendant tried to pull the storm door open. Defendant broke the glass in the storm door, then kicked in the wooden door. Once defendant and Hill entered the house, defendant noticed some movement and realized that the victim was in the house. Hill then went around defendant and began hitting the victim with a brass duck. Defendant took the brass duck away from Hill, ran out the back door, and threw it into a field behind the house. When defendant returned to the house, he discovered Hill "poking at" the victim with a knife. Defendant took the knife away from Hill, broke it in half by stepping on it, then ran away. Defendant

began drinking when he returned home; Hill returned home some time later.

The next morning defendant and Hill went to a jewelry store to have a ring in Hill's possession appraised. Hill refused to tell defendant how she obtained the ring. At Hill's suggestion on the way home, they drove by the victim's house, where they were stopped and questioned by police officers. Hill subsequently allowed the officers to seize the car in order to perform a luminol examination. Once the officers left with Hill's car, defendant again asked Hill about the ring. Hill removed the ring from her bra and asked defendant where she could sell the ring. Defendant suggested a jeweler in Forest City, and they walked to a nearby store to call a cab. When Hill exited the store, she told defendant that she had wrapped some of the jewelry in a paper towel and hidden it in the store's rest room. Once they arrived in Forest City, defendant began to understand where the rings had come from and told Hill not to sell them. Hill stated that the rings were hers and that she could do with them as she pleased. Defendant became angry and walked home.

Police officers were searching the home when defendant returned, and defendant noticed Hill smoking crack while officers were present in the room. Defendant admitted that he owned the wet clothing officers discovered and that he had worn those clothes the night of the murder. After the police officers left the house, defendant borrowed his sister's car to drive Hill to a pawn shop. When they arrived Hill entered the pawn shop alone, then returned to the car. After defendant drove Hill to a location where she purchased drugs, they returned the car to defendant's sister and walked home. As defendant and Hill were walking home, defendant suggested that Hill dispose of the remaining jewelry. Hill agreed and hid the remaining rings behind a building.

Later that evening defendant went to the store alone. When he returned home, he was arrested on an unrelated charge of breaking and entering a motor vehicle. Defendant was questioned about the murder when he was in jail for this other charge. Defendant did not want to "point the finger" at himself or Hill, but he eventually told officers where the rings were located in a manner intended to avoid incriminating anyone. Defendant did not tell anyone about his involvement in the murder until a year later, shortly before the trial, when he attempted to tell his mother.

Defendant further testified that he accepts responsibility for the murder because he kicked in the door and could have done more to stop the murder from occurring. Defendant stated that he did not intend to kill anyone and did not know that anyone was home when he broke into the victim's house.

Defendant also presented testimony from a juvenile court counselor, two camp counselors, an investigator with the Department of Social Services, and defendant's sister and aunt that showed that defendant had a history of theft but was not a violent or aggressive person. Defendant's sister also testified that defendant's father denied paternity of defendant, and would leave defendant behind when he picked up the other children for a visit.

Dr. Anthony Sciara, an expert in clinical psychology, testified that defendant has an IQ of 88, suffers from depression and a coping deficit, and responds hastily without adequate information. Dr. Sciara did not find indications that defendant would tend to be aggressive and noted that defendant has a passive personality that leads him to follow what other people tell him. The doctor further testified that defendant's substance abuse began around the age of seven or eight.

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

JURY SELECTION

[1] In his first issue relating to jury selection for the resentencing, defendant argues that the trial court committed prejudicial constitutional error in preventing defendant from fully exploring whether a prospective juror could consider a life sentence given the circumstances of this case and the prospective juror's religious views. This juror was ultimately seated on the jury.

When asked by the prosecutor during *voir dire* whether he had an opinion on the death penalty, prospective juror Mark Franklin responded, "I have an opinion about it. . . . I believe in it." Prospective juror Franklin then indicated that he could follow the law and could return a sentence of either death or life imprisonment. Once prospective juror Franklin was passed to the defense, defense counsel entered into the following colloquy with him:

> [DEFENSE COUNSEL]: Could [a life sentence] also be an appropriate punishment for first degree murder? Premeditated, intentional murder?

MR. FRANKLIN: Depending on the circumstances.

[DEFENSE COUNSEL]: Okay. Are you thinking of any circumstances when you say that?

[PROSECUTOR]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: I'm sorry. Do you mean you would want to hear the evidence first?

MR. FRANKLIN: Yes.

[DEFENSE COUNSEL]: This is a case of first degree murder, and what that is, is premeditated, intentional[,] deliberate killing. He's already been convicted of that. He's also been convicted of first degree burglary as part of it, and that's an aggravating factor under the law of North Carolina. The State has to—the State does not have to prove murder because that's already been done here. They do have to prove at least one aggravating factor, and that is an aggravating factor, the fact that the murder was part of a burglary. That's true in this case because [defendant] was also convicted of burglary. Knowing that, knowing that about this case, could you still consider a life sentence after you heard all of the evidence?

[PROSECUTOR]: Objection.

THE COURT: The objection is sustained. It's incomplete, overly broad, hypothetical question.

Defendant argues that the above question was essentially the same as the following question, which this Court has expressly approved: "Is your support for the death penalty such that you would find it difficult to consider voting for life imprisonment for a person convicted of first degree murder?" *State v. Conner*, 335 N.C. 618, 643, 440 S.E.2d 826, 840 (1994). Defendant notes that the only difference between the approved question and the question at issue is that the one at issue added that the first-degree murder was accompanied by a first-degree burglary conviction. Since evidence of at least one aggravating circumstance is required before the State can prosecute for first-degree murder, defendant contends that it must also be permissible to ask a prospective juror whether he can consider a life sentence where an aggravating circumstance exists. We disagree.

This Court has long held that so-called "stake out" questions are improper. " 'Counsel should not fish for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided. . . . Jurors should not be asked what kind of verdict they would render under certain named circumstances.' " *State v. Braxton*, 352 N.C. 158, 179, 531 S.E.2d 428, 440 (2000) (quoting *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980)) (alteration in original), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). Defendant sought to stake out the juror by asking whether a certain set of circumstances would still allow him to vote for life imprisonment. However, the trial court had not yet instructed the juror on the standard of proof for aggravating and mitigating circumstances or on the process of weighing those circumstances. Thus, defendant sought to ask the juror's answer to a legal question before the juror had been properly instructed by the trial court as to the law. "[S]uch 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. . . . [S]uch questions tend to 'stake out' the juror and cause him to pledge himself to a future course of action." *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).

The trial court's decision is further supported by *State v. Richmond*, 347 N.C. 412, 495 S.E.2d 677, *cert. denied*, 525 U.S. 843, 142 L. Ed. 2d 88 (1998), and *State v. Robinson*, 339 N.C. 263, 451 S.E.2d 196 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). In both *Richmond* and *Robinson*, this Court held that it was improper to stake out prospective jurors by asking whether they could still consider mitigating circumstances knowing that the defendant had a prior first-degree murder conviction. *Richmond*, 347 N.C. at 424, 495 S.E.2d at 683; *Robinson*, 339 N.C. at 272, 451 S.E.2d at 202. The improper question in *Richmond* and *Robinson* went to an aggravating circumstance: whether the defendant had been previously convicted of another capital felony, N.C.G.S. § 15A-2000(e)(2) (1999). Thus, we see no difference between the question in those cases and the one at bar, as all three involved "stake out" questions based on an aggravating circumstance. Furthermore, as we noted in *Richmond*, defendant here could have properly asked whether the prospective juror could consider all aggravating and mitigating circumstances presented to the jury. *Richmond*, 347 N.C. at 426, 495 S.E.2d at 684. The use of a specific aggravating circumstance in this case, however, created an improper "stake out" question.

[2] Defendant next sought to ask prospective juror Franklin about his religious beliefs in light of his association with Gideon's International, an organization dedicated to distributing Bibles. Defendant attempted to ask prospective juror Franklin whether he is "a person who believes in the Biblical concept of an eye for an eye." The trial court sustained the prosecutor's objection to this question.

Defendant contends that the trial court should have allowed him to inquire into the prospective juror's possible bias toward the death penalty based on his religious views and that this ruling prevented defendant from asking the prospective juror whether his religious views would prevent or impair his ability to follow the law. However, even a cursory review of the transcript reveals that defendant did not ask that particular question. What defendant was prevented from asking was whether the prospective juror believed in "an eye for an eye," not whether the prospective juror's religious views would impair his ability to follow the law. In *State v. Mitchell*, 353 N.C. 309, 543 S.E.2d 830 (2001), this Court held that it is improper for a defendant to ask a prospective juror about his or her understanding of the Bible's teachings on the death penalty. *Id.* at 318, 543 S.E.2d at 836. In so holding, the Court relied on *State v. Laws*, 325 N.C. 81, 109, 381 S.E.2d 609, 625-26 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), where the Court held that it is improper to ask whether a prospective juror believes in a literal interpretation of the Bible. *Mitchell*, 353 N.C. at 318, 543 S.E.2d at 836. The Court in *Mitchell* noted that " '[c]ounsel's right to inquire into the beliefs of prospective jurors to determine their biases and attitudes does not extend to all aspects of the jurors' private lives or of their religious beliefs.' " *Id.* (quoting *Laws*, 325 N.C. at 109, 381 S.E.2d at 625).

Defendant in this case was allowed to inquire into the prospective juror's religious affiliation, his activities with Gideon's International, his views on capital punishment, his ability to consider mitigating circumstances, and his willingness to impose a life sentence. Given that defendant was allowed "wide latitude to inquire into [the prospective juror's] beliefs, attitudes, and biases," *id.*, we decline to hold that the trial court erred in refusing to allow defendant to delve into such personal information as specific religious teachings.

Defendant further contends that this question was permissible in light of an earlier prospective juror's statement that, as the Bible

teaches "an eye for an eye," death is the only appropriate punishment for murder. Defendant was allowed to strike this prospective juror for cause but argues that when one juror is excused for a religious belief, defendant should be allowed to ask other jurors whether they subscribe to that same belief.

When asked whether she could consider a life sentence, the previous prospective juror, Melissa Bailey, stated unequivocally that she could not consider a life sentence because of her understanding of the Bible. The fact that one prospective juror volunteers such personal information in response to a permissible question does not make it proper for counsel to specifically ask another prospective juror to reveal that same information. For the above reasons we hold that the trial court properly sustained the prosecutor's objections to defendant's *voir dire* questioning of prospective juror Franklin.

[3] Defendant next contends that the trial court committed prejudicial constitutional error in allowing the prosecutor to question prospective jurors in a manner designed to avoid disclosure of their bias regarding the death penalty. Defendant contends that the prosecutor did so by giving an introductory speech that instructed the prospective jurors how to respond to death-qualification questions, by asking leading questions, by failing to probe further once a prospective juror indicated a propensity to impose death, and by asking leading questions to recharacterize juror statements so that the prospective jurors could be death-qualified.

With respect to the prosecutor's opening comments to the jury venire, defendant does not claim that the prosecutor misstated the law in any way. Furthermore, defendant did not object to the statement; and we find nothing to warrant the trial court's intervention *ex mero motu*. As to the prosecutor's use of leading questions and the trial court's denial of defendant's pretrial motion to prohibit leading questions in *voir dire*, this Court has previously held that

> [l]eading questions should not in most cases be used when testimony is being offered to a jury. To do so allows the questioner in effect to testify to the jury. 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 169 (4th ed. 1993). This consideration does not apply at a jury *voir dire*. It is not error to allow leading questions at that time.

State v. Gray, 347 N.C. 143, 164, 491 S.E.2d 538, 545 (1997), *cert. denied*, 523 U.S. 1031, 140 L. Ed. 2d 486 (1998). Thus, we hold that the trial court did not err in allowing such questions.

Defendant further contends that the trial court's denial of defendant's motion for individual and sequestered *voir dire* allowed the prosecutor to indoctrinate all of the prospective jurors with his leading questions. Just as "[t]he argument that a collective *voir dire* permits prospective jurors to become 'educated' as to responses which would enable them to be excused from the panel is . . . speculative," *State v. Wilson*, 313 N.C. 516, 524, 330 S.E.2d 450, 457 (1985), the argument that such *voir dire* allows prospective jurors to become educated as to responses that would permit them to serve on the jury is equally speculative. Moreover, defendant has failed to show any specific harm that resulted from the collective *voir dire*. *See State v. Barnes*, 345 N.C. 184, 208, 481 S.E.2d 44, 56-57, *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).

As for defendant's contention that the prosecutor did not probe further once a prospective juror indicated a propensity to impose death, we note that nothing prevented defendant from doing so. For the above reasons we hold that the trial court did not abuse its discretion in either denying defendant's pretrial motions for individual and sequestered jury selection and to prohibit leading questions or in failing to prevent the prosecutor from asking leading questions during *voir dire*.

OTHER ISSUES

[4] Defendant first contends that the trial court erred in preventing defendant from arguing in closing arguments that someone else had committed the murder. We disagree and, therefore, find no error in the trial court's handling of this issue.

At resentencing the trial court granted the prosecutor's motion to prevent defendant from testifying that anyone else committed the crime, stating:

> [R]esidual doubt testimony is not admissible during the sentencing proceeding of a capital case. That being the case, I'm going to grant or sustain the State's objection to the extent of any testimony from the defendant that someone else committed the crime of murder. . . . And that he did not commit the crime of murder

> both on the basis of felony murder and on the basis of premeditation and deliberation.

Despite this ruling defendant testified, without objection from the prosecution, that his girlfriend, Lisa Hill, had committed the murder and that defendant had tried repeatedly to stop her.

During the charge conference the trial court ruled that defense counsel could not argue any evidence during closing that someone else had committed the murder but that it would permit argument that someone else had been present. Pursuant to this ruling the trial court sustained the prosecutor's objections to defendant's closing argument on two occasions. First, defendant stated with respect to the aggravating circumstance that the murder was especially heinous, atrocious, or cruel: "Is it heinous, atrocious and cruel? You bet. No doubt about that. I guess the real question is, what's [defendant's] involvement in that." Second, in referring to the lack of the victim's blood or hair on defendant, counsel stated that defendant testified that he had taken the knife away from somebody and broken it. The prosecutor objected to both arguments, and the trial court instructed the jury each time that it should not consider arguments that "someone other than the defendant is legally responsible for this murder." Defendant contends that these rulings prevented defendant from arguing mitigating evidence demonstrating that he had a lesser role in the offense.

Defendant relies on two United States Supreme Court cases to support his contention that he should have been allowed to argue this evidence in that it shows the circumstances of the crime in a mitigating fashion. *See Hitchcock v. Dugger*, 481 U.S. 393, 95 L. Ed. 2d 347 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 1 (1982). In *Eddings* the Court held that

> "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

455 U.S. at 112, 71 L. Ed. 2d at 8 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 990 (1978)) (first alteration in original). The trial court in *Eddings* refused to consider evidence that the defendant had a personality disorder and poor family history because such evidence did not tend to provide a legal excuse for the defendant's

actions. *Id.* at 113, 71 L. Ed. 2d at 10. The Supreme Court concluded that such mitigating evidence should have been considered. *Id.* at 114, 71 L. Ed. 2d at 11.

In *Hitchcock*, which was appealed from Florida, Florida law at the time of the defendant's sentencing prevented consideration of nonstatutory mitigating circumstances. 481 U.S. at 396, 95 L. Ed. 2d at 352. The Court began by noting that

> in capital cases, " 'the sentencer' " may not refuse to consider or " 'be precluded from considering' " any relevant mitigating evidence. *Skipper v. South Carolina*, 476 U.S. 1, 4[, 90 L. Ed. 2d 1, 6] (1986) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 114[, 71 L. Ed. 2d 1, 11] (1982)).

Hitchcock, 481 U.S. at 394, 95 L. Ed. 2d at 350. As the Florida law violated *Skipper*, the Court held that the law was invalid. *Id.* at 399, 95 L. Ed. 2d at 353.

Though defendant is correct in noting that a jury may not be prevented from considering any aspect of the defendant's character or record and any of the circumstances of the crime as mitigating evidence, the United States Supreme Court has held that this rule

> in no way mandates reconsideration by capital juries, in the sentencing phase, of their "residual doubts" over a defendant's guilt. Such lingering doubts are not over any aspect of [defendant's] "character," "record," or a "circumstance of the offense." This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor.

Franklin v. Lynaugh, 487 U.S. 164, 174, 101 L. Ed. 2d 155, 166 (1988). In a concurring opinion, Justice O'Connor stated as follows:

> "Residual doubt" is not a fact about the defendant or the circumstances of the crime. It is instead a lingering uncertainty about facts, a state of mind that exists somewhere between "beyond a reasonable doubt" and "absolute certainty." [Defendant's] "residual doubt" claim is that the States must permit capital sentencing bodies to demand proof of guilt to "an absolute certainty" before imposing the death sentence. Nothing in our cases mandates the imposition of this heightened burden of proof at capital sentencing.

Id. at 188, 101 L. Ed. 2d at 175 (O'Connor, J., concurring).

Pursuant to the ruling in *Franklin*, this Court has held that residual doubt is not properly considered as mitigating evidence in this state. *See, e.g., State v. Roseboro*, 351 N.C. 536, 549, 528 S.E.2d 1, 10 (holding that "the defendant's character or record and the circumstances of the offense do not encompass" residual doubt), *cert. denied*, 531 U.S. 1019, 148 L. Ed. 2d 498 (2000); *State v. Walls*, 342 N.C. 1, 52, 463 S.E.2d 738, 765 (1995) (holding that "residual doubt has no place in the sentencing phase"), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996); *State v. Hill*, 331 N.C. 387, 415, 417 S.E.2d 765, 779 (1992) (holding that "[l]ingering or residual doubt as to the defendant's guilt does not involve the defendant's character or record, or the circumstances of the offense," and that residual doubt is thus not a relevant circumstance to be submitted in a capital sentencing proceeding"), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993). Thus, while *Eddings* and *Hitchcock* do stand for the proposition that a sentencer must be allowed to consider all mitigating evidence, this Court, relying on United States Supreme Court precedent, has held that evidence suggesting residual doubt is not mitigating evidence. For this reason we do not find *Eddings* or *Hitchcock* to be controlling on the facts in this case.

In further support of this assignment of error, defendant argues that two cases in particular are factually similar to the instant case and should control its disposition. Defendant relies first on *Green v. Georgia*, 442 U.S. 95, 60 L. Ed. 2d 738 (1979) (per curiam). In *Green* the Supreme Court held that the exclusion during sentencing of a hearsay statement that defendant did not participate in the offense was a violation of due process. *Id.* at 97, 60 L. Ed. 2d at 741. The evidence during the guilt phase in *Green* showed that the defendant acted in concert with another man. *Id.* at 96, 60 L. Ed. 2d at 740.

The second case upon which defendant relies is *State v. Barts*, 321 N.C. 170, 362 S.E.2d 235 (1987). In *Barts* the defendant pled guilty to first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. *Id.* at 175, 362 S.E.2d at 238. The evidence supporting the defendant's plea showed that the defendant acted in concert with two other men. *Id.* at 173, 362 S.E.2d at 236-37. In explaining the charges to the defendant, the trial court advised that if the State proved that the defendant acted in concert with someone else, he would be equally responsible under the law even if he did not actually commit any of the acts constituting murder. *Id.* at 175, 362 S.E.2d at 238. At sentencing the trial court excluded a hearsay statement in which another person confessed that he, not the defendant,

personally administered the fatal beating. *Id.* at 182, 362 S.E.2d at 241. This Court, relying on *Green*, held that the hearsay was erroneously excluded as it was relevant to the issue of punishment.

Green and *Barts* are distinguishable from this case in that neither case involves residual doubt. Both *Green* and *Barts* included evidence during the guilt phase that the defendant acted in concert with another person. When instructed on acting in concert, a jury may convict a defendant of premeditated and deliberate first-degree murder even though it does not believe the defendant personally committed the acts constituting the offense. *Barts*, 321 N.C. at 177, 362 S.E.2d at 239. The excluded evidence suggesting that the defendant did not personally kill the victim was consistent with the guilty verdict in *Green* and the evidentiary basis for the guilty plea in *Barts* and would not have prompted the jury in either case to consider residual doubt. Where a defendant acts in concert with another, the defendant may argue to the jury that he did not personally commit the physical acts of murder without appealing to their residual doubt. Accordingly, neither of those cases addresses the issue of residual doubt.

In this case defendant was convicted of premeditated and deliberate first-degree murder and no evidence at the guilt-innocence phase tended to show that defendant acted in concert with another person. Thus defendant's attempt at sentencing to argue that he did not kill the victim himself was in direct contravention to the finding of the guilt-phase jury that convicted defendant on the basis of premeditation and deliberation without evidence of or an instruction on acting in concert. The purpose of defendant's evidence and argument that someone else committed the murder was to raise residual doubt as to his intention to commit murder and, thus, was not proper mitigating evidence.

Defendant also contends that he did not attempt to offer exculpatory evidence in this case but merely offered evidence that showed his level of participation in this offense. Thus, defendant argues that this case does not raise the issue of residual doubt, as in *Walls*, 342 N.C. 1, 463 S.E.2d 738, but is instead a case where defendant attempts to show his level of participation in the crime without exculpating himself, as in *Barts*, 321 N.C. 170, 362 S.E.2d 235. We disagree.

Defendant's trial counsel made essentially the same argument prior to the trial court's ruling that defendant could not testify as to residual doubt:

> The defendant's evidence that he would give is that he, himself, kicked in the door, and so doing, he committed first degree burglary. And out of his first degree burglary a murder occurred. And so, on his own statement that he will give, he basically confesses to felony murder. And in so doing, places himself in the same jeopardy that he's in anyway.

Such arguments are not persuasive on the facts before us. In this case, defendant was convicted by a jury of first-degree murder on the bases of both premeditation and deliberation and felony murder. Defendant testified at resentencing that he broke into the victim's home at Hill's urging; that Hill attacked the victim; and that defendant stopped Hill from beating and from stabbing the victim. This testimony concedes that defendant committed burglary, a felony, and that a murder resulted. Thus, this evidence is consistent with felony murder and does not raise residual doubt as to guilt under the felony murder theory. However, defendant's testimony was not consistent with premeditation and deliberation as a basis for the first-degree murder conviction in that it suggested that defendant never intended to kill the victim. Thus, the testimony created doubt as to whether defendant committed premeditated and deliberate murder.

Just as a defendant may not argue residual doubt as to the offense of first-degree murder during sentencing, *See Roseboro*, 351 N.C. at 549, 528 S.E.2d at 10; *Walls*, 342 N.C. at 52, 463 S.E.2d at 765; *Hill*, 331 N.C. at 415, 417 S.E.2d at 779, we hold that defendant may not argue residual doubt as to a basis underlying the first-degree murder conviction, such as premeditation and deliberation. Residual doubt as to a basis for the underlying conviction is not a circumstance of the offense and, thus, is equally inappropriate.

Defendant further contends that by preventing defendant from arguing his case to the jury, the trial court's ruling deprived defendant of his right to counsel and the right to present a defense. A defendant's right to present a closing argument is constitutionally protected. *Herring v. New York*, 422 U.S. 853, 858-60, 45 L. Ed. 2d 593, 598-99 (1975). However, "[t]his is not to say that closing arguments in a criminal case must be uncontrolled or even unrestrained. The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing arguments." *Id.* at 862, 45 L. Ed. 2d at 600; *see also State v. Miller*, 344 N.C. 658, 673, 477 S.E.2d 915, 924 (1996) ("*Improper* restrictions on the defendant's opportunity to make a closing argument may constitute a denial of the constitutional

right to counsel as well as the right to present a defense.") (emphasis added). In this case, as the above analysis illustrates, counsel was only prevented from making improper arguments to the jury. Thus, we hold that the trial court's restriction on closing arguments in this case was not improper and did not infringe upon defendant's constitutional rights.

Defendant's contention that residual doubt cannot exist in a case before a resentencing jury is equally meritless. The argument relies on semantics and ignores the rationale underlying the rule prohibiting residual doubt. Essentially, defendant argues that a resentencing jury cannot have "residual" doubt as that jury was not present at the guilt phase, that is, this jury did not make the original determination of guilt beyond a reasonable doubt and, therefore, cannot have "lingering" or "residual" doubt. Although in a technical sense defendant may be correct, defendant essentially attempted to create doubt in the minds of these jurors and to argue that the resentencing jury should consider its doubts about the earlier jury's verdict based on premeditation and deliberation. Hence, a residual doubt analysis is appropriate; and we are unpersuaded by this argument.

For the reasons stated above, we hold that the evidence defendant sought to argue to the jury improperly attempted to present residual doubt as a mitigating circumstance. Therefore, we hold that the trial court did not abuse its discretion in ruling that defendant could not present such evidence or argue it to the jury in closing arguments.

[5] Defendant next contends that, even if the evidence is improper as residual doubt, defendant should have been permitted to argue it to the jury as the State did not object when it was presented through defendant's testimony. The settled law in this state is that counsel may argue all evidence which has been presented as well as reasonable inferences which arise therefrom. *State v. McNeil*, 350 N.C. 657, 685, 518 S.E.2d 486, 503 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000). Furthermore, counsel is allowed wide latitude in its arguments to the jury. *State v. Meyer*, 353 N.C. 92, 113, 540 S.E.2d 1, 13 (2000), *cert. denied*, — U.S. —, — L. Ed. 2d —, 70 U.S.L.W. 3235 (2001). However, these general rules are balanced by the trial judge's discretion to limit argument of counsel where the subject is improper for jury argument. *State v. Whiteside*, 325 N.C. 389, 398, 383 S.E.2d 911, 916 (1989). As this Court has held that residual doubt is not relevant to mitigation, the trial court did not abuse its discretion

in prohibiting counsel from arguing evidence creating residual doubt even though the evidence was admitted through defendant's testimony. To allow such argument would have served only to confuse the jury and eviscerate the rule prohibiting presentation of residual doubt as a mitigating circumstance.

Defendant further contends that concerns of residual doubt must yield to defendant's right to testify on his own behalf. Although the trial court initially ruled that defendant could not testify that someone else had committed the murder, the transcript discloses that defendant was not actually prevented from so testifying. Accordingly, even if the trial court's ruling were erroneous, such an error would be harmless beyond a reasonable doubt. *State v. Rinck*, 303 N.C. 551, 572, 280 S.E.2d 912, 927 (1981) ("[A]ny error by the trial court in sustaining the State's objections was cured when the evidence sought to be admitted was subsequently admitted without objection.").

[6] Defendant contends next that he is entitled to a new sentencing proceeding, as the trial court erroneously failed to submit to the jury the requested statutory mitigating circumstance that defendant was acting under duress or under the domination of another person, N.C.G.S. § 15A-2000(f)(5). "[T]he test for sufficiency of evidence to support submission of a statutory mitigating circumstance is whether a juror could reasonably find that the circumstance exists based on the evidence." *Fletcher*, 348 N.C. at 323, 500 S.E.2d at 686. The pattern instruction requested by defendant states that a person acts under duress "if he acts under the pressure of any threat or compulsion from any source" and that a person acts under the domination of another person "if he acts at the command or under the control of the other person or in response to the assertion of any authority . . . which defendant did not have sufficient will to resist." N.C.P.I.—Crim. 150.10 (2000).

We hold that in this case no evidence was presented to warrant submission of the (f)(5) mitigating circumstance. Defendant's own testimony shows that he was strong-willed with respect to Hill: he refused to give her drugs, told her to get her own drugs, stopped her from beating the victim with the brass duck, stopped her from stabbing the victim with the knife, and told her to dispose of the remaining rings. At most defendant's testimony shows that Hill suggested commission of the crime and that defendant readily agreed and participated. This is not the equivalent of duress or domination. Likewise, evidence presented by the prosecution does not support this circumstance as it showed that defendant was alone with the vic-

tim at the time of the crime. Thus, no evidence was before the jury from which a juror could reasonably find that defendant was acting under duress or under the domination of another person.

[7] Defendant also argues that the trial court erroneously failed to submit to the jury the statutory mitigating circumstance that defendant was an accomplice in or accessory to the capital felony committed by another person and that his participation was relatively minor, N.C.G.S. § 15A-2000(f)(4). Though defendant did not request submission of this circumstance at resentencing, a trial court has no discretion as to whether to submit a circumstance where substantial evidence supporting the circumstance has been presented. *State v. Skipper*, 337 N.C. 1, 44, 446 S.E.2d 252, 276 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995).

Defendant acknowledges that this Court has found this circumstance inapplicable where the defendant is convicted of premeditated and deliberate murder. *See Roseboro*, 351 N.C. at 549, 528 S.E.2d at 10. Defendant argues, though, that the Court should not apply *Roseboro* where, as here, evidence offered at sentencing or resentencing presents facts unknown to the guilt-phase jury. However, under defendant's evidence at resentencing, the trial court properly determined that no substantial evidence supported a finding that defendant's participation was minor. Thus, we hold that the trial court did not err in failing to submit this mitigating circumstance.

[8] Defendant next contends by separate assignments of error that the trial court erroneously failed to instruct the jury on the following nonstatutory mitigating circumstances that were supported by the evidence: (i) that defendant told the circumstances surrounding the murder not for the purpose of avoiding responsibility for his crime but to explain his sense of remorse for not successfully stopping the attack on the victim; and (ii) that defendant was dominated by or influenced by Hill, who is approximately fifteen years his elder. Submission of a requested nonstatutory mitigating circumstance is required where:

> "(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. Green, 336 N.C. 142, 182, 443 S.E.2d 14, 37 (quoting *State v. Benson*, 323 N.C. 318, 325, 372 S.E.2d 517, 521 (1988)), *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

In support of the nonstatutory mitigator that defendant testified to the circumstances of the crime to explain defendant's sense of remorse for not stopping the attack rather than to avoid responsibility, defendant directs us to his own testimony. Defendant testified that he feels sorry for the victim's family and that he blames himself because he kicked in the door, which action initiated the whole incident, and because he could have done more to stop Hill from killing the victim.

Assuming *arguendo* that the trial court erred in failing to submit this circumstance, any error was harmless beyond a reasonable doubt. In *State v. Blakeney*, 352 N.C. 287, 531 S.E.2d 799 (2000), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001), this Court held that the trial court's erroneous failure to submit the requested nonstatutory mitigating circumstance was harmless beyond a reasonable doubt as it "did not preclude any juror from considering and giving weight to any mitigating evidence underlying defendant's proposed circumstance." *Id.* at 317, 531 S.E.2d at 820. The Court noted that defense counsel argued to the jury the evidence underlying the requested circumstance and that the trial court submitted to the jury the catchall mitigating circumstance. *Id.* at 317-18, 531 S.E.2d at 820-21.

The jury in this case heard defendant's testimony supporting the circumstance at issue, and defendant's attorney argued in closing that defendant "is acutely aware of the tremendous treasure that his actions struck down. He knows that. He has changed. . . . He knows that it would have never occurred without him. He knows that." As in *Blakeney*, the jury in this case was able to consider this alleged mitigating evidence and was encouraged to do so by counsel's closing argument; the trial court submitted to the jury the catchall mitigating circumstance, N.C.G.S. § 15A-2000(f)(9). Thus, any error was harmless beyond a reasonable doubt.

Defendant argues that the same evidence that supported submission of the (f)(5) statutory mitigating circumstance, that defendant acted under duress or domination of another, supports the nonstatutory mitigating circumstance that defendant was dominated or influenced by Hill, who is approximately fifteen years his elder. As noted above in discussing the (f)(5) mitigating circumstance, the evidence was insufficient to warrant submission of this nonstatutory mitigating circumstance. All the evidence, considered in the light most favorable to defendant, showed that defendant exhibited strong will with respect to Hill. During the charge conference the only evidence

to which defendant referred as supporting this mitigating circumstance was that he lived in Hill's house, that the only car to which he had access belonged to Hill, and that Hill was nearly fifteen years older than he. This evidence is insufficient to support a reasonable conclusion by a juror that defendant was dominated or influenced by Hill. Accordingly, we find no error in the trial court's refusal to submit this nonstatutory mitigating circumstance.

[9] Defendant next contends that the trial court erroneously failed to require the jury to make a factual determination of defendant's state of mind concerning the murder, pursuant to *Enmund v. Florida*, 458 U.S. 782, 73 L. Ed. 2d 1140 (1982), and *Tison v. Arizona*, 481 U.S. 137, 95 L. Ed. 2d 127 (1987). This Court has explained *Enmund* and *Tison* as follows:

> In *Enmund* the [United States Supreme] Court held that the Eighth Amendment forbids the imposition of the death penalty on a defendant who aids and abets in the commission of a felony in the course of which a murder is committed by others, when the defendant does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. *Enmund*, 458 U.S. at 801, 73 L. Ed. 2d at 1154. In a later case, however, the Court further construed its holding in *Enmund* and held that major participation in the felony committed, combined with reckless indifference to human life, is sufficient grounds for the imposition of the death penalty. *Tison v. Arizona*, 481 U.S. 137, 158, 95 L. Ed. 2d 127, 145 (1987).

State v. McCollum, 334 N.C. 208, 223, 433 S.E.2d 144, 151-52 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). Defendant acknowledges that this Court has held that no *Enmund/Tison* instruction is required when a defendant is convicted of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. *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). However, defendant argues that *Robinson* should not apply for the following reasons: (i) the resentencing jury was not the same as the guilt-phase jury; and (ii) as a defendant may be convicted of premeditated first-degree murder under a theory of acting in concert, the question of whether a defendant is guilty of premeditated murder is not necessarily the same question as whether a defendant intended to kill. We find both contentions without merit and, accordingly, find no error.

In support of his position, defendant cites *State v. Adams*, 347 N.C. 48, 490 S.E.2d 220 (1997), *cert. denied*, 522 U.S. 1096, 139 L. Ed. 2d 878 (1998), where this Court held that findings as to mitigating circumstances by one jury at an earlier sentencing are not binding on a new jury at a subsequent resentencing. *Id.* at 62, 490 S.E.2d at 227. Defendant states in a conclusory fashion that it follows from *Adams* that the predicate findings of the first jury as to guilt are not binding on a second jury with respect to the appropriateness of an *Enmund/Tison* instruction. We disagree. Defendant's interpretation would permit a resentencing jury to completely retry the issue of guilt even though the case was remanded pursuant to a holding that error occurred only in the sentencing proceeding, not in the guilt phase.

Defendant further relies on *Barnes*, 345 N.C. 184, 481 S.E.2d 44, to support the proposition that because a defendant may be convicted of premeditated first-degree murder under the principle of acting in concert, the question of whether a defendant is guilty of premeditated murder is not necessarily the same question as whether the defendant intended to kill. In *Barnes* the Court held that a defendant may be found guilty of premeditated first-degree murder by acting in concert without regard to which person committed which particular acts if the acts are done in pursuance of a common purpose to commit a crime or as a natural or probable consequence thereof. *Id.* at 233, 481 S.E.2d at 71. Thus, defendant argues, finding a defendant guilty of premeditated murder does not necessarily include a finding that a defendant intended to kill. Defendant further argues that under his description of events, he could have been convicted of premeditated first-degree murder by acting in concert with Hill pursuant to *Barnes*, yet have a jury instructed pursuant to *Enmund/Tison* find that defendant did not intend to kill.

Even if we assume *arguendo* that a finding of premeditation based on acting in concert does not necessarily show that the defendant intended to kill and that a defendant convicted of premeditated and deliberate murder by acting in concert is entitled to the *Enmund/Tison* instruction, this rule would be irrelevant in the present case. Defendant was convicted of murder based on premeditation and deliberation without any evidence or instruction regarding acting in concert. Defendant's contention that evidence during resentencing which showed that he acted in concert with another person mandated an *Enmund/Tison* instruction is unpersuasive. We have already held that this evidence was improperly admitted to raise

residual doubt as to defendant's conviction based on premeditation and deliberation. Accordingly, we hold that where the guilt-phase jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation without an instruction on acting in concert, an *Enmund/Tison* instruction is not required at sentencing. This assignment of error is overruled.

[10] Defendant next contends that ineffective assistance of counsel in violation of the Sixth Amendment mandates that he receive a new sentencing proceeding. Defendant specifically complains that during closing arguments counsel made the following statement to the jury with respect to the submitted aggravating circumstance that the murder was especially heinous, atrocious, or cruel: "Is it heinous, atrocious, and cruel? You bet. No doubt about that. I guess the real question is, what's [defendant's] involvement in that." As noted previously the trial court sustained the prosecutor's objection to this statement suggesting residual doubt and instructed the jury not to consider any argument that someone else was legally responsible for the murder. Defendant argues that the decision to make this concession, though agreed to by defendant, fell below the required objective standard of reasonableness.

When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693 (1984). In order to meet this burden, defendant must satisfy a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 80 L. Ed. 2d at 693.

This Court has held that an admission of guilt by trial counsel without defendant's consent is a *per se* violation of the Sixth Amendment right to effective assistance of counsel. *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). The *Harbison* rule,

however, does not apply to sentencing proceedings. *State v. Boyd*, 343 N.C. 699, 723, 473 S.E.2d 327, 340 (1996), *cert. denied*, 519 U.S. 1096, 136 L. Ed. 2d 722 (1997); *Walls*, 342 N.C. at 57, 463 S.E.2d at 768. Accordingly, having determined that the alleged concession did not constitute ineffective assistance of counsel *per se*, we proceed to analyze counsel's actions under a traditional *Strickland* analysis.

We begin by addressing the first prong of the *Strickland* test, that counsel's errors were so serious as to violate defendant's constitutional right to counsel. The evidence in this case leaves little doubt that this murder was especially heinous, atrocious, or cruel. Defendant attacked an elderly woman in her home in the early morning hours, taking her from room to room while assaulting her in an effort to locate her valuables. The victim had a large area with several lacerations on the back of her head that went down to her skull. She suffered four lacerations to her forehead, all of which went down to the skull. Below two superficial cuts on the right side of the victim's neck, an incised wound had cut her jugular vein. Additionally, two incised wounds were inflicted on the left side of the victim's neck, and the victim had numerous defensive wounds on her hands. The pathologist testified that the lacerations were caused by a blunt object, whereas the incised wounds to the neck were caused by a knife-like object. Though the victim died as a result of these wounds, the evidence shows that she was conscious and ambulatory for a time after the attack, moving to a chair in a bedroom before succumbing to her wounds.

Given the overwhelming evidence that this murder was especially heinous, atrocious, or cruel, counsel could reasonably have decided upon a strategy of conceding this aggravating circumstance to gain credibility with the jury—credibility that may have later helped defendant with respect to mitigating circumstances. Defendant's argument that this tactical decision actually hurt defendant's credibility when the court instructed that the argument was improper does not persuade us that his "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 693. Under these facts counsel's strategy was not necessarily thwarted by the objection. Counsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear. On the record in this case, we conclude that defendant has failed to satisfy the first prong of the *Strickland* test; therefore, we hold that this ineffective assistance of counsel claim fails. *See id.* at

687, 80 L. Ed. 2d at 693 (holding that a claim of ineffective assistance of counsel fails "unless a defendant makes both showings").

[11] Defendant contends next that the trial court erred in overruling defendant's objection to the prosecutor's closing argument improperly urging the jury to consider the general deterrence value of capital punishment. We hold that the trial court did not err in overruling defendant's objection or in failing to intervene *ex mero motu* to later statements.

Defendant cites the following passage from the prosecutor's closing argument:

> [PROSECUTOR]: . . . [T]he 12 of you will be acting as the voice and conscience of this community when you come in here and tell us what is the appropriate punishment in this case. What are the standards in this community? What will we do in Rutherford County for actions such as this?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> . . . .
>
> [PROSECUTOR]: That's what you will be doing is acting as the voice and conscious [sic] of this community. Your words will ring out loud and clear through your verdict. That's why it is such a big responsibility. It's the standards of Rutherford County. We're not in California. We're not in Texas. We're not in Illinois. We want to know, what does a Rutherford County juror think about a case like this? That's what you tell us. It will be your collective voice.

The prosecutor later stated: "It's high time that if good people, like you, stand up and be judgmental and pass judgment and set the standard. He has no standards to do what he did. . . . Let your voice say, 'We won't tolerate this in Rutherford County.' " Along the same lines the prosecutor later argued:

> Your voice, through this verdict, will ring out loud and clear out of this courtroom. It will tell us the answer to the question, Can you commit an act such as this man did? Can you kick in people's doors? Can you steal from them? Can you take their property? And not receive the ultimate punishment? Can that happen in Rutherford County? It shouldn't. It shouldn't. And you have the

> opportunity and responsibility to say, We won't let it happen. Say, through your verdict, We will not tolerate one bit of murder or assault and battery. If you do this, you will pay the ultimate price. That's the right message that needs to come out of this case and out of your verdict. Say to [defendant] and to anyone who would follow in his footsteps, You cannot do that. You cannot come in here and talk us into doing something other than the ultimate punishment.

This Court has held that arguments based on general deterrence—that is, that the jury should impose the death penalty in the case before it to deter others from committing similar crimes—are improper. *State v. Kirkley*, 308 N.C. 196, 215, 302 S.E.2d 144, 155 (1983), *overruled on other grounds by State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988). However, it is not improper for the State to "remind the jurors that 'they are the voice and conscience of the community.' " *McNeil*, 350 N.C. at 687-88, 518 S.E.2d at 505 (quoting *State v. Brown*, 320 N.C. 179, 204, 358 S.E.2d 1, 18, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987)).

Defendant objected only to the first quoted section above. That portion of the prosecutor's argument clearly urges the jury to act as the voice and conscience of the community and does not improperly argue general deterrence. Thus, that portion of the closing argument was proper; and the trial court did not err in overruling defendant's objection.

[12] As defendant did not object to the second or third quoted portions, "the standard of review is whether the argument was so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *Roseboro*, 351 N.C. at 546, 528 S.E.2d at 8. Moreover, " '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. Hipps*, 348 N.C. 377, 411, 501 S.E.2d 625, 645 (1998) (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999). While the prosecutor's statement that the jury should send a message with its verdict to defendant "and any who would follow in his footsteps" is arguably a reference to general deterrence, we decline to hold that this one brief comment out of thirty-two transcript pages of closing argument was so grossly improper as to warrant intervention *ex mero motu*. The

offending comment was not only brief, but its overall significance to the entire closing argument was minimal; and the comment was made in the context of a proper "voice and conscience of the community" argument. *See Hardy*, 353 N.C. at 137, 540 S.E.2d at 345 ("The objectionable statements were a passing reference . . . . In comparison to the prosecutor's entire closing argument, the comments were minor."). Furthermore, we note that even in *Kirkley* the Court held that the general deterrence argument was not so grossly improper as to warrant intervention *ex mero motu* where the prosecutor stated, "I'm asking you to impose the death penalty as a deterrent . . . ." *Kirkley*, 308 N.C. at 215, 302 S.E.2d at 155. Thus, we hold that the trial court did not err in failing to intervene *ex mero motu* during the prosecutor's arguments.

[13] Defendant's next contention is that the trial court erred in failing to intervene *ex mero motu* to prohibit the prosecutor's grossly improper arguments that jurors put themselves in the place of the victim and that the victim was tortured and begged for her life. Defendant argues that the prosecutor improperly asked the jurors to put themselves in place of the victim by asking the jury to "imagine" the victim's fear and the pain of the stabbings and stating that it could have been the home of one of the jurors or their family members.

Defendant relies on *McCollum*, 334 N.C. at 224, 433 S.E.2d at 152, for the proposition that this Court will not condone asking the jurors to put themselves in place of the victims. In *McCollum* the prosecutor asked the jurors to imagine that the eleven-year-old rape and murder victim was their own child, that the postmortem photographs were of their child, and that their child had been "split open" in an autopsy. *Id.* The trial court in *McCollum* overruled the defendant's objections to these statements. *Id.* This Court noted that while such comments are not condoned, the prosecutor did not misstate the evidence. *Id.* Moreover, the substantial weight of the evidence supporting the aggravating circumstances reduced the likelihood that the jury's decision was influenced by the prosecutor's closing argument. *Id.* at 224-25, 433 S.E.2d at 152-53. Hence the argument did not constitute prejudicial error. *Id.*

[14] The comments in this case were markedly less egregious than those in *McCollum*. The prosecutor did not ask the jurors to imagine themselves or a loved one as the victim, but merely asked them to imagine the fear and pain that the victim must have felt. Likewise, the

prosecutor's statement that the home could have been the home of one of the jurors did not ask the jurors to put themselves in the victim's place, but reiterated the random arbitrariness of this crime. These statements asked the jurors to make commonsense inferences and did not ask them to imagine being the victim. Given that the prosecutor in this case did not misstate the evidence; that the evidence supporting the aggravating circumstances was substantial; and that the Court in *McCollum* did not find error where the trial court overruled an objection to substantially more egregious statements, we decline to hold that the comments in this case were so grossly improper as to warrant intervention *ex mero motu*.

[15] Defendant also contends that the prosecutor inflamed the passion of the jury by speculating as to what occurred beyond the reasonable inferences from the evidence in the record.

> Counsel are entitled to argue to the jury all the law and facts in evidence and all reasonable inferences that may be drawn therefrom, but may not place before the jury incompetent and prejudicial matters and may not travel outside the record by interjecting facts . . . not included in the evidence.

State v. Syriani, 333 N.C. 350, 398, 428 S.E.2d 118, 144, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993).

Defendant refers to statements made by the prosecutor that the victim was watching television on the couch when the break-in occurred; ran into the kitchen and got a knife to defend herself; was "forced, literally tortured, into giving up the location of her valuables"; and probably begged for her life and asked for mercy. We hold that these statements are reasonable inferences from the evidence and, thus, are not improper arguments.

Testimony showed that the television was on when officers arrived and that the victim usually watched television immediately before she fell asleep. Thus, the jury could reasonably infer that the victim was lying down watching television when the break-in occurred. There was testimony that the blood spatter in the kitchen was the result of a struggle and that the victim had defensive wounds on her hands, and defendant testified that he had visions of a white woman holding a knife. One reasonable inference from this evidence is that defendant took the knife away from the victim in the kitchen and attacked her with it. The presence of the victim's blood in the kitchen and the dining room, the plundered personal possessions in

the dining room and bedroom, and the numerous wounds caused by two different weapons support an inference that the victim was taken from room to room and beaten to force her to identify the location of her valuables. Furthermore, given the prolonged nature of the attack and the evidence that the victim was conscious for a time after the attack, one may reasonably infer that the victim may have begged for mercy. Thus, we hold that the trial court did not err in failing to intervene *ex mero motu* to restrain the prosecutor's arguments.

PRESERVATION ISSUES

Defendant raises eight additional issues that he concedes have previously been decided contrary to his position by this Court: (i) whether the instructions to the jury on the especially heinous, atrocious, or cruel aggravating circumstance were unconstitutionally vague, as they failed to distinguish death-eligible murders from those that are not death-eligible; (ii) whether the trial court erred in denying defendant's motion for mistrial after a witness gave unsolicited testimony of a prior attempted rape charge that was dismissed for lack of evidence; (iii) whether the trial court erred in using inherently vague terms to define defendant's burden of proof applicable to mitigating circumstances; (iv) whether the trial court erred in instructing the jury that the mitigating circumstances must outweigh the aggravating circumstances; (v) whether the trial court erred in instructing the jury such that jurors could disregard mitigating circumstances found in Issue Two when considering Issues Three and Four; (vi) whether the trial court erred in instructing the jury on Issues Three and Four that consideration of mitigating circumstances was discretionary; (vii) whether the trial court erred in instructing the jury that it must be unanimous to answer "No" on Issues One, Three, and Four; and (viii) whether the indictment is unconstitutional in that it failed to include all elements of first-degree murder and failed to include the aggravating circumstances relied upon by the State.

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 defendant has demonstrated no compelling reason to depart from our prior holdings. We thus overrule these assignments of error.

PROPORTIONALITY

Finally, this Court exclusively has the statutory duty in capital cases, pursuant to N.C.G.S. § 15A-2000(d)(2), to review the record

and determine: (i) whether the record supports the jury's findings of the aggravating circumstances upon which the court based its death sentence; (ii) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (iii) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *See McCollum*, 334 N.C. at 239, 433 S.E.2d at 161.

[16] After a thorough review of the transcript, record on appeal, briefs, and oral arguments of counsel, we are convinced that the jury's findings of the two aggravating circumstances submitted were supported by the evidence. We also conclude that nothing in the record suggests that defendant's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Finally, we must consider whether the imposition of the death penalty in defendant's case is proportionate to other cases in which the death penalty has been affirmed, considering both the crime and the defendant. *See State v. Robinson*, 336 N.C. 78, 133, 443 S.E.2d 306, 334 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995). The purpose of proportionality review is "to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Proportionality review also acts "[a]s a check against the capricious or random 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). Our consideration is limited to those cases that are roughly similar as to the crime and the defendant, but we are not bound to cite every case used for comparison. *See Syriani*, 333 N.C. at 400, 428 S.E.2d at 146. Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *Green*, 336 N.C. at 198, 443 S.E.2d at 47.

Defendant was convicted of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. Defendant was also convicted of first-degree burglary and robbery with a dangerous weapon. The jury found both of the aggravating circumstances submitted: (i) that the murder was committed while defendant was engaged in the commission of a burglary, N.C.G.S. § 15A-2000(e)(5); and (ii) that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9).

The trial court submitted five statutory mitigating circumstances for the jury's consideration: (i) defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); (ii) the crime was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (iii) defendant's capacity to appreciate the criminality of his conduct was impaired, N.C.G.S. § 15A-2000(f)(6); (iv) defendant's age at the time of the crime, N.C.G.S. § 15A-2000(f)(7); and (v) the catchall mitigating circumstance that there existed any other circumstance arising from the evidence which the jury deemed to have mitigating value, N.C.G.S. § 15A-2000(f)(9). The jury found none of the statutory mitigating circumstances to exist. The trial court also submitted seventeen nonstatutory mitigating circumstances; the jury found four of these to exist.

We begin our proportionality analysis by comparing this case to those cases in which this Court has determined the sentence of death to be disproportionate. This Court has determined the death sentence to be disproportionate on seven occasions. *Benson*, 323 N.C. 318, 372 S.E.2d 517; *Stokes*, 319 N.C. 1, 352 S.E.2d 653; *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). This case is not substantially similar to any of the cases in which this Court has found that the death sentence was disproportionate.

In four of the seven cases in which this Court has concluded that the death penalty was disproportionate, the especially heinous, atrocious, or cruel aggravating circumstance was not submitted to the jury, *Benson*, 323 N.C. 318, 372 S.E.2d 517; *Rogers*, 316 N.C. 203, 341 S.E.2d 713; *Hill*, 311 N.C. 465, 319 S.E.2d 163; *Jackson*, 309 N.C. 26, 305 S.E.2d 703, whereas in a fifth the circumstance was submitted to but not found by the jury, *Young*, 312 N.C. 669, 325 S.E.2d 181. As the jury in the present case found this aggravating circumstance existed, this case is clearly distinguishable from those five cases. "While this fact is certainly not dispositive, it does serve as an indication that the sentence of death in the present case is not disproportionate." *Walls*, 342 N.C. at 72, 463 S.E.2d at 777. The evidence in this case showed that defendant beat and stabbed the victim repeatedly while taking

her from room to room, forcing her to identify the location of her valuables. The victim tried to fend off defendant's attack to no avail. After attacking the victim with two different weapons, defendant left the victim conscious and dying. The victim managed to move to a chair in a bedroom before succumbing to her wounds. Furthermore, defendant was convicted in part under a theory of premeditation and deliberation. "The finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *Artis*, 325 N.C. at 341, 384 S.E.2d at 506.

In the other two cases in which we have concluded that the death penalty was disproportionate, the jury did find that the murders were especially heinous, atrocious, or cruel. *Stokes*, 319 N.C. 1, 352 S.E.2d 653; *Bondurant*, 309 N.C. 674, 309 S.E.2d 170. However, both cases are distinguishable from the case at hand on other grounds.

In *Stokes* the Court emphasized that the defendant was found guilty of first-degree murder based only upon the felony murder rule; that there was little, if any, evidence of premeditation and deliberation; and that the defendant acted in concert with a considerably older co-felon. 319 N.C. at 24, 21, 352 S.E.2d at 666, 664. To the contrary, in the present case there was no proper evidence that defendant acted in concert with someone else; and the trial jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation as well as under the felony murder rule.

In *Bondurant* the defendant shot the victim but then immediately directed the driver of the car in which they had been riding to proceed to an emergency room. *Bondurant*, 309 N.C. at 694, 309 S.E.2d at 182. In concluding that the death penalty was disproportionate, the Court focused on the defendant's immediate attempt to obtain medical assistance for the victim and the lack of any apparent motive for the killing. *Id.* In contrast, defendant in this case left the house while the victim lay conscious and dying. Furthermore, the trial jury found that defendant committed the murder in the course of a burglary, thus establishing his motivation for this senseless killing.

We further note that the resentencing jury found two aggravating circumstances in this case. Of the seven cases in which this Court has found a death sentence disproportionate, the jury found multiple aggravating circumstances to exist in only two. *Young*, 312 N.C. 669, 325 S.E.2d 181; *Bondurant*, 309 N.C. 674, 309 S.E.2d 170. As discussed above, *Bondurant* is clearly distinguishable. The Court in *Young*

focused in part on the failure of the jury to find the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. *Young*, 312 N.C. at 691, 325 S.E.2d at 194. As that aggravating circumstance was found to exist in this case, *Young* is also distinguishable.

We also consider cases in which this Court has found the death penalty to be proportionate. Defendant in this case broke into an elderly victim's home at night, stabbed and beat her in various rooms in the house, and left her to die. "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.' " *Adams*, 347 N.C. at 77, 490 S.E.2d at 236 (quoting *Brown*, 320 N.C. at 231, 358 S.E.2d at 34) (alterations in original). Furthermore, this Court has deemed the (e)(5) and (e)(9) aggravating circumstances, standing alone, to be sufficient to sustain a sentence of death. *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). Viewed in this light we conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence disproportionate or those in which juries have consistently returned recommendations of life imprisonment.

Defendant received a fair capital sentencing proceeding, free from prejudicial error; and the death sentence in this case is not disproportionate. Accordingly, the judgment of the trial court is left undisturbed.

NO ERROR.

Justice EDMUNDS concurring.

I agree with the result reached by the majority. However, because this case is now in a somewhat unusual procedural posture, I am concerned that the holding may be applied too broadly to limit proper closing argument in capital sentencing proceedings, during which counsel representing defendants convicted of first-degree murder routinely and justifiably seek to convince the sentencing jury that it should recommend a life sentence.

Both as a practical and as a legal matter, attorneys at a capital sentencing proceeding are bound by their trial tactics and by the jury verdict. However, here, because we had remanded defendant's case

for resentencing, that proceeding was conducted before a different jury than the one that heard the guilt-innocence phase. Defendant elected not to testify at the guilt-innocence phase, but he nevertheless presented a defense, offering witnesses who suggested that an enigmatic individual in a raincoat killed the victim. The jury found defendant guilty, and at the subsequent sentencing proceeding before that same jury, defendant presented evidence of various psychological difficulties but made no further representation that someone else was the murderer. *State v. Fletcher*, 348 N.C. 292, 323-29, 500 S.E.2d 668, 686-90 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 113 (1999). We vacated and ordered a new sentencing proceeding. *Id.* On remand, defendant jettisoned his first failed defense and took the stand to testify that his girlfriend, Lisa Hill, was the one who stabbed and bludgeoned the victim. This theory was inconsistent with that presented at the guilt-innocence phase, strongly suggesting that defendant was attempting to take advantage of the fact that he had a new jury to raise a different and presumably improved defense. In light of the fact that the first jury had rejected defendant's original defense and convicted him of the murder, I agree with the majority that the trial court's instruction to the second jury limiting its consideration of the new defense was correct.

Even so, I believe the procedural quirks in this case thwart the majority's efforts to address general principles relating to "residual doubt." Because the jury that sat during the sentencing proceeding was different from the jury that returned the guilty verdict and because defendant presented contradictory defenses to different juries, I believe the issues relating to "residual doubt" and a defendant's ability to present relevant evidence at sentencing are not clearly and cleanly before this Court now. In my view, there is a risk that the majority's discussion of "residual doubt" could be read expansively to preclude future defendants from raising legitimate issues at sentencing. For instance, a defendant who did not testify at trial might be prevented from offering, as mitigation evidence, his version of events. Similarly, a defendant who has professed his innocence throughout the guilt phase could not continue to tell his same story. N.C.G.S. § 15A-2000(a)(3) states that "[i]n the [sentencing] proceeding . . . all such [guilt phase] evidence is competent for the jury's consideration on punishment." Therefore, a defendant may ask a sentencing jury to consider all evidence presented at trial, not just that comporting with a guilty verdict or that tending to mitigate guilt. The extent (if any) to which this statute conflicts with a trial court's

ability to enforce the factual determination inherent in a jury verdict is clouded by the procedural twist in the case at bar. Accordingly, I would limit the majority holding to the facts now before us.

Justices ORR and BUTTERFIELD join in this concurring opinion.

STATE OF NORTH CAROLINA v. CHRISTOPHER LAMAR WILSON

No. 106PA98

(Filed 18 December 2001)

1. Homicide— first-degree murder—short-form indictment

The short-form murder indictments used to charge defendant with two counts of first-degree murder were constitutional and defendant has presented no compelling reason why the Supreme Court should reexamine this issue.

2. Constitutional Law— due process—effective assistance of counsel—adequate period for preparation of case for trial

A defendant was not denied his rights to due process and effective assistance of counsel in a first-degree murder prosecution even though defendant's case was called for trial only twenty-seven days after assistant counsel was appointed, because: (1) defendant did not object at trial to the brevity of time for assistant counsel to prepare, nor did he move for a continuance; (2) the Supreme Court will not consider constitutional arguments raised for the first time on appeal; (3) the change in assistant counsel did not affect defendant's ability to object to this alleged error since the same lead counsel represented defendant from counsel's initial appointment until the trial began over a year later; and (4) plain error review has been applied only to jury instructions and evidentiary rulings, and even if it did apply, merely referring to the trial court's action as plain error in the assignment of error without supporting argument is insufficient to invoke this analysis. N.C.G.S. § 7A-450(b1); N.C. R. App. P. 10(b)(1).

3. Homicide— first-degree murder—failure to instruct on lesser-included offense

The trial court did not err in a first-degree murder prosecution by failing to instruct the jury on the lesser-included offense

of second-degree murder, because: (1) even if the evidence was sufficient to permit a jury to rationally determine that defendant acted without premeditation and deliberation, submission of second-degree murder would not necessarily be mandated in this case where defendant was also found guilty on the basis of felony murder; (2) even if it were assumed that defendant did not commit robbery or attempted robbery, the evidence was undisputed that defendant acted in concert with his coparticipant and that the coparticipant committed robbery; (3) the evidence would not permit a rational jury to find that defendant was not engaged in the commission of a felony at the time of the murders since under a theory of acting in concert defendant would also be guilty of robbery with a dangerous weapon regardless of whether he actually committed or attempted to commit the robbery himself; and (4) no evidence supports a conclusion that defendant had withdrawn from a common plan with his coparticipant to commit robbery with a dangerous weapon.

4. Homicide— first-degree murder—trial court changed mind on submission of second-degree murder

The trial court did not err in a first-degree murder prosecution by originally agreeing to instruct on second-degree murder and then, after defense counsel had begun closing arguments, directing defense counsel to tell the jury that the trial court had changed its mind and would not submit second-degree murder, because: (1) the trial court's ruling did not express the judge's opinion on the issue of premeditation and deliberation to the jury since the court merely offered that counsel could blame the incorrect argument on the court's ruling, and counsel could have chosen instead to claim that he had been mistaken; (2) defendant's strategic choice to reveal the trial court's ruling to the jury was not error entitling him to relief since a defendant cannot claim to be prejudiced by his own conduct, N.C.G.S. § 15A-1443(c); (3) the error would at most have revealed to the jury only that the trial court did not agree that the evidence supported a finding that defendant committed second-degree murder, and the jury was made aware that the action was required by law and was not based on the judge's opinion of the facts the jury was to decide; (4) counsel actually told the jury that the State had caused the circumstances that led the judge to be unable to submit second-degree murder; and (5) defendant fails to explain how he was prejudiced given the brevity of defense

counsel's comments, and defendant was not discredited by the contradiction.

5. Constitutional Law— due process-right to a fair trial—effective assistance of counsel—correction of misstatement in closing argument

The trial court did not violate defendant's rights to due process, a fair trial, and effective assistance of counsel in a first-degree murder prosecution by ordering defense counsel to tell the jury after defendant's closing argument was completed that one can commit armed robbery upon a person who is dead, because: (1) defendant did not object to the trial court's ruling at trial and made no argument raising a constitutional issue to the trial court; (2) plain error review is generally limited to jury instructions and evidentiary rulings, and even if this review were available, defendant has failed to specifically allege and argue plain error; (3) defendant is unable to show any prejudice from the alleged error since counsel's statements could have misled a jury to think that robbery cannot be committed where the victim is dead; and (4) by being allowed to tell the jury himself, counsel had the opportunity to minimize the damage to his credibility created by the correction.

6. Homicide— requested instruction—imperfect self-defense

The trial court did not err in a first-degree murder prosecution by denying defendant's motion for his requested instruct on imperfect self-defense, because: (1) self-defense, perfect or imperfect, is not a defense to first-degree murder under the felony murder theory, and only perfect self-defense is applicable to the underlying felonies; and (2) no evidence tended to negate that defendant committed robbery with a dangerous weapon by acting in concert with his coparticipant.

7. Appeal and Error— preservation of issue—type of gun—distance gun fired

Defendant did not preserve for appeal the admission over objection of an SBI agent's testimony that a six inch barrel gun could have been used during commission of the crimes at a distance of less than three feet from the victim, because: (1) defendant chose to withdraw his objection; and (2) defendant failed to allege plain error to this issue.

8. Constitutional Law— right to remain silent—evidence of defendant's invocation of right

The trial court did not err in a first-degree murder prosecution by admitting evidence that defendant exercised his right to remain silent, because: (1) the record discloses that at the time defendant invoked his right to remain silent, he had already admitted to the officers that he had committed the armed robbery and disposed of the gun; (2) the prosecutor never implied that defendant's statement was an admission of guilt; and (3) it cannot be said as a matter of law that a reasonable probability exists that the outcome of the trial would have been different had the trial court not admitted into evidence defendant's invocation of his right to remain silent.

9. Criminal Law— restraint of defendant during trial—shackle or leg brace—safety

The trial court did not abuse its discretion in a first-degree murder prosecution by ordering, over defendant's objection, that defendant be restrained throughout the trial with either a shackle or a leg brace for safety reasons, because: (1) an officer testified that officers had a lot of trouble with defendant while he was in jail, including his involvement in at least two fights; (2) the trial court considered the seriousness of the charges against defendant, and made the ultimate determination on the issue after hearing the officer's testimony; and (3) nothing in the record supports a conclusion that the restraint violated defendant's constitutional rights since defendant was restrained by a leg brace hidden under his clothing, and the trial court allowed defendant to walk to the witness stand outside the presence of the jury to avoid any possible prejudice.

10. Homicide— first-degree murder—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder as to one of the victims on the basis that the evidence was allegedly insufficient to find that either defendant or his coparticipant fired the bullet that caused that victim's death, because the evidence viewed in the light most favorable to the State reveals that: (1) two of the bullets recovered from the victim store clerk's body were .38-caliber, which could not have been fired from the other store clerk's or the coparticipant's handgun, and that one of those bullets was

consistent in weight, caliber, brand, and design with the bullets later found in defendant's jacket pocket; and (2) substantial circumstantial evidence rising above mere suspicion and conjecture exists to show that the third fatal bullet was also fired from defendant's gun rather than by the other store clerk.

11. Sentencing— aggravating factor—armed robbery—carrying concealed weapon

The trial court did not improperly aggravate defendant's armed robbery sentence by finding that he was carrying a concealed weapon, because: (1) the trial court's written findings clarify that the trial court actually considered a prior conviction for carrying a concealed weapon as an aggravating factor instead of defendant's carrying of a concealed weapon in the present case; and (2) the trial court's misspoken oral finding is not controlling where the more carefully crafted and deliberate written finding required by the Fair Sentencing Act under N.C.G.S. § 15A-1340.4(b) reveals that the trial court actually relied upon a different proper aggravating factor.

Justice BUTTERFIELD concurring.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review judgments imposing sentences of life imprisonment entered by Burroughs, J., on 7 April 1995 in Superior Court, Cleveland County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. On 31 July 2001, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments. Heard in the Supreme Court 17 October 2001.

Roy A. Cooper, Attorney General, by Robert C. Montgomery, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Charlesena Elliott Walker, Assistant Appellate Defender, for defendant-appellant.

PARKER, Justice.

Defendant Christopher Lamar Wilson was indicted for the first-degree murders of C. Ervin Lovelace and Hugh Wayne Marcrum, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. Defendant was tried capitally and was found guilty of two counts of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. He

was also found guilty of robbery with a firearm and conspiracy to commit robbery with a firearm. Following a capital sentencing proceeding, the jury recommended sentences of life imprisonment for the murder convictions. Accordingly, the trial court sentenced defendant to two sentences of life imprisonment to be served consecutively; the trial court also sentenced defendant to consecutive terms of forty years' imprisonment for the robbery with a firearm conviction and ten years' imprisonment for the conspiracy to commit robbery with a firearm conviction.

The State's evidence tended to show that on 30 November 1993, Cassandra Adams drove defendant; defendant's ex-girlfriend, Ashley Dye; and Shalan Wilson ("Shalan") to a fast-food restaurant. After Adams got her food, she and Dye sat on the hood of the car talking while defendant and Shalan talked to another man, Derrick Floyd, off to the side of the car. Dye told Adams that she "knew what [defendant] and [Shalan] had been doing" and that they should rob Little Dan's, a convenience store located in Kings Mountain, North Carolina, as "the camera was broken, they did not have a security system and they did not have a red button beside the cash register."

Later that day defendant told Dye that he had overheard her earlier statements about Little Dan's and asked her for more details. Dye reiterated the information; she added that the store had no safe and that the cash was kept in a bag behind a curtain underneath the cash register. Dye also stated that the next night, 1 December 1993, two women would be working and would not have a gun in the store. Dye further told defendant that if a man was working, he would have a gun. Defendant asked Dye where the gun would be if the man was working, and Dye responded that it would be under the cash register. After driving around for a time, Adams took Shalan, defendant, and Dye to their respective homes.

On 2 December 1993 Adams, Dye, and defendant spoke together on the telephone. Dye asked if Adams was "still going to do that tonight." Adams stated that she had not made up her mind yet. Adams picked up defendant in her mother's car around 9:00 p.m. that evening and told defendant that she was scared and did not want to go through with the robbery. Adams and defendant drove to Shalan's home, where Adams told Shalan that she was "scared and [she] thought something was going to go wrong, and [she] didn't want to do it." Shalan "started waving his arms around" and told Adams that they were going to go through with the robbery as planned and that she

"was not going to chicken out on him." Adams, defendant, and Shalan then got into the car, whereupon Adams noticed that Shalan had a black nine-millimeter gun and a pair of gloves with him.

Adams, defendant, and Shalan then drove around for awhile, unsuccessfully attempting to locate Dye. They drove to Little Dan's, but Adams again became worried upon seeing the number of cars in the parking lot. Adams continued past Little Dan's and looked for Dye at an apartment complex near the convenience store. Again unsuccessful in her attempt to locate Dye, Adams drove past Little Dan's to a truck stop to buy gloves for defendant, noting that all of the cars in the Little Dan's parking lot were now gone. Adams then drove defendant and Shalan past Little Dan's again to see how many cars were in the parking lot. Adams turned the car around and let defendant and Shalan out of the car, then drove away to a nearby road.

After a short time Adams drove back to Little Dan's and saw defendant and Shalan running toward the car. After defendant and Shalan got back into the car, Adams began driving towards Gastonia, North Carolina. At that point she noticed that defendant had a .38-caliber gun with him and that Shalan had another gun, a "silverish, shiny revolver." When she asked what had happened, defendant stated: "He tried to play hero[,] and I had to pop him." Adams asked defendant whether the man was dead; and defendant replied, "They're dead." At this point Adams realized for the first time that two men were dead. Adams then drove defendant and Shalan back to their respective homes.

Earlier that evening, in response to information from a store employee that "an attempted holdup" might happen at Little Dan's that night, officers with the Kings Mountain Police Department alerted the store clerks and began surveillance of the store. The record is unclear as to who relayed this information to the police department. Officer Ron Creech went to Little Dan's with his partner, Officer Tessneer, around 10:15 p.m. on 2 December 1993. The officers began their shift surveilling the store from their car, which was parked two to three hundred yards from the store. After watching the store for approximately forty minutes, the officers noticed two black men come around the corner of the store and "trot" to the front door, crouching below the front windows. In response to this suspicious activity, the officers called for backup and began driving toward the store. The two men exited the store after approximately ten seconds, running in the opposite direction from which they had come. The offi-

cers lost sight of the men and began searching for them. Unable to locate the men, the officers returned to Little Dan's, where the backup units were arriving. The backup units continued searching for the suspects while Officers Creech and Tessneer entered the store to check on the clerks. The officers discovered the dead bodies of both clerks on the floor behind the counter.

The victims had been shot in numerous places, and the crime scene investigators observed blood on and around the bodies. The investigators also noticed a bullet fragment near one victim's head, a copper-jacketed bullet on the floor in a shopping aisle of the store, and a nine-millimeter Luger shell casing on the floor behind the other victim; an empty brown leather holster was also found underneath this victim.

The pathologist who performed the autopsy on victim Marcrum discovered three gunshot wounds: one bullet entered the right cheek, broke the mandible, and exited through the neck. A second bullet entered the right side of the back, hit the collarbone, and lodged at the base of the neck. A third bullet also entered the right side of the back; perforated the right lung, the aorta, the trachea, and the left lung; then lodged in the left shoulder. The pathologist opined that the third gunshot described above caused the victim's death.

The autopsy on victim Lovelace was performed by another pathologist, who discovered six gunshot wounds: one bullet entered the right temple and lodged in the brain, a second entered the left side of the face and lodged in the left side of the head, a third entered through the left lip and exited through the jaw, a fourth entered and lodged in the chest, a fifth went through the right wrist, and a sixth went through the left hand. The wound to the left hand was caused by a bullet fired from a range of less than four or five inches; whereas, the wound to the right wrist was caused by a bullet fired from less than thirty inches away. The pathologist further opined that the bullet entering the victim's brain was the cause of death.

While the record is unclear as to how officers came to suspect that defendant and Shalan were involved in the murders, on the morning of 3 December 1993 investigators went to defendant's home with warrants for his arrest. Defendant was taken into custody and consented to allow investigators to search the home. The investigators located a jacket belonging to defendant with three .38-caliber shells in one pocket. When asked where the gun was, defendant responded that he had thrown it out the window of the car on an

entrance ramp to Interstate 85 after the robbery. Defendant was then taken to the police station, where he made a statement to the investigators. Officers were unable to locate the gun during a later search of the area indicated by defendant.

Also on the morning of 3 December 1993 investigators served an arrest warrant on Shalan. When they took Shalan into custody, investigators discovered a loaded Smith and Wesson nine-millimeter semiautomatic pistol between the mattress and box spring of the bed on which Shalan had been lying. A later search of Shalan's residence revealed a Colt Diamondback .38-caliber revolver in a foot locker. Danny Goforth, the owner of Little Dan's, testified that the Colt revolver found in Shalan's home belonged to Goforth and had been taken from its normal location behind the counter at Little Dan's.

A forensic firearms and tool-mark examiner from the State Bureau of Investigation determined that the copper-jacketed bullet found in an aisle in the store and the nine-millimeter casing found behind victim Marcrum's body were fired from the nine-millimeter Luger semiautomatic pistol seized from Shalan's home. The investigator further determined that the .38-caliber bullets retrieved from victim Lovelace's face and chest and from victim Marcrum's chest and shoulder could not have been fired from the gun stolen from Little Dan's or from Shalan's nine-millimeter; however, these bullets were consistent with the three bullets discovered in defendant's jacket. The investigator further opined that, based on his analysis of holes in the victims' clothing, the two gunshots to Marcrum's back and the gunshot to Lovelace's chest were fired from less than three feet away.

Defendant took the stand in his own defense and testified that he first heard about Little Dan's around 29 or 30 November 1993 when Adams told him it would be easy to rob. On 2 December 1993 Adams drove defendant and Shalan to various locations around Kings Mountain, finally stopping to let the two men exit the car near Little Dan's. Defendant had a .38-caliber pistol in his right pocket as he and Shalan approached the store. When defendant and Shalan entered the store, the clerk ducked below the counter and reappeared with a gun. At this point defendant's gun was "still hanging out of his pocket." Defendant testified that "everybody started shooting" and admitted that he was shooting; however, he was uncertain whether Shalan or the clerk was also shooting. Defendant stated that he shot twice from a range of five to six feet, and the clerk again ducked behind the

counter. When the clerk reappeared, defendant shot at him again. The clerk ducked behind the counter once more, leaving the gun on the counter. Defendant then saw another clerk, previously unseen by defendant. This second clerk reached for the gun on the counter. Defendant heard another shot and fired another shot himself. Defendant and Shalan then ran from the store.

Defendant stated that he shot at the first clerk because he thought the clerk was going to kill him when the clerk initially appeared from behind the counter with the gun. Defendant further stated that he did not take any money and that he did not go behind the counter. Defendant and Shalan got back into the car driven by Adams, and defendant threw his bullets and gun out the window while the car was driving on the entry ramp to Interstate 85.

On cross-examination defendant testified that on several occasions when they passed by Little Dan's immediately prior to the murders, they saw a police car in the parking lot. Defendant denied that Adams bought a pair of gloves for him at the truck stop shortly before the murders. Defendant further stated that the plan was for Adams to drive defendant and Shalan to the store and for them to rob it by merely showing their guns. Defendant admitted that he and Shalan had committed a similar robbery at a Hardee's restaurant the night they learned about Little Dan's. On that occasion upon defendant and Shalan's entering the restaurant, defendant had shown his gun to the employees without pointing it at anyone; and an employee had given them money from the register. Defendant testified that he and Shalan intended the robbery at Little Dan's to proceed in the same manner. On redirect examination defendant testified that he did not consider running away when he saw the clerk's gun. To the contrary defendant testified: "[W]henever I saw the gun, I was going to shoot back."

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

JURISDICTIONAL ISSUE

[1] Defendant contends that the short-form murder indictments were insufficient to charge defendant with first-degree murder as they did not allege that the murders were either committed in the course of a felony or with premeditation and deliberation. Thus, defendant argues that use of the short-form murder indictments for first-degree murder violates defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and

Article I, Sections 19 and 23 of the North Carolina Constitution. Furthermore, defendant contends that such use of the short-form murder indictments directly contravenes two recent United States Supreme Court cases. *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999); *Almendarez-Torres v. United States*, 523 U.S. 224, 140 L. Ed. 2d 350 (1998). As defendant concedes, however, this Court has previously ruled against defendant's position on this issue. *See, e.g., State v. Mitchell*, 353 N.C. 309, 543 S.E.2d 830, *cert. denied*, —— U.S. ——, 151 L. Ed. 2d 389 (2001); *State v. Holman*, 353 N.C. 174, 540 S.E.2d 18 (2000), *cert. denied*, —— U.S. ——, 151 L. Ed. 2d 181 (2001); *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001); *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). Defendant has presented no compelling reason why this Court should reexamine this issue, and this assignment of error is overruled.

APPOINTMENT OF ASSISTANT COUNSEL

[2] By another assignment of error, defendant contends that he was deprived of his rights to due process and effective assistance of counsel when defendant's case was called for trial only twenty-seven days after assistant counsel was appointed. Defendant contends that assistant counsel could not adequately prepare himself to represent defendant effectively in this short period of time; thus, his constitutional rights were violated.

"An indigent person indicted for murder may not be tried where the State is seeking the death penalty without an assistant counsel being appointed in a timely manner." N.C.G.S. § 7A-450(b1) (1999). Although appointment of assistant counsel is not constitutionally required, this statute mandates timely appointment of assistant counsel where defendant is to be tried capitally. *See State v. Call*, 353 N.C. 400, 413, 545 S.E.2d 190, 199, *cert. denied*, —— U.S. ——, 151 L. Ed. 2d 548 (2001). Accordingly, pursuant to this statute, the trial court appointed Leslie A. Farfour, Jr., and W. Robinson Deaton, Jr., on 6 December 1993 to represent defendant in his capital trial. On 14 December 1993, the trial court allowed Deaton's motion to withdraw and appointed Larry Wilson to represent defendant along with Farfour. On 14 March 1994, the trial court signed a second order appointing Wilson and Farfour to represent defendant. On 22 February 1995, the trial court allowed Wilson's motion to withdraw

and appointed Calvin Coleman to serve as assistant counsel. On 21 March 1995, defendant's case was called for trial.

Defendant did not object at trial to the brevity of time for assistant counsel to prepare, nor did he move for a continuance. Defendant has, therefore, failed to properly preserve this issue for appellate review. N.C. R. App. P. 10(b)(1). Furthermore, we decline to address defendant's claim that this late withdrawal and appointment of assistant counsel implicated his constitutional rights as this Court will not consider constitutional arguments raised for the first time on appeal. *State v. Benson*, 323 N.C. 318, 321, 372 S.E.2d 517, 519 (1988). We further note that the change in assistant counsel did not affect defendant's ability to object to this alleged error. The same lead counsel represented defendant from counsel's initial appointment on 6 December 1993 until the trial began over a year later. Thus, lead counsel was in a position to determine whether the late withdrawal and appointment of assistant counsel would prejudice defendant's case and, if so, request a continuance or object to the trial date.

Defendant's assignment of error describes this alleged error as "plain error." However, we have applied plain error review only to jury instructions and evidentiary rulings. *State v. Davis*, 349 N.C. 1, 29, 506 S.E.2d 455, 470 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). Even were plain error review available for this issue, we have consistently held that a defendant must "specifically and distinctly contend" in his brief that the error constituted plain error. *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000), *cert. denied*, 537 U.S. 997, 149 L. Ed. 2d 641 (2001). Merely referring to the trial court's action as plain error in the assignment of error without supporting argument is, thus, insufficient to invoke such analysis. *Id.* For these reasons, we decline to address this issue.

GUILT-INNOCENCE PHASE

[3] Defendant next contends that the trial court erred in failing to instruct the jury on second-degree murder as a lesser-included offense of first-degree murder in that the jury could reasonably have found that the State failed to prove either premeditation and deliberation or the underlying felony for the felony murder rule. As discussed below, the trial court initially granted defendant's motion during the charge conference but later told defendant that it would not submit the instruction on second-degree murder.

The test for determining whether submission of second-degree murder as a lesser-included offense is required is as follows:

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

State v. Gary, 348 N.C. 510, 524, 501 S.E.2d 57, 66-67 (1998) (quoting *State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986)). Moreover, "[a]n instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and acquit him of the greater." *Id.* at 524, 501 S.E.2d at 67.

Defendant first argues that a rational jury could find that defendant killed the victims without premeditation and deliberation. Second-degree murder is defined as "the unlawful killing of another human being with malice but without premeditation and deliberation." *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). Thus, defendant argues, an instruction on second-degree murder was required. However, even if we assume *arguendo* that the evidence was sufficient to permit a jury rationally to determine that defendant acted without premeditation and deliberation, submission of second-degree murder would not necessarily be mandated in this case where defendant was also found guilty on the basis of felony murder.

Determination of this issue is controlled by our decision in *State v. Quick*, 329 N.C. 1, 405 S.E.2d 179 (1991). In *Quick* the trial court instructed the jury on both premeditation and deliberation and felony murder. *Id.* at 7, 405 S.E.2d at 183. The defendant argued that he was entitled to an instruction on second-degree murder as a lesser-included offense as there was evidence tending to negate premeditation and deliberation. *Id.* at 28, 405 S.E.2d at 195-96. This Court agreed that one witness' testimony tended to show the absence of premeditation and deliberation. *Id.* at 28, 405 S.E.2d at 196. However, the Court noted that inasmuch as premeditation is irrelevant to felony murder and no evidence permitted an inference that the mur-

der was not committed in the course of the commission of a felony, the trial court properly refused to instruct on second-degree murder. *Id.* at 28-29, 405 S.E.2d at 196. Similarly, in the present case the trial court instructed the jury on both premeditation and deliberation and felony murder. Thus, under *Quick*, even if we assume *arguendo* that certain evidence tended to negate premeditation, defendant is entitled to a second-degree murder instruction only if evidence also tended to show that the murder was not committed in the course of the commission of a felony.

Defendant argues that a rational jury could find that the murders were not committed during the commission of robbery with a dangerous weapon, the felony underlying the submission of felony murder to the jury. Pursuant to N.C.G.S. § 14-87, robbery with a dangerous weapon is "(1) the 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." *State v. Beaty*, 306 N.C. 491, 496, 293 S.E.2d 760, 764 (1982). "An attempted robbery with a dangerous weapon occurs when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this result." *State v. Allison*, 319 N.C. 92, 96, 352 S.E.2d 420, 423 (1987).

Defendant contends that a rational jury could find that defendant did not commit robbery or attempted robbery, in that: (i) the evidence did not show that defendant's actions ever advanced beyond the mere plan and preparation to commit robbery; and (ii) defendant's evidence showed that he freely and voluntarily abandoned his plan to rob the store before he took or attempted to take any money. However, even were we to assume *arguendo* that a jury could find that defendant did not commit robbery or attempted robbery, the evidence was undisputed that defendant acted in concert with Shalan and that Shalan did commit robbery.

The law on acting in concert is as follows:

> "[I]f 'two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof.' "

State v. Erlewine,[1] 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991) (quoting *State v. Westbrook*, 279 N.C. 18, 41-42, 181 S.E.2d 572, 586 (1971), *death sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972)) (alteration in original). The trial court in this case instructed the jury on the law of acting in concert.

By defendant's own admission, he and Shalan entered the store with the common purpose and plan to rob the store. The evidence further showed that after the clerks were felled, Shalan took a gun from one of the clerks. "A homicide victim is still a 'person,' within the meaning of a robbery statute, when the interval between the fatal blow and the taking of property is short." *State v. Pakulski*, 319 N.C. 562, 572, 356 S.E.2d 319, 325 (1987). Thus, on the uncontradicted evidence, Shalan committed armed robbery against the clerk by shooting him and taking his gun. Accordingly, under a theory of acting in concert, defendant would also be guilty of robbery with a dangerous weapon regardless of whether he actually committed, or attempted to commit, robbery himself. For this reason the evidence would not permit a rational jury to find that defendant was not engaged in the commission of a felony at the time of the murders.

Defendant's contention that the evidence shows that he abandoned his plan to rob the store is presented in support of the argument that defendant did not commit or attempt to commit a robbery. However, we also address whether such evidence could lead a rational jury to conclude that defendant no longer had a common purpose and plan with Shalan to commit the crime and, therefore, could not be convicted of robbery under a theory of acting in concert.

> Where the perpetration of a felony has been entered on, one who had aided or encouraged its commission cannot escape criminal responsibility by quietly withdrawing from the scene. The influence and effect of his aiding or encouraging continues until he renounces the common purpose and makes it plain to the

1. We note that this definition of acting in concert was the one in effect at the time of the commission of the crime. Shortly after the murders in question the Court's opinion in *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994), *overruled by State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44, *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997), *and* 523 U.S. 1024, 140 L. Ed. 2d 473 (1998), changed the law regarding acting in concert to require that a defendant may be convicted of a specific intent crime by acting in concert only if the jury finds that the defendant had the requisite specific intent. As the crime in this case was committed prior to the 29 September 1994 certification date in *Blankenship*, the acting in concert law as enunciated in *Erlewine* and reinstated in *Barnes* is appropriate in this case. *See State v. Evans*, 346 N.C. 221, 229, 485 S.E.2d 271, 275 (1997), *cert. denied*, 522 U.S. 1057, 139 L. Ed. 2d 653 (1998).

> others that he has done so and that he does not intend to participate further.

State v. Spears, 268 N.C. 303, 310, 150 S.E.2d 499, 504 (1966). Although *Spears* dealt with the law of aiding and abetting, we hold that for the purposes of acting in concert the above statement is equally applicable to withdrawal from a common plan. Based on this rule no evidence supports a conclusion that defendant had withdrawn from the common plan with Shalan to commit robbery with a dangerous weapon. Any withdrawal by defendant was done silently in his own mind without any outward manifestation or communication to Shalan. Defendant exited the store with Shalan and left in the getaway car with him. For the foregoing reasons we hold that the trial court properly refused to instruct the jury on second-degree murder as a lesser-included offense to first-degree murder.

[4] Defendant next contends that the trial court erred in originally agreeing to instruct on second-degree murder, then, after defense counsel had begun closing arguments, directing defense counsel to tell the jury that the court had changed its mind and would not submit second-degree murder. During the charge conference the trial court agreed to instruct the jury on second-degree murder as a lesser-included offense. Based upon this initial ruling, defense counsel told the jury in his closing argument that if it found defendant guilty of murder, it should only find him guilty of second-degree murder. Counsel also stated that the verdict sheet would allow the jury to find defendant guilty of either first-degree or second-degree murder, or not guilty. The trial court later interrupted defense counsel and, outside the presence of the jury, the following colloquy ensued:

> THE COURT: I've looked at the pattern jury instructions, and I do not think second degree murder's going to be an option. I'm going to look at it some more, and I wanted to tell you before you finish your argument, so don't say anything today. Just go ahead with your argument, but we'll let you carry over until tomorrow, and I'll tell you before the day's over, but at this point, I just don't think it's going to be. . . .
>
> . . . .
>
> [DEFENSE COUNSEL]: I'm about through, obviously.
>
> THE COURT: But you've already talked about second [degree murder].

[DEFENSE COUNSEL]: Not really.

[PROSECUTOR]: He hasn't asked them to convict him of anything. I've been listening.

THE COURT: No, he hasn't but he's planted it. He's been jumping around all the bushes. But don't mention it right now.

After a brief recess the trial court notified counsel that it would not instruct on second-degree murder, and the following exchange occurred:

[DEFENSE COUNSEL]: We would OBJECT and EXCEPT, especially in light of the fact that I indicated to the jury that it would be submitted on second degree.

THE COURT: That's why I'm going to give you plenty of time to correct that, if you have. I listened. I didn't catch that.

[DEFENSE COUNSEL]: I told them that that would be on the verdict sheet, Your Honor. That's what I did—

THE COURT: Well, you can just tell them that I changed my mind. Blame it on me.

After resuming closing argument, defense counsel related the trial court's ruling to the jury as follows:

Now, originally, [defense counsel] told you that [defendant] could be found guilty of second degree murder. Well, that's what we were originally told by the judge. The judge changed his mind, and I'll speak to you about that later. As it stands now, he's been charged with first degree murder . . . .

. . . .

Now, I told you before that I'd talk to you again about the charge of second degree murder that the judge is not going to charge you on. He originally said he would. Now, for reasons of law—and he certainly has the right to do that—he's decided that he cannot charge you on second degree murder.

Defendant contends that he suffered prejudicial error in that the jury became informed of the court's ruling, made outside its presence, which caused defense counsel to " 'eat his words,' belittle himself and discredit his own case before the jury."

The State argues that these issues were not properly preserved for appeal under N.C. R. App. P. 10(b)(1). We disagree. The record shows that counsel objected to the trial court's decision, and counsel's objection clearly related both to the trial court's decision not to submit the instruction and the timing of the decision. Counsel stated, "We would OBJECT and EXCEPT, especially in light of the fact that I indicated to the jury that it would be submitted on second degree." A necessary consequence of the timing of the ruling was that defense counsel would have to explain his "about-face" to the jury. Thus, we hold that counsel's objection was sufficient to preserve for appeal the timing of the court's ruling and any prejudice to defendant resulting from counsel's "about-face" with the jury. However, as defendant failed to object to this issue on any constitutional basis at trial, we decline to address any constitutional arguments on this issue. *See Benson*, 323 N.C. at 321, 372 S.E.2d at 519.

We first address defendant's contention that the trial court's ruling expressed the judge's opinion on the issue of premeditation and deliberation to the jury. A trial judge "may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C.G.S. § 15A-1222 (1999). In *State v. Allen*, 353 N.C. 504, 509-10, 546 S.E.2d 372, 375 (2001), this Court held that "[p]arties in a trial must take special care against expressing or revealing to the jury legal rulings which have been made by the trial court, as any such disclosures will have the potential for special influence with the jurors." The Court in *Allen* further noted that how the judge's opinion is conveyed to the jury, " 'whether directly or indirectly, by comment on the testimony of a witness, by arraying the evidence unequally in the charge, by imbalancing the contentions of the parties, by the choice of language in stating the contentions, or by the general tone and tenor of the trial,' " is irrelevant. *Id.* at 510, 546 S.E.2d at 376 (quoting *State v. Williamson*, 250 N.C. 204, 207, 108 S.E.2d 443, 445 (1959)).

Defendant argues that the trial court violated this principle by directing counsel to explain to the jury that the trial court had changed its ruling. However, the transcript clearly shows that the trial judge did not order defense counsel to tell the jury the court's ruling; rather, the court merely offered that counsel could blame his earlier, now incorrect, argument on the court's ruling. While the trial court erred in allowing defense counsel to "blame it on" the trial court, defendant was not forced to take that approach as the trial court stated that it would give counsel plenty of time to correct any

previous reference to second-degree murder. Counsel could have chosen instead to claim that he had been mistaken. As a defendant cannot claim to be prejudiced by his own conduct, N.C.G.S. § 15A-1443(c) (1999), we decline to hold that defendant's strategic choice to reveal the trial court's ruling to the jury was error entitling him to relief. *See State v. Jaynes*, 353 N.C. 534, 545, 549 S.E.2d 179, 189-90 (2001) (holding that although the trial court erred in allowing a method of jury selection that violated the jury selection statute, the defendant was not compelled to participate and, instead, chose to do so voluntarily; thus, the defendant was prejudiced by his own conduct).

Even were we to assume *arguendo* that the trial court ordered defendant to reveal the court's ruling to the jury, or that defendant was essentially forced to do so by the circumstances created by the trial court, we hold that defendant was not prejudiced by the error. The error would at most have revealed to the jury only that the trial court did not agree that the evidence supported a finding that defendant committed second-degree murder, which was no longer an issue before the jury. In fact defense counsel told the jurors that the trial court changed its ruling "for reasons of law." Thus, the jury was made aware that the action was required by law and was not based on the judge's opinion of the facts the jury was to decide. Furthermore, by the following arguments counsel actually told the jury that the State had caused the circumstances that led the judge to be unable to submit second-degree murder:

> And about that, I'm going to say that the State has more or less painted you into a corner and is daring you to come out, and I'm going to tell you why I say that.
>
> The legislature . . . [has] made a crime—a law—that fits just about every criminal act you can do. There are thousands of them. The State has some responsibility to charge a person with the correct crime. . . .
>
> Second degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation, and if that murder was done with a deadly weapon, you can infer that there was malice—
>
> . . . .
>
> . . . The State chose, instead, to charge [defendant] with first degree murder based on malice, premeditation, deliberation.

> First degree murder based on felony murder. . . . That corner that you're in is that neither of these crimes fit what [defendant] did. He could have been charged with the correct crime.
>
> . . . .
>
> . . . There's a calculated gamble here, I believe, that even though the crimes don't fit, by golly, you'll never let him go. . . .
>
> . . . .
>
> . . . [I]t would take a lot of strength to find him not guilty of these offenses. I'm not saying he's not guilty. Not guilty as charged is what I'm saying.

Thus, from this argument the jury would not deduce that the judge had expressed his opinion on the facts. Rather, the jury would more likely conclude that the State had charged defendant with the inappropriate crime and that, therefore, the trial court could not submit the appropriate crime. While this argument is in itself an inappropriate statement of the law inasmuch as a trial court must instruct on second-degree murder as a lesser-included offense if such instruction is warranted by the evidence, *see Gary*, 348 N.C. at 524, 501 S.E.2d at 67, defendant's argument clearly would have led the jury to think that the trial court's hands were bound by the State's decision and that, thus, the court's decision did not reflect its opinion on the matter.

Defendant further contends that this case is like *Allen*, where the prosecutor stated that the trial court permitted the jury to hear the words of a witness " 'because the Court found they were trustworthy and reliable. . . . If there had been anything wrong with that evidence, you would not have heard that.' " *Allen*, 353 N.C. at 508, 546 S.E.2d at 374 (alterations in original). This Court held that the trial court erred in allowing this argument. The present case is distinguishable from *Allen*, however, as the comment in question did not bolster the State's case or even imply that the trial court had an opinion as to a witness' veracity or defendant's guilt. Withdrawal of second-degree murder did not imply that the trial court thought defendant was guilty of first-degree murder. Moreover, while defendant's brief is replete with general allegations that the jury's knowledge of the trial court's ruling prejudiced defendant, he does not explain how defendant was so prejudiced. We conclude that defendant suffered no prejudice from the jury's knowledge of the court's ruling.

Defendant further contends that the trial court's reversal of its prior ruling caused defendant to be discredited before the jury to his prejudice. Defendant argues that the reversal required defense counsel to discredit their own earlier argument and appear to be "conniving, dishonest and talking out of both sides of their faces." This change in approach was, according to defendant, especially prejudicial, as counsel had told the jurors that he would not "intentionally mislead [them]."

Defendant had made only two brief references to second-degree murder in his argument prior to the trial court's decision not to submit the instruction. First, counsel argued that if the jury were to find defendant guilty it should be only of second-degree murder rather than first-degree. Second, counsel mentioned that the verdict sheet would allow the jury to find defendant guilty of first-degree murder, guilty of second-degree murder, or not guilty. The significance defense counsel attached to these prior arguments is reflected in defense counsel's statement that he had "not really" argued second-degree murder to the jury when the trial court initially considered changing its ruling. Given the brevity of these comments, any prejudice to defendant caused by the retraction was *de minimus*. Counsel had not argued that defendant was guilty of second-degree murder; he had merely argued that if defendant was guilty of anything, it was certainly not first-degree murder. Moreover, as noted above defendant chose to explain his prior argument by telling the jurors that the court had changed its ruling. Thus, counsel did not appear to go back on their word not to "intentionally mislead [the jurors]" or appear to be "conniving, dishonest and talking out of both sides of their faces"; therefore, defendant was not discredited by the contradiction. For these reasons we are not persuaded that a reasonable possibility exists that the outcome of the trial would have been different if defendant had not had to explain to the jury that second-degree murder would not be an option available to them. *See* N.C.G.S. § 15A-1443(a). These assignments of error are overruled.

[5] Defendant next contends that the trial court erred and violated defendant's state and federal constitutional rights to due process, a fair trial, and effective assistance of counsel by ordering defense counsel to tell the jury, after defendant's closing argument was completed, that one can commit armed robbery upon a person who is dead. Defense counsel had initially made the following statements to the jury:

> One of the elements that the State has to prove just cannot be overcome, and that is that the defendant obtained the property by endangering or threatening the life of a person with a firearm. All of the available evidence shows that these clerks had already been shot and Shalan was on his way out of the door when he took that gun. He did not endanger anyone for the purpose of robbing them of that gun. . . .
>
> . . . And [defendant] did not commit an armed robbery, and I'm asking you to find that the State did not prove those seven elements of armed robbery to you beyond a reasonable doubt as far as it relates to [defendant]. If the State wanted to charge Shalan with larceny, that's fine. I don't represent Shalan, but I would argue and contend that he didn't even commit an armed robbery. He didn't endanger anyone for the purpose of taking a gun. Those people, by all accounts, as sad as it is, were dead—shot when on the way out of the store, Shalan grabbed the gun.

The trial court later told defense counsel that he must "tell [the jurors] that you can commit armed robbery after the person's dead because [counsel] told them to the contrary," indicating that counsel should "clear up any misconception." Pursuant to the trial court's direction, counsel told the jury:

> During the course of my deliberations with you, I may have said something that could mislead you with regard to armed robbery and whether or not an armed robbery can be committed when a person is dead. And I want to read something for you to clear that up.
>
> "To be found guilty of robbery with a dangerous weapon, a defendant['s] threatened use or use of a dangerous weapon must precede or be co-committed [sic] with the taking or be so joined by time and circumstances with the taking as to be part of one continuous transaction."

Defendant did not object to the trial court's ruling at trial and made no argument raising a constitutional issue to the trial court. Thus, defendant has failed to preserve this issue for appellate review. N.C. R. App. P. 10(b)(1); *see also Benson*, 323 N.C. at 322, 372 S.E.2d at 519 (holding that constitutional issues not raised and passed on at trial will not be considered for the first time on appeal). Defendant further described the trial court's action as plain error in the assignment of error, although defendant's argument in the brief does not

contend that this ruling was plain error. However, as noted previously, plain error review is generally limited to jury instructions and evidentiary rulings. *Davis*, 349 N.C. at 29, 506 S.E.2d at 470. Even were plain error review available for this issue, defendant has failed to specifically allege and argue plain error. Thus, defendant has failed to preserve this issue for appeal.

Even had defendant properly preserved this issue for appeal, however, he is unable to show any prejudice from the alleged error. While counsel is allowed wide latitude in making arguments to the jury, the trial court does not abuse its discretion by sustaining an objection or otherwise correcting an argument the jury could interpret to misstate the law. *State v. McKoy*, 323 N.C. 1, 27, 372 S.E.2d 12, 26 (1988), *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). In this case counsel's argument likely would have left the jury with the impression that robbery with a dangerous weapon could not occur where the property was taken from a dead person. Counsel argued that robbery did not occur because Shalan took the gun after the clerks were shot and, thus, did not endanger a life to obtain the property. However, the law is clear that "[a] homicide victim is still a 'person,' within the meaning of a robbery statute, when the interval between the fatal blow and the taking of property is short." *Pakulski*, 319 N.C. at 572, 356 S.E.2d at 325. Thus, counsel's statements could have misled a jury to think that robbery cannot be committed where the victim is dead, and the trial court properly sought to correct any possible confusion.

Defendant's argument that the statements were intended to show that as to him no robbery occurred in that the plan was aborted during the shooting and that Shalan took the gun as an afterthought is unpersuasive. First, no evidence showed that the plan to rob the store was abandoned. Second, the crux of the issue is not counsel's intent but whether the jury could be led to misunderstand the law as a result of the statement; clearly, the jury could be so misled in this case.

Defendant argues that, even if counsel did misstate the law, the trial court has no authority to delegate its duty to correct the jury's possible misinterpretation to counsel. Assuming *arguendo* that the trial court cannot delegate that duty, we conclude any error in this case was not prejudicial to defendant. Regardless of who had the duty to correct the erroneous impression, the statements had to be clarified to prevent the jury's misapplication of the law. By being allowed to tell the jury himself, counsel had the opportunity to minimize the damage to his credibility created by the correction.

Defendant also argues that the trial court's timing exacerbated the prejudice as the correction undermined defendant's entire defense. However, defendant himself contends that counsel was generally arguing that as to defendant no robbery occurred because the use of force was not done with the intention of taking the gun and that taking the gun was an afterthought. The trial court's order to correct any misperceptions as to the possibility of robbing a dead victim would, therefore, not contradict the premise of defendant's argument. We hold that defendant has failed to show prejudice as required by N.C.G.S. § 15A-1443(a). This assignment of error is without merit and is overruled.

[6] Defendant next contends that the trial court erred by denying defendant's motion to instruct the jury on imperfect self-defense, thereby violating defendant's federal and state constitutional rights. The trial court also overruled defendant's objection to submission of the following instruction to the jury: "[N]either the issue of self defense [n]or death by accident is available to the defendant, and neither are [sic] to be considered by you in connection with the accusation of first degree murder in perpetration of a felony." Defendant argues that the trial court erred in failing to submit the requested instruction, which was supported by the evidence.

"A trial court must give a requested instruction that is a correct statement of the law and is supported by the evidence." *State v. Conner*, 345 N.C. 319, 328, 480 S.E.2d 626, 629, *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997). The law of imperfect self-defense is as follows:

> [I]f the defendant believed it was necessary to kill the deceased in order to save himself from death or great bodily harm, and the defendant's belief was reasonable because the circumstances at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but the defendant, although without murderous intent, was the aggressor or used excessive force, the defendant would have lost the benefit of perfect self-defense. In this situation he would have shown only that he exercised the imperfect right of self-defense and would remain guilty of at least voluntary manslaughter.

State v. Bush, 307 N.C. 152, 159, 297 S.E.2d 563, 568 (1982). However, this Court has stated that "[s]elf-defense, perfect or imperfect, is not a defense to first-degree murder under the felony murder theory, and only perfect self-defense is applicable to the underlying

felonies." *State v. Richardson*, 341 N.C. 658, 668, 462 S.E.2d 492, 499 (1995). Thus, to the extent that defendant contends that a self-defense instruction should have been submitted as to the first-degree murder charge, under *Richardson* the trial court did not err. Likewise, to the extent defendant claims he was entitled to an instruction on imperfect self-defense as to the robbery underlying the felony murder, under *Richardson* defendant was not entitled to such an instruction.

We have identified three circumstances where self-defense may properly be utilized in a case involving the felony murder rule:

> (i) a reasonable basis upon which the jury may have disbelieved the prosecution's evidence of the underlying felony, *Layne* [*v. State*], 542 So. 2d [237,] 244 [(Miss. 1989)]; (ii) a factual showing that defendant clearly articulated his intent to withdraw from the situation; or (iii) a factual showing that at the time of the violence the dangerous situation no longer existed, *Gray*[*v. State*], 463 P.2d [897,] 909 [(Alaska 1970)].

State v. Bell, 338 N.C. 363, 387, 450 S.E.2d 710, 723 (1994), *cert. denied*, 515 U.S. 1163, 132 L. Ed. 2d 861 (1995). Defendant's argument that the first circumstance existed in the present case is unpersuasive, for as previously discussed with respect to a second-degree murder instruction, no evidence tended to negate that defendant committed robbery with a dangerous weapon by acting in concert with Shalan. Though they are not argued by defendant, the other two circumstances are equally inapplicable to this case. We hold, therefore, that the trial court did not err in refusing to submit the requested instruction to the jury.

[7] Defendant next contends that the trial court erred in overruling defendant's objections to certain testimony of State Bureau of Investigation Agent Trochum and in denying defendant's motions to strike the offending statements. Trochum's testimony in question was that two of the bullet holes in the shirt of one victim would have been caused by bullets fired from a distance of less than three feet, given the type of ammunition and a "six inch barrel gun." Defendant contends that the trial court erred in overruling his objection to this testimony, as the record is devoid of any evidence that a "six inch barrel gun" was used during commission of the crimes; thus, testimony that a "six inch barrel gun" would have been fired from less than three feet from the victim was not relevant. In response to defendant's objection and motion to strike, the trial court overruled the objection and

denied the motion, but stated that counsel could "be heard at lunchtime." At the lunch break, the following transpired:

> THE COURT: Now, what was the objection to the ballistic man giving an estimate as to the distance the firearm was from the shirt?
>
> [DEFENSE COUNSEL]: Yes, sir, Your Honor, I withdraw that objection. He answered the question that I had in mind.

Rather than argue why the trial court should reverse its prior ruling, defendant chose instead to withdraw his objection. Thus, this issue was not properly preserved for appeal. *See* N.C. R. App. P. 10(b)(1). Moreover, defendant has failed to allege plain error as to this issue. Accordingly, we decline to address this assignment of error.

[8] Defendant contends next that the trial court erred by admitting evidence that defendant exercised his right to remain silent guaranteed by the Fifth Amendment to the United States Constitution. Prior to trial defendant moved to suppress statements given to law enforcement officers subsequent to waiving his *Miranda* rights. The trial court ruled that the State would be allowed

> to introduce the initial statement down through page four of the transcript where it states, "You don't want to talk about how you got up with them yesterday or anything or what time you got together and what you done or where you went or who you talked to or –," and the defendant answered, "No." At that point, the tape will stop.

Defendant asserts that his constitutional right to remain silent was violated by this ruling in that the jury was allowed to hear evidence that defendant exercised that right. Defendant argues that while the trial court correctly ruled that defendant had invoked his right to remain silent, it erred in admitting into evidence the words spoken to invoke that right.

Assuming *arguendo* that the trial court erred in allowing the jury to hear defendant's invocation of his right to remain silent, we conclude any error would have been harmless beyond a reasonable doubt. The record discloses that at the time defendant invoked his right to remain silent, he had already admitted to the officers that he had committed the armed robbery and disposed of the gun. At trial defendant testified that he and Shalan went to Little Dan's with the intention of robbing the store and that defendant took part in the

shootout that resulted in the victims' deaths. Moreover, the prosecutor never implied that this statement was an admission of guilt. *See State v. Alexander*, 337 N.C. 182, 196, 194, 446 S.E.2d 83, 91, 90 (1994) (holding that the law enforcement officer's statement that "[the defendant] wished not to talk to me" was "relatively benign" in that the record showed that the prosecutor made no attempt to emphasize that the defendant did not speak with officers and the evidence of the defendant's guilt was substantial); *State v. Williams*, 305 N.C. 656, 674, 292 S.E.2d 243, 255 (noting that the defendant voluntarily answered some questions and that "the State did not [ask the jury to] use the defendant's request for an attorney to infer guilt"), *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982). On this record we cannot say as a matter of law that a reasonable probability exists that the outcome of the trial would have been different had the trial court not admitted into evidence defendant's invocation of his right to remain silent. *See* N.C.G.S. § 15A-1443(b); *see also State v. Robinson*, 336 N.C. 78, 114, 443 S.E.2d 306, 323 (1994) (holding that the pertinent inquiry is whether there is a reasonable probability that a different result would have been reached absent the error), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995). Accordingly, we hold that the error, if any, was harmless beyond a reasonable doubt.

[9] By another assignment of error, defendant claims that the trial court erred in ordering, over defendant's objection, that defendant be restrained throughout the trial with either a shackle or a leg brace, thereby violating defendant's federal and state constitutional rights to due process and a fair trial. Defendant contends that restraint was not reasonably necessary and that the trial court made this ruling without hearing any testimony and merely acceded to the bailiff's opinion that defendant should be restrained.

This Court has stated that:

> shackling of the defendant should be avoided because (1) it may interfere with the defendant's thought processes and ease of communication with counsel, (2) it intrinsically gives affront to the dignity of the trial process, and most importantly, (3) it tends to create prejudice in the minds of the jurors by suggesting that the defendant is an obviously bad and dangerous person whose guilt is a foregone conclusion.

State v. Tolley, 290 N.C. 349, 366, 226 S.E.2d 353, 367 (1976). Despite these concerns,

> A trial judge may order a defendant or witness subjected to physical restraint in the courtroom when the judge finds the restraint to be reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons.

N.C.G.S. § 15A-1031 (1999).

Max Blanton, an officer in charge of defendant, testified that although there had been no problems with defendant in the courtroom for hearings, officers "had a lot of trouble out of [defendant] while he's been in jail." Blanton further explained that defendant had been involved in at least two fights while in jail and had "beat [another inmate] up real bad."

After Blanton testified, the trial court ruled as follows:

> THE COURT: Okay. Because of the extreme penalty that the State seeks in this matter and because other pretrial matters have not addressed the ultimate question of what, if anything, may be at stake and knowing human nature to be such as it is, for the safety of the public, for the safety of the jurors, for the safety of the court personnel, for the safety of the attorneys, for the safety of the bailiffs and the other people involved in and around the courthouse, I feel that from a safety standpoint, shackles or a brace are called for. He has selected the brace. Over his protest, the brace will be used, and we'll move on from there.

In light of Blanton's testimony and the court's consideration of the seriousness of the charges against defendant, the trial court did not abuse its discretion in concluding that it was reasonably necessary for defendant to be restrained "from a safety standpoint." *See State v. Paige*, 316 N.C. 630, 645, 343 S.E.2d 848, 857-58 (1986) (holding that a "judge may base his findings supporting the use of restraints upon reliable information which would not be admissible as evidence at a trial"); *Tolley*, 290 N.C. at 368, 226 S.E.2d at 368 (holding that the court may consider, *inter alia*, "the seriousness of the present charge against the defendant"). Furthermore, the record is clear that the trial court made the ultimate determination on the issue after hearing Blanton's testimony; therefore, defendant's contention that the trial court allowed Blanton to determine whether defendant should be shackled is meritless.

Finally, we note that nothing in the record supports a conclusion that the restraint in this case violated defendant's constitutional

rights. The record reveals that defendant was restrained by a leg brace hidden under his clothing which might have caused him to "limp or walk stiff legged" and would lock in place when he sat down and bent his knee. To avoid any possible prejudice created by the manner in which defendant walked with the brace, the court allowed defendant to walk to the witness stand outside the presence of the jury. From outward appearances the brace was so obscured that the trial court had to be informed that defendant was wearing the brace when he next entered the courtroom. Under these circumstances, the likelihood is negligible that use of the leg brace influenced the jury to conclude that defendant is dangerous and, hence guilty. Clearly, the device did not demean the dignity of the process. Defendant does not allege that the restraint interfered with his thought process or his ability to communicate with his counsel. For the foregoing reasons we hold that the trial court did not abuse its discretion, and this assignment of error is overruled.

[10] Defendant next contends that the trial court erred in denying defendant's motion to dismiss the charge that he murdered Ervin Lovelace on the basis that the evidence was insufficient to find that either defendant or Shalan fired the bullet that caused Lovelace's death. In ruling on a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn therefrom. *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998). The State must present substantial evidence of each element of the offense charged. *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied," *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988); however, 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, the motion to dismiss must be allowed," *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983).

In this case defendant argues that the evidence was insufficient to show that either defendant or Shalan, with whom defendant was acting in concert, fired the bullet that killed Lovelace. Moreover, defendant argues that it is possible that the other victim fired the bul-

let that killed Lovelace, which would be insufficient to charge defendant with the murder. *See State v. Bonner*, 330 N.C. 536, 542, 411 S.E.2d 598, 601 (1992) (holding that there can be no criminal liability for felony murder where, "though defendants engaged in reckless and dangerous conduct, neither they nor their accomplices committed the fatal act"). A firearms expert could determine only that the bullet that killed Lovelace was larger than a .25-caliber but could not form an opinion as to what weapon may have fired the bullet. Defendant argues that, on this evidence, the jury could only speculate that either defendant or Shalan, and not the other victim, fired the fatal bullet. However, the evidence, when viewed in a light most favorable to the State, shows that the other two bullets recovered from Lovelace's body were .38-caliber, which could not have been fired from the clerk's or Shalan's gun, and that one of those bullets was consistent in weight, caliber, brand, and design with the bullets later found in defendant's jacket pocket. When all the evidence showed that only three guns were involved, a logical conclusion is that those two bullets removed from Lovelace's body were fired from defendant's gun. While neither of these bullets caused the fatal wound, the connection of these two bullets to defendant's gun constitutes substantial circumstantial evidence that the third fatal bullet was also fired from defendant's gun. Thus, while a possibility exists that the fatal bullet was fired by the other clerk, substantial circumstantial evidence, which rises above mere suspicion and conjecture, that defendant fired the fatal shot was presented. Therefore, the trial court did not err in denying defendant's motion to dismiss this charge.

SENTENCING

[11] In his only assignment of error relating to sentencing, defendant argues that the trial court erred by aggravating his armed robbery sentence by finding that he was carrying a concealed weapon, where that evidence was also used to support the conviction. A sentence may not be aggravated by evidence supporting an element of the same offense. Aggravation of a presumptive sentence must be based upon conduct which goes beyond that normally encompassed by the crime for which the defendant is convicted. *State v. Small*, 328 N.C. 175, 190, 400 S.E.2d 413, 421 (1991).

The trial court in this case made the following oral finding:

> In 93 CRS 11742, robbery with a firearm, the State has presented an aggravating factor—that is, carrying a concealed weapon. The Court finds that the factors in aggravation out-

weigh the factors in mitigation, and the defendant is confined in the custody of the State Department of Correction for a term of forty years to run consecutive to the two life sentences earlier given.

However, the trial court later made written findings as to the aggravating and mitigating factors on the "Felony Judgment Findings of Factors in Aggravation and Mitigation of Punishment" form which did not conform precisely with the oral findings. These written findings showed the sole aggravating factor relating to the robbery with a firearm conviction to be that "defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement," specifically a 1990 conviction for carrying a concealed weapon.

Viewed together, the oral and written findings reflect that the oral finding was a mere *lapsus linguae*. The later written finding clarifies that the court actually considered a prior conviction for carrying a concealed weapon as the aggravating factor, not defendant's carrying of a concealed weapon in the present case. We hold that the trial court's misspoken oral finding is not controlling where the more carefully crafted and deliberate written finding, required by the Fair Sentencing Act, N.C.G.S. § 15A-1340.4(b)(1988), reveals that the trial court actually relied upon a different, proper aggravating factor. Having made this determination, we need not address whether the trial court could have properly found as an aggravating factor in this case that defendant carried a concealed weapon. This assignment of error is overruled.

For the foregoing reasons we conclude that defendant received a fair trial free from prejudicial error.

NO ERROR.

Justice BUTTERFIELD concurring.

I join in the majority opinion, but write separately to express my view that while this defendant may not have been prejudiced by the trial court's failure to give the agreed-upon instruction, the court's handling of the situation was fundamentally unfair. In my opinion, by forcing defense counsel to retract his earlier statements, the trial court may have cast aspersions on counsel's competence in the minds of the jurors. The court's actions not only required defense counsel to "eat his words," such actions also compelled him to

change the course of his argument midstream in order to deal with the court's decision to withdraw second-degree murder as a possible verdict. The obvious purpose of the charge conference is to enable counsel to know what instructions will be given so that counsel will be in a position to argue the facts in light of the law to be charged to the jury. Counsel, therefore, must be able to stand on the decisions reached by the court during the charge conference and to structure closing arguments accordingly.

Defendant's defense, as manifested in counsel's argument to the jury, was to admit some degree of culpability less than first-degree murder. At the time of the court's decision to withdraw the promised instruction, defense counsel had not specifically asked the jury to convict defendant of second-degree murder. Nonetheless, as the court noted, counsel had firmly "planted" the seed, vehemently arguing that if the jury was to find defendant guilty of anything, it should be second-degree murder, not first-degree murder. Thus, the anticipated instruction was the cornerstone of the case defense counsel constructed in his argument.

Additionally, I believe that the court's promise to instruct on second-degree murder induced the defense to acknowledge some culpability on the part of defendant. The defense's reliance on the promised instruction was compounded by the fact that prior to changing its decision, the trial court interrupted defense counsel's argument to inquire as to whether defendant consented to counsel's admission that defendant was guilty of second-degree murder, as required under *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). Therefore, on these facts, the failure of the trial court to give an instruction on second-degree murder after agreeing to do so was fundamentally unfair. However, because the evidence of defendant's guilt was overwhelming, I am satisfied that the court's failure to instruct the jury as promised was harmless.

WILLIAM SPEAGLE, AND WIFE, DERENE SPEAGLE v.
CHRISTY LYNETTE HOLLAND SEITZ

No. 32PA01

(Filed 18 December 2001)

1. **Child Support, Custody, and Visitation— custody—past circumstances or conduct—relevancy**

Any past circumstance or conduct which could impact either the present or the future of a child is relevant when determining custody between parents or between parents and nonparents, notwithstanding the fact that such circumstances or conduct did not exist or was not being engaged in at the time of the custody proceeding. However, findings of fact of a parent's conduct inconsistent with that parent's protected status, whether related to past or present conduct, do not in and of themselves determine custody but merely trigger the best interests of the child analysis.

2. **Child Support, Custody, and Visitation— custody—grandparents—conduct inconsistent with protected status as a parent—evidence of participation in murder of other parent—best interests of child standard**

Although the trial court reached the correct result in a child custody case when it applied the best interests of the child standard and awarded custody to plaintiff paternal grandparents based on its finding that defendant mother's neglect and separation from her child was inconsistent with her protected status, the trial court erred by excluding evidence of defendant's participation in the murder of the child's father, even though defendant had been acquitted of all criminal charges relating to the murder, because evidence of defendant's involvement in the murder of the child's father was highly relevant to whether she should be allowed any form of child custody and could be proven using the preponderance of the evidence standard applicable to child custody cases.

Justice EDMUNDS 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, 141 N.C. App. 534, 541 S.E.2d 188 (2000), reversing an order and judgment entered 5 April 1999 by

Creech, J., in District Court, Catawba County. Heard in the Supreme Court 11 September 2001.

Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, P.A., by Forrest A. Ferrell and Stephen L. Palmer; and Long, Parker, Warren & Jones, P.A., by Robert B. Long, Jr., for plaintiff-appellants.

Ruldolf Maher Widenhouse & Fialko, by Thomas K. Maher, for defendant-appellee.

LAKE, Chief Justice.

The question presented for review in this case is whether the trial court was correct in determining defendant lost her constitutionally protected status as a parent and in applying the "best interests of the child" analysis under the circumstances in this case. The Court of Appeals reversed the trial court, holding there was no evidence of "conduct inconsistent" with defendant's protected status at the time of trial or at any time soon before trial, which would support triggering of the "best interest" analysis. *Speagle v. Seitz*, 141 N.C. App. 534, 537 n.1, 541 S.E.2d 188, 190 n.1 (2000).

On 1 March 2001, this Court allowed defendant's motion to dismiss plaintiffs' appeal of a constitutional question, but allowed plaintiffs' petition for discretionary review. For the reasons stated below, we reverse the decision of the Court of Appeals and direct that court to reinstate the trial court's judgment awarding custody of the child to plaintiffs.

On 3 September 1993, defendant, Christy Lynette Holland (now Christy Seitz), gave birth to a daughter, Amber Ashton Holland, out of wedlock. The biological father of the child was William Stacy Speagle. Starting soon after the child's birth, defendant and the child often moved from one location to another. Defendant and the minor child resided with plaintiffs, William Speagle and Derene Speagle, and the father from about 1 October 1993 until shortly after Christmas in December 1993. Plaintiffs are the parents of Stacy Speagle and the paternal grandparents of the child.

Defendant was employed as a topless dancer at various establishments in North Carolina from 1993 through 1995. Defendant was fired from one such establishment in June 1995 in Hickory, North Carolina, for violating its rules by ejaculating a male patron in front of the audience.

During the early part of 1994, defendant and the infant child resided with defendant's mother and stepfather. During this period, defendant denied that Stacy Speagle was the biological father of the child. However, a paternity test confirmed he was the biological father. Defendant and her daughter moved to a townhouse in the Bethlehem community of Alexander County, North Carolina, in January or February 1994. Plaintiffs and the child's father visited the child at this location. Defendant and the child moved to Raleigh in October 1994. In March 1995, they moved back to Hickory, North Carolina. After her return to Hickory in 1995, defendant danced at another establishment in Hickory at various times throughout the year. While defendant worked, she left her child in the care of a woman previously warned by the Catawba County Department of Social Services for keeping too many children in her house. Defendant occasionally picked the child up at 1:00 or 2:00 a.m. from this residence.

Defendant and the father reconciled several times after the child's birth. After a period of reconciliation in the summer of 1995, they soon separated again. Defendant did not allow the father to see his child after this separation. The father filed two separate actions in Catawba County, seeking custody and legitimation of the minor child. On 12 December 1995, the trial court entered a temporary custody order providing joint custody to defendant and the father. The custody case was set for trial commencing at the 21 February 1996 session of court.

In September 1995, defendant moved to Carolina Beach, North Carolina, with the child in her custody. From September 1995 until November 1995, defendant worked part-time as a topless dancer in Snead's Ferry, North Carolina. During this period, she had a relationship with Bryce Delon, a marine stationed nearby at Camp Lejeune. On weekends, defendant and her sister, Brandy Holland, would spend the night on the base with Delon and his roommate, Heath Mosely. On occasion, defendant engaged in sexual intercourse with Delon, and her sister engaged in sexual intercourse with Mosely during these weekends.

Defendant had sole custody of the child from the time of her birth until 12 December 1995, when the trial court entered an order granting joint custody to defendant and the father. During the times defendant and the father were not reconciled and he had custody of the minor child, both father and child resided with plaintiffs.

In December 1995, defendant traveled with Delon to Texas to meet his family. On 18 January 1996, defendant and Stacy Speagle again reconciled and began living together in defendant's home in Hickory. After this reconciliation, Delon visited defendant at her residence in Hickory.

On 29 January 1996, Delon shot and killed Stacy Speagle. Later that evening, Delon committed suicide. On 30 January 1996, defendant was arrested and charged with the first-degree murder of Speagle and conspiracy to commit first-degree murder. On the day of defendant's arrest, plaintiffs filed a complaint seeking permanent custody of the child as well as an *ex parte* order for temporary custody. The District Court, Catawba County, immediately entered an emergency order granting plaintiffs custody of the child. Defendant remained in jail until 26 March 1996, when she was released on bond. After being released on bond, defendant moved to Dallas, Texas, and lived with her sister, Brandy Holland. She later established her own residence there and worked as an office receptionist.

On 29 March 1996, defendant filed an answer to plaintiffs' complaint and counterclaimed for custody. On 2 May 1996, the trial court denied defendant's motion for temporary custody. The court allowed plaintiffs' motion to stay further proceedings either until the completion of defendant's trial for Speagle's murder or the district attorney, the State Bureau of Investigation and the Hickory Police Department "decid[e] to share all information which plaintiffs' counsel considers adequate to present the case of the plaintiffs at a custody proceeding." On 29 June 1997, after a six-week trial, defendant was acquitted of all charges relating to the murder of Speagle. In October 1997, defendant married Eric Seitz in Texas, and in June 1998, she gave birth to a second child.

In the case *sub judice*, the trial court found as a fact that defendant's "lifestyle and romantic involvements" resulted in her "neglect and separation from the minor child" and concluded that defendant was unfit to have custody of the child. The trial court found as a fact and concluded as a matter of law that, at the time of the hearing, it was in the best interests of the child for custody to remain with plaintiffs. Defendant was awarded visitation with the child.

The trial court further found defendant's conduct to be inconsistent with her constitutionally protected interest as set forth in *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994). In *Petersen*,

this Court held that natural parents have a constitutionally protected interest in the companionship, custody, care, and control of their children. Absent a showing of unfitness or neglect, this interest must prevail in a custody dispute between a parent and a nonparent. *Id.* at 403-04, 445 S.E.2d at 905.

In addition, the trial court made several findings of fact regarding plaintiffs and their relationship with the minor child. The trial court found plaintiffs presented ample testimony of their love for the child and their ability to provide for her care and upbringing. Plaintiffs had good character and reputations, with a stable life in a comfortable, well-kept home in Hickory, North Carolina. The child was well adjusted; was enrolled in a nearby school; and had a strong bond with plaintiff, Derene Speagle. Shortly after the child began visitation with defendant, plaintiffs sought professional assistance from a child psychologist to assist the child with those visits. The trial court found that since the child's birth, plaintiffs and the child had a close and loving relationship, the continuation of which was necessary to protect the child's best interests and welfare.

Defendant appealed the trial court's decision to the Court of Appeals, contending there was insufficient evidence to support the trial court's finding that defendant lost her constitutionally protected right to custody. The Court of Appeals agreed, and based on *Petersen*, it reversed the trial court's ruling and awarded custody of the child to defendant. *Speagle*, 141 N.C. App. at 537-38, 541 S.E.2d at 190. The Court of Appeals held there existed "no evidence [d]efendant was engaging in any 'conduct inconsistent' with her protected status in August 1998, the date of the custody trial, or any time soon before that trial." *Id.* at 537 n.1, 541 S.E.2d at 190 n.1. The Court of Appeals thus concluded that defendant did not lose her constitutionally protected status. *Id.* at 537, 541 S.E.2d at 190. Therefore, the court reasoned that it was improper for the trial court to apply the best interests analysis. *Id.*

In the appeal to the Court of Appeals, plaintiffs asserted a cross-assignment of error addressing the trial court's failure to admit and consider evidence of defendant's participation in the murder. This cross-assignment was not addressed by the Court of Appeals. In their petition for discretionary review by this Court, plaintiffs included this issue that the Court of Appeals failed to address. On 1 March 2001, this Court allowed plaintiffs' petition for discretionary review with no limitations.

Plaintiffs now argue that the trial court's findings of fact of defendant's neglect and separation from the child and that defendant's conduct was inconsistent with her protected status were supported by the evidence, and the trial court's conclusions of law based thereon were correct. Additionally, plaintiffs assert that while the trial court reached the correct result, the court erred in excluding evidence of defendant's participation in Speagle's murder. Plaintiffs contend that in light of defendant's overall conduct and under these circumstances, the Court of Appeals erred in concluding defendant did not lose her constitutionally protected status. Specifically, plaintiffs assert that the evidence of defendant's involvement in Speagle's murder was relevant and should have been allowed and incorporated into the trial court's determination. Plaintiffs contend defendant's participation in the murder of the child's father could be proven by a preponderance of the evidence, and such proof, in and of itself, would abrogate her constitutional right to custody. Plaintiffs contend the murder evidence and trial court's findings of fact regarding defendant's conduct inconsistent with her protected status, based upon her lifestyle, strongly support the trial court's award of custody to plaintiffs.

The United States Supreme Court has recognized that protection of a parent's interest in the custody of his or her children is not absolute. *Lehr v. Robertson*, 463 U.S. 248, 77 L. Ed. 2d 614 (1983). This principle is stated by this Court in *Price v. Howard*, 346 N.C. 68, 76, 484 S.E.2d 528, 533 (1997). Like the present case, *Price* also involved a custody dispute between a parent and a third party who was not the natural parent. In *Price*, this Court set forth a test for determining when a parent loses his or her protected status and the "best interest of the child" analysis is triggered, holding as follows:

> A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. *Lehr*, 463 U.S. 248, 77 L. Ed. 2d 614; *In re Hughes*, 254 N.C. 434, 119 S.E.2d 189 [(1961)]. Therefore, the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, applica-

> tion of the "best interest of the child" standard in a custody dispute with a nonparent would offend the Due Process Clause. However, conduct inconsistent with the parent's protected status, which need not rise to the statutory level warranting termination of parental rights, *see* N.C.G.S. § 7A-289.32 (1995), would result in application of the "best interest of the child" test without offending the Due Process Clause. Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. *Other types of conduct*, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents. Where such conduct is properly found by the trier of fact, based on evidence in the record, custody should be determined by the "best interest of the child" test mandated by statute.

Price, 346 N.C. at 79, 484 S.E.2d at 534-35 (emphasis added) (citations omitted); *see also Adams v. Tessener*, 354 N.C. 57, 61-62, 500 S.E.2d 499, 502 (2001). We reaffirm the holding in *Price*.

As mentioned above, plaintiffs contend the trial court erred in excluding relevant evidence of defendant's participation in the murder. Notwithstanding plaintiffs' assignments of error and arguments in this regard, the Court of Appeals did not specifically address the relevancy of the murder evidence.

While we do not consider the evidence relating to the murder to be essential to our determination of the instant case, in light of the circumstances here presented, we elect to address the issue of the relevancy of this type of evidence in custody proceedings, as this was one of the main contentions of the parties in both the trial court and the Court of Appeals, and we consider this issue important in the development of our law in custody proceedings.

[1] In addition, we do not agree with the inference contained in the Court of Appeals' opinion that custody proceedings, unlike termination of parental rights proceedings, cannot or should not be concerned with past circumstances or past actions and conduct of a parent when determining custody as between parents or between parents and nonparents. We conclude that any past circumstance or conduct which could impact either the present or the future of a child is relevant, notwithstanding the fact that such circumstance or conduct did not exist or was not being engaged in at the time of the custody proceeding. In this regard, we note that findings of fact of a parent's conduct inconsistent with that parent's protected status, whether

related to past or present conduct, do not in and of themselves determine custody. A finding of inconsistent conduct merely triggers the best interests of the child analysis.

[2] We now turn to whether the evidence of defendant's participation in Speagle's murder was relevant and constituted "conduct inconsistent" with her protected status. While the trial court did not expressly state this evidence was not relevant, it is clear from the record that the trial court did not consider this evidence when determining custody. The court noted defendant had been tried and acquitted of all charges in the Speagle murder and stated that evidence of defendant's role in the murder had "nothing to do with what is before this Court today." We disagree with the trial court's ruling regarding the relevancy and thus the admissibility of this evidence.

We find the logic and authority set forth in a prominent case from California to be compelling. The court there held: "As a matter of case law, as well as common sense, the question of whether one parent has actually murdered the other is about as relevant as it is possible to imagine in any case involving whether the surviving parent should be allowed any form of child custody." *Simpson v. Brown*, 67 Cal. App. 4th 914, 925-26, 79 Cal. Rptr. 2d 389, 395 (1998). The relevance of this type of evidence in child custody cases is clear, and such evidence is paramount.

Other areas of North Carolina law find such evidence highly relevant. For example, the "slayer" statute, N.C.G.S. § 31A-4 (1999), prevents a murderer from acquiring the testate or intestate property of a decedent he willfully and unlawfully killed. Likewise, the principle that a person may not benefit from his or her own wrong prevents a parent from sharing in the wrongful death proceeds in an action brought by the child's estate, based upon the parent's negligence. *Carver v. Carver*, 310 N.C. 669, 675, 314 S.E.2d 739, 744 (1984); *see* 2 James B. McLaughlin, Jr. & Richard T. Bowser, *Wiggins: Wills and Administration of Estates in North Carolina* § 203 (4th ed. 2000). It would be incongruous for evidence of a party's participation in a murder to be relevant in property and estate cases but not be relevant in child custody cases where one parent is accused of killing the other parent.

The trial court excluded testimony previously given by Robert Varney in defendant's criminal trial. That testimony tended to show that in December 1995, Bryce Delon approached Varney and asked him to kill Speagle while Delon was on military leave. Delon appar-

ently wanted to kill Speagle because of his custody battle with defendant. Varney also testified in the murder trial that on 27 January 1996, two days prior to the murder, he traveled with Delon to Hickory to visit defendant at the home she was sharing with Stacy Speagle. During the evening of 27 January 1996, a woman named Heather Brown came to defendant's residence. According to Varney's testimony, Delon hid in the bathroom with a .45-caliber pistol in hand until he realized it was Brown. Delon then stated to Brown, "You almost got f—ing shot." Varney testified this incident occurred while the child was in the residence. During the trip, Delon told Varney that "he [Delon] was going to have Christy [defendant] send him [Stacy Speagle] to a Food Lion and he was going to pop him in the parking lot." Speagle was in fact murdered by Delon in a Food Lion parking lot. Delon murdered Speagle with a .45-caliber pistol. All of this evidence was excluded in the custody trial.

The trial court did consider testimony by Brown regarding a statement made by defendant concerning the victim. Brown testified that in December 1995, defendant stated to Brown that "Stacy Speagle would be dead by Christmas and it was taken care of." Speagle was murdered by Delon on 29 January 1996, one month after Christmas.

The California Court of Appeals dealt with a similar situation in *Hightower v. Smith*, 147 Cal. App. 2d 686, 306 P.2d 86 (1956). In that case, the mother's paramour was convicted of murdering the child's father. At the time of the murder, the child's father was married to the child's mother. The mother was indicted, tried and acquitted of the father's murder. The mother sought custody of her child over the child's paternal aunt. The trial court considered all evidence and denied custody to the mother. *Id.* at 687, 306 P.2d at 86. The California Court of Appeals affirmed the trial court. *Id.* at 703, 306 P.2d at 98.

In this case, defendant was acquitted of all criminal charges relating to the murder. The standard of proof in a criminal trial is proof of guilt beyond a reasonable doubt. However, the applicable standard of proof in child custody cases is by a preponderance, or greater weight, of the evidence. *Jones v. All American Life Ins. Co.*, 312 N.C. 725, 733, 325 S.E.2d 237, 241 (1985). Preponderance of the evidence is a lower standard than proof beyond a reasonable doubt. Although defendant was acquitted in the criminal trial, evidence of her involvement in the murder of the child's father was highly relevant in the subsequent custody case and could possibly have been proven using the lower standard. Thus, the trial court should have considered all

relevant, admissible evidence relating to defendant's role in Speagle's murder.

Defendant argued Varney's testimony was inadmissible hearsay, regardless of relevancy. Plaintiffs contended the evidence fell within the Rule 804(b)(1) hearsay exception as former testimony admissible where the declarant at a later trial is unavailable as a witness. The trial court did not find this evidence inadmissable as hearsay, and the Court of Appeals did not address the issue. We decline to address this issue as well because we conclude a new trial is not required in this case.

In light of the evidence before and considered by the trial court, we conclude the trial court was correct in its finding of fact that defendant's conduct "resulted in her neglect and separation from the minor child," and in accord with our holding in *Price*, we further conclude the trial court was correct in holding, in effect, that defendant's actions were inconsistent with her protected status, and in applying the "best interest of the child" analysis, that defendant was unfit to have custody. The decision of the Court of Appeals is therefore reversed and that court is directed to reinstate the order and judgment of the trial court.

REVERSED.

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

STATE OF NORTH CAROLINA v. GARY WAYNE LONG

No. 19A01

(Filed 18 December 2001)

1. Criminal Law— requested instruction—voluntary intoxication—utterly incapable standard

The trial court did not err in a capital first-degree murder prosecution by denying defendant's request to instruct the jury on voluntary intoxication as a defense to premeditated and deliberate murder, because defendant failed to satisfy the high threshold utterly incapable standard based on the facts that: (1)

defendant had a sufficient amount of time to become intoxicated after committing the murder; (2) no evidence suggests the degree of defendant's intoxication, if any, at the time of the murder; (3) evidence of defendant's actions designed to hide defendant's participation or to clean up after the murder demonstrates that defendant could plan and think rationally, and thus, was not so intoxicated at the time of the murder as to negate defendant's ability to form specific intent; and (4) the trial court submitted the lesser-included offense of second-degree murder giving the jurors the option to find that defendant failed to have the specific intent necessary.

2. Constitutional Law— effective assistance of counsel— preservation of issue—postconviction motion for appropriate relief

Although defendant contends he received ineffective assistance of counsel in a capital first-degree murder prosecution based on his counsel's preparation and failure to preserve the intoxication issue, the record discloses that evidentiary issues need to be developed before defendant will be in a position to adequately raise this claim, and defendant can raise this issue in a postconviction motion for appropriate relief.

3. Sentencing— capital—aggravating circumstances—victim engaged in performance of official duties as a witness at time of murder

The trial court erred in a capital first-degree murder prosecution by submitting the N.C.G.S. § 15A-2000(e)(8) aggravating circumstance that the victim was "engaged in" the performance of her official duties as a witness at the time of the murder where the evidence showed that defendant had been charged with assaulting the victim and the victim was to be a witness against defendant but was not actively participating in any of her duties as a witness at the time she was killed. To the extent that language in *State v. Gray*, 347 N.C. 143, 491 S.E. 2d 538 (1997) implies that a witness is engaged in her official duties from the time she swears out a warrant until she completes her testimony, that language is disavowed.

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 16 September 1999 in Superior Court, Rowan County, upon a jury ver-

dict finding defendant guilty of first-degree murder. Heard in the Supreme Court 10 September 2001.

Roy A. Cooper, Attorney General, by Ellen B. Scouten, Special Deputy Attorney General, for the State.

Paul M. Green for defendant-appellant.

PARKER, Justice.

Defendant Gary Wayne Long was indicted on 9 February 1998 for the first-degree murder of his mother, Wilma Yates Lowder. Defendant was tried capitally and found 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 accordingly.

The State's evidence tended to show that defendant was the son of the seventy-two-year-old victim and that he lived with her in Kannapolis, North Carolina, at the time of the crime.

The relationship between the victim and defendant was checkered with prior acts of violence. The victim had previously told others that defendant was abusive to her and had told her he wished she would die. The victim had mentioned that defendant had held a knife to her throat but said she was afraid that defendant would harm her if she took any action against him. A friend of the victim's testified that the victim had told him three to four months before the murder that defendant repeatedly said to her, "Die Bitch," and, "[G]o to hell where your mama and daddy is at."

On 5 October 1997, the victim called police officers to her residence, stating that defendant had pushed her and held her down. Defendant was subsequently arrested and charged with assault on a female. The bail bondsman whom the victim called to post bond for defendant feared for the victim's safety and, therefore, refused to post defendant's bond. Defendant was awaiting trial on this charge at the time of the murder.

On the evening of 9 January 1998, Elma Yates Vanhoy, the victim's sister, called the victim several times but received no answer. Worried about her sister, Ms. Vanhoy phoned the police department and asked that an officer check on the victim. Officer Goble was dispatched to the residence and received no response after

knocking. The officer then left the residence at 11:00 p.m. and informed the victim's sister that all the lights were off and that the house was locked.

In light of the officer's information, Ms. Vanhoy woke her son-in-law, Frank Turnmire, at 11:30 p.m. and asked him to go check on the victim. The police were dispatched to help Mr. Turnmire gain access to the house by forced entry. When they entered the residence, they found defendant lying on the floor in his bedroom, intoxicated to the point of being nearly passed out. The hallway and the walls were blood splattered, and a path of blood was leading from the hallway to the bathroom where officers found the victim's body lying on the bathroom floor.

The victim's shirt had been pulled up to her neck; she had numerous wounds on her stomach and a slit across her neck. The body appeared to have been in that position several hours. Beneath the victim's body officers found a curved knife blade with no handle.

Officers found a small bloodstained steak-knife handle in a trash can in defendant's bedroom. They also discovered blue jeans that appeared to be bloodstained in the sink in defendant's bathroom and a shirt in defendant's bedroom that looked as though it had bloodstains on it.

Experts from the State Bureau of Investigation (SBI) lab compared the tread on defendant's tennis shoes with the imprints on the linoleum flooring from the victim's home and concluded that defendant's tennis shoes made the bloody impressions found on the linoleum flooring. The SBI serologist concluded that the blood on defendant's tennis shoes matched the DNA of the victim and did not match the DNA of defendant. Through DNA testing an officer found both defendant's and the victim's blood on defendant's wrist watch.

An expert from the SBI lab concluded that the knife handle found in the trash can in defendant's bedroom had at one time been joined to the knife blade found under the body of the victim. The pathologist who performed the autopsy on the victim opined that trauma to the head and chest and the knife injuries to the neck caused the victim's death. The pathologist also noted defensive wounds on the victim's hands and arms. Additional facts will be presented as necessary to discuss specific issues.

GUILT-INNOCENCE PHASE

[1] Defendant contends that the trial court erred by denying his request to instruct the jury on voluntary intoxication. Defendant argues that the evidence of his intoxication at the time of the murder was sufficient to show that he lacked the necessary specific intent for first-degree murder. We disagree.

To satisfy his burden in establishing voluntary intoxication as a defense to negate premeditation and deliberation, defendant must show substantial evidence that his " 'mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill.' " *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987) (quoting *State v. Medley*, 295 N.C. 75, 79, 243 S.E.2d 374, 377 (1978)). More importantly, the evidence must show that " '*at the time of the killing*,' " defendant was so intoxicated that he could not form specific intent. *Id.* (quoting *Medley*, 295 N.C. at 79, 243 S.E.2d at 377). "Evidence tending to show only that defendant drank some unknown quantity of alcohol over an indefinite period of time before the murder does not satisfy the defendant's burden of production." *State v. Geddie*, 345 N.C. 73, 95, 478 S.E.2d 146, 157 (1996), *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 43 (1997); *see also State v. Laws*, 325 N.C. 81, 98, 381 S.E.2d 609, 619 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990).

Although defendant was substantially impaired when officers found him shortly after midnight, defendant presented no evidence of his condition before or at the time of the murder. Further, the victim's body was found cold, indicating the victim had been dead for several hours. The exact time of the victim's death is unknown; however, the victim's sister began calling the victim's residence at around 9:00 p.m. and never received an answer. Given the time differential between the time officers discovered defendant and noted his intoxicated state and the probable time of the murder, defendant had a sufficient amount of time to become intoxicated after committing the murder. Further, no evidence suggests the degree of defendant's intoxication, if any, at the time of the murder.

Additionally, evidence showed that defendant removed his tennis shoes, placed them under a cabinet, and put on his bedroom shoes. He placed a pair of blue jeans in the sink in his bathroom and removed his shirt. He threw a knife handle that matched the blade found under the victim's body in a trash can in his bedroom. These

actions, designed to hide defendant's participation or to clean up from the murder, demonstrate that defendant could plan and think rationally and was, thus, not so intoxicated at the time of the murder as to negate defendant's ability to form specific intent.

Based on the foregoing, we conclude defendant has failed to satisfy the high threshold "utterly incapable" standard required for an instruction on voluntary intoxication as a defense to premeditated and deliberate murder. While a defendant may rely on the State's evidence if it is sufficient to establish the defense, in this case the State's evidence did not satisfy defendant's burden of production. The State's evidence merely showed that sometime after the murder occurred, defendant was substantially impaired. Moreover, defendant's toxicology expert, Dr. Andrew Mason, testified as to his opinion of defendant's intoxication at 10:00 p.m., based on assumed facts, not in evidence, furnished to him by defendant's counsel. This evidence did not constitute substantial evidence of defendant's intoxication at the time of the murder. Without this temporal component defendant's defense of voluntary intoxication must fail. We do note, however, that the trial court submitted the lesser-included offense of second-degree murder. Having heard defendant's expert testimony, if the jurors had a reasonable doubt as to whether defendant's intoxication precluded him from forming the specific intent necessary for premeditated and deliberate murder, the jurors had the option of convicting defendant of the lesser offense.

We hold that the record evidence regarding defendant's intoxication at the time of the murder was insufficient to warrant instruction on the defense of voluntary intoxication. Accordingly, the trial court did not err in declining defendant's request for such instruction.

[2] Next, defendant contends that the record suggests a claim of ineffective assistance of counsel (IAC) in trial counsels' preparation and preservation of the intoxication issue. More specifically, defendant raises concerns that the Fourth Circuit Court of Appeals in *McCarver v. Lee*, 221 F.3d 583, 589 (4th Cir. 2000), *cert. denied*, 531 U.S. 1089, 148 L. Ed. 2d 694 (2001), interprets North Carolina law to require him to raise any IAC claim on direct appeal.

This Court has recently addressed the timing of an IAC claim pursuant to N.C.G.S. § 15A-1419(a)(3), taking into consideration the *McCarver* decision. *State v. Fair*, 354 N.C. 131, 166, —— S.E.2d ——, ——, (2001). The Court held in *State v. Fair* that a defendant's "IAC claims brought on direct review will be decided on the merits when

the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *Id.* The Court further noted that "should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent MAR proceeding." *Id.* at 167, —— S.E.2d at ——, slip op. at 48. Thus, while in some situations a defendant may be required to raise an IAC claim on direct appeal, a defendant will not be required to do so in all situations. In fact, given the nature of IAC claims, "defendants likely will not be in a position to adequately develop many IAC claims on direct appeal." *Id.*

The record discloses that in this case evidentiary issues may need to be developed before defendant will be in position to adequately raise his possible IAC claim. For this reason we direct that defendant not be precluded from raising this issue in a postconviction motion for appropriate relief.

SENTENCING PROCEEDING

[3] Defendant next contends that the trial court erroneously submitted the (e)(8) aggravating circumstance that the victim was "engaged in the performance of h[er] official duties" as a witness at the time of the murder in that this circumstance was not supported by the evidence. N.C.G.S. § 15A-2000(e)(8) (1999). We agree.

The victim made a complaint to law enforcement officers on 5 October 1997 that defendant had "pushed her around the room and pushed her down on the bed and held her shoulders to the bed." Based on this complaint, officers immediately charged defendant with assault and named the victim as a witness. The victim-witness was killed on 9 January 1998, five days before defendant's trial was scheduled to begin. Based upon this evidence, the trial court instructed the jury on the (e)(8) aggravating circumstance.

The aggravating circumstance contained in N.C.G.S. § 15A-2000(e)(8) states in pertinent part:

> The capital felony was committed against a . . . witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

N.C.G.S. § 15A-2000(e)(8). This aggravating circumstance contains two possible bases for the circumstance to be submitted: that the

murder was committed against a witness (i) while engaged in the performance of his official duties, or (ii) because of the exercise of his official duty. Thus, one prong is concerned with the victim's conduct at the time of the murder ("engaged in"), while the other prong is concerned with the defendant's motive ("because of").

The jury was instructed as follows:

> First, was this murder committed against a witness against the defendant while engaged in the performance of her official duties. A murder is so committed, ladies and gentlemen, if at the time the defendant kills the victim, the victim is a witness against the defendant and is at that time engaged in their performance of an official duty. An official duty is anything which is necessary for a witness to do in his capacity as a witness against the defendant. Making a complaint which leads to the issuance of charges and waiting to testify in that case pursuant to subpoena constitutes the performance of an official duty of a witness. If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, the victim was a witness against the defendant and at that time was engaged in an official duty, you would find this aggravating circumstance . . . .

Under this instruction the jury was permitted to consider whether the victim was killed "while" she was "engaged in" her official duties as a witness. The trial court did not instruct the jury on the second, "because of" alternative. In giving this instruction, the trial court relied upon this Court's holding in *State v. Gray*, 347 N.C. 143, 491 S.E.2d 538 (1997), *cert. denied*, 523 U.S. 1031, 140 L. Ed. 2d 486 (1998), and the pattern jury instruction. Notes to the pattern jury instruction on N.C.G.S. § 15A-2000(e)(8) advise that one instruction is to be used "when the victim was killed while actually performing the official duty," N.C.P.I.—Crim. 150.10 n.26 (19__), while another instruction is to be used "when the killing did not occur *while* the victim was exercising his official duty, but *after* he did so and because of his having done so," *id.* at n.29.

The State argues, and the trial court agreed, that based upon *State v. Gray* a witness is engaged in the official performance of her duties from the time she swears out a warrant until the time she testifies. In *Gray* this Court stated in addressing the "engaged in" prong of the (e)(8) aggravating circumstance that "procuring a warrant and waiting to testify constitute the performance of an official duty of a witness." *Gray*, 347 N.C. at 183, 491 S.E.2d at 556. This statement is,

however, mere *obiter dicta* as to the "engaged in" prong as the submission in *Gray* dealt only with the "because of" prong. *Id.* In *Gray* the aggravating circumstance submitted was as follows:

> "Was this murder committed against Roslyn Gray because of the exercise of her official duty as a witness, that is, swearing out under oath before a magistrate four criminal warrants against the Defendant in her role as a witness in trials scheduled December 8, 1992?"

Id. at 180-81, 491 S.E.2d at 554. Moreover, *Gray* relied upon *State v. Green*, 321 N.C. 594, 365 S.E.2d 587, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988), as authority for this proposition. However, nothing in the Court's opinion in *Green* supports or suggests that "waiting to testify constitute[s] performance of an official duty."

We hold that the fact the victim was waiting to testify against defendant may be considered in making the factual determination of whether the victim was a witness against defendant for purposes of either prong of (e)(8). However, this factual determination is only the first step for either prong. To submit the "because of" prong, the State must also show that defendant's motivation in killing the victim was that she was a witness. To submit the "engaged in" prong, the State must also show that the victim was actively engaged at the time of the murder in the performance of a duty expected of a witness, such as swearing out a warrant, discussing the case with a prosecutor, going to court to testify, or actively testifying. *See State v. Gaines*, 332 N.C. 461, 470, 421 S.E.2d 569, 573 (1992) (interpreting N.C.G.S. § 15A-2000(e)(8) to require with respect to a law enforcement officer that the State prove, first, that the victim was a law enforcement officer and, second, "one or the other of a disjunctive, two-pronged test: (1) that the officer was murdered 'while engaged in the performance of his official duties' or (2) 'because of the exercise of his official duty' "), *cert. denied*, 507 U.S. 1038, 123 L. Ed. 2d 486 (1993). To the extent that language in *Gray* implies that a witness is engaged in her official duties from the time she swears out a warrant until she completes her testimony, that language is hereby disavowed.

In the instant case the evidence showed that the victim was merely waiting to testify but was not actively participating in any of her duties as a witness. At most the evidence showed that the victim was to be a witness against defendant. Thus, while the evidence established that the victim was to be a witness against defendant, no evidence established that the victim was engaged in her duties as a

witness at the time. Therefore, on this record we hold that the trial court erred in submitting the "engaged in" prong of the (e)(8) aggravating circumstance.

Further, on this record we cannot conclude as a matter of law that the "weighing process used by the jury would not have been different had the impermissible aggravating circumstance not been present." *State v. Taylor*, 304 N.C. 249, 285, 286 S.E.2d 761, 784 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983). Thus, this error cannot be harmless.

Finally, for clarification we note that, notwithstanding the comment in the notes to the pattern jury instructions, nothing in this opinion is intended to suggest that the fact a victim witness has not yet testified precludes submission of the "because of" prong of the (e)(8) aggravator.

Inasmuch as we remand this case for a new capital sentencing proceeding based on the erroneous submission of the (e)(8) aggravating circumstance, we decline to address defendant's other issues pertaining to the sentencing proceeding.

PRESERVATION ISSUES

Defendant raises four issues pertinent to guilt-innocence that he concedes have been decided contrary to his position previously by this Court, namely, (i) that the short-form indictment was insufficient to charge defendant with first-degree murder and should be held unconstitutional; (ii) that the trial court's denial of defendant's motion to prohibit death qualification of the jury was constitutional error; (iii) that admission, pursuant to Rule 404(b) of the North Carolina Rules of Evidence, of evidence concerning defendant's prior conflicts with the victim was constitutional error; and (iv) that admission, pursuant to Rules 803(3) and 804(b)(5) of the North Carolina Rules of Evidence, of the victim's unsworn, hearsay statements concerning defendant was constitutional error.

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

NO ERROR IN GUILT-INNOCENCE PHASE; DEATH SENTENCE VACATED; REMANDED FOR NEW CAPITAL SENTENCING PROCEEDING.

J. ARTHUR POPE, PLAINTIFF v. MICHAEL EASLEY, GOVERNOR OF NORTH CAROLINA, AND ROY COOPER, ATTORNEY GENERAL OF NORTH CAROLINA, DEFENDANTS, AND LORETTA C. BIGGS, HUGH B. CAMPBELL, JR., AND ALBERT S. THOMAS, JR., ADDITIONAL DEFENDANTS

No. 206PA01

(Filed 18 December 2001)

Judges— additional Court of Appeals judgeships—unconstitutional initial terms—severability

The General Assembly's addition of three new Court of Appeals judgeships in 2000 Sess. Laws, ch. 67, sec. 15.5(a) was constitutionally permissible under N.C. Const. art. IV, § 7, but the provision of section 15.5(a) making the creation of the new judgeships effective upon gubernatorial appointment and allowing appointees to serve initial terms of four years violates the requirement of N.C. Const. art. IV, § 19 that judicial appointees hold their places only until the next election for members of the General Assembly. However, the portion of section 15.5(a) that established the term of office was severable from the portion that created the judgeships. Since section 15.5(a) operated to create vacancies at the Court of Appeals, the three new Court of Appeals seats are required to be placed on the ballot for the 2002 election cycle.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of an order and judgment entered on 14 February 2001 by Farmer, J., in Superior Court, Wake County. Heard in the Supreme Court 10 September 2001.

Stam, Fordham & Danchi, P.A., by Paul Stam, for plaintiff-appellee.

Roy Cooper, Attorney General, by Grayson G. Kelley, Senior Deputy Attorney General, for defendant-appellants and -appellees Easley and Cooper and additional defendant-appellants and -appellees Biggs and Campbell.

Boyce & Isley, PLLC, by Eugene Boyce and Laura Boyce Isley, for additional defendant-appellant and -appellee Thomas.

PER CURIAM.

On 30 June 2000, the General Assembly of North Carolina enacted, and the Governor of North Carolina signed into law, Session Law 2000-67, which authorized, among other things, the expansion of the North Carolina Court of Appeals from twelve to fifteen judges. Act of June 30, 2000, ch. 67, sec. 15.5, 2000 N.C. Sess. Laws 197, 371-72. Section 15.5.(a) of the ratified bill, adding a new, sixth paragraph to N.C.G.S. § 7A-16, provides, in part, as follows:

> On or after December 15, 2000, the Governor shall appoint three additional judges to increase the number of judges to 15. *Each judgeship shall not become effective until the temporary appointment is made, and each appointee shall serve from the date of qualification until January 1, 2005. Those judges' successors shall be elected in the 2004 general election and shall take office on January 1, 2005, to serve terms expiring December 31, 2012.*

Ch. 67, sec. 15.5.(a), 2000 N.C. Sess. Laws at 371 (emphasis added).

Plaintiff, a member of the House of Representatives of the General Assembly, initiated this action on 4 December 2000 against Governor James B. Hunt, Jr. and Attorney General Michael Easley in their official capacities. Plaintiff sought a declaration that section 15.5.(a) conflicts with the North Carolina Constitution by establishing four-year temporary initial terms of office for the three new Court of Appeals judges, that the future judicial appointees could not lawfully hold office, and that the appropriated funds could not be spent to support the new judgeships. Plaintiff also requested that the Governor be enjoined from issuing commissions for the new judgeships.

On 14 December 2000, the trial court denied plaintiff's motion for a preliminary injunction. On 5 January 2001, Governor Hunt appointed Loretta C. Biggs, Hugh B. Campbell, Jr., and Albert S. Thomas, Jr. to the newly created seats on the Court of Appeals. On 18 January 2001, plaintiff filed a motion to amend his complaint to add the three newly appointed judges as additional defendants. Plaintiff also moved to substitute the newly elected Governor and Attorney

General for the original defendants holding such offices. The trial court allowed these motions on 5 February 2001.

In an order and judgment entered 14 February 2001, the trial court determined that, while the General Assembly's expansion of the Court of Appeals was constitutionally permissible, its creation of four-year temporary initial judgeship terms in section 15.5.(a) was inconsistent with the North Carolina Constitution. The trial court further ruled the portion of section 15.5.(a) that established the term of office was severable from the portion that created the judgeships. By severing the portion establishing four-year initial terms, the trial court purported to transform the newly created judicial seats into vacancies. The trial court ordered these vacancies to be filled according to the provisions of Article IV, Section 19 of the North Carolina Constitution and N.C.G.S. § 163-9. This outcome established initial temporary terms of two years rather than four years, requiring the three new Court of Appeals seats to be placed on the ballot in the 2002 election cycle rather than, as provided by the General Assembly in section 15.5.(a), the 2004 election cycle.

On 14 March 2001, plaintiff and additional defendant Thomas each filed notices of appeal. On 26 March 2001, defendants Easley and Cooper and additional defendants Biggs and Campbell filed a notice of appeal. On 10 April 2001, the parties filed a joint petition for discretionary review prior to determination in the Court of Appeals, which was allowed by this Court on 3 May 2001.

At the outset, we observe that acts of the General Assembly are accorded a strong presumption of constitutionality. *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989). The Constitution of North Carolina is not a grant of power; rather, the power remains with the people and is exercised through the General Assembly, which functions as the arm of the electorate. *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891-92 (1961). An act of the people's elected representatives is thus an act of the people and is presumed valid *unless it conflicts with the Constitution. Id.*

Our task, therefore, is to determine whether the General Assembly's creation of three additional Court of Appeals judgeships, effective upon appointment by the Governor, with initial appointive terms of approximately four years, exceeded the limitations of the North Carolina Constitution. We hold that the General Assembly's enactment of section 15.5.(a) created three new judgeships, vacant

upon creation, and therefore, such positions must be filled consistent with the limitations of Article IV, Section 19.

Article IV, Section 19 of the North Carolina Constitution states that "all vacancies occurring in the offices provided for by this article [including judges of the Court of Appeals] shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices." In an apparent effort to avoid this specific constitutional limitation, the General Assembly utilized two clauses in the legislation in question. *See* ch. 67, sec. 15.5.(a), 2000 N.C. Sess. Laws at 371-72. First, section 15.5.(a) declared that "[e]ach judgeship shall not become effective until the temporary appointment is made." This language purported to make the effective creation of the new judgeships contemporaneous with appointment—thus sidestepping the constitutional requirements for vacancies in judicial office. *See* N.C. Const. art. IV, § 19. However, as noted in the concurring opinion of Justice Walter Clark in *Cook v. Meares*, 116 N.C. 582, 589-90, 21 S.E. 973, 975 (1895), in order "[t]o fill an office there must be one already created. If the term of the office is to begin in the future . . . , it is competent for the legislature, or other appointing power, to fill it, provided that there has then been such an office created, but not at a time when there is no such office in existence." Thus, any legislative attempt to *not* create the office of Judge of the Court of Appeals *until* the Governor made his appointment simply cannot occur because the office must exist before it can be filled.

Second, section 15.5.(a) states that "each appointee shall serve from the date of qualification until January 1, 2005." This language appears to circumvent the specific provision of Article IV, Section 19 that requires judicial appointees to run at the next general election for members of the General Assembly (in this case, November 2002). As the statutory language clearly results in a term of office for appointees that does not—and cannot—comply with the two specific terms of office for judges provided for in the Constitution—an eight-year elected term, in Article IV, Section 16, and an appointive term requiring the appointee to run in the next even-year election, in Article IV, Section 19—it may not stand. While the General Assembly has the constitutional authority to determine the "structure, organization, and composition of the Court of Appeals," *see* N.C. Const. of 1868, art. IV, § 6A (1965) (amended by Act of July 2, 1969, ch. 1258, sec. 1, 1969 N.C. Sess. Laws 1461, 1471, and ratification by the people

on 3 November 1970; recodified as Section 7 in similar form in the North Carolina Constitution of 1971), the General Assembly may not bypass the express provision in Article IV, Section 19 of the North Carolina Constitution by delaying the effective date for the judgeships in question until the moment of appointment by the Governor.

Finally, it is necessary for us to determine whether the trial court properly severed the unconstitutional part of section 15.5.(a): "Each judgeship shall not become effective until the temporary appointment is made, and each appointee shall serve from the date of qualification until January 1, 2005. Those judges' successors shall be elected in the 2004 general election and shall take office on January 1, 2005, to serve terms expiring December 31, 2012." Session Law 2000-67 contains a severability clause, section 28.4, which provides: "If any section or provision of this act is declared unconstitutional or invalid by the courts, it does not affect the validity of this act as a whole or any part other than the part so declared to be unconstitutional or invalid." Ch. 67, sec. 28.4, 2000 N.C. Sess. Laws at 440. The test for severability is whether the remaining portion of the legislation can stand on its own and whether the General Assembly would have enacted the remainder absent the offending portion. *See, e.g., Jackson v. Guilford Cty. Bd. of Adjust.*, 275 N.C. 155, 168, 166 S.E.2d 78, 87 (1969) ("When the statute, . . . [can] be given effect had the invalid portion never been included, it will be given such effect if it is apparent that the legislative body, had it known of the invalidity of the one portion, would have enacted the remainder alone."). Additionally, the inclusion of a severability clause within legislation will be interpreted as a clear statement of legislative intent to strike an unconstitutional provision and to allow the balance to be enforced independently. *Fulton Corp. v. Faulkner*, 345 N.C. 419, 421, 481 S.E.2d 8, 9 (1997).

The inclusion of section 28.4 evinces a clear legislative intent to allow the remaining portion of section 15.5.(a) to stand. *See id.* Furthermore, the balance of section 15.5.(a), "On or after December 15, 2000, the Governor shall appoint three additional judges to increase the number of judges to 15," can be enforced independently of the unconstitutional portions of the section. *See* N.C. Const. art. IV, § 7. We conclude, therefore, that under the *Jackson* test, the trial court properly severed the offending provision and allowed the portion creating the judgeships to stand.

In summary, the General Assembly enacted section 15.5.(a), which added a new, sixth paragraph to N.C.G.S. § 7A-16, pursuant to its power to determine the "structure, organization, and composition of the Court of Appeals." *See* N.C. Const. art. IV, § 7. This legislative enactment is presumed valid unless it conflicts with the North Carolina Constitution. *McIntyre*, 254 N.C. at 515, 119 S.E.2d at 891-92. Pursuant to our power of judicial review, *Bayard v. Singleton*, 1 N.C. 5 (1787), we hold that in enacting the provisions making the creation of the new judgeships effective upon gubernatorial appointment and allowing the appointees to serve for nearly four years before facing election, the General Assembly devised a statutory framework that does not comport with the constitutional limitation requiring that judicial appointees hold their places only until the next election for members of the General Assembly. *See* N.C. Const. art. IV, § 19. The remaining portion of section 15.5.(a), i.e., the provision creating three new Court of Appeals judgeships, was constitutionally permissible, N.C. Const. art. IV, § 7, and is severable from the unconstitutional provisions. *See Jackson*, 275 N.C. at 168, 166 S.E.2d at 87.

We therefore affirm the trial court's determination that the addition of three new Court of Appeals judgeships under section 15.5.(a) was constitutionally permissible. Additionally, we affirm the trial court's conclusion that section 15.5.(a) operated to create a vacancy at the Court of Appeals, thereby requiring an election to fill the vacancy in the 2002 election cycle. Accordingly, the order of the trial court is affirmed.

AFFIRMED.

STATE OF NORTH CAROLINA v. JOEL MATIAS

No. 307A01

(Filed 18 December 2001)

Drugs–constructive possession–cocaine in car seat

The trial court did not err by denying defendant's motion to dismiss a cocaine possession charge where defendant had been in a car where drugs were found for about twenty minutes; there was an odor of marijuana in the car and marijuana seeds and rolling papers were found in the car, so that a juror could rea-

sonably conclude that defendant knew there were drugs in the car; a juror could reasonably conclude that the drugs came from a package hidden in the seat under defendant; and an officer testified that defendant was the only person who could have shoved the package containing the cocaine into the crease in the seat.

Justice BUTTERFIELD dissenting.

Justice ORR joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 143 N.C. App. 445, 550 S.E.2d 1 (2001), finding no error in a judgment entered 14 September 1999 by Spencer, J., in Superior Court, Alamance County. Heard in the Supreme Court 16 October 2001.

Roy Cooper, Attorney General, by Clinton C. Hicks, Assistant Attorney General, for the State.

Craig T. Thompson for defendant-appellant.

WAINWRIGHT, Justice.

On 19 April 1999, Joel Matias (defendant) was indicted for possession of cocaine. On 14 September 1999, a jury found defendant guilty of this charge. The trial court sentenced defendant to a term of four to five months imprisonment, suspended the sentence, and placed defendant on supervised probation for eighteen months. The majority of the panel in the Court of Appeals concluded defendant received a trial free from error. *State v. Matias*, 143 N.C. App. 445, 550 S.E.2d 1 (2001). Judge Hunter dissented. We affirm the decision of the Court of Appeals.

The evidence presented at trial tends to show as follows: On 28 March 1999, Burlington Police Officers Jesse Qualls and Sam Epps were working as off-duty security guards at the Creekside Apartments. The officers' duties at the apartments include "maintain[ing] the peace." Around 9:00 p.m. on 28 March, the officers, who were in a patrol car, saw a car with a Tennessee license plate driving through the parking lot at approximately five miles per hour. After the car passed the officers, Qualls detected an odor of marijuana. When the car turned right into a parking space, the officers pulled in behind the car and initiated a stop.

When the officers approached the car, Epps also smelled marijuana. The officers questioned the occupants and determined the driver did not have an operator's license. The officers removed the driver from the car, conducted a pat-down search, arrested the driver, and instructed the other three occupants to exit the car one at a time. Defendant exited last from the right rear seat of the car.

During a search of the car incident to arrest, the officers found "a small clear plastic [bag] with a green leafy substance, vegetable material, and a small piece of tin foil that was kind of balled up inside of that." The green, leafy substance was identified as marijuana. The plastic bag was located between the seat pad and back pad in the back right seat where defendant had been sitting. A white, powdery substance, later identified by the State Bureau of Investigation as cocaine, was found inside the tin foil. According to Officer Epps, defendant was the only person who could have placed the plastic bag in the space between the seat pads. The officers also observed marijuana seeds in the car's carpet and found rolling papers, an unopened beer can, and a cigar inside the car.

Defendant's father testified defendant left home that evening around 8:40 p.m. when a car blew the horn. Defendant testified he left home to go to a dance and rode in the back right seat of the car. Defendant's father did not recall any discussion about his son going to a dance that evening.

The sole issue defendant presents to this Court is whether the trial court erred in denying his motions to dismiss at the close of the State's evidence and at the close of all the evidence.

"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 also support reasonable inferences of the defendant's innocence.' " *State v. Alexander*, 337 N.C. 182, 187, 446 S.E.2d 83, 86 (1994) (quoting *State v. Smith*, 40 N.C. App. 72, 79, 252 S.E.2d 535, 540 (1979)), *quoted in State v. Grigsby*, 351 N.C. 454, 456-57, 526 S.E.2d 460, 462 (2000). In analyzing a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State. *State v. Davis*, 325 N.C. 693, 696, 386 S.E.2d 187, 189 (1989). Moreover, the State is given every reasonable inference to be drawn from the evidence. *Id.* If substantial evidence exists, whether direct, circumstantial, or both, supporting a finding that the offense charged was committed by the

defendant, the case must be left for the jury. *Id.* at 696-97, 386 S.E.2d at 189. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

"[I]n a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials." *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986). Proof of nonexclusive, constructive possession is sufficient. *Id.* Constructive possession exists when the defendant, "while not having actual possession, . . . has the intent and capability to maintain control and dominion over" the narcotics. *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986). "Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). "However, unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred." *Davis*, 325 N.C. at 697, 386 S.E.2d at 190; *see also Brown*, 310 N.C. at 569, 313 S.E.2d at 588-89.

In the present case, since defendant did not have exclusive possession of the car in which the cocaine was found, the critical issue is whether the evidence discloses other incriminating circumstances sufficient for the jury to find defendant had constructive possession of the cocaine. *See Davis*, 325 N.C. at 697, 386 S.E.2d at 190. When the evidence is examined in the light most favorable to the State, we find such additional incriminating circumstances do exist and the trial court therefore properly denied defendant's motions to dismiss. *See id.* at 697-99, 386 S.E.2d at 190-91; *see also Brown*, 310 N.C. at 569-70, 313 S.E.2d at 589.

At the time of his arrest, defendant had been in the car approximately twenty minutes. According to both officers, there was an odor of marijuana in the car. The officers also found marijuana seeds and rolling papers inside the car. Accordingly, a juror could reasonably determine defendant knew drugs were in the car. A juror could also reasonably conclude the drugs came from the package hidden in the car seat under defendant. Finally, Officer Epps testified defendant was the only person in the car who could have shoved the package containing the cocaine into the crease of the car seat.

We hold this evidence, when viewed in the light most favorable to the State, supports the charge of possession of cocaine. Accordingly, the trial court did not err in submitting that charge to the jury. The decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice BUTTERFIELD dissenting.

The majority's holding sets a troubling precedent that mere proximity to hidden narcotics is sufficient to sustain a conviction. I take issue with such a precedent. The majority correctly found that the vehicle in which defendant was riding was not in the exclusive possession of defendant. As such, additional incriminating circumstances must exist for the trial court to properly deny defendant's motion to dismiss. The majority asserts that there were additional incriminating circumstances. However, my review of the record leads me to the conclusion that there were no additional incriminating circumstances sufficient to deny defendant's motion to dismiss. Therefore, I respectfully dissent.

The majority found the following:

> At the time of his arrest, defendant had been in the car approximately twenty minutes. According to both officers, there was an odor of marijuana in the car. The officers also found marijuana seeds and rolling papers inside the car. Accordingly, a juror could reasonably determine defendant knew *drugs* were in the car.

(Emphasis added.) I am not persuaded by the majority's reasoning. Defendant was convicted of the offense of possession of cocaine. I do not believe that one can reasonably infer that defendant should have known of the existence of cocaine in the vehicle because he could have smelled the odor of marijuana and seen marijuana seeds and rolling papers. The evidence in this case could lead to a reasonable inference that there was marijuana in the vehicle, but not that there was an odorless substance such as cocaine in the vehicle. The majority stated that defendant must have known that there were "drugs" in the vehicle. The State's burden was to specifically prove that defendant knew of the presence of cocaine, not "drugs," in the vehicle.

I find it particularly difficult to accept any reasonable inference that defendant should have known of the existence of cocaine from

the marijuana smell. One of the arresting officers testified that he did not believe this inference was possible. The prosecutor had the following colloquy with Officer Epps:

> Q. And could you tell the jury why only Mr. Matias [defendant] was charged with [possession of cocaine]?
>
> A. The location that I found the baggy of marijuana was under Mr. Matias' seat along with the tinfoil. In my opinion I felt that, with the odor that Officer Qualls indicated to me that he detected and the odor that I detected and also seeing the baggy which I believed to be marijuana, I felt like everyone in the car had knowledge that there was marijuana in the car or being used in the car. The cocaine, however, to my knowledge, does not give off an odor that is detectable. So Mr. Matias was charged with [possession of] cocaine due to the fact of it being under the seat that he was sitting in.
>
> Q. So in other words, Officer, based on the smell and other items that would lead you to believe that everybody else knew about the marijuana, they were thus charged with [possession of] marijuana?
>
> A. That's correct.
>
> Q. And you had no other evidence that anybody else would have known or knew about the cocaine?
>
> A. That's correct.

Clearly, since the officer did not believe the other occupants "would have known or knew about the cocaine," the smell of marijuana and the presence of rolling paper could not have been the basis for his arrest of defendant. This testimony reveals that the officer's only basis for charging defendant was his proximity to the bag of marijuana and cocaine that was hidden in the seat. When asked if either he or the other officer noticed anything unusual or any kind of surreptitious movements, Officer Epps responded, "No, sir, I would have remembered that if it had taken place." This testimony satisfies me that there were no incriminating circumstances attributable to defendant. The officers found cocaine and simply charged the person sitting closest to it.

I do not believe the State is entitled to such an unreasonable inference as the majority has drawn from these facts. I believe that the trial court erred in failing to grant defendant's motion

to dismiss. Therefore, I vote to reverse the opinion of the Court of Appeals.

Justice ORR joins in this dissenting opinion.

THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR v. REGINALD FRAZIER

No. 72PA01

(Filed 18 December 2001)

Attorneys–discipline of disbarred attorney–authority of State Bar

The Disciplinary Hearing Commission of the North Carolina State Bar did not have the authority to discipline a disbarred attorney because the disciplinary powers of the DHC are extinguished after disbarment. The contempt powers of the DHC were not examined in this case; however, it was noted that any such powers should be exercised with the utmost prudence. Under N.C.G.S. § 84-37(a), the State Bar may investigate charges or complaints of unauthorized practice of law and seek an injunction in Superior Court and, further, may bring allegations of unauthorized practice to the attention of the district attorney, whose duty under N.C.G.S. § 84-7 is not to be ignored.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 141 N.C. App. 514, 540 S.E.2d 758 (2000), reversed and remanded an order entered 3 September 1999 by Jones (Abraham Penn), J., in Superior Court, Wake County. Heard in the Supreme Court 11 September 2001.

Carolin Bakewell and A. Root Edmonson for plaintiff-appellee.

Michaux & Michaux, P.A., by Eric C. Michaux, for defendant-appellant.

BUTTERFIELD, Justice.

The principle issue raised for review is whether the Disciplinary Hearing Commission of the North Carolina State Bar (DHC), plaintiff

herein, may discipline a disbarred attorney who has allegedly engaged in the unauthorized or unlawful practice of law.

Defendant was disbarred from the practice of law on 6 November 1989. Although defendant has challenged the order of disbarment on several occasions, he has not been reinstated to the practice of law. In 1994, the DHC received notice that defendant had been engaged in the unauthorized or unlawful practice of law. The DHC presented the information to the Craven County district attorney, with no action being taken by that office. The DHC then moved to have defendant held in criminal contempt for violation of the 6 November 1989 disbarment order. Following plaintiff's presentation of evidence, defendant moved to dismiss. In a order signed 18 February 1994, the trial court granted defendant's motion to dismiss. The DHC did not appeal this ruling. In August 1994, the DHC received new allegations that defendant was continuing to practice law and had placed an advertisement for legal services in the local newspaper. The DHC instituted a show cause proceeding. Defendant filed a series of motions in September, November, and December of 1994 alleging indigency, seeking appointment of counsel, attempting to discharge appointed counsel, seeking a continuance, and attempting to remove the contempt proceeding to federal court. Defendant did not appear at the DHC hearing on 19 December or 20 December 1994.

On 20 January 1995, the DHC issued a judgment of contempt finding defendant guilty of sixteen counts of contempt, sentencing him to consecutive sentences of thirty days in jail for each count, and imposing a fine of $200.00 for each count. Upon application of the DHC, the trial court issued an arrest warrant for defendant on 23 January 1995. Defendant was arrested and taken to the Craven County jail on 26 January 1995 with no hearing before any judicial official. In his petition for discretionary review, defendant explains that defendant was transported to the Wake County jail on 30 January 1995 and subsequently transferred to the North Carolina Department of Correction.

Defendant petitioned for a writ of *habeas corpus* in the United States District Court for the Eastern District of North Carolina. After a hearing in November 1995, the district judge released defendant pending a final ruling in the *habeas* proceeding. On 21 November 1996, the district judge issued a writ of *habeas corpus* releasing defendant and directing the DHC to notify defendant of his appellate rights in the matter. In response to the federal court order, plaintiff

informed defendant of his right of appeal to the Superior Court, Wake County. Defendant gave notice of appeal and asserted motions to dismiss. The trial court conducted a hearing and granted defendant's motions to dismiss the DHC contempt proceeding and declared the 20 January 1995 DHC order null and void. The DHC then appealed the trial court's ruling to the Court of Appeals.

The Court of Appeals examined two issues: (1) whether defendant was subject to the contempt power of the DHC even though he was disbarred, and (2) whether the DHC can lawfully exercise contempt power. The Court of Appeals held that both issues had been decided in the affirmative in *Frazier v. Murray*, 135 N.C. App. 43, 519 S.E.2d 525 (1999), *appeal dismissed*, 351 N.C. 354, 542 S.E.2d 209 (2000), and that the panel was bound by the *Frazier* holding. In concluding that defendant was subject to the contempt power of the DHC even though he was disbarred, the Court of Appeals stated that it was bound by the following from *Frazier*:

> "The Disciplinary Hearing Commission clearly had authority to discipline and disbar plaintiff. [N.C. Gen. Stat. §§ 84-28, 84-28.1 (1995).] N.C. Gen. Stat. § 84-28.1(b) authorizes the Disciplinary Hearing Commission to 'hold hearings in discipline, incapacity and disability matters, to make findings of fact and conclusions of law after such hearings, and to enter orders necessary to carry out the duties delegated to it by the council.' [N.C. Gen. Stat. § 84-28.1(b).]"

Disciplinary Hearing Comm'n v. Frazier, 141 N.C. App. 514, 518-19, 540 S.E.2d 758, 761 (2000) (quoting *Frazier v. Murray*, 135 N.C. App. at 49, 519 S.E.2d at 529). We reverse.

Defendant comes before us on appeal as a disbarred attorney who has allegedly engaged in the unauthorized or unlawful practice of law. In this appeal, defendant does not challenge, nor does he admit, the allegations that he has engaged in the unauthorized or unlawful practice of law. Rather, defendant alleges that the Court of Appeals erred in holding that the DHC had the authority to discipline defendant and that the DHC had the power to hold defendant in criminal contempt. We agree.

The instant case illustrates the confusion that has surrounded the jurisdiction of the North Carolina State Bar over disbarred attorneys. The government of the North Carolina State Bar is vested in the Council, as set out in N.C.G.S. § 84-17. The Council is vested with the

authority to regulate the professional conduct of attorneys. N.C.G.S. § 84-23 (1999). The authority of the North Carolina State Bar to disbar attorneys under N.C.G.S. § 84-28 is not at issue here. The threshold issue is whether the North Carolina State Bar retains jurisdiction over a disbarred attorney. We believe that there is no authority for the DHC's actions to discipline defendant and find him in criminal contempt.

Neither N.C.G.S. § 84-28.1 nor the powers vested in the Council grant any authority to discipline disbarred attorneys. The DHC "is authorized to hold hearings in discipline, incapacity and disability matters, to make findings of fact and conclusions of law after such hearings, and to enter orders necessary to carry out the duties delegated to it by the council." N.C.G.S. § 84-28.1(b) (1999). There is no authorization for the DHC to discipline a disbarred attorney for the unauthorized or unlawful practice of law. The purpose of the DHC is to discipline only those attorneys who are members of the North Carolina State Bar. By its own determination, the North Carolina State Bar has severed the ties that previously bound the disbarred attorney to the Bar. After disbarment, the disciplinary powers of the North Carolina State Bar over a disbarred attorney are extinguished. Upon disbarment of defendant, the DHC lacked any authority to discipline defendant or to find him in contempt.

Having determined that the DHC did not have authority over defendant, we need not examine the contempt powers of the DHC. However, we note that the future exercise of any contempt powers that the legislature may have vested in the DHC, absent clarifying amendment of the statutes, should be exercised with the utmost prudence.

While the DHC does not have the authority to discipline a disbarred attorney or find a disbarred attorney in contempt, the DHC does have the means to help prevent the unauthorized or unlawful practice of law in this state. Under N.C.G.S. § 84-37, the North Carolina State Bar may investigate "any charges or complaints of unauthorized or unlawful practice of law." N.C.G.S. § 84-37(a) (1999). The North Carolina State Bar, after its investigation may seek a temporary injunction to restrain a defendant from the unauthorized or unlawful practice of law. N.C.G.S. § 84-37(b). The North Carolina State Bar may also bring an action in its name for a final judgment in its favor that "shall perpetually restrain the defendant or defendants from the commission or continuance of the act or acts complained

of." N.C.G.S. § 84-37(b). Such actions shall be brought in the "superior court of any county in which the acts constituting unauthorized or unlawful practice of law are alleged to have been committed or in which there appear reasonable grounds that they will be committed or in the county where the defendants in the action reside or in Wake County." N.C.G.S. § 84-37(c). If a defendant engages in the unauthorized or unlawful practice of law after a final judgment to perpetually restrain the defendant from the unauthorized or unlawful practice of law, contempt proceedings remain in the courts in accordance with the laws of this state.

The North Carolina State Bar, in addition to conducting an investigation and seeking injunctive relief, may bring allegations of the unauthorized or unlawful practice of law to the attention of a district attorney. N.C.G.S. § 84-7 provides:

> The district attorney of any of the superior courts shall, upon the application of any member of the Bar, or of any bar association, of the State of North Carolina, bring such action in the name of the State as may be proper to enjoin any such person, corporation, or association of persons who it is alleged are violating the provisions of G.S. 84-4 to 84-8, and it shall be the duty of the district attorneys of this State to indict any person, corporation, or association of persons upon the receipt of information of the violation of the provisions of G.S. 84-4 to 84-8.

N.C.G.S. § 84-7(1999). This statute unambiguously states that the process of seeking criminal sanctions for the unlawful practice of law are under the exclusive control of district attorneys. The duty imposed on district attorneys by N.C.G.S. § 84-7 is not to be ignored.

Defendant requests this Court to apply N.C. R. App. P. 2 and reconsider our dismissal of *Frazier v. Murray*, in which he failed to perfect his appeal. We decline to do so.

For the foregoing reasons, we conclude that the Court of Appeals erred in reversing the order of the Superior Court.

REVERSED.

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

HANES CONSTRUCTION COMPANY, A NORTH CAROLINA CORPORATION v. HOTMIX & BITUMINOUS EQUIP. CO., INC.

No. 563A01

(Filed 18 December 2001)

Jurisdiction— breach of contract—out-of-state seller—long-arm statute—minimum contacts

The decision of the Court of Appeals that the trial court had personal jurisdiction over the out-of-state seller of asphalt equipment in a breach of contract action is reversed for the reasons stated in the dissenting opinion in the Court of Appeals that personal jurisdiction over defendant was not authorized by the long-arm statute, N.C.G.S. § 1-75.4, and that the exercise of personal jurisdiction over defendant violated due process because defendant had insufficient minimum contacts with this state.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 146 N.C. App. 24, 552 S.E.2d 177 (2001), reversing and remanding an order signed 4 April 2000 by Burke, J., in Superior Court, Davidson County. Heard in the Supreme Court 11 December 2001.

Cunningham Crump & Cunningham, PLLC, by R. Flint Crump, for plaintiff-appellee.

Brinkley Walser, PLLC, by Stephen W. Coles, for defendant-appellant.

PER CURIAM.

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

REVERSED.

CARLTON v. CARLTON

[354 N.C. 561 (2001)]

LINDA A. CARLTON v. GREG CARLTON

No. 526A01

(Filed 18 December 2001)

Child Support, Custody, and Visitation— modification of custody order—changed circumstances—effect on welfare of child

A decision of the Court of Appeals remanding an order of the trial court which modified a prior joint child custody order by granting primary custody to the father is reversed for the reasons stated in the dissenting opinion in the Court of Appeals that the mother's absconding with the child for two months and the father's relocation to Hawaii constitute a substantial change of circumstances and that the trial court made sufficient findings as to the effect of the changed circumstances on the welfare of the child to support its order.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 145 N.C. 252, 549 S.E.2d 916 (2001), vacating and remanding an order entered 28 March 2000 by Hodges, J., in District Court, Catawba County. Heard in the Supreme Court 11 December 2001.

Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, P.A., by J. Scott Hanvey, for plaintiff-appellee.

Sigmon, Sigmon & Isenhower, by C. Randall Isenhower, for defendant-appellant.

PER CURIAM.

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

REVERSED.

ALFRED R. GROOMS, PETITIONER v. STATE OF N.C. DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION, RESPONDENT

No. 401A01

(Filed 18 December 2001)

Pensions and Retirement— local government employee—death after retirement—survivor's alternate benefit

A decision of the Court of Appeals that the beneficiary of a county employee who died within 180 days of retirement was entitled to select the survivor's alternate benefit set forth in N.C.G.S. § 128-27(m) is reversed for the reason stated in the dissenting opinion in the Court of Appeals that the legislature did not intend for the alternate benefit provided by the statute to apply to the beneficiary of a government employee whose death occurred after his retirement.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 144 N.C. App. 160, 550 S.E.2d 204 (2001), reversing and remanding an order entered 23 February 2000 by Bullock, J., in Superior Court, Wake County. Heard in the Supreme Court 15 November 2001.

Kilpatrick Stockton LLP, by James B. Trachtman, for petitioner-appellee.

Roy Cooper, Attorney General, by Robert M. Curran, Assistant Attorney General, for respondent-appellant.

PER CURIAM.

For the reasons stated in the dissenting opinion by Judge Timmons-Goodson, we reverse the decision of the Court of Appeals.

REVERSED.

BEN JOHNSON HOMES, INC., A GEORGIA CORPORATION, AND C. BENJAMIN JOHNSON, JR., INDIVIDUALLY v. CAROL FREES WATKINS

No. 148A01

(Filed 18 December 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 142 N.C. App. 162, 541 S.E.2d 769 (2001), affirming in part and reversing and remanding in part an order for summary judgment entered 1 February 2000 by Beal, J., in Superior Court, Transylvania County. On 16 August 2001, the Supreme Court granted discretionary review of additional issues. Heard in the Supreme Court 14 November 2001.

William H. Coward for plaintiff-appellants.

Cloninger, Lindsay, Hensley & Searson, PLLC, by John C. Cloninger, for defendant-appellee.

PER CURIAM.

Justice MARTIN did not participate in the consideration or decision of this case. The remaining members of this Court were equally divided, with three members voting to affirm the decision of the Court of Appeals and three members voting to reverse. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Williamson v. Bullington*, 353 N.C. 363, 544 S.E.2d 221 (2001); *Reese v. Barbee*, 350 N.C. 60, 510 S.E.2d 374 (1999).

AFFIRMED.

DORIS FRIEND-NOVORSKA v. JAMES C. NOVORSKA

No. 322A01

(Filed 18 December 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 143 N.C. App. 387, 545 S.E.2d 788 (2001), affirming in part and reversing in part an order entered 7 September 1999 by Buckner, J., in District Court, Orange County. Heard in the Supreme Court 12 December 2001.

Hayes Hofler & Associates, P.A., by R. Hayes Hofler, for plaintiff-appellant.

Darsie, Sharpe, MacKritis & Dukelow P.L.L.C., by Lisa M. Dukelow, for defendant-appellee.

PER CURIAM.

AFFIRMED.

LEE CYCLE CENTER, INC. D/B/A WILSON CYCLE CENTER AND LEE MOTOR COMPANY, INC. V. WILSON CYCLE CENTER, INC. D/B/A CAROLINA MOTORSPORTS AND CAROLINA MOTORSPORTS OF WILSON, INC.

No. 271A01

(Filed 18 December 2001)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a decision by a divided panel of the Court of Appeals, 143 N.C. App. 1, 545 S.E.2d 745 (2001), affirming in part and reversing in part a judgment signed by Ragan, J., on 27 September 1999 in Superior Court, Wilson County. Heard in the Supreme Court 10 December 2001.

Farris and Farris, P.A., by Robert A. Farris, Jr.; Thomas J. Farris; and William M.J. Farris, for plaintiff-appellants.

Narron & Holdford, P.A., by I. Joe Ivey, for defendant-appellees.

PER CURIAM.

AFFIRMED.

HARLAND DEAN CAMPBELL v. CITY OF HIGH POINT

No. 438A01

(Filed 18 December 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 144 N.C. App. 493, 551 S.E.2d 443 (2001), affirming an order for summary judgment signed 4 April 2000 by Albright, J., in Superior Court, Guilford County. Heard in the Supreme Court 10 December 2001.

Skager Law Firm, by Philip R. Skager, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by Gusti W. Frankel and Alison R. Bost, for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE v. MESSER

[354 N.C. 567 (2001)]

STATE OF NORTH CAROLINA v. WILLIAM LYDA MESSER

No. 405A01

(Filed 18 December 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 145 N.C. App. 43, —— S.E.2d —— (2001), reversing a judgment entered 29 September 1999 by Caviness, J., in Superior Court, Buncombe County. Heard in the Supreme Court 15 November 2001.

Roy Cooper, Attorney General, by Elizabeth Leonard McKay, Special Deputy Attorney General, for the State-appellant.

Leah Broker for defendant-appellee.

PER CURIAM.

AFFIRMED.

FRANK A. CONSIDINE v. COMPASS GROUP, USA, INC.

No. 529A01

(Filed 18 December 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 145 N.C. App. 314, 551 S.E.2d 179 (2001), affirming an order entered 3 April 2000 by Kincaid, J., in Superior Court, Mecklenburg County. Heard in the Supreme Court 10 December 2001.

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

Smith Helms Mulliss & Moore, L.L.P., by H. Landis Wade, Jr.; Paul M. Navarro, and Melissa M. Kidd, for defendant-appellee.

PER CURIAM.

AFFIRMED.

DISHNER DEVELOPERS, INC. v. VICTORIA BROWN

No. 528A01

(Filed 18 December 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 145 N.C. App. 375, 549 S.E.2d 904 (2001), affirming an order entered by Gavin, J., on 23 March 2000 in District Court, Moore County. Heard in the Supreme Court 11 December 2001.

Lapping & Lapping, by Sherwood F. Lapping, for plaintiff-appellee.

Gill & Tobias, LLP, by Douglas R. Gill, for defendant-appellant.

PER CURIAM.

AFFIRMED.

BRENDA HENRY AND FOSTER HENRY, INDIVIDUALLY, AND BRENDA HENRY, AS GUARDIAN AD LITEM FOR CRYSTAL HENRY v. SOUTHEASTERN OB-GYN ASSOCIATES, P.A., JAMES L. PRICE, M.D., AND LAIF LOFGREN, M.D.

No. 507A01

(Filed 18 December 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 142 N.C. App. 561, 550 S.E.2d 245 (2001), affirming an order entered 20 September 1999 by Lanier, J., in Superior Court, New Hanover County. Heard in the Supreme Court 10 December 2001.

The Law Offices of William S. Britt, by William S. Britt, for plaintiff-appellants.

Walker, Clark, Allen, Herrin & Morano L.L.P., by Robert D. Walker, Jr., and O. Drew Grice, Jr., for defendant-appellees.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by Adam Stein, on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

AFFIRMED.

IN RE THE ESTATE OF CANDICE LEIGH LUNSFORD, DECEASED

No. 362A01

(Filed 18 December 2001)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 143 N.C. App. 646, 547 S.E.2d 483 (2001), affirming an order entered 3 March 2000 by Burke, J., in Superior Court, Surry County. On 19 July 2001, the Supreme Court allowed respondent Lunsford's petition for discretionary review as to additional issues. Heard in the Supreme Court 15 November 2001.

Royster and Royster, by Stephen G. Royster and Michael D. Beal, for petitioner-appellee Dawn Collins Bean.

Law Offices of Jonathan S. Dills, P.A., by Jonathan S. Dills and Daniel B. Anthony, for respondent-appellant Randy Keith Lunsford.

ORDER.

The opinion of the Court of Appeals is vacated. This case is remanded to the Court of Appeals for further remand to the trial court for additional findings of fact as to (1) whether respondent Randy Lunsford abandoned Candice Leigh Lunsford; (2) if so, whether respondent Randy Lunsford resumed care and maintenance of Candice Leigh Lunsford at least one year prior to her death and continued the same until her death; and (3) whether respondent Randy Lunsford "substantially complied" with all orders of the trial court requiring contribution to the support of the child.

So ordered by the Court in Conference, this the 18th day of December, 2001.

s/Butterfield, J.
For The Court

CLARK v. ITT GRINNEL INDUS. PIPING, INC.

No. 80P01

Case below: 141 N.C. App. 417

Petition by defendant (ITT Grinnell Industrial Piping, Inc.) for discretionary review pursuant to G.S. 7A-31 allowed 18 December 2001 for the limited purpose of remand for reconsideration in light of *Austin v. Continental General Tire.*

HACKNEY v. CLEGG'S TERMITE & PEST CONTROL, INC.

No. 469P01

Case below: 145 N.C. App. 203

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 December 2001.

HENDERSON v. WACHOVIA BANK OF N.C.

No. 553P01

Case below: 145 N.C. App. 621

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 December 2001.

HONBARRIER v. BEAVER

No. 442P01

Case below: 145 N.C. App. 203

Petition by defendant (The Warrior Golf Club, LLC) for discretionary review pursuant to G.S. 7A-31 denied 18 December 2001.

IN RE D.D.

No. 625P01

Case below: 146 N.C. App. 309

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 18 December 2001. Petition by juvenile appellant for discretionary review pursuant to G.S. 31 denied 18 December 2001.

IN RE DENIAL OF REQUEST FOR ADMIN. HEARING

No. 607P01

Case below: 146 N.C. App. 258

Petition by petitioner (Karen Keltz) for discretionary review pursuant to G.S. 7A-31 denied 18 December 2001.

IN RE ESTATE OF MONK

No. 648P01

Case below: 146 N.C. App. 695

Motion by respondent (Mainor and Southerland) for temporary stay allowed 16 November 2001. Justice Butterfield recused.

IN RE MORRILL

No. 615A01

Case below: 146 N.C. App. 748

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 18 December 2001. Motion by respondent to deny Attorney General's motion to dismiss, dismissed as moot 18 December 2001. Motion by respondent for stay denied 18 December 2001. Motion by respondent for stay of appeal denied 18 December 2001.

JANNEY v. J.W. JONES LUMBER CO.

No. 492A01

Case below: 145 N.C. App. 402

Motion by plaintiff and defendants to withdraw appeal allowed 18 December 2001.

KEARNS v. HORSLEY

No. 403P01

Case below: 144 N.C. App. 200

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 18 December 2001.

LASHLEE v. WHITE CONSOL. INDUS., INC.

No. 548P01

Case below: 144 N.C. App. 684

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 18 December 2001.

LEGRANDE v. STATE

No. 462A01-6

Case below: Stanley County Superior Court

Claim by plaintiff against the State of North Carolina for erroneous convictions, imprisonments and sentence to death in capital case 95CRS567, 847 from Stanly County dismissed 18 December 2001. Claim by plaintiff against the State for malicious and deliberate erroneous convictions, imprisonments and sentence to death in capital case 95CRS567, 847 from Stanly County dismissed 18 December 2001.

MOORE v. N.C. COOP. EXT. SERV.

No. 576P01

Case below: 146 N.C. App. 89

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 18 December 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 December 2001.

RAWLS & ASSOCS. v. HURST

No. 380P01

Case below: 144 N.C. App. 286

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 18 December 2001.

RILEY v. DEBAER

No. 407PA01

Case below: 144 N.C. App. 357

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 18 December 2001 for the limited purpose of remanding to the Court of Appeals for reconsideration in light of *Johnson v. First Union Corp.*, 131 N.C. App. 142, 504 S.E.2d 808 (1998), *review allowed*, 349 N.C. 529, 526 S.E.2d 126 (1998), *review improvidently allowed*, 351 N.C. 339, 525 S.E.2d 171 (2000). *See In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d (1981).

STATE v. ANDERSON

No. 269A00

Case below: Craven County Superior Court

Motion by defendant to stay appeal denied 18 December 2001.

STATE v. ANTHONY

No. 183A00

Case below: Gaston County Superior Court

Motion by defendant to dismiss 97CRS11653 for lack of jurisdiction denied 18 December 2001. Petition by defendant for writ of certiorari to consider dismissal of 97CRS11653 denied 18 December 2001.

STATE v. BAKER

No. 616P01

Case below: 146 N.C. App. 110

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 18 December 2001.

STATE v. BARBER

No. 637P01

Case below: 147 N.C. App. 69

Motion by Attorney General for temporary stay allowed 21 November 2001 pending determination of the State's petition for discretionary review.

STATE v. BOWERS

No. 630P01

Case below: 146 N.C. App. 270

Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 18 December 2001.

STATE v. BROWN

No. 602P01

Case below: 146 N.C. App. 299

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 18 December 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 December 2001.

STATE v. FAIR

No. 506A99

Case below: 354 N.C. 131

Motion by defendant for reconsideration and stay of the mandate denied 6 December 2001. Motion by Appellate Defender for withdrawal of opinion denied 6 December 2001. Motion by Appellate Defender for additional briefing as amicus curiae dismissed as moot 6 December 2001. Motion by N.C. Academy of Trial Lawyers for leave fo file amicus curiae brief dismissed as moot 6 December 2001.

STATE v. GRAY

No. 556A93-2

Case below: Lenoir County Superior Court

Motion by defendant to delay ruling dismissed 18 December 2001.

STATE v. HILL

No. 418P01

Case below: 144 N.C. App. 450

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 18 December 2001.

STATE v. HILL

No. 535A95-3

Case below: Harnett County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Harnett County, denied 18 December 2001.

STATE v. HYATT

No. 402A00

Case below: Buncombe County Superior Court

Application by defendant pro se for writ of habeas corpus denied 21 November 2001.

STATE v. JOHNSON

No. 623P01

Case below: 146 N.C. App. 447

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 18 December 2001. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 December 2001.

STATE v. JOHNSON

No. 583P01

Case below: 146 N.C. App. 111

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 December 2001. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 18 December 2001.

STATE v. MESSER

No. 405A01

Case below: 145 N.C. App. 43

Temporary stay dissolved 18 December 2001. Petition by Attorney General for writ of supersedeas dismissed as moot 18 December 2001.

STATE v. PATTERSON

No. 597P01

Case below: 146 N.C. App. 113

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 December 2001.

STATE v. PEARSON

No. 541A01

Case below: 145 N.C. App. 506

Motion by defendant pro se for temporary stay denied 30 November 2001.

STATE v. RASHEED

No. 608P01

Case below: 146 N.C. App. 308

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 18 December 2001.

STATE v. REEVES

No. 346P01

Case below: 143 N.C. App. 186

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 18 December 2001.

STATE v. STEPHENS

No. 10A96-2

Case below: Johnston County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Johnston County, denied 18 December 2001.

STATE v. STRICKLAND

No. 483A95-2

Case below: Union County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Union County, denied 18 December 2001.

STATE v. TRUSELL

No. 632P01

Case below: 141 N.C. App. 151

Moore County Superior Court

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 18 December 2001. Petition by defendant pro se for writ of certiorari to review the order of the Superior Court, Moore County, dismissed 18 December 2001.

STATE v. WOODARD

No. 519PA01

Case below: 146 N.C. App. 75

Petition by Attorney General for writ of supersedeas allowed 18 December 2001. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 18 December 2001.

TAYLOR v. TAYLOR

No. 575P01

Case below: 146 N.C. App. 111

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 18 December 2001.

WALLACE v. BOARD OF TR.

No. 464P01

Case below: 145 N.C. App. 264

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 18 December 2001.

PETITION TO REHEAR

WELLS v. CONSOLIDATED JUD'L RET. SYS. OF N.C.

No. 156A00

Case below: 354 N.C. 313

Petition by plaintiff to rehear pursuant to Rule 31 denied 18 December 2001.

APPENDIXES

PRESENTATION OF
MURRAY GIBSON JAMES
PORTRAIT

ORDER ADOPTING STANDARDS OF
PROFESSIONAL CONDUCT
FOR MEDIATORS

AMENDMENTS TO THE NORTH CAROLINA
RULES OF APPELLATE
PROCEDURE

AMENDMENTS TO THE SETTLEMENT
PROCEDURES IN DISTRICT COURT
ACTIONS INVOLVING FAMILY
FINANCIAL ISSUES

AMENDMENTS TO THE REVISED
RULES OF PROFESSIONAL CONDUCT
CONCERNING ADVERTISING

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ADMINISTRATIVE COMMITTEE

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PLAN OF LEGAL SPECIALIZATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE MODEL BYLAWS FOR JUDICIAL DISTRICT BARS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PRACTICAL TRAINING OF LAW STUDENTS

Presentation of the Portrait

of

MURRAY GIBSON JAMES

Associate Justice
Supreme Court of North Carolina
1950

November 1, 2001

Murray Gibson James

Justice James was born at Maple Hill in Pender County on November 5, 1892. He was the second of four brothers, all of whom became lawyers. His father was Gibson James, descended from Samuel James of English ancestry who settled near Kenansville in the 1730's in what is now Duplin County. Anabel Murray, his mother, was descended from James Murray of Scotch ancestors who immigrated to the Court House Bay area of Onslow County in the early 1720's. Both Samuel James and James Murray were mentioned in court records as "His Majesty's Justices."

After receiving his early education in Pender County, Justice James attended Maryville College in Tennessee and North Carolina State College, where he received his BS degree in Scientific Agriculture. He was a member of the Phi Kappa Phi and the Phi Kappa Delta fraternities. He served in World War I as a 1st Lieutenant in the 1st Pioneer Division. After the war, he taught English in the Wilson High School while finishing his graduate work at UNC-Chapel Hill. Justice James was a member of the faculty of State College from 1922-1925. His legal training was self-taught with the assistance of night classes taught by Dean Samuel F. Mordecai of Trinity College (Duke) and Judge George P. Pell of Raleigh. He was admitted to the Bar in 1924, and moved to Wilmington in 1925 to practice law with the firm of Roundtree, Carr and James.

This firm became James and James when his youngest brother Joshua Stuart James and nephew Richard S. James joined him in the practice. As a civil trial lawyer, Justice James practiced in both the State and Federal courts and was a member of the ABA, the American Counsel Association, the International Association of Insurance Counsel, and the American Judicature Society. Governor Kerr Scott appointed Justice James to the Supreme Court on October 20, 1950.

Justice James married Elizabeth Wiggins McCraw of Wilson, N.C. on June 1, 1926. They had two sons, Murray Gibson James, Jr., who died as a young child, and Joseph McCraw James, who became a physician. Mrs. James died September 28, 1938. There are two grandchildren, Elizabeth James Dunn and Eleanor James Hissam. There are four great grandchildren: Sallie Dunn, Mary Katherine Dunn, Isabelle Hissam, and Margaret Hissam. Justice James was remarried on January 1, 1959 to his childhood sweetheart, Sallie Marshburn. He died on November 17, 1968, and she died on November 5, 1996.

OPENING REMARKS

and

RECOGNITION OF DR. JOSEPH M. JAMES

BY

CHIEF JUSTICE I. BEVERLY LAKE, JR.

The Chief Justice welcomed the guests with the following remarks:

> It is my pleasure to welcome you on behalf of the Court to this special ceremony honoring Justice James. Due to the efforts of the Supreme Court Historical Society and the James family, the presentation of Justice James' portrait today closes another gap in our portrait collection and we have a significant contribution to our fine collection. This contribution allows us to appropriately remember an important part of our history and a valued member of this Court family.
>
> With portrait ceremonies for less recent members of our Court, there is the added interest in remembering the times of previous members of this Court and former administrations. Today, for a moment, we return to the times of Governor Kerr Scott and to a Supreme Court headed by then Chief Justice Walter Stacy and former Associate Justices William Devin, M.V. Barnhill, Wallace Winborne, Emery Denny and Sam Ervin.

Chief Justice Lake welcomed official and personal guests of the Court. The Chief Justice then recognized the James family.

The Chief Justice recognized Dr. Joseph M. James, son of Justice Murray James, to present the portrait to the Court.

PRESENTATION ADDRESS
BY
DR. JOSEPH M. JAMES

Chief Justice Lake, Justices of the court, honored guests and friends, I am tardy. It is a trait of mine that my father had to endure. He knew about the portraits in these halls. I did not know of them until recently. Mr. Danny G. Moody, the Executive Director of the North Carolina Supreme Court Historical Society, phoned me awhile back and asked if we would provide a portrait. The project has proven to be a pleasant one. This process has enriched my family.

There is a biographical sketch of Justice James in the program and I won't repeat it.

I will tell you of some of his cases and some of the things I remember about him, as seen through the eyes of a child and a young man. He was tall and slender. He always wore a moustache. He was generally rather quiet. In the mid-'40s he developed chronic peptic ulcer disease. Before this he was quite vigorous. He enjoyed humor, and read extensively. He frequently used colloquialisms, but they disappeared suddenly when he became inquisitive or angry and were replaced with impeccable grammar and elocution. After my mother died in 1938 we became very close. Over dinner we discussed cases that he was preparing or trying. After my homework was done he would frequently read to me from Mark Twain, Bill Nye, Artemis Ward and other humorists. It was soon apparent that humor lay immediately below this quiet demeanor. He frequently used it to evaluate a juror, witness or new acquaintance, but usually in a quiet non-confrontational manner. He made you think of the frequently repeated skit of the adult tiring while playing with a child and feigning sleep, only to have the child lift one eyelid and inquire "are you in there?" He was a genealogist. This was born of long waits in county court houses, waiting for his case to be called, and time was spent in the registrar's office looking at old wills and deeds. He felt the strong obligation of being first an officer of the court, and then an advocate for his client.

Father had a rather explosive introduction to N.C. State College and was soon known throughout the student body. It seems that the "new economics" had been applied to clearing farmland. No longer did one burn stumps out. Scientific Agriculture taught one to remove stumps with dynamite. They demonstrated how to drill holes under the stump and place the dynamite sticks in the ground under the stump to blow it out of the ground. They also demonstrated that if one placed the dynamite on a plank on top of the ground that all it did when it went off was to blow the dust off the plank. Aha, an idea developed! At the end of class they took the plank and absconded with several sticks of dynamite. That night at about one o'clock they placed the plank with the dynamite on top of it on the roof of Wautauga Hall and lit the fuse. They woke up the entire West Side of Raleigh. The next morning a sixteen-foot hole was found in the roof. Father spent the next summer working in the logwoods to pay for the roof. I don't know if his friend Kerr Scott was involved.

He was particularly proud of his service in the 1st Pioneer division. This was the first division trained to circumvent trench warfare.

They were trained to get behind the trenches and disrupt communications and supply lines. Father's platoon members were from the mountains of Tennessee. They qualified as marksmen immediately. They had always traveled by foot. All he had to do was teach them to march and read a map. In short order they were on training sorties of seven to ten days in length. They traveled at night living off the land in the area of Camp Seavere, SC. He enjoyed recalling the surprised look on farmers' faces as he led the pay-master back along their route to pay for the chickens, pigs, corn and milk that they had appropriated the week before. This is where he learned pacemaking. Wilmington's city blocks are laid off sixteen blocks to a mile. If we walked from his office to the bank, savings and loan, post office or courthouse, he would announce the distance and arrival time. With me running along side, he would start off, with a 31-inch stride at a standard pace and arrive precisely on time. He later taught me to determine north by time if the sun was out, or by the appearance of a tree. On a cloudy day a telephone pole was even better. The sun caused the creosote to dry and change color on the south side of the pole.

After my mother died I spent more time with him. When he became attorney for the Wilmington Shipyard I frequently traveled to Newport News with him. He would go to work at the Newport News Shipbuilding and Dry Dock Co. and I would take my sandwich and coke and spend the day at Mariners Museum. After he died I found a number of notes that he had written. One said, "It has been a long and exhaustive effort. I have spent many long hours on the legal work of the shipyard. We have built over three hundred ships. The war has been won. I am very tired but proud of what we have done."

I remember the case that involved a ship being towed through the Cape Fear River Bridge. The ship hit the bridge abutment and sunk under the open span, preventing the bridge from closing. The ship had to be refloated. The span would not close properly and the bridge eventually had to be replaced. It was an expensive collision. The case revolved around two points. First, was the current at a standstill? Second, was the ship hogged? If it was the captain was negligent for not telling the tug skipper of its deformed condition that would cause it to veer suddenly when it came close to the bottom. The U. S. Coast Guard Commandant was called to testify about the tide and current. He was the first Admiral that I ever saw. His gold braid and uniform was an impressive sight to a youngster. Father represented the insurer of the tug. The jury found that the cur-

rent was at a stand, and that the ship was hogged and that it "smelled bottom" causing it to hit the bridge. The tugboat Skipper was absolved. It was a huge loss to Lloyds of London.

After WW II oystermen returning home from the military found that all of the oysters in Stump Sound were dead. This was a major loss. The effluent from the laundry at Camp Davis was found to have entered a creek and then into the bay and this killed the oysters. It required a Private Bill of Congress in order to sue the Government and recover the damages. Father began to lobby Representatives and Senators on behalf of the oystermen. My trips to Washington began. I rode the Pullman trains and met politicians for the first time. The lobbying was successful. The damages proven were the largest ever in the state at that time.

I became aware of the false teeth caper. In spite of his strong feeling of obligation as an officer of the court, he on this occasion became a backslider. At supper one night he announced that he almost got put in jail that afternoon. He was trying a case whose opposing counsel was Mr. Aaron Goldberg. He considered Mr. Goldberg one of the few worthy opponents in Wilmington. Both recognized that the case had little merit but neither client would compromise and settle the case. On this hot August afternoon the heat in the courtroom was stifling. It was difficult to keep the jury's attention. Father was summing up his case to the jury and realized that he had lost their attention. He heard a loud scraping sound that was distracting the jury. Mr. Goldberg was whetting a large pocketknife on the sole of his shoe. Father stopped in mid sentence and sat down. It was Mr. Goldberg's turn. Midway through his summation father removed his upper plate and using his pocketknife began scraping a high spot off the roof of the upper plate. The accompanying loud groink groink noise put an end to the business of the court. The judge angrily summoned them to his chambers and threatened them with contempt, or as Artemis Ward might have said "arson in the third degree". They both managed to avoid jail. The case was promptly settled.

Kerr Scott, his old classmate, called and inquired if he ran for governor would Dad campaign for him in eastern North Carolina. The Campaign was joined and I spent many hours putting up posters in eastern NC. My most vivid memory was of a Friday rally in Burgaw. Mr. Scott was an avid foxhunter and on Saturday the Maple Hill farmers had a hunt in his honor. The first pack of dogs was let out of the pickup truck and they picked up the scent in five

minutes. He climbed in the truck and off they went. It seems that every five minutes they met another truck with another pack of dogs and the scenario was repeated. This happened until it was obvious that this group of farmers had on previous days caught and penned up almost every fox in Pender County and were releasing them one at a time. The hunt was a howling success as was the subsequent election.

Late in the afternoon of October 20, 1950 a Highway Patrolman appeared at my dormitory door at Chapel Hill, identified me and told me I was to come with him. My mind raced. I thought that I had made it home from Harry's Beer Parlor the night before without incident. I had no idea what could he want. He told me to put on a tie and coat, that I was wanted at the Governor's office. That evening I watched as Governor Scott announced to the press his appointment of my father to the N. C. Supreme Court. Of the Justices I met I remember Justice Ervin the best. I later encountered him on several occasions. I have fond memories of him. The Senate Watergate investigation was particularly memorable, hearing him take the testimony of the bagman Mr. Elasowitz.

After an interim term on the Supreme Court he returned to Wilmington and practiced until two years before his death.

As his health began to decline I frequently visited him before supper. I would pour us a drink of bourbon and we would discuss the events of the day. On one occasion he opened the conversation with "You have always irritated me." I answered with my best psychiatric non-commital, "Oh." He then went on to say "I was born and raised thirty five miles from Wilmington, practiced law here for forty years and never became a Wilmingtonian. You were born here and were one that day and that has always irritated me." We both laughed realizing that he was again stating that he had always considered himself a countryman and a farmer, not an urbanite. He died on November 17, 1968.

He was a member of the American Bar Association, the American Counsel Association, the International Association of Insurance Counsel and the American Judicature Society.

He married Elizabeth Wiggins McCraw of Wilson, NC on June 1, 1926. They had two sons, my brother, Murray Gibson James Jr., died as a young child. Mrs. James died September 28, 1938. There are two grandchildren, Elizabeth James Dunn and Eleanor James Hissam. There are four great grandchildren Sallie Dunn, Mary Katherine Dunn, Isabelle Hissam and Margaret Hissam. Justice James was

remarried on January 1, 1959 to his childhood sweetheart Sallie Marshburn. She died November 5, 1996.

Justice James' nephew and partner Richard S. James will unveil the portrait.

ACCEPTANCE OF JUSTICE JAMES' PORTRAIT BY CHIEF JUSTICE LAKE

Thank you. On behalf of the Supreme Court, it is with pleasure that I accept the portrait of Justice James as a part of the collection which will hang on the third floor of this building. We are delighted to have this work of art, and we sincerely appreciate the efforts of all who helped to make this ceremony a reality.

ORDER ADOPTING STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

WHEREAS, section 7A-38.2 of the North Carolina General Statutes establishes the Dispute Resolution Commission under the Judicial Department and charges it with the administration of mediator certification and regulation of mediator conduct and decertification, and

WHEREAS, N.C.G.S. § 7A-38.2(a) provides for this Court to adopt standards for the conduct of mediators and of mediator training programs participating in the mediated settlement conference program established pursuant to N.C.G.S. § 7A-38.1,

WHEREAS, N.C.G.S. § 7A-38.3(e) provides for this Court to adopt standards for the conduct of mediators and mediator training programs participating in the prelitigation farm nuisance mediation program established pursuant to N.C.G.S. § 7A-38.3, and

WHEREAS, N.C.G.S. § 7A-38.4(l) provides for this Court to adopt standards for the conduct of mediators and of mediator training programs participating in the pilot program for settlement of equitable distribution and other family financial matters established pursuant to N.C.G.S. 7A-38.4.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.2(a), N.C.G.S. § 7A-38.3(e), and N.C.G.S. § 7A-38.4(l), Standards of Professional Conduct For Mediators are hereby adopted to read as in the following pages. These Standards shall be effective on the 16th day of August, 2001. Until that date, the Standards adopted by this Court on the 24th day of June, 1999, shall remain in effect.

Adopted by the Court in conference the 16th day of August, 2001. The Appellate Division Reporter shall publish the Standards of Professional Conduct for Mediators in their entirety at the earliest practicable date.

s/Butterfield, J.
For the Court

STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

PREAMBLE

These standards are intended to instill and promote public confidence in the mediation process and to be a guide to mediator conduct. As with other forms of dispute resolution, mediation must be built on public understanding and confidence. Persons serving as mediators are responsible to the parties, the public, and the courts to conduct themselves in a manner which will merit that confidence. These standards apply to all mediators who participate in mediated settlement conferences in the State of North Carolina pursuant to N.C.G.S. § 7A-38.1, N.C.G.S. § 7A-38.3, or N.C.G.S. § 7A-38.4 or who are certified to do so.

Mediation is a process in which an impartial person, a mediator, works with disputing parties to help them explore settlement, reconciliation, and understanding among them. In mediation, the primary responsibility for the resolution of a dispute rests with the parties.

The mediator's role is to facilitate communication and recognition among the parties and to encourage and assist the parties in deciding how and on what terms to resolve the issues in dispute. Among other things, a mediator assists the parties in identifying issues, reducing obstacles to communication, and maximizing the exploration of alternatives. A mediator does not render decisions on the issues in dispute.

I. Competency: A mediator shall maintain professional competency in mediation skills and, where the mediator lacks the skills necessary for a particular case, shall decline to serve or withdraw from serving.

A. A mediator's most important qualification is the mediator's competence in procedural aspects of facilitating the resolution of disputes rather than the mediator's familiarity with technical knowledge relating to the subject of the dispute. Therefore a mediator shall obtain necessary skills and substantive training appropriate to the mediator's areas of practice and upgrade those skills on an ongoing basis.

B. If a mediator determines that a lack of technical knowledge impairs or is likely to impair the mediator's effectiveness, the mediator shall notify the parties and withdraw if requested by any party.

C. Beyond disclosure under the preceding paragraph, a mediator is obligated to exercise his judgment whether his skills or expertise are sufficient to the demands of the case and, if they are not, to decline from serving or to withdraw.

II. Impartiality: A mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute.

A. Impartiality means absence of prejudice or bias in word and action. In addition, it means a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.

B. As early as practical and no later than the beginning of the first session, the mediator shall make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's impartiality.

C. The mediator shall decline to serve or shall withdraw from serving if:

(1) a party objects to his serving on grounds of lack of impartiality or

(2) the mediator determines he cannot serve impartially.

III. Confidentiality: A mediator shall, subject to ~~statutory obligations to the contrary~~ exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.

~~A. Apart from statutory duties to report certain kinds of information, a mediator shall not disclose, directly or indirectly, to any nonparty, any information communicated to the mediator by a party within the mediation process.~~

A. A mediator shall not disclose, directly or indirectly, to any nonparty, any information communicated to the mediator by a party within the mediation process.

~~B. Even where there is a statutory duty to report information if certain conditions exist, a mediator is obligated to resolve doubts regarding the duty to report in favor of maintaining confidentiality.~~

B. ~~C.~~ A mediator shall not disclose, directly or indirectly, to any party to the mediation, information communicated to the mediator in confidence by any other party, unless that party

gives permission to do so. A mediator may encourage a party to permit disclosure, but absent such permission, the mediator shall not disclose.

C. The confidentiality provisions set forth in A. and B. above notwithstanding, a mediator has discretion to report otherwise confidential information to a party, non-party, or law enforcement personnel in the following circumstances:

(1) the mediator is under a statutory duty to report the confidential information, see, for example, N.C. Gen. Stat. § 7A-38.1 and § 7A-38.4 which provide for an exception to confidentiality when the mediator has reason to believe that a child or elder has been or may be abused.

(2) a party to the mediation has communicated to the mediator a threat of serious bodily harm or death to be inflicted on any person, and the mediator has reason to believe the party has the intent and ability to act on the threat.

(3) a party to the mediation has communicated to the mediator a threat of significant damage to real or personal property and the mediator has reason to believe the party has the intent and ability to act on the threat.

(4) a party's conduct during the mediation results in direct bodily injury or death to a person.

D. Nothing in this Standard prohibits the use of information obtained in a mediation for instructional purposes, ~~provided identifying information is removed~~ or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable.

IV. Consent: A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator, and the party's options within the process.

A. A mediator shall discuss with the participants the rules and procedures pertaining to the mediation process and shall inform the parties of such matters as applicable rules require. A mediator shall also inform the parties of the following:

(1) that mediation is private;

(2) that mediation is informal;

(3) that mediation is confidential to the extent provided by law;

(4) that mediation is voluntary, meaning that the parties do not have to negotiate during the process nor make or accept any offer at any time;

(5) the mediator's role; and

(6) what fees, if any, will be charged by the mediator for his services.

B. A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nevertheless, a mediator may and shall encourage parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.

C. Where a party appears to be acting under undue influence, or without fully comprehending the process, issues, or options for settlement, a mediator shall explore these matters with the party and assist the party in making freely chosen and informed decisions.

D. If after exploration the mediator concludes that a party is acting under undue influence or is unable to fully comprehend the process, issues or options for settlement, the mediator shall discontinue the mediation.

E. In appropriate circumstances, a mediator shall encourage the parties to seek legal, financial, tax or other professional advice before, during or after the mediation process. A mediator shall explain generally to *pro se* parties that there may be risks in proceeding without independent counsel or other professional advisors.

V. Self Determination: A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute, and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement.

A. A mediator is obligated to leave to the parties full responsibility for deciding whether and on what terms to resolve their dispute. He may assist them in making informed and thoughtful decisions, but shall not impose his judgment for that of the parties concerning any aspect of the mediation.

B. Subject to Section A. above and Standard VI. below, a mediator may raise questions for the parties to consider regarding the

acceptability, sufficiency, and feasibility, for all sides, of proposed options for settlement—including their impact on third parties. Furthermore, a mediator may make suggestions for the parties' consideration. However at no time shall a mediator make a decision for the parties, or express an opinion about or advise for or against any proposal under consideration.

C. Subject to Standard IV. E. above, if a party to a mediation declines to consult an independent counsel or expert after the mediator has raised this option, the mediator shall permit the mediation to go forward according to the parties' wishes.

D. If, in the mediator's judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, gross inequality of bargaining power or ability, gross unfairness resulting from non-disclosure or fraud by a participant, or other circumstance likely to lead to a grossly unjust result, the mediator shall inform the parties. The mediator may choose to discontinue the mediation in such circumstances but shall not violate the obligation of confidentiality.

VI. Separation of Mediation from Legal and Other Professional Advice: A mediator shall limit himself solely to the role of mediator, and shall not give legal or other professional advice during the mediation.

A Mediator may, in areas where he is qualified by training and experience, raise questions regarding the information presented by the parties in the mediation session. However, the mediator shall not provide legal or other professional advice whether in response to statements or questions by the parties or otherwise.

VII. Conflicts of Interest: A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute.

A. The mediator shall place the interests of the parties above the interests of any court or agency which has referred the case, if such interests are in conflict.

B. Where a party is represented or advised by a professional advocate or counselor, the mediator shall place the interests of the party over his own interest in maintaining cordial relations with the professional, if such interests are in conflict.

C. A mediator who is a lawyer or other professional shall not advise or represent either of the parties in future matters concerning the subject of the dispute.

D. A mediator shall not charge a contingent fee or a fee based on the outcome of the mediation.

E. A mediator shall not use information obtained during a mediation for personal gain or advantage.

F. A mediator shall not knowingly contract for mediation services which cannot be delivered or completed as directed by a court or in a timely manner.

G. A mediator shall not prolong a mediation for the purpose of charging a higher fee.

H. A mediator shall not give or receive any commission, rebate, or other monetary or non-monetary form of consideration from a party or representative of a party in return for referral of clients for mediation services.

VIII. Protecting the Integrity of the Mediation Process. A mediator shall encourage mutual respect between the parties, and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

A. A mediator shall make reasonable efforts to ensure a balanced discussion and to prevent manipulation or intimidation by either party and to ensure that each party understands and respects the concerns and position of the other even if they cannot agree.

B. When a mediator discovers an intentional abuse of the process, such as nondisclosure of material information or fraud, the mediator shall encourage the abusing party to alter the conduct in question. The mediator is not obligated to reveal the conduct to the other party, (and subject to Standard V. D. above) nor to discontinue the mediation, but may discontinue without violating the obligation of confidentiality.

In the Supreme Court of North Carolina

Order Adopting Amendments to the North Carolina Rules of Appellate Procedure

Rules 3, 4, 7, 9, 15, 26, 27, 28, 31, 33, 40, and 42 are hereby amended as described below:

Rule 3(c) is amended to read as follows:

"(c) *Time for Taking Appeal.* In civil actions and special proceedings, a party must file and serve a notice of appeal:

"(1) within 30 days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or

"(2) within 30 days after service upon the party of a copy of the judgment if service was not made within that three-day period; provided that

"(3) if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the 30-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subsections (1) and (2) of this subdivision (c).

"In computing the time for filing a notice of appeal, the provision for additional time after service by mail of N.C. R. App. P. 27(b) and N.C. R. Civ. P. 6(e) shall not apply.

"If timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party."

Rule 4(a)(2) is amended by striking all references to the number "10" and replacing them with the number "14."

Rule 4(d) is amended by striking the words "life imprisonment or."

Rule 7(b)(1) para 4, is amended by replacing the words "Appendix G" in the fourth paragraph with the words "Appendix B."

Rule 9(d)(2) is amended by adding the word "nondocumentary" in the beginning of the second sentence after the words "When an original."

Rule 15(d) is amended by adding the following sentence at the end:

"A motion for extension of time is not permitted."

Rule 26(g), para.1, is amended in the second sentence by replacing the numeral "11" to "12" before the words "point type."

Rule 27(c) is amended by adding the words "or the responses thereto" after the word "rehearing," and prior to the words "prescribed by these rules or by law" in the last sentence of the first paragraph.

Rule 28(b)(1) is amended is amended by replacing the phrase "table of contents" with the phrase "subject index."

Rule 28(b)(4) through (9) are renumbered (5) through (10), respectively.

Rule 28 is further amended by adding a new subsection (b)(4) as follows:

"(4) A statement of the grounds for appellate review. Such statement shall include citation of the statue or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right."

Rule 28(c), para 1, first sentence is amended by replacing the phrase "table of contents" with the phrase "subject index."

Rule 28(c), para 1, second sentence is amended by inserting the phrase "statement of the grounds for appellate review," after the phrase "history of the case."

Rule 28(j), first sentence is amended by replacing the words "table and contents" with the phrase "subject index."

Rule 31(b) is amended by deleting the following sentence as follows:

"~~Two copies thereof shall be filed with the clerk.~~"

Rule 33(a) is amended in the fifth sentence, beginning "Only those counsel," by deleting the next to the last word so that it reads "heard in argument."

Rule 33 is amended by adding a new subsection (b) as follows and by renumbering the existing subsection (b) to (c):

"(b) Signatures on electronically filed documents. If more than one attorney is listed as being an attorney for the party(ies) on an electronically filed document, it is the responsibility of the attorney actually filing the document from his or her computer to (1) list his or her name first on the document, and (2) place on the document under his or her signature line the following statement: 'I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.' "

Rule 40 is amended by changing "App. R." to "N.C. R. App. P."

Rule 42 is amended by changing "App. R. . . ." to "N.C. R. App. P. . . ."

Minor typographical and grammatical corrections have been made throughout the Rules, and they are highlighted in the redline version of the Rules released with this order.

The Appendixes to the North Carolina Rules of Appellate Procedure are amended as follows:

Appendix A is amended to read as follows:

APPENDIX A
TIMETABLES FOR APPEALS

TIMETABLE OF APPEALS FROM TRIAL DIVISION UNDER ARTICLE II OF THE RULES OF APPELLATE PROCEDURE

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Taking Appeal (civil)	30	entry of judgment (unless tolled)	3(c)
Taking Appeal (agency)	30	~~final agency determination~~ receipt of final agency order (unless statutes provide otherwise)	18(b)(2)
Taking Appeal (crim.)	~~10~~14	entry of judgment (unless tolled)	4(a)
Ordering Transcript (civil, agency)	~~10~~14	filing notice of appeal	7(a)(1) 18(b)(3)

Ordering Transcript (criminal indigent)	~~10~~14	order filed by clerk of superior court	7(a)(2)
Preparing & delivering transcript		~~receipt~~ service of order for transcript	7(b)(1)
(civil, non-capital criminal)	60		
(capital criminal)	120		
Serving proposed record on appeal		notice of appeal (no transcript) or reporter's certificate of delivery of transcript	11(b)
(civil, non-capital criminal)	35		
(agency)	35		18(d)
Serving proposed record on appeal (capital)	70	reporter's certificate of delivery	11(b)
Serving objections or proposed alternative record on appeal		service of proposed record	11(c)
(civil, non-capital criminal)	21		
(capital criminal)	35		
(agency)	30	service of proposed record	18(d)(2)
Requesting judicial settlement of record	10	expiration of the last day within which an appellee served could serve objections, etc.	11(c) 18(d)(3)
Judicial settlement of record	20	service on judge of request for settlement	11(c) 18(d)(3)
Filing Record on Appeal in appellate court	15	settlement of record on appeal	12(a)
Filing appellant's brief (or mailing brief under Rule 26(a))	30	Clerk's mailing of printed record—or from docketing record in civil appeals in forma pauperis (60 days in Death Cases)	13(a)
Filing appellee's brief (or mailing brief under Rule 26(a))	30	service of appellant's brief (60 days in Death Cases)	13(a)
Oral Argument	30	filing appellant's brief (usual minimum time)	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	15	Mandate	31(a)

TIMETABLE OF APPEALS TO THE SUPREME COURT FROM THE COURT OF APPEALS UNDER ARTICLE III OF THE ~~APPELLATE RULES~~ RULES OF APPELLATE PROCEDURE

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Petition for Discretionary Review prior to determination	15	docketing appeal in Court of Appeals	15(b)

Notice of Appeal and/or Petition for Discretionary Review	15	Mandate of Court of Appeals (or from order of Court of Appeals denying petition for rehearing)	14(a) 15(b)
Cross-Notice of Appeal	10	filing of first notice of appeal	14(a)
Response to Petition for Discretionary Review	10	service of petition	15(d)
~~Filing appellant's brief (or mailing brief under~~	~~30~~	~~Clerk's mailing of printed record or from docketing record in civil appeals~~	~~14(d) 15(g)~~
~~Rule 26(a))~~		~~in forma pauperis~~	
Filing appellant's brief (or mailing brief under Rule 26(a))		Filing notice of appeal Certification of review	14(d) 15(g)(2)
Filing appellee's brief (or mailing brief under Rule 26(a))	30	service of appellant's brief	14(d) 15(g)
Oral Argument	30	filing appellee's brief (usual minimum time)	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	15	Mandate	31(a)

NOTES

All of the critical time intervals here outlined except those for taking an appeal and petitioning for discretionary review or for rehearing may be extended by order of the Court wherein the appeal is docketed at the time. Note that Rule 27 ~~has been amended and now~~ grants the trial tribunal the authority to grant only one extension of time for service of the proposed record. All other motions for extension of the times provided in the rules must be filed with the appellate court to which the appeal of right lies.

No time limits are prescribed for petitions for writs of certiorari other than that they be "filed without unreasonable delay." ~~(~~Rule 21(c).~~)~~

Appendix B is amended to read as follows:

APPENDIX B
FORMAT AND STYLE

All documents for filing in either Appellate Court are prepared on 8½ x 11 inch, ~~white~~ plain, white unglazed paper of 16 to 20 pound weight. Typing is done on one side only, although the document will

be reproduced in two-sided format. No vertical rules, law firm marginal return addresses, or punched holes will be accepted. The papers need not be stapled; a binder clip or rubber bands are adequate to secure them in order.

Papers shall be prepared using at least ~~10~~ 12-point type and spacing, so as to produce a clear, black image. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be approximately 6½ inches wide and 9 inches long. Tabs are located at the following distances from the left margin: ½", 1", 1½", 2", 4¼" (center), and 5".

CAPTIONS OF DOCUMENTS.

All documents to be filed in either appellate court shall be headed by a caption. The caption contains: the number to be assigned the case by the Clerk; the Judicial District from which the case arises; the appellate court to whose attention the document is addressed; the style of the case showing the names of all parties to the action; the county from which the case comes; the indictment or docket numbers of the case below (in records on appeal and in motions and petitions in the cause filed prior to the filing of the record); and the title of the document. The caption shall be placed beginning at the top margin of a cover page and, again, on the first textual page of the document.

No. _____ (Number) DISTRICT

(SUPREME COURT OF NORTH CAROLINA)
(or)
(NORTH CAROLINA COURT OF APPEALS)

****

STATE OF NORTH CAROLINA	)	
or	)	
(Name of Plaintiff)	)	From (Name) County
	)	No. _____
v	)	
	)	
(Name of Defendant)	)	

****
(TITLE OF DOCUMENT)
****

The caption should reflect the title of the action (all parties named) as it appeared in the trial division. The appellant or petitioner

is not automatically given topside billing; the relative position of the plaintiff and defendant should be retained.

The caption of a record on appeal and of a notice of appeal from the Trial Division should include directly below the name of the county, the indictment or docket numbers of the case in the trial division. Those numbers, however, should not be included in other documents except for a petition for writ of certiorari or other petitions and motions where no record on appeal has yet been created in the case. In notices of appeal or petitions to the Supreme Court from decisions of the Court of Appeals, the caption should show the court of appeals' docket number in similar fashion.

Immediately below the caption of each document, centered and underlined, in all capital letters, should be the title of the document, e.g., PETITION FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31, or DEFENDANT-APPELLANT'S BRIEF. A brief filed in the Supreme Court in a case previously heard and decided by the Court of Appeals is entitled ~~to a~~ NEW BRIEF.

INDEXES

A brief or petition which is long or complex or which treats multiple issues, and all Appendixes to briefs (Rule 28) and Records on Appeal (Rule 9) must contain an index to the contents.

The index should be indented approximately ¾" from each margin, providing a five-inch line. The form of the index for a record on appeal should be as follows (indexes for briefs are addressed in Appendix E):

(Record)

INDEX

USE OF THE TRANSCRIPT OF EVIDENCE WITH RECORD ON APPEAL

Those portions asterisked (*) in the sample index above would be omitted if the transcript option were selected under Appellate Rule 9(c). In their place in the record, counsel should place a statement in substantially the following form:

> "Per Appellate Rule 9(c) the transcript of proceedings in this case, taken by (name), court reporter, from (date) to (date) and consisting of (# of pages) pages, numbered (1) through (last page #), and bound in (# of volumes) volumes is filed contemporaneously with this record."

The transcript should be prepared with a clear, black image on 8½ x 11 paper of 16-20 pound substance. Enough copies should be reproduced to assure the parties of a reference copy, and file one copy in the Appellate Court. In criminal appeals, the District Attorney is responsible for conveying a copy to the Attorney General (App. Rule 9(c)).

The transcript should not be inserted into the record on appeal, but, rather, should be separately bound and submitted for filing in the proper appellate court with the record. Transcript pages inserted into the record on appeal will be treated in the manner of a narration and will be printed at the standard page charge. Counsel should note that the separate transcript will not be reproduced with the record on appeal, but will be treated and used as an exhibit.

TABLE OF CASES AND AUTHORITIES

Immediately following the index and before the inside caption, all briefs, petitions, and motions greater than five pages in length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to A Uniform System of Citation. (14th ed.).

FORMAT OF BODY OF DOCUMENT

The body of the document of records on appeal should be single-spaced with double-spaces between paragraphs. The body of the document of petitions, notices of appeal, responses, motions, and briefs should be double-spaced, with captions, headings, and long quotes single-spaced.

Adherence to the margins is important since the document will be reproduced front and back and will be bound on the side. No part of the text should be obscured by that binding.

Quotations of more than three lines in length should be indented ¾ inch from each margin and should be single-spaced. The citation should immediately follow the quote.

References to the record on appeal should be made through a parenthetic entry in the text. (R. pp. 38-40) References to the transcript, if used, should be made in similar manner. (T. p. 558, line 21)

TOPICAL HEADINGS

The various sections of the brief or petition should be separated (and indexed) by topical headings, centered and underlined, in all capital letters.

Within the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin to margin. Sub-issues should be presented in similar format, but block indented ½ inch from the left margin.

NUMBERING PAGES

The cover page containing the caption of the document (and the index in Records on Appeal) is unnumbered. The index and table of cases and authorities are on pages numbered with lower case roman numerals, e.g., i, ii, iv.

While the page containing the inside caption and the beginning of the substance of the petition or brief bears no number, it is page 1. Subsequent pages are sequentially numbered by arabic numbers, flanked by dashes, at the center of the top margin of the page, e.g. -4-.

An appendix to the brief should be separately numbered in the manner of a brief.

SIGNATURE AND ADDRESS

All original papers filed in a case will bear the original signature of at least one counsel participating in the case, as in the example

below. The name, address, ~~and~~ telephone number, and e-mail address of the person signing, together with the capacity in which he signs the paper will be included. Where counsel or the firm is retained, the firm name should be included above the signature; however, if counsel is appointed in an indigent criminal appeal, only the name of the appointed counsel should appear, without identification of any firm affiliation. Counsel participating in argument must have signed the brief in the case prior to that argument.

(Retained)

ATTORNEY, COUNSELOR, LAWYER & HOWE
By: _____
John Q. Howe
By: _____
M. R. N. Associate
Attorneys for Plaintiff Appellants
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
howe@aclh.web

(Appointed)

_____
John Q. Howe
Attorney for Defendant Appellant
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
howe@aclh.web

Appendix C is amended by rewriting item 23 in Tables 1 and 3 and item 13 in Table 2 to read as follows:

"23. Names, office addresses, telephone numbers, and e-mail addresses of counsel for all parties to appeal."

Appendix C is amended by changing all occurrences of "Record, p." to "R. p." and all occurrences of "Transcript," to "T."

Appendix D(1)(a) is amended by deleting the words "or of imprisonment for life" after the word "death."

Appendix D(1)(b) is amended by deleting the words "Life Imprisonment or" after the words "Sentence of" and before the word "Death" and by deleting the words "(imprisonment for life)" before the words "Respectfully submitted."

Appendix D is amended by striking all dates ending with "19__" and replacing them with "2___."

Appendix E is amended by adding the following section after the section entitled "Statement of the Case":

"STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

"Set forth the statutory basis for permitting appellate review. For example, in an appeal from a final judgment to the Court of Appeals, the appellant might state that the ground for appellate review is a final judgment of the superior court under G.S. § 7A-27(b). If the appeal is based on N.C. R. Civ. P. 54(b), the appellant must also state that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. If the appeal is from an interlocutory order or determination based on a substantial right, the appellant must present, in addition to the statutory authorization, facts and argument showing the substantial right that will be lost, prejudiced, or less than adequately protected absent immediate appellate review."

Appendix F is amended by changing the last paragraph as follows:

"Photocopying charges are $.20 per page. The ~~electronic~~ facsimile transmission fee for documents sent from the clerk's office, which is in addition to standard photocopying charges, is $5.00 for the first 25 pages and $.20 for each page thereafter. " ~~The electronic transmission fee for documents received by the clerk's office for filing pursuant to Rule 26(a)(2) is $10.00 per document~~ filed."

These amendments to the North Carolina Rules of Appellate Procedure and the Appendixes thereto shall be effective 31 October 2001.

Adopted by the Court in conference the 18th day of October 2001. The Appellate Division Reporter shall publish the Rules in their entirety in the Advance Sheets of the Supreme Court and the Court of Appeals, at the earliest practicable date. The Rules in their entirety shall also be placed on the Judicial Branch web page at www.aoc.state.nc.us.

Edmunds, J.
For the Court

Witness my hand and the Seal of the Supreme Court of North Carolina, this the 18th day of October, 2001.

Christie Speir Cameron
Clerk of the Supreme Court

NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Adopted 13 June 1975, with amendments received through 18 October 2001.

These rules were promulgated by the Court under the rule-making authority conferred by Article IV, § 13(2) of the Constitution of North Carolina. They are effective with respect to all appeals taken from orders and judgments of the Superior Courts, the District Courts, the North Carolina Industrial Commission, the North Carolina Utilities Commission and the Commissioner of Insurance of North Carolina in which notice of appeal was given on and after July 1, 1975. As to such appeals, these rules supersede the Rules of Practice in the Supreme Court of North Carolina, 254 N.C. 783 (1961), as amended; the Supplementary Rules of the Supreme Court, 271 N.C. 744 (1967), as amended; and the Rules of Practice in the Court of Appeals of North Carolina, 1 N.C. App. 632 (1968), as amended. With respect to all appeals in which notice of appeal was given prior to July 1, 1975, the rules of court and statutes then controlling appellate procedure are continued in force as the Rules of Practice of the Courts of the Appellate Division until final disposition of the appeals.

An Appendix of Tables and Forms prepared by the Drafting Committee, as revised, is published with the rules for its possible helpfulness to the profession in the early stages of experience with these rules. Although authorized to be published for this purpose, it is not an authoritative source on parity with the rules.

Article I
Applicability of Rules

Article II
Appeals from Judgments and Orders of Superior Courts and District Courts

Article III
Review by Supreme Court of Appeals
Originally Docketed in Court of Appeals:
Appeals of Right; Discretionary Review

Article VI
General Provisions

Appendixes

NORTH CAROLINA RULES OF APPELLATE PROCEDURE

ARTICLE I
APPLICABILITY OF RULES

RULE 1
SCOPE OF RULES: TRIAL TRIBUNAL DEFINED

(a) *Scope of Rules.* These rules govern procedure in all appeals from the courts of the trial division to the courts of the appellate division; in appeals in civil and criminal cases from the Court of Appeals to the Supreme Court; in direct appeals from administrative agencies, boards, and commissions to the appellate division; and in applications to the courts of the appellate division for writs and other relief which the courts or judges thereof are empowered to give.

(b) *Rules Do Not Affect Jurisdiction.* These rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.

(c) *Definition of Trial Tribunal.* As used in these rules, the term "trial tribunal" includes the superior courts, the district courts, and any administrative agencies, boards, or commissions from which appeals lie directly to the appellate division.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 27 November 1984—1(a), (c)—effective 1 February 1985.

RULE 2
SUSPENSION OF RULES

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

ARTICLE II
APPEALS FROM JUDGMENTS AND ORDERS OF SUPERIOR COURTS AND DISTRICT COURTS

RULE 3
APPEAL IN CIVIL CASES—HOW AND WHEN TAKEN

(a) *Filing the Notice of Appeal.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

(b) *Special Provisions.* Appeals in the following types of cases shall be taken in the time and manner set out in the General Statutes section noted:

(1) Termination of parental rights, G.S. 7A-289.34.

(2) Juvenile matters, G.S. 7A-666.

(c) *Time for Taking Appeal.* In civil actions and special proceedings, a party must file and serve a notice of appeal:

(1) within 30 days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or

(2) within 30 days after service upon the party of a copy of the judgment if service was not made within that three-day period; provided that

(3) if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the 30-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subsections (1) and (2) of this subdivision (c).

In computing the time for filing a notice of appeal, the provision for additional time after service by mail of N.C. R. App. P. 27(b) and N.C. R. Civ. P. 6(e) shall not apply.

If timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

(d) *Content of Notice of Appeal.* The notice of appeal required to be filed and served by subdivision (a) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(e) *Service of Notice of Appeal.* Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

ADMINISTRATIVE HISTORY

Adopted 13 June 1975.
Amended: 14 April 1976;
8 December 1988—3(a), (b), (c), (d)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
8 June 1989—3(b)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
28 July 1994—3(c)—1 October 1994;
6 March 1997—(c)—effective upon adoption 6 March 1997;
18 October 2001—3(c)—effective 31 October 2001.

RULE 4
APPEAL IN CRIMINAL CASES—HOW AND WHEN TAKEN

(a) *Manner and Time.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by

(1) giving oral notice of appeal at trial, or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within 14 days after entry of the judgment or order or within 14 days after a ruling on a motion for appropriate relief made during the 14-day period following entry of the judgment or order.

(b) *Content of Notice of Appeal.* The notice of appeal required to be filed and served by subdivision (a)(2) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or

order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(c) *Service of Notice of Appeal.* Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

(d) *To Which Appellate Court Addressed.* An appeal of right from a judgment of a superior court by any person who has been convicted of murder in the first degree and sentenced to death shall be filed in the Supreme Court. In all other criminal cases, appeal shall be filed in the Court of Appeals.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 4 October 1978—4(a)(2)—effective 1 January 1979;
13 July 1982—4(d);
3 September 1987—4(d)—effective for all judgments of the superior court entered on or after 24 July 1987;
8 December 1988—4(a)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
8 June 1989—4(a) 8 December 1988 amendment rescinded prior to effective date;
18 October 2001—4(a)(2), (d) (subsection (d) amended to conform with G.S. § 7A-27) effective 31 October 2001.

RULE 5
JOINDER OF PARTIES ON APPEAL

(a) *Appellants.* If two or more parties are entitled to appeal from a judgment, order, or other determination and their interests are such as to make their joinder in appeal practicable, they may give a joint oral notice of appeal or file and serve a joint notice of appeal in accordance with Rules 3 and 4; or they may join in appeal after timely taking of separate appeals by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties.

(b) *Appellees.* Two or more appellees whose interests are such as to make their joinder on appeal practicable may, by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties, so join.

(c) *Procedure after Joinder.* After joinder, the parties proceed as a single appellant or appellee. Filing and service of papers by and upon joint appellants or appellees is as provided by Rule 26(e).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

RULE 6
SECURITY FOR COSTS ON APPEAL

(a) *In Regular Course.* Except in pauper appeals an appellant in a civil action must provide adequate security for the costs of appeal in accordance with the provisions of G.S. 1-285 and 1-286.

(b) *In Forma Pauperis Appeals.* An appellant in a civil action may be allowed to prosecute an appeal in forma pauperis without providing security for costs in accordance with the provisions of G.S. 1-288.

(c) *Filed with Record on Appeal.* When security for costs is required, the appellant shall file with the record on appeal a certified copy of the appeal bond or a cash deposit made in lieu of bond.

(d) *Dismissal for Failure to File or Defect in Security.* For failure of the appellant to provide security as required by subdivision (a) or to file evidence thereof as required by subdivision (c), or for a substantial defect or irregularity in any security provided, the appeal may on motion of an appellee be dismissed by the appellate court where docketed, unless for good cause shown the court permits the security to be provided or the filing to be made out of time, or the defect or irregularity to be corrected. A motion to dismiss on these grounds shall be made and determined in accordance with Rule 37 of these rules. When the motion to dismiss is made on the grounds of a defect or irregularity, the appellant may as a matter of right correct the defect or irregularity by filing a proper bond or making proper deposit with the clerk of the appellate court within 10 days after service of the motion upon him or before the case is called for argument, whichever first occurs.

(e) *No Security for Costs in Criminal Appeals.* Pursuant to G.S. 15A-1449, no security for costs is required upon appeal of criminal cases to the appellate division.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 27 November 1984—6(e)—effective 1 February 1985;
6 July 1990—6(c)—effective 1 October 1990.

RULE 7
PREPARATION OF THE TRANSCRIPT; COURT REPORTER'S DUTIES

(a) *Ordering the Transcript.*

(1) *Civil Cases.* Within 14 days after filing the notice of appeal the appellant shall arrange for the transcription of the proceedings or of such parts of the proceedings not already on file, as the appellant deems necessary, in accordance with these rules, and shall provide the following information in writing: a designation of the parts of the proceedings to be transcribed; the name and address of the court reporter or other neutral person designated to prepare the transcript; and, where portions of the proceedings have been designated to be transcribed, a statement of the issues the appellant intends to raise on appeal. The appellant shall file the written documentation of this transcript arrangement with the clerk of the trial tribunal, and serve a copy of it upon all other parties of record, and upon the person designated to prepare the transcript. If the appellant intends to urge on appeal that a finding or conclusion of the trial court is unsupported by the evidence or is contrary to the evidence, the appellant shall file with the record on appeal a transcript of all evidence relevant to such finding or conclusion. If an appellee deems a transcript of other parts of the proceedings to be necessary, the appellee, within 14 days after the service of the written documentation of the appellant, shall arrange for the transcription of any additional parts of the proceedings or such parts of the proceedings not already on file, in accordance with these rules. The appellee shall file with the clerk of the trial tribunal, and serve on all other parties of record, written documentation of the additional parts of the proceedings to be transcribed; and the name and address of the court reporter or other neutral person designated to prepare the transcript.

(2) *Criminal Cases.* In criminal cases where there is no order establishing the indigency of the defendant for the appeal, the defendant shall arrange for the transcription of the proceedings as in civil cases.

Where there is an order establishing the indigency of the defendant, unless the trial judge's appeal entries spec-

ify or the parties stipulate that parts of the proceedings need not be transcribed, the clerk of the trial tribunal shall order a transcript of the proceedings by serving the following documents upon either the court reporter(s) or neutral person designated to prepare the transcript: a copy of the appeal entries signed by the judge; a copy of the trial court's order establishing indigency for the appeal; and a statement setting out the number of copies of the transcript required and the name, address and telephone number of appellant's counsel. The clerk shall make an entry of record reflecting the date these documents were served upon the court reporter(s) or transcriptionist.

(b) *Production and Delivery of Transcript.*

(1) In civil cases: from the date the requesting party serves the written documentation of the transcript arrangement on the person designated to prepare the transcript, that person shall have 60 days to prepare and deliver the transcript.

In criminal cases where there is no order establishing the indigency of the defendant for the appeal: from the date the requesting party serves the written documentation of the transcript arrangement upon the person designated to prepare the transcript, that person shall have 60 days to produce and deliver the transcript in non-capital cases and 120 days to produce and deliver the transcript in capitally tried cases.

In criminal cases where there is an order establishing the indigency of the defendant for the appeal: from the date the clerk of the trial court serves the order upon the person designated to prepare the transcript, that person shall have 60 days to procure and deliver the transcript in non-capital cases and 120 days to produce and deliver the transcript in capitally tried cases.

The transcript format shall comply with Appendix B of these Rules.

Except in capitally tried criminal cases which result in the imposition of a sentence of death, the trial tribunal, in its discretion, and for good cause shown by the appellant may extend the time to produce the transcript for an additional 30 days. Any subsequent motions for addi-

tional time required to produce the transcript may only be made to the appellate court to which appeal has been taken. All motions for extension of time to produce the transcript in capitally tried cases resulting in the imposition of a sentence of death, shall be made directly to the Supreme Court by the appellant. Where the clerk's order of transcript is accompanied by the trial court's order establishing the indigency of the appellant and directing the transcript to be prepared at State expense, the time for production of the transcript commences seven days after the filing of the clerk's order of transcript.

(2) The court reporter, or person designated to prepare the transcript, shall deliver the completed transcript to the parties, as ordered, within the time provided by this rule, unless an extension of time has been granted under Rule 7(b)(1) or Rule 27(c). The court reporter or transcriptionist shall certify to the clerk of the trial tribunal that the parties' copies have been so delivered, and shall send a copy of such certification to the appellate court to which the appeal is taken. The appealing party shall retain custody of the original transcript and shall transmit the original transcript to the appellate court upon settlement of the record on appeal.

(3) The neutral person designated to prepare the transcript shall not be a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or be financially interested in the action unless the parties agree otherwise by stipulation.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
REPEALED: 1 July 1978.
(See note following Rule 17.)
Re-adopted: 8 December 1988—effective for all judgments of the trial tribunal entered on or after 1 July 1989.
Amended: 8 June 1989—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
26 July 1990—7(a)(1), (a)(2), and (b)(1)—effective 1 October 1990;
21 November 1997—effective 1 February 1998;
8 April 1999—7(b)(1), para. 5;
18 October 2001— 7(b)(1), para. 4—effective 31 October 2001.

RULE 8
STAY PENDING APPEAL

(a) *Stay in Civil Cases.* When appeal is taken in a civil action from a judgment, order, or other determination of a trial court, stay of execution or enforcement thereof pending disposition of the appeal must ordinarily first be sought by the deposit of security with the clerk of the superior court in those cases for which provision is made by law for the entry of stays upon deposit of adequate security, or by application to the trial court for a stay order in all other cases. After a stay order or entry has been denied or vacated by a trial court, an appellant may apply to the appropriate appellate court for a writ of supersedeas in accordance with Rule 23. In any appeal which is allowed by law to be taken from an agency to the appellate division, application for the Writ of Supersedeas may be made to the appellate court in the first instance. Application for the writ of supersedeas may similarly be made to the appellate court in the first instance when extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial court for a stay order.

(b) *Stay in Criminal Cases.* When a defendant has given notice of appeal, those portions of criminal sentences which impose fines or costs are automatically stayed pursuant to the provisions of G.S. 15A-1451. Stays of imprisonment or of the execution of death sentences must be pursued under G.S. 15A-536 or Appellate Rule 23, Writ of Supersedeas.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 27 November 1984—8(b)—effective 1 February 1985;
6 March 1997—8(a)—effective 1 July 1997.

RULE 9
THE RECORD ON APPEAL

(a) *Function; Composition of Record.* In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal and the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule 9.

(1) *Composition of the Record in Civil Actions and Special Proceedings.* The record on appeal in civil actions and special proceedings shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or a statement showing same;

d. copies of the pleadings, and of any pre-trial order on which the case or any part thereof was tried;

e. so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

g. copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law;

h. a copy of the judgment, order, or other determination from which appeal is taken;

i. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

j. copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2);

k. assignments of error set out in the manner provided in Rule 10;

l. a statement, where appropriate, that the record of proceeding was made with an electronic recording device.

(2) *Composition of the Record in Appeals from Superior Court Review of Administrative Boards and Agencies.* The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, other than those specified in Rule 18(a), shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons, notice of hearing or other papers showing jurisdiction of the board or agency over the persons or property sought to be bound in the proceeding, or a statement showing same;

d. copies of all petitions and other pleadings filed in the superior court;

e. copies of all items properly before the superior court as are necessary for an understanding of all errors assigned;

f. a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken;

g. a copy of the notice of appeal from the superior court, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (3); and

h. assignments of error to the actions of the superior court, set out in the manner provided in Rule 10.

(3) *Composition of the Record in Criminal Actions.* The record on appeal in criminal actions shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court;

d. copies of docket entries or a statement showing all arraignments and pleas;

e. so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement that the entire verbatim transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

g. copies of the verdict and of the judgment, order, or other determination from which appeal is taken; and in capitally tried cases, a copy of the jury verdict sheet for sentencing, showing the aggravating and mitigating circumstances submitted and found or not found;

h. a copy of the notice of appeal or an appropriate entry or statement showing appeal taken orally; of all orders establishing time limits relative to the perfecting of the appeal; of any order finding defendant indigent for the purposes of the appeal and assigning counsel; and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is to be filed pursuant to Rule 9(c)(2);

i. copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all errors assigned, unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2);

j. assignments of error set out in the manner provided in Rule 10; and

k. a statement, where appropriate, that the record of proceedings was made with an electronic recording device.

(b) *Form of Record; Amendments.* The record on appeal shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(1) *Order of Arrangement.* The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(2) *Inclusion of Unnecessary Matter; Penalty.* It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the errors assigned. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(3) *Filing Dates and Signatures on Papers.* Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other determination shall show the date on which it was entered. The typed or printed name of the person signing a paper shall be entered immediately below the signature.

(4) *Pagination; Counsel Identified.* The pages of the record on appeal shall be numbered consecutively, be referred to as "record pages" and be cited as "(R. p. ____)." Pages of the verbatim transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and cited as "(T. p. _____)." At the end of the record on appeal shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal.

(5) *Additions and Amendments to Record on Appeal.* On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the filing of the record on appeal in the appellate

court, such motions may be made by any party to the trial tribunal.

(c) *Presentation of Testimonial Evidence and Other Proceedings.* Testimonial evidence, voir dire, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the record on appeal in the form specified in Rule 9(c)(1) or by designating the verbatim transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (c)(3). Where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the record on appeal.

(1) *When Testimonial Evidence Narrated—How Set Out in Record.* Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence required to be included in the record on appeal by Rule 9(a) shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Counsel are expected to seek that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. To this end, counsel may object to particular narration that it does not accurately reflect the true sense of testimony received; or to particular question and answer portions that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, he shall settle the form in the course of his general settlement of the record on appeal.

(2) *Designation that Verbatim Transcript of Proceedings in Trial Tribunal Will Be Used.* Appellant may designate in the record that the testimonial evidence will be presented in the verbatim transcript of the evidence in the trial tribunal in lieu of narrating the evidence as permitted by Rule 9(c)(1). Appellant may also designate that the verbatim transcript will be used to present voir dire or other trial proceedings where those proceedings are the basis

for one or more assignments of error and where a verbatim transcript of those proceedings has been made. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the verbatim transcript which has been made, provided that when the verbatim transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all errors assigned. When appellant has narrated the evidence and trial proceedings under Rule 9(c)(1), the appellee may designate the verbatim transcript as a proposed alternative record on appeal.

(3) *Verbatim Transcript of Proceedings—Settlement, Filing, Copies, Briefs.* Whenever a verbatim transcript is designated to be used pursuant to Rule 9(c)(2):

a. it shall be settled, together with the record on appeal, according to the procedures established by Rule 11;

b. appellant shall cause the settled, verbatim transcript to be filed, contemporaneously with the record on appeal, with the clerk of the appellate court in which the appeal is docketed;

c. in criminal appeals, the district attorney, upon settlement of the record, shall forward one copy of the settled transcript to the Attorney General of North Carolina; and

d. the briefs of the parties must comport with the requirements of Rule 28 regarding complete statement of the facts of the case and regarding appendixes to the briefs.

(4) *Presentation of Discovery Materials.* Discovery materials offered into evidence at trial shall be brought forward, if relevant, as other evidence. In all instances where discovery materials are considered by the trial tribunal, other than as evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: Depositions shall be treated as testimonial evidence and shall be presented by narration or by transcript of the deposition in the manner prescribed by this Rule 9(c). Other discovery materials, including interrogatories and answers, requests for admission, responses to requests, motions to produce, and the like,

pertinent to questions raised on appeal, may be set out in the record on appeal or may be sent up as documentary exhibits in accordance with Rule 9(d)(2).

(5) *Electronic Recordings.* When a narrative or transcript has been prepared from an electronic recording, the parties shall not file a copy of the electronic recording with the appellate division except at the direction or with the approval of the appellate court.

(d) *Models, Diagrams, and Exhibits of Material.*

(1) *Exhibits.* Maps, plats, diagrams and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. Where such exhibits are not necessary to an understanding of the errors assigned, they may by agreement of counsel or by order of the trial court upon motion be excluded from the record on appeal.

(2) *Transmitting Exhibits.* Three legible copies of each documentary exhibit offered in evidence and required for understanding of errors assigned shall be filed in the appellate court; the original documentary exhibit need not be filed with the appellate court. When an original nondocumentary exhibit has been settled as a necessary part of the record on appeal, any party may within 10 days after settlement of the record on appeal in writing request the clerk of superior court to transmit the exhibit directly to the clerk of the appellate court. The clerk shall thereupon promptly identify and transmit the exhibit as directed by the party. Upon receipt of the exhibit, the clerk of the appellate court shall make prompt written acknowledgment thereof to the transmitting clerk and the exhibit shall be included as part of the records in the appellate court. Portions of the record on appeal in either appellate court which are not suitable for reproduction may be designated by the Clerk of the Supreme Court to be exhibits. Counsel may then be required to submit three additional copies of those designated materials.

(3) *Removal of Exhibits from Appellate Court.* All models, diagrams, and exhibits of material placed in the custody of the Clerk of the appellate court must be taken away by the parties within 90 days after the mandate of the Court has issued or the case has otherwise been closed by with-

drawal, dismissal, or other order of the Court, unless notified otherwise by the Clerk. When this is not done, the Clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the Clerk shall destroy them, or make such other disposition of them as to him may seem best.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 10 June 1981—9(c)(1)—applicable to all appeals docketed on or after 1 October 1981;
12 January 1982—9(c)(1)—applicable to all appeals docketed after 15 March 1982;
27 November 1984—applicable to all appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—9(a), (c)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
8 June 1989—9(a)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
26 July 1990—9(a)(3)(h), 9(d)(2)—effective 1 October 1990;
6 March 1997—9(b)(5)—effective upon adoption 6 March 1997;
21 November 1997—9(a)(1)(j)-(l), 9(a)(3)(i)-(k), 9(c)(5)—effective 1 February 1998;
18 October 2001—9(d)(2)—effective 31 October 2001.

RULE 10
ASSIGNING ERROR ON APPEAL

(a) *Function in Limiting Scope of Review.* Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly making them the basis of assignments of error, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law.

(b) *Preserving Questions for Appellate Review.*

(1) *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. Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.

(2) *Jury Instructions; Findings and Conclusions of Judge.* A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

(3) *Sufficiency of the Evidence.* A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action or judgment as in case of nonsuit at the conclusion of all the evidence, irrespective of whether he made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of his motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action or for judgment as in case of nonsuit at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

If a defendant's motion to dismiss the action or for judgment as in case of nonsuit is allowed, or shall be sustained on appeal, it shall have the force and effect of a verdict of "not guilty" as to such defendant.

(c) *Assignments of Error.*

(1) *Form; Record References.* A listing of the assignments of error upon which an appeal is predicated shall be stated at the conclusion of the record on appeal, in short form without argument, and shall be separately numbered. Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references. Questions made as to several issues or findings relating to one ground of recovery or defense may be combined in one assignment of error, if separate record or transcript references are made.

(2) *Jury Instructions.* Where a question concerns instructions given to the jury, the party shall identify the specific portion of the jury charge in question by setting it within brackets or by any other clear means of reference in the record on appeal. A question of the failure to give particular instructions to the jury, or to make a particular finding of fact or conclusion of law which finding or conclusion was not specifically requested of the trial judge, shall identify the omitted instruction, finding or conclusion by setting out its substance in the record on appeal immediately following the instructions given, or findings or conclusions made.

(3) *Sufficiency of Evidence.* In civil cases, questions that the evidence is legally or factually insufficient to support a particular issue or finding, and challenges directed against any conclusions of law of the trial court based upon such issues or findings, may be combined under a single assignment of error raising both contentions if the record references and the argument under the point sufficiently direct the court's attention to the nature of the question made regarding each such issue or finding or legal conclusion based thereon.

(4) *Assigning Plain Error.* In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

(d) *Cross-Assignments of Error by Appellee.* Without taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Portions of the record or transcript of proceedings necessary to an understanding of such cross-assignments of error may be included in the record on appeal by agreement of the parties under Rule 11(a), may be included by the appellee in a proposed alternative record on appeal under Rule 11(b), or may be designated for inclusion in the verbatim transcript of proceedings, if one is filed under Rule 9(c)(2).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 10 June 1981—10(b)(2), applicable to every case the trial of which begins on or after 1 October 1981;
7 July 1983—10(b)(3);
27 November 1984—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—effective for all judgments of the trial tribunal entered on or after 1 July 1989.

RULE 11
SETTLING THE RECORD ON APPEAL

(a) *By Agreement.* Within 35 days after the reporter's or transcriptionist's certification of delivery of the transcript, if such was ordered (70 days in capitally tried cases), or 35 days after filing of the notice of appeal if no transcript was ordered, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

(b) *By Appellee's Approval of Appellant's Proposed Record on Appeal.* If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in

accordance with the provisions of Rule 9. Within 21 days (35 days in capitally tried cases) after service of the proposed record on appeal upon him an appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appear in accordance with Rule 11(c). If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) *By Judicial Order or Appellant's Failure to Request Judicial Settlement.* Within 21 days (35 days in capitally tried cases) after service upon him of appellant's proposed record on appeal, an appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have served, may in writing request the judge from whose judgment, order, or other determination appeal was taken to settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court, and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case. If only one appellee or only one set of appellees proceeding jointly have so served, and no other party makes timely request for judicial settlement, the record on appeal is thereupon settled in accordance with the appellee's objections, amendments or proposed alternative record on appeal. If more than one appellee proceeding separately have so served, failure of the appellant to make timely request for judicial settlement results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than 15 days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than 20 days after service of the request for hearing upon the judge. If requested, the judge shall return the record items submitted for reference during the judicial settle-

ment process with the order settling the record on appeal. Provided, that nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) *Multiple Appellants; Single Record on Appeal.* When there are multiple appellants (2 or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal, and the appellants shall attempt to agree to the procedure for constituting a proposed record on appeal. The assignments of error of the several appellants shall be set out separately in the single record on appeal and related to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) [Reserved.]

(f) *Extensions of Time.* The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 27 November 1984—11(a), (c), (e), (f)—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985.

8 December 1988—11(a), (b), (c), (e), (f)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;

26 July 1990—11(b), (c), (d)—effective 1 October 1990;

6 March 1997—11(c)—effective upon adoption 6 March 1997;

21 November 1997—11(a)—effective 1 February 1998.

RULE 12
FILING THE RECORD; DOCKETING THE APPEAL; COPIES OF THE RECORD

(a) *Time for Filing Record on Appeal.* Within 15 days after the record on appeal has been settled by any of the procedures provided in this Rule 11 or Rule 18, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

(b) *Docketing the Appeal.* At the time of filing the record on appeal, the appellant shall pay to the clerk the docket fee fixed pursuant to G.S. 7A-20(b), and the clerk shall thereupon enter the appeal upon the docket of the appellate court. If an appellant is authorized to appeal in forma pauperis as provided in G.S. 1-288 or 7A-450 et seq., the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed in the appellate court.

(c) *Copies of Record on Appeal.* The appellant need file but a single copy of the record on appeal. Upon filing, the appellant may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the costs of reproducing copies of the record on appeal. The clerk will reproduce and distribute copies as directed by the court.

In civil appeals in forma pauperis the appellant need not pay a deposit for reproducing copies, but at the time of filing the original record on appeal shall also deliver to the clerk two legible copies thereof.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 27 November 1984—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—12(a), (c)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
6 March 1997—12(c)—effective upon adoption 6 March 1997.

RULE 13
FILING AND SERVICE OF BRIEFS

(a) *Time for Filing and Service of Briefs.*

(1) *Cases Other Than Death Penalty Cases.* Within 30 days after the clerk of the appellate court has mailed the printed record to the parties, the appellant shall file his brief in the office of the clerk of the appellate court, and serve copies thereof upon all other parties separately represented. In civil appeals in forma pauperis, no printed record is created; accordingly, appellant's 30 days for filing and serving the brief shall run from the date of dock-

eting the record on appeal in the appellate court. Within 30 days after appellant's brief has been served on an appellee, the appellee shall similarly file and serve copies of his brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief within 14 days after service of the brief of the appellee.

(2) *Death Penalty Cases.* Within 60 days after the Clerk of the Supreme Court has mailed the printed record to the parties, the defendant-appellant in a criminal appeal which includes a sentence of death shall file his brief in the office of the Clerk and serve copies thereof upon all other parties separately represented. Within 60 days after appellant's brief has been served, the State-appellee shall similarly file and serve copies of its brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief within 21 days after service of the brief of the State-appellee.

(b) *Copies Reproduced by Clerk.* A party need file but a single copy of his brief. At the time of filing the party may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the cost of reproducing copies of the brief. The clerk will reproduce and distribute copies of briefs as directed by the court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original brief shall also deliver to the clerk two legible photocopies thereof.

(c) *Consequence of Failure to File and Serve Briefs.* If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the court.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 7 October 1980—13(a)—effective 1 January 1981;
27 November 1984—13(a), (b)—effective 1 February 1985;
30 June 1988—13(a)—effective 1 September 1988;
8 June 1989—13(a)—effective 1 September 1989.

ARTICLE III
REVIEW BY SUPREME COURT OF APPEALS ORIGINALLY DOCKETED IN COURT OF APPEALS: APPEALS OF RIGHT; DISCRETIONARY REVIEW

RULE 14
APPEALS OF RIGHT FROM COURT OF APPEALS TO SUPREME COURT UNDER G.S. 7A-30

(a) *Notice of Appeal; Filing and Service.* Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices of appeal with the Clerk of the Court of Appeals and with the Clerk of the Supreme Court and serving notice of appeal upon all other parties within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. For cases which arise from the Industrial Commission, a copy of the notice of appeal shall be served on the Chairman of the Industrial Commission. The running of the time for filing and serving a notice of appeal is tolled as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for appeal thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days after the first notice of appeal was filed. A petition prepared in accordance with Rule 15(c) for discretionary review in the event the appeal is determined not to be of right or for issues in addition to those set out as the basis for a dissenting opinion may be filed with or contained in the notice of appeal.

(b) *Content of Notice of Appeal.*

(1) *Appeal Based Upon Dissent in Court of Appeals.* In an appeal which is based upon the existence of a dissenting opinion in the Court of Appeals the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the basis upon which it is asserted that appeal lies of right under G.S. 7A-30; and shall state the issue or issues which are the basis of the dissenting opinion and which are to be presented to the Supreme Court for review.

(2) *Appeal Presenting Constitutional Question.* In an appeal which is asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from

which the appeal is taken; shall state the issue or issues which are the basis of the constitutional claim and which are to be presented to the Supreme Court for review; shall specify the articles and sections of the Constitution asserted to be involved; shall state with particularity how appellant's rights thereunder have been violated; and shall affirmatively state that the constitutional issue was timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not) and either not determined or determined erroneously.

(c) *Record on Appeal.*

(1) *Composition.* The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) *Transmission; Docketing; Copies.* Upon the filing of a notice of appeal, the Clerk of the Court of Appeals will forthwith transmit the original record on appeal to the Clerk of the Supreme Court, who shall thereupon file the record and docket the appeal. The Clerk of the Supreme Court will procure or reproduce copies of the record on appeal for distribution as directed by the Court, and may require a deposit from appellant to cover the cost of reproduction. In appeals in forma pauperis, the Clerk of the Court of Appeals will transmit with the original record on appeal the copies filed by the appellant in that Court under Rule 12(c).

(d) *Briefs.*

(1) *Filing and Service; Copies.* Within 30 days after filing notice of appeal in the Supreme Court, the appellant shall file with the Clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those questions upon which review by the Supreme Court is sought; provided, however, that when the appeal is based upon the existence of a substantial constitutional question or when the appellant has filed a petition for discretionary review for issues in addition to those set out as the basis of a dissent in the Court of Appeals, the appellant shall

file and serve a new brief within 30 days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist or allows or denies the petition for discretionary review in an appeal based upon a dissent. Within 30 days after service of the appellant's brief upon him, the appellee shall similarly file and serve copies of a new brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief within 14 days after service of the brief of the appellee.

The parties need file but single copies of their respective briefs. At the time of filing a brief, the party may be required to pay to the Clerk a deposit fixed by the Clerk to cover the cost of reproducing copies of the brief. The Clerk will reproduce and distribute copies as directed by the Court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the Clerk two legible copies thereof.

(2) *Failure to File or Serve.* If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the Court.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 31 January 1977—14(d)(1);
7 October 1980—14(d)(1)—effective 1 January 1981;
27 November 1984—14(a), (b), (d)—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;
30 June 1988—14(b)(2), (d)(1)—effective 1 September 1988;
8 June 1989—14(d)(1)—effective 1 September 1989;
6 March 1997—14(a)—effective 1 July 1997.

RULE 15
DISCRETIONARY REVIEW ON CERTIFICATION BY SUPREME COURT UNDER G.S. 7A-31

(a) *Petition of Party.* Either prior to or following determination by the Court of Appeals of an appeal docketed in that court, any party to the appeal may in writing petition the Supreme Court upon any grounds specified in G.S. 7A-31 to certify the cause for discretionary review by the Supreme Court; except that a petition for discretionary review of an appeal from the Industrial Commission, the North Carolina State Bar, the Property Tax Commission, the Board of State Contract Appeals, or the Commissioner of Insurance may only be made following determination by the Court of Appeals; and except that no petition for discretionary review may be filed in any post-conviction proceeding under G.S. Chap. 15A, Art. 89, or in valuation of exempt property under G.S. Chap.

(b) *Same; Filing and Service.* A petition for review prior to determination by the Court of Appeals shall be filed with the Clerk of the Supreme Court and served on all other parties within 15 days after the appeal is docketed in the Court of Appeals. For cases which arise from the Industrial Commission, a copy of the petition shall be served on the Chairman of the Industrial Commission. A petition for review following determination by the Court of Appeals shall be similarly filed and served within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely petition for review is filed by a party, any other party may file a petition for review within 10 days after the first petition for review was filed.

(c) *Same; Content.* The petition shall designate the petitioner or petitioners and shall set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under G.S. 7A-31 for discretionary review. The petition shall state each question for which review is sought, and shall be accompanied by a copy of the opinion of the Court of Appeals when filed after determination by

that court. No supporting brief is required; but supporting authorities may be set forth briefly in the petition.

(d) *Response.* A response to the petition may be filed by any other party within 10 days after service of the petition upon him. No supporting brief is required, but supporting authorities may be set forth briefly in the response. If, in the event that the Supreme Court certifies the case for review, the respondent would seek to present questions in addition to those presented by the petitioner, those additional questions shall be stated in the response. A motion for extension of time is not permitted.

(e) *Certification by Supreme Court; How Determined and Ordered.*

(1) *On Petition of a Party.* The determination by the Supreme Court whether to certify for review upon petition of a party is made solely upon the petition and any response thereto and without oral argument.

(2) *On Initiative of the Court.* The determination by the Supreme Court whether to certify for review upon its own initiative pursuant to G.S. 7A-31 is made without prior notice to the parties and without oral argument.

(3) *Orders; Filing and Service.* Any determination to certify for review and any determination not to certify made in response to petition will be recorded by the Supreme Court in a written order. The Clerk of the Supreme Court will forthwith enter such order, deliver a copy thereof to the Clerk of the Court of Appeals, and mail copies to all parties. The cause is docketed in the Supreme Court upon entry of an order of certification by the Clerk of the Supreme Court.

(f) *Record on Appeal.*

(1) *Composition.* The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) *Filing; Copies.* When an order of certification is filed with the Clerk of the Court of Appeals, he will forthwith transmit the original record on appeal to the Clerk of the

Supreme Court. The Clerk of the Supreme Court will procure or reproduce copies thereof for distribution as directed by the Court. If it is necessary to reproduce copies, the Clerk may require a deposit of the petitioner to cover the costs thereof.

(g) *Filing and Service of Briefs.*

(1) *Cases Certified Before Determination by Court of Appeals.* When a case is certified for review by the Supreme Court before being determined by the Court of Appeals, the times allowed the parties by Rule 13 to file their respective briefs are not thereby extended. If a party has filed his brief in the Court of Appeals and served copies before the case is certified, the Clerk of the Court of Appeals shall forthwith transmit to the Clerk of the Supreme Court the original brief and any copies already reproduced by him for distribution, and if filing was timely in the Court of Appeals this constitutes timely filing in the Supreme Court. If a party has not filed his brief in the Court of Appeals and served copies before the case is certified, he shall file his brief in the Supreme Court and serve copies within the time allowed and in the manner provided by Rule 13 for filing and serving in the Court of Appeals.

(2) *Cases Certified for Review of Court of Appeals Determinations.* When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared in conformity with Rule 28 in the Supreme Court and serve copies upon all other parties within 30 days after the case is docketed in the Supreme Court by entry of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within 30 days after a copy of appellant's brief is served upon him. If permitted by Rule 28(h), the appellant may serve and file a reply brief within 14 days after service of the brief of the appellee.

(3) *Copies.* A party need file or the Clerk of the Court of Appeals transmit, but a single copy of any brief required by this Rule 15 to be filed in the Supreme Court upon certification for discretionary review. The Clerk of the Supreme Court will thereupon procure from the Court of

Appeals or will himself reproduce copies for distribution as directed by the Supreme Court. The Clerk may require a deposit of any party to cover the costs of reproducing copies of his brief.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(4) *Failure to File or Serve.* If an appellant fails to file and serve his brief within the time allowed by this Rule 15, the appeal may be dismissed on motion of an appellee or upon the Court's own initiative. If an appellee fails to file and serve his brief within the time allowed by this Rule 15, he may not be heard in oral argument except by permission of the Court.

(h) *Discretionary Review of Interlocutory Orders.* An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will be certified for review by the Supreme Court only upon a determination by the Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

(i) *Appellant, Appellee Defined.* As used in this Rule 15, the terms "appellant" and "appellee" have the following meanings:

(1) With respect to the Supreme Court review prior to determination by the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means a party who appealed from the trial tribunal; "appellee," a party who did not appeal from the trial tribunal.

(2) With respect to Supreme Court review of a determination of the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means the party aggrieved by the determination of the Court of Appeals; "appellee," the opposing party. Provided, that in its order of certification, the Supreme Court may designate either party appellant or appellee for purposes of proceeding under this Rule 15.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 7 October 1980—15(g)(2)—effective 1 January 1981;
18 November 1981—15(a).
30 June 1988—15(a), (c), (d), (g)(2)—effective 1 September 1988;
8 December 1988—15(i)(2)—effective 1 January 1989;
8 June 1989—15(g)(2)—effective 1 September 1989;
6 March 1997—15(b)—effective 1 July 1997;
18 October 2001—15(d)—effective 31 October 2001.

RULE 16
SCOPE OF REVIEW OF DECISIONS OF COURT OF APPEALS

(a) *How Determined.* Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Except where the appeal is based solely upon the existence of a dissent in the Court of Appeals, review in the Supreme Court is limited to consideration of the questions stated in the notice of appeal filed pursuant to Rule 14(b)(2) or the petition for discretionary review and the response thereto filed pursuant to Rule 15(c) and (d), unless further limited by the Supreme Court, and properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court.

(b) *Scope of Review in Appeal Based Solely Upon Dissent.* Where the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those questions which are (1) specifically set out in the dissenting opinion as the basis for that dissent, (2) stated in the notice of appeal, and (3) properly presented in the new briefs required by Rule 14(d)(1) to be filed in the Supreme Court. Other questions in the case may properly be presented to the Supreme Court through a petition for discretionary review, pursuant to Rule 15, or by petition for writ of certiorari, pursuant to Rule 21.

(c) *Appellant, Appellee Defined.* As used in this Rule 16, the terms "appellant" and "appellee" have the following meanings when applied to discretionary review:

(1) With respect to Supreme Court review of a determination of the Court of Appeals upon petition of a party, "appellant" means the petitioner, "appellee" means the respondent.

(2) With respect to Supreme Court review upon the Court's own initiative, "appellant" means the party aggrieved by the decision of the Court of Appeals; "appellee" means the opposing party. Provided that in its order of certification the Supreme Court may designate either party "appellant" or "appellee" for purposes of proceeding under this Rule 16.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 3 November 1983—16(a), (b)—applicable to all notices of appeal filed in the Supreme Court on and after 1 January 1984.
30 June 1988—16(a), (b)—effective 1 September 1988;
26 July 1990—16(a)—effective 1 October 1990.

RULE 17
APPEAL BOND IN APPEALS UNDER G.S. §§ 7A-30, 7A-31

(a) *Appeal of Right.* In all appeals of right from the Court of Appeals to the Supreme Court in civil cases, the party who takes appeal shall, upon filing the notice of appeal in the Supreme Court, file with the Clerk of that Court a written undertaking, with good and sufficient surety in the sum of $250, or deposit cash in lieu thereof, to the effect that he will pay all costs awarded against him on the appeal to the Supreme Court.

(b) *Discretionary Review of Court of Appeals Determination.* When the Supreme Court on petition of a party certifies a civil case for review of a determination of the Court of Appeals, the petitioner shall file an undertaking for costs in the form provided in subdivision (a). When the Supreme Court on its own initiative certifies a case for review of a determination of the Court of Appeals, no undertaking for costs shall be required of any party.

(c) *Discretionary Review by Supreme Court Before Court of Appeals Determination.* When a civil case is certified for review by the Supreme Court before being determined by the Court of Appeals, the undertaking on appeal initially filed in the Court of Appeals shall stand for the payment of all costs incurred in either the Court of Appeals or the Supreme Court and awarded against the party appealing.

(d) *Appeals in Forma Pauperis.* No undertakings for costs are required of a party appealing in forma pauperis.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 19 June 1978—effective 1 July 1978;
26 July 1990—17(a)—effective 1 October 1990.

Note to 1 July 1978 Amendment:

Repeal of Rule 7 and limiting Rule 17's application to civil cases are to conform the Rules of Appellate Procedure to Chap. 711, 1977 Session Laws, particularly that portion of Chap. 711 codified as G.S. 15A-1449 which provides, "In criminal cases no security for costs is required upon appeal to the appellate division." Section 33 of Chap. 711 repealed, among other statutes, G.S. 15-180 and 15-181 upon which Rule 7 was based. Chap. 711 becomes effective 1 July 1978. While G.S. 15A-1449, strictly construed, does not apply to cost bonds in appeals from or petitions for further review of decisions of the Court of Appeals, the Supreme Court believes the legislature intended to eliminate the giving of security for costs in criminal cases on appeal or on petition to the Supreme Court from the Court of Appeals. The Court has, therefore, amended Rule 17 to comply with what it believes to be the legislative intent in this area.

ARTICLE IV
DIRECT APPEALS FROM ADMINISTRATIVE AGENCIES TO APPELLATE DIVISION

RULE 18
TAKING APPEAL; RECORD ON APPEAL—COMPOSITION AND SETTLEMENT

(a) *General.* Appeals of right from administrative agencies, boards, or commissions (hereinafter "agency") directly to the appellate division under G.S. 7A-29 shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as hereinafter provided in this Article.

(b) *Time and Method for Taking Appeals.*

(1) The times and methods for taking appeals from an agency shall be as provided in this Rule 18 unless the statutes governing the agency provide otherwise, in which case those statutes shall control.

(2) Any party to the proceeding may appeal from a final agency determination to the appropriate court of the appellate division for alleged errors of law by filing and serving a notice of appeal within 30 days after receipt of

a copy of the final order of the agency. The final order of the agency is to be sent to the parties by Registered or Certified Mail. The notice of appeal shall specify the party or parties taking the appeal; shall designate the final agency determination from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(3) If a transcript of fact-finding proceedings is not made by the agency as part of the process leading up to the final agency determination, the appealing party may contract with the reporter for production of such parts of the proceedings not already on file as he deems necessary, pursuant to the procedures prescribed in Rule 7.

(c) *Composition of Record on Appeal.* The record on appeal in appeals from any agency shall contain:

(1) an index of the contents of the record, which shall appear as the first page thereof;

(2) a statement identifying the commission or agency from whose judgment, order or opinion appeal is taken, the session at which the judgment, order or opinion was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

(3) a copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the agency over persons or property sought to be bound in the proceeding, or a statement showing same;

(4) copies of all other notices, pleadings, petitions, or other papers required by law or rule of the agency, including a Form 44 for all cases which originate from the Industrial Commission, to be filed with the agency to present and define the matter for determination;

(5) a copy of any findings of fact and conclusions of law and a copy of the order, award, decision, or other determination of the agency from which appeal was taken;

(6) so much of the evidence taken before the agency or before any division, commissioner, deputy commissioner, or hearing officer of the agency, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that

the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2) and (3);

(7) where the agency has reviewed a record of proceedings before a division, or an individual commissioner, deputy commissioner, or hearing officer of the agency, copies of all items included in the record filed with the agency which are necessary for an understanding of all errors assigned;

(8) copies of all other papers filed and statements of all other proceedings had before the agency or any of its individual commissioners, deputies, or divisions which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed pursuant to Rule 9(c)(2) and (3);

(9) a copy of the notice of appeal from the agency, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

(10) assignments of error to the actions of the agency, set out as provided in Rule 10; and

(11) a statement, where appropriate, that the record of proceedings was made with an electronic recording device.

(d) *Settling the Record on Appeal.* The record on appeal may be settled by any of the following methods:

(1) *By Agreement.* Within 35 days after filing of the notice of appeal or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) *By Appellee's Approval of Appellant's Proposed Record on Appeal.* If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant shall, within 35 days after filing of the notice of appeal or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), file in the office of the agency head and serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule

18(c). Within 30 days after service of the proposed record on appeal upon him, an appellee may file in the office of the agency head and serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal. If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) *By Conference or Agency Order; Failure to Request Settlement.* If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the agency head to convene a conference to settle the record on appeal. A copy of that request, endorsed with a certificate showing service on the agency head, shall be served upon all other parties. Each party shall promptly provide to the agency head a reference copy of the record items, amendments, or objections served by that party in the case. If only one appellee or only one set of appellees proceeding jointly have so filed and no other party makes timely request for agency conference or settlement by order, the record on appeal is thereupon settled in accordance with the one appellee's, or one set of appellees', objections, amendments, or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for agency conference or for settlement by order results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

Upon receipt of a request for settlement of the record on appeal, the agency head shall send written notice to counsel for all parties setting a place and time for a conference to settle the record on appeal. The conference shall be held not later than 15 days after service of the request upon the agency head. The agency head or a delegate appointed in writing by the agency head shall settle the record on appeal by order entered not more than 20

days after service of the request for settlement upon the agency. If requested, the settling official shall return the record items submitted for reference during the settlement process with the order settling the record on appeal.

When the agency head is a party to the appeal, the agency head shall forthwith request the Chief Judge of the Court of Appeals or the Chief Justice of the Supreme Court, as appropriate, to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of these Rules and the appointing order.

Nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by agency order.

(e) *Further Procedures.* Further procedures for perfecting and prosecuting the appeal shall be as provided by these Rules for appeals from the courts of the trial divisions.

(f) *Extensions of Time.* The times provided in this Rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 21 June 1977;
7 October 1980—18(d)(3)—effective 1 January 1981;
27 February 1985—applicable to all appeals in which the notice of appeal is filed on or after 15 March 1985;
26 July 1990—18(b)(3), (d)(1), (d)(2)—effective 1 October 1990;
6 March 1997—18(c)(2), (c)(4)—effective 1 July 1997;
21 November 1997—18(c)(11)—effective 1 February 1998.

RULE 19
[RESERVED]

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 21 June 1977—19(d).
REPEALED: 27 February 1985—effective 15 March 1985.

RULE 20
MISCELLANEOUS PROVISIONS OF LAW GOVERNING IN AGENCY APPEALS

Specific provisions of law pertaining to stays pending appeals from any agency to the appellate division, to pauper appeals therein, and to the scope of review and permissible mandates of the Court of Appeals therein shall govern the procedure in such appeals notwithstanding any provisions of these rules which may prescribe a different procedure.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 27 February 1985—effective 15 March 1985.

ARTICLE V
EXTRAORDINARY WRITS

RULE 21
CERTIORARI

(a) *Scope of the Writ.*

(1) *Review of the Judgments and Orders of Trial Tribunals.* The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

(2) *Review of the Judgments and Orders of the Court of Appeals.* The writ of certiorari may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action; or for review of orders of the Court of Appeals when no right of appeal exists.

(b) *Petition for Writ; to Which Appellate Court Addressed.* Application for the writ of certiorari shall be made by filing a petition therefor with the clerk of the court of the appellate division to which

appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought.

(c) *Same; Filing and Service; Content.* The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. For cases which arise from the Industrial Commission, a copy of the petition shall be served on the Chairman of the Industrial Commission. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

(d) *Response; Determination by Court.* Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The Court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) *Petition for Writ in Post Conviction Matters; to Which Appellate Court Addressed.* 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.

(f) *Petition for Writ in Post Conviction Matters—Death Penalty Cases.* A petition for writ of certiorari to review orders of the trial court on motions for appropriate relief in death penalty cases shall be filed in the Supreme Court within 60 days after delivery of the transcript of the hearing on the motion for appropriate relief to the petitioning party. The responding party shall file its response within 30 days of service of the petition.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 18 November 1981—21(a), (e);
27 November 1984—21(a)—effective 1 February 1985;
3 September 1987—21(e)—effective for all judgments of the superior court entered on and after 24 July 1987;
8 December 1988—21(f)—applicable to all cases in which the superior court order is entered on or after 1 July 1989;
6 March 1997—21(c), (f)—effective 1 July 1997.

RULE 22
MANDAMUS AND PROHIBITION

(a) *Petition for Writ; to Which Appellate Court Addressed.* Applications for the writs of mandamus or prohibition directed to a judge, judges, commissioner, or commissioners shall be made by filing a petition therefor with the clerk of the court to which appeal of right might lie from a final judgment entered in the cause by the judge, judges, commissioner, or commissioners to whom issuance of the writ is sought.

(b) *Same; Filing and Service; Content.* The petition shall be filed without unreasonable delay after the judicial action sought to be prohibited or compelled has been undertaken, or has occurred, or has been refused, and shall be accompanied by proof of service on the respondent judge, judges, commissioner, or commissioners and on all other parties to the action. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and certified copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk shall docket the petition.

(c) *Response; Determination by Court.* Within 10 days after service upon him of the petition the respondent or any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The Court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

RULE 23
SUPERSEDEAS

(a) *Pending Review of Trial Tribunal Judgments and Orders.*

(1) *Application—When Appropriate.* Application may be made to the appropriate appellate court for a writ of supersedeas to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal which is not automatically stayed by the taking of appeal when an appeal has been taken or a petition for mandamus, prohibition, or certiorari has been filed to obtain review of the judgment, order, or other determination; and (i) a stay order or entry has been sought by the applicant by deposit of security or by motion in the trial tribunal and such order or entry has been denied or vacated by the trial tribunal, or (ii) extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial tribunal for a stay order.

(2) *Same—How and to Which Appellate Court Made.* Application for the writ is by petition which shall in all cases, except those initially docketed in the Supreme Court, be first made to the Court of Appeals. Except where an appeal from a superior court is initially docketed in the Supreme Court no petition will be entertained by the Supreme Court unless application has been first made to the Court of Appeals and by that court denied.

(b) *Pending Review by Supreme Court of Court of Appeals Decisions.* Application may be made in the first instance to the Supreme Court for a writ of supersedeas to stay the execution or enforcement of a judgment, order or other determination mandated by the Court of Appeals when a notice of appeal of right or a petition for discretionary review has been or will be timely filed, or a petition for review by certiorari, mandamus, or prohibition has been filed to obtain review of the decision of the Court of Appeals. No prior motion for a stay order need be made to the Court of Appeals.

(c) *Petition: Filing and Service; Content.* The petition shall be filed with the clerk of the court to which application is being made, and shall be accompanied by proof of service upon all other

parties. The petition shall be verified by counsel or the petitioner. Upon receipt of the required docket fee, the clerk will docket the petition.

For stays of the judgments of trial tribunals, the petition shall contain a statement that stay has been sought in the court to which issuance of the writ is sought and by that court denied or vacated, or of facts showing that it was impracticable there to seek a stay. For stays of any judgment, the petition shall contain: (1) a statement of any facts necessary to an understanding of the basis upon which the writ is sought; and (2) a statement of reasons why the writ should issue in justice to the applicant. The petition may be accompanied by affidavits and by any certified portions of the record pertinent to its consideration. It may be included in a petition for discretionary review by the Supreme Court under G.S. § 7A-31, or in a petition to either appellate court for certiorari, mandamus or prohibition.

(d) *Response; Determination by Court.* Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) *Temporary Stay.* Upon the filing of a petition for supersedeas, the applicant may apply, either within the petition or by separate paper, for an order temporarily staying enforcement or execution of the judgment, order, or other determination pending decision by the court upon the petition for supersedeas. If application is made by separate paper, it shall be filed and served in the manner provided for the petition for supersedeas in Rule 23(c). The court for good cause shown in such a petition for temporary stay may issue such an order ex parte. In capital cases, such stay, if granted, shall remain in effect until the period for filing a petition for certiorari in the United States Supreme Court has passed without a petition being filed, or until certiorari on a timely filed petition has been denied by that Court. At that time, the stay shall automatically dissolve.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 2 December 1980—23(b)—effective 1 January 1981;
6 March 1997—23(e)—effective 1 July 1997.

RULE 24
FORM OF PAPERS: COPIES

A party need file with the appellate court but a single copy of any paper required to be filed in connection with applications for extraordinary writs. The court may direct that additional copies be filed. The clerk will not reproduce copies.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

ARTICLE VI
GENERAL PROVISIONS

RULE 25
PENALTIES FOR FAILURE TO COMPLY WITH RULES

(a) *Failure of Appellant to Take Timely Action.* If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been filed in an appellate court motions to dismiss are made to that court. Motions to dismiss shall be supported by affidavits or certified copies of docket entries which show the failure to take timely action or otherwise perfect the appeal, and shall be allowed unless compliance or a waiver thereof is shown on the record, or unless the appellee shall consent to action out of time, or unless the court for good cause shall permit the action to be taken out of time.

Motions heard under this rule to courts of the trial divisions may be heard and determined by any judge of the particular court specified in Rule 36 of these rules; motions made under this rule to a commission may be heard and determined by the chairman of the commission; or if to a commissioner, then by that commissioner. The procedure in all motions made under this rule to trial tribunals shall be that provided for motion practice by the N.C. Rules of Civil Procedure; in all motions made under this rule to courts of the appellate division, shall be that provided by Rule 37 of these rules.

(b) *Sanctions for Failure to Comply with Rules.* A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to

comply with these appellate rules. The court may impose sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 8 December 1988—effective 1 July 1989;
6 March 1997—25(a)—effective upon adoption 6 March 1997.

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 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.

In all cases where a document has been filed by facsimile machine pursuant to this rule, counsel must forward the following items by first class mail, contemporaneously with the transmission: the original 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 elec-

tronic 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.

(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 is 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 service 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 pro-

ceeding 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 1/2 x 11") with the exception of wills and exhibits. All printed matter must appear in at least 12-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 10 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and text books cited, with references to the pages where they are cited.

The body of the document shall at its close bear the printed name, post office address, and telephone number of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record. 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.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 5 May 1981—26(g)—effective for all appeals arising from cases filed in the court of original jurisdiction after 1 July 1982;
11 February 1982—26(c);
7 December 1982—26(g)—effective for documents filed on and after 1 March 1983;
27 November 1984—26(a)—effective for documents filed on and after 1 February 1985;
30 June 1988—26(a), (g)—effective 1 September 1988;
26 July 1990—26(a)—effective 1 October 1990;
6 March 1997—26(b), (g)—effective 1 July 1997;

4 November 1999—effective 15 November 1999;
18 October 2001—26(g), para. 1—effective 31 October 2001.

RULE 27
COMPUTATION AND EXTENSION OF TIME

(a) *Computation of Time.* In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

(b) *Additional Time After Service by Mail.* Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

(c) *Extensions of Time; By Which Court Granted.* Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal or for filing a petition for discretionary review or a petition for rehearing or the responses thereto prescribed by these rules or by law.

(1) *Motions for Extension of Time in the Trial Division.* The trial tribunal for good cause shown by the appellant may extend once for no more than 30 days the time permitted by Rule 11 or Rule 18 for the service of the proposed record on appeal.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state.

Motions made under this Rule 27 to a court of the trial division may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chairman of the commission; or if to a commissioner, then by that commissioner.

(2) *Motions for Extension of Time in the Appellate Division.* All motions for extensions of time other than those specifically enumerated in Rule 27(c)(1) may only be made to the appellate court to which appeal has been taken.

(d) *Motions for Extension of Time; How Determined.* Motions for extension of time made in any court may be determined ex parte, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time. Provided that motions made after the expiration of the time allowed in these rules for the action sought to be extended must be in writing and with notice to all other parties and may be allowed only after all other parties have had opportunity to be heard.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 7 March 1978—27(c);
4 October 1978—27(c)—effective 1 January 1979;
27 November 1984—27(a), (c)—effective 1 February 1985;
8 December 1988—27(c)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
26 July 1990—27(c), (d)—effective 1 October 1990;
18 October 2001—27(c)—effective 31 October 2001.

RULE 28
BRIEFS: FUNCTION AND CONTENT

(a) *Function.* The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief are deemed abandoned. Similarly, questions properly presented for review in the Court of Appeals but not then stated in the notice of appeal or the petition, accepted by the Supreme Court for review, and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court are deemed abandoned.

(b) *Content of Appellant's Brief.* An appellant's brief in any appeal shall contain, under appropriate headings, and in the form pre-

scribed by Rule 26(g) and the Appendixes to these rules, in the following order:

(1) A cover page, followed by a subject index and table of authorities required by Rule 26(g).

(2) A statement of the questions presented for review.

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

(4) A statement of the grounds for appellate review. Such statement shall include citation of the statue or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

(5) A full and complete statement of the facts. This should be a nonargumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

(6) An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

The body of the argument shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the question presented may be narrated or quoted in the body of the argument,

with appropriate reference to the record on appeal or the transcript of proceedings, or the exhibits.

(7) A short conclusion stating the precise relief sought.

(8) Identification of counsel by signature, typed name, office address and telephone number.

(9) The proof of service required by Rule 26(d).

(10) The appendix required by Rule 28(d).

(c) *Content of Appellee's Brief; Presentation of Additional Questions.* An appellee's brief in any appeal shall contain a subject index and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix as may be required by Rule 28(d). It need contain no statement of the questions presented, statement of the procedural history of the case, statement of the grounds for appellate review, or statement of the facts, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present questions in addition to those stated by the appellant.

Without having taken appeal, an appellee may present for review, by stating them in his brief, any questions raised by cross-assignments of error under Rule 10(d). Without having taken appeal or made cross-assignments of error, an appellee may present the question, by statement and argument in his brief, whether a new trial should be granted to the appellee rather than a judgment n.o.v. awarded to the appellant when the latter relief is sought on appeal by the appellant.

If the appellee is entitled to present questions in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new questions supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate.

(d) *Appendixes to Briefs.* Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file verbatim portions of the transcript as appendixes to their briefs, if required by this Rule 28(d).

(1) *When Appendixes to Appellant's Brief Are Required.* Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:

a. those portions of the transcript of proceedings which must be reproduced verbatim in order to understand any question presented in the brief;

b. those portions of the transcript showing the pertinent questions and answers when a question presented in the brief involves the admission or exclusion of evidence;

c. relevant portions of statutes, rules, or regulations, the study of which is required to determine questions presented in the brief.

(2) *When Appendixes to Appellant's Brief Are Not Required.* Notwithstanding the requirements of Rule 28(d)(1), the appellant is not required to reproduce an appendix to its brief with respect to an assignment of error:

a. whenever the portion of the transcript necessary to understand a question presented in the brief is reproduced verbatim in the body of the brief;

b. to show the absence or insufficiency of evidence unless there are discrete portions of the transcript where the subject matter of the alleged insufficiency of the evidence is located; or

c. to show the general nature of the evidence necessary to understand a question presented in the brief if such evidence has been fully summarized as required by Rule 28(b)(4) and (5).

(3) *When Appendixes to Appellee's Brief Are Required.* Appellee must reproduce appendixes to his brief in the following circumstances:

a. Whenever the appellee believes that appellant's appendixes do not include portions of the transcript required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript he believes to be necessary to understand the question.

b. Whenever the appellee presents a new or additional question in his brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript as if he were the appellant with respect to each such new or additional question.

(4) *Format of Appendixes.* The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of clear photocopies of transcript pages which have been deemed necessary for inclusion in the appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered and an index to the appendix shall be placed at its beginning.

(e) *References in Briefs to the Record.* References in the briefs to assignments of error shall be by their numbers and to the pages of the printed record on appeal or of the transcript of proceedings, or both, as the case may be, at which they appear. Reference to parts of the printed record on appeal and to the verbatim transcript or documentary exhibits shall be to the pages where the parts appear.

(f) *Joinder of Multiple Parties in Briefs.* Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief although they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) *Additional Authorities.* Additional authorities discovered by a party after filing his brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs nor in such a memorandum may not be cited and discussed in oral argument.

Before the Court of Appeals, the party shall file an original and three copies of the memorandum; in the Supreme Court, the party shall file an original and 14 copies of the memorandum.

(h) *Reply Briefs.* Unless the court, upon its own initiative, orders a reply brief to be filed and served, none will be received or considered by the court, except as herein provided:

(1) If the appellee has presented in its brief new or additional questions as permitted by Rule 28(c), an appellant may, within 14 days after service of such brief, file and serve a reply brief limited to those new or additional questions.

(2) If the parties are notified under Rule 30(f) that the case will be submitted without oral argument on the record

and briefs, an appellant may, within 14 days after service of such notification, file and serve a reply brief limited to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief or in a reply brief filed pursuant to Rule 28(h)(1).

(i) *Amicus Curiae Briefs.* A brief of an amicus curiae may be filed only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that Court on its own initiative.

A person desiring to file an amicus curiae brief shall present to the Court a motion for leave to file, served upon all parties, within ten days after the printed record is mailed by the Clerk and ten days after the record is docketed in pauper cases. The motion shall state concisely the nature of the applicant's interest, the reasons why an amicus curiae brief is believed desirable, the questions of law to be addressed in the amicus curiae brief and the applicant's position on those questions. The proposed amicus curiae brief may be conditionally filed with the motion for leave. Unless otherwise ordered by the Court the application for leave will be determined solely upon the motion, and without responses thereto or oral argument.

The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. Unless other time limits are set out in the order of the Court permitting the brief, the amicus curiae shall file the brief within the time allowed for the filing of the brief of the party supported or, if in support of neither party, within the time allowed for filing appellant's brief. Reply briefs of the parties to an amicus curiae brief will be limited to points or authorities presented in the amicus curiae brief which are not presented in the main briefs of the parties. No reply brief of an amicus curiae will be received.

A motion of an amicus curiae to participate in oral argument will be allowed only for extraordinary reasons.

(j) *Page Limitations Applicable to Briefs Filed in the Court of Appeals.* Principal briefs filed in the North Carolina Court of Appeals, whether filed by appellant, appellee, or amicus curiae, formatted according to Rule 26 and the Appendixes to these Rules, shall be limited to 35 pages of text, exclusive of subject index, tables of authorities, and appendixes. Reply briefs, if permitted by this Rule shall be limited to 15 pages of text.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 27 January 1981—repeal 28(d)—effective 1 July 1981;
10 June 1981—28(b), (c)—effective 1 October 1981;
12 January 1982—28(b)(4)—effective 15 March 1982;
7 December 1982—28(i)—effective 1 January 1983;
27 November 1984—28(b), (c), (d), (e), (g), (h)—effective 1 February 1985;
30 June 1988—28(a), (b), (c), (d), (e), (h), (i)—effective 1 September 1988;
8 June 1989—28(h), (j)—effective 1 September 1989;
26 July 1990—28(h)(2)—effective 1 October 1990;
18 October 2001—28(b)(4)-(10), (c), (j)—effective 31 October 2001.

RULE 29
SESSIONS OF COURTS; CALENDAR OF HEARINGS

(a) *Sessions of Court:*

(1) *Supreme Court.* The Supreme Court shall be in continuous session for the transaction of business. Unless otherwise scheduled by the Court, hearings in appeals will be held during the week beginning the second Monday in the months of February through May and September through December. Additional settings may be authorized by the Chief Justice.

(2) *Court of Appeals.* Appeals will be heard in accordance with a schedule promulgated by the Chief Judge. Panels of the Court will sit as scheduled by the Chief Judge. For the transaction of other business, the Court of Appeals shall be in continuous session.

(b) *Calendaring of Cases for Hearing.* Each appellate court will calendar the hearing of all appeals docketed in the court. In general, appeals will be calendared for hearing in the order which they are docketed, but the court may vary the order for any cause deemed appropriate. On motion of any party, with notice to all other parties, the court may determine without hearing to give an appeal peremptory setting or otherwise to vary the normal calendar order. Except as advanced for peremptory setting on motion of a party or the court's own initiative, no appeal will be calendared for hearing at a time less than 30 days after the filing of the appellant's brief. The clerk of the appellate court will give reasonable notice to all counsel

of record of the setting of an appeal for hearing by mailing a copy of the calendar.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 3 March 1982—29(a)(1);
3 September 1987—29(a)(1);
26 July 1990—29(b)—effective 1 October 1990.

RULE 30
ORAL ARGUMENT

(a) *Order and Content of Argument.* The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Oral arguments should complement the written briefs, and counsel will therefore not be permitted to read at length from briefs, records, and authorities.

(b) *Time Allowed for Argument.*

(1) *In General.* Ordinarily a total of thirty minutes will be allowed all appellants and a total of thirty minutes will be allowed all appellees for oral argument. Upon written or oral application of any party, the court for good cause shown may extend the times limited for argument. Among other causes, the existence of adverse interests between multiple appellants or between multiple appellees may be suggested as good cause for such an extension. The court of its own initiative may direct argument on specific points outside the times limited. Counsel is not obliged to use all the time allowed, and the court may terminate argument whenever it considers further argument unnecessary.

(2) *Numerous Counsel.* Any number of counsel representing individual appellants or appellees proceeding separately or jointly may be heard in argument within the times herein limited or allowed by order of court. When more than one counsel is heard, duplication or supplementation of argument on the same points shall be avoided unless specifically directed by the court.

(c) *Non-Appearance of Parties.* If counsel for any party fails to appear to present oral argument, the court will hear argument from opposing counsel. If counsel for no party appears, the court will decide the case on the written briefs unless it orders otherwise.

(d) *Submission on Written Briefs.* By agreement of the parties, a case may be submitted for decision on the written briefs; but the court may nevertheless order oral argument prior to deciding the case.

(e) *Decision of Appeal Without Publication of an Opinion.*

(1) In order to minimize the cost of publication and of providing storage space for the published reports, the Court of Appeals is not required to publish an opinion in every decided case. If the panel which hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.

(2) Decisions without published opinion shall be reported only by listing the case and the decision in the Advance Sheets and the bound volumes of the Court of Appeals Reports.

(3) A decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered.

(f) *Pre-Argument Review; Decision of Appeal Without Oral Argument.*

(1) At anytime that the Supreme Court concludes that oral argument in any case pending before it will not be of assistance to the Court, it may dispose of the case on the record and briefs. In those cases, counsel will be notified not to appear for oral argument.

(2) The Chief Judge of the Court of Appeals may from time to time designate a panel to review any pending case, after all briefs are filed but before argument, for decision under this rule. If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the Court, the case may be disposed of on record and briefs. Counsel will be notified not to appear for oral argument.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 18 December 1975—30(e);
3 May 1976—30(f);
5 February 1979—30(e);
10 June 1981—30(f)—to become effective 1 July 1981.

RULE 31
PETITION FOR REHEARING

(a) *Time for Filing; Content.* A petition for rehearing may be filed in a civil action within 15 days after the mandate of the court has been issued. The petition shall state with particularity the points of fact or law which, in the opinion of the petitioner, the court has overlooked or misapprehended, and shall contain such argument in support of the petition as petitioner desires to present. It shall be accompanied by a certificate of at least two attorneys who for periods of at least five years respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified. Oral argument in support of the petition will not be permitted.

(b) *How Addressed; Filed.* A petition for rehearing shall be addressed to the court which issued the opinion sought to be reconsidered.

(c) *How Determined.* Within 30 days after the petition is filed, the court will either grant or deny the petition. Determination to grant or deny will be made solely upon the written petition; no written response will be received from the opposing party; and no oral argument by any party will be heard. Determination by the court is final. The rehearing may be granted as to all or less than all points suggested in the petition. When the petition is denied the clerk shall forthwith notify all parties.

(d) *Procedure When Granted.* Upon grant of the petition the clerk shall forthwith notify the parties that the petition has been granted. The case will be reconsidered solely upon the record on appeal, the petition to rehear, new briefs of both parties, and the oral argument if one has been ordered by the court. The briefs shall be addressed solely to the points specified in the order granting the petition to rehear. The petitioner's brief shall be filed within 30 days after the case is certified for rehearing, and the opposing party's brief,

within 30 days after petitioner's brief is served upon him. Filing and service of the new briefs shall be in accordance with the requirements of Rule 13. No reply brief shall be received on rehearing. If the court has ordered oral argument, the clerk shall give notice of the time set therefor, which time shall be not less than 30 days after the filing of the petitioner's brief on rehearing.

(e) *Stay of Execution.* When a petition for rehearing is filed, the petitioner may obtain a stay of execution in the trial court to which the mandate of the appellate court has been issued. The procedure is as provided for stays pending appeal by Rule 8 of these rules.

(f) *Waiver by Appeal from Court of Appeals.* The timely filing of a notice of appeal from, or of a petition for discretionary review of, a determination of the Court of Appeals constitutes a waiver of any right thereafter to petition the Court of Appeals for rehearing as to such determination or, if a petition for rehearing has earlier been filed, an abandonment of such petition.

(g) *No Petition in Criminal Cases.* The courts will not entertain petitions for rehearing in criminal actions.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 27 November 1984—31(a)—effective 1 February 1985;
3 September 1987—31(d);
8 December 1988—31(b), (d)—effective 1 January 1989;
18 October 2001—31(b)—effective 31 October 2001.

RULE 32
MANDATES OF THE COURTS

(a) *In General.* Unless a court of the appellate division directs that a formal mandate shall issue, the mandate of the court consists of certified copies of its judgment and of its opinion and any direction of its clerk as to costs. The mandate is issued by its transmittal from the clerk of the issuing court to the clerk or comparable officer of the tribunal from which appeal was taken to the issuing court.

(b) *Time of Issuance.* Unless a court orders otherwise, its clerk shall enter judgment and issue the mandate of the court 20 days after the written opinion of the court has been filed with the clerk.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 27 November 1984—32(b)—effective 1 February 1985.

RULE 33
ATTORNEYS

(a) *Appearances.* An attorney will not be recognized as appearing in any case unless he is entered as counsel of record therein. The signature of an attorney on a record on appeal, motion, brief, or other document permitted by these rules to be filed in a court of the appellate division constitutes entry of the attorney as counsel of record for the parties designated and a certification that he represents such parties. The signature of a member or associate in a firm's name constitutes entry of the firm as counsel of record for the parties designated. Counsel of record may not withdraw from a case except by leave of court. Only those counsel of record who have personally signed the brief prior to oral argument may be heard in argument.

(b) *Signatures on electronically filed documents.* If more than one attorney is listed as being an attorney for the party(ies) on an electronically filed document, it is the responsibility of the attorney actually filing the document from his or her computer to (1) list his or her name first on the document, and (2) place on the document under his or her signature line the following statement: "I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it."

(c) *Agreements.* Only those agreements of counsel which appear in the record on appeal or which are filed in the court where an appeal is docketed will be recognized by that court.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 18 October 2001—33(a)-(c)—effective 31 October 2001.

RULE 33A
SECURE LEAVE PERIODS FOR ATTORNEYS

(a) *Purpose, Authorization.* In order to secure for the parties to actions and proceedings pending in the Appellate Division, and to the public at large, the heightened level of professionalism that an attorney is able to provide when the attorney enjoys periods of time that are free from the urgent demands of professional responsibility and to enhance the overall quality of the attorney's personal and family life, any attorney may from time to time designate and enjoy one or more secure leave periods each year as provided in this Rule.

(b) *Length, Number.* A secure leave period shall consist of one or more complete calendar weeks. During any calendar year, an attor-

ney's secure leave periods pursuant to this Rule and to Rule 26 of the General Rules of Practice for the Superior and District Courts shall not exceed, in the aggregate, three calendar weeks.

(c) *Designation, Effect.* To designate a secure leave period an attorney shall file a written designation containing the information required by subsection (D), with the official specified in subsection (E), and within the time provided in subsection (F). Upon such filing, the secure leave period so designated shall be deemed allowed without further action of the court, and the attorney shall not be required to appear at any argument or other in-court proceeding in the Appellate Division during that secure leave period.

(d) *Content of Designation.* The designation shall contain the following information: (1) the attorney's name, address, telephone number and state bar number, (2) the date of the Monday on which the secure leave period is to begin and of the Friday on which it is to end, (3) the dates of all other secure leave periods during the current calendar year that have previously been designated by the attorney pursuant to this Rule and to Rule 26 of the General Rules of Practice for the Superior and District Courts, (4) a statement that the secure leave period is not being designated for the purpose of delaying, hindering or interfering with the timely disposition of any matter in any pending action or proceeding, and (5) a statement that no argument or other in-court proceeding has been scheduled during the designated secure leave period in any matter pending in the Appellate Division in which the attorney has entered an appearance.

(e) *Where to File Designation.* The designation shall be filed as follows: (1) if the attorney has entered an appearance in the Supreme Court, in the office of the Clerk of the Supreme Court; (2) if the attorney has entered an appearance in the Court of Appeals, in the office of the Clerk of Court of Appeals.

(f) *When to File Designation.* To be effective, the designation shall be filed: (1) no later than ninety (90) days before the beginning of the secure leave period, and (2) before any argument or other in-court proceeding has been scheduled for a time during the designated secure leave period.

ADMINISTRATIVE HISTORY

Adopted: 6 May 1999—effective 1 January 2000 for all actions and proceedings pending in the appellate division on and after that date.

RULE 34
FRIVOLOUS APPEALS; SANCTIONS

(a) A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:

(1) the appeal was not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) a petition, motion, brief, record, or other paper filed in the appeal was so grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

(b) A court of the appellate division may impose one or more of the following sanctions:

(1) dismissal of the appeal;

(2) monetary damages including, but not limited to,

a. single or double costs,

b. damages occasioned by delay,

c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding;

(3) any other sanction deemed just and proper.

(c) A court of the appellate division may remand the case to the trial division for a hearing to determine one or more of the sanctions under (b)(2) or (b)(3) of this rule.

(d) If a court of the appellate division remands the case to the trial division for a hearing to determine a sanction under (c) of this rule, the person subject to sanction shall be entitled to be heard on that determination in the trial division.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 8 December 1988—effective 1 July 1989;
8 April 1999—34(d).

RULE 35
COSTS

(a) *To Whom Allowed.* Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered by the court; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed in part, reversed in part, or modified in any way, costs shall be allowed as directed by the court.

(b) *Direction as to Costs in Mandate.* The clerk shall include in the mandate of the court an itemized statement of costs taxed in the appellate court and designate the party against whom taxed.

(c) *Costs of Appeal Taxable in Trial Tribunals.* Any costs of an appeal which are assessable in the trial tribunal shall upon receipt of the mandate be taxed as directed therein, and may be collected by execution of the trial tribunal.

(d) *Execution to Collect Costs in Appellate Courts.* Costs taxed in the courts of the appellate division may be made the subject of execution issuing from the court where taxed. Such execution may be directed by the clerk of the court to the proper officers of any county of the State; may be issued at any time after the mandate of the court has been issued; and may be made returnable on any day named. Any officer to whom such execution is directed is amenable to the penalties prescribed by law for failure to make due and proper return.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

RULE 36
TRIAL JUDGES AUTHORIZED TO ENTER ORDERS UNDER THESE RULES

(a) *When Particular Judge Not Specified by Rule.* When by these rules a trial court or a judge thereof is permitted or required to enter an order or to take some other judicial action with respect to a pending appeal and the rule does not specify the particular judge with authority to do so, the following judges of the respective courts have

such authority with respect to causes docketed in their respective divisions:

(1) Superior court: the judge who entered the judgment, order, or other determination from which appeal was taken, and any regular or special judge resident in the district or assigned to hold courts in the district wherein the cause is docketed;

(2) District court: the judge who entered the judgment, order, or other determination from which appeal was taken; the chief district judge of the district wherein the cause is docketed; and any judge designated by such chief district judge to enter interlocutory orders under G.S. § 7A-192.

(b) *Upon Death, Incapacity, or Absence of Particular Judge Authorized.* When by these rules the authority to enter an order or to take other judicial action is limited to a particular judge and that judge is unavailable for the purpose by reason of death, mental or physical incapacity, or absence from the state, the Chief Justice will upon motion of any party designate another judge to act in the matter. Such designation will be by order entered ex parte, copies of which will be mailed forthwith by the Clerk of the Supreme Court to the judge designated and to all parties.

ADMINISTRATIVE HISTORY

Adopted: 3 June 1975.

RULE 37
MOTIONS IN APPELLATE COURTS

(a) *Time; Content of Motions; Response.* An application to a court of the appellate division for an order or for other relief available under these rules may be made by filing a motion for such order or other relief with the clerk of the court, with service on all other parties. Unless another time is expressly provided by these rules, the motion may be filed and served at any time before the case is called for oral argument. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion and shall state with particularity the grounds on which it is based and the order or relief sought. If a motion is supported by affidavits, briefs, or other papers, these shall be served and filed with the motion. Within 10 days after a motion is served upon him or until the appeal is called for oral argument, whichever period is shorter, a party may file and serve copies of a response in opposition to the

motion, which may be supported by affidavits, briefs, or other papers in the same manner as motions. The court may shorten or extend the time for responding to any motion.

(b) *Determination.* Notwithstanding the provisions of Rule 37(a), a motion may be acted upon at any time, despite the absence of notice to all parties, and without awaiting a response thereto. A party who has not received actual notice of such a motion or who has not filed a response at the time such action is taken, and who is adversely affected by the action may request reconsideration, vacation or modification thereof. Motions will be determined without argument, unless the court orders otherwise.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

RULE 38
SUBSTITUTION OF PARTIES

(a) *Death of a Party.* No action abates by reason of the death of a party while an appeal may be taken or is pending, if the cause of action survives. If a party acting in an individual capacity dies after appeal is taken from any tribunal, the personal representative of the deceased party in a personal action, or the successor in interest of the deceased party in a real action may be substituted as a party on motion filed by the representative or the successor in interest or by any other party with the clerk of the court in which the action is then docketed. A motion to substitute made by a party shall be served upon the personal representative or successor in interest in addition to all other parties. If such a deceased party in a personal action has no personal representative, any party may in writing notify the court of the death, and the court in which the action is then docketed shall direct the proceedings to be had in order to substitute a personal representative.

If a party against whom an appeal may be taken dies after entry of a judgment or order but before appeal is taken, any party entitled to appeal therefrom may proceed as appellant as if death had not occurred; and after appeal is taken, substitution may then be effected in accordance with this subdivision. If a party entitled to appeal dies before filing a notice of appeal, appeal may be taken by his personal representative, or, if he has no personal representative, by his attorney of record within the time and in the manner prescribed in these rules; and after appeal is taken, substitution may then be effected in accordance with this rule.

(b) *Substitution for Other Causes.* If substitution of a party to an appeal is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

(c) *Public Officers; Death or Separation from Office.* When a person is a party to an appeal in an official or representative capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Prior to the qualification of a successor, the attorney of record for the former party may take any action required by these rules to be taken. An order of substitution may be made, but neither failure to enter such an order nor any misnomer in the name of a substituted party shall affect the substitution unless it be shown that the same affected the substantial rights of a party.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

RULE 39
DUTIES OF CLERKS; WHEN OFFICES OPEN

(a) *General Provisions.* The clerks of the courts of the appellate division shall take the oaths and give the bonds required by law. The courts shall be deemed always open for the purpose of filing any proper paper and of making motions and issuing orders. The offices of the clerks with the clerks or deputies in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but the respective courts may provide by order that the offices of their clerks shall be open for specified hours on Saturdays or on particular legal holidays or shall be closed on particular business days.

(b) *Records to Be Kept.* The clerk of each of the courts of the appellate division shall keep and maintain the records of that court, on paper, microform, or electronic media, or any combination thereof. The records kept by the clerk shall include indexed listings of all cases docketed in that court, whether by appeal, petition, or motion and a notation of the dispositions attendant thereto; a listing of final judgments on appeals before the court, indexed by title, docket number, and parties, containing a brief memorandum of the judgment of the court and the party against whom costs were adjudicated; and records of the proceedings and ceremonies of the court.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 8 December 1988—39(b)—effective 1 January 1989.

RULE 40
CONSOLIDATION OF ACTIONS ON APPEAL

Two or more actions which involve common questions of law may be consolidated for hearing upon motion of a party to any of the actions made to the appellate court wherein all are docketed, or upon the initiative of that court. Actions so consolidated will be calendared and heard as a single case. Upon consolidation, the parties may set the course of argument, within the times permitted by N.C. R. App. P. 30(b), by written agreement filed with the court prior to oral argument. This agreement shall control unless modified by the court.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 18 October 2001—effective 31 October 2001.

RULE 41
APPEAL INFORMATION STATEMENT

(a) The Court of Appeals has adopted an APPEAL INFORMATION STATEMENT which will be revised from time to time. The purpose of the APPEAL INFORMATION STATEMENT is to provide the Court the substance of an appeal and the information needed by the Court for effective case management.

(b) Each appellant shall complete, file and serve the APPEAL INFORMATION STATEMENT as set out in this Rule.

(1) The Clerk of the Court of Appeals shall furnish an APPEAL INFORMATION STATEMENT form to all parties to the appeal when the record on appeal is docketed in the Court of Appeals.

(2) Each appellant shall complete and file the APPEAL INFORMATION STATEMENT with the Clerk of the Court of Appeals at or before the time his or her appellant's brief is due and shall serve a copy of the statement upon all other parties to the appeal pursuant to Rule 26. The APPEAL INFORMATION STATEMENT may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service.

(3) If any party to the appeal concludes that the APPEAL INFORMATION STATEMENT is in any way inaccurate or incomplete, that party may file with the Court of Appeals a written statement setting out additions or corrections within 7 days of the service of the APPEAL INFORMATION STATEMENT and shall serve a copy of the written statement upon all other parties to the appeal pursuant to Rule 26. The written statement may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service.

ADMINISTRATIVE HISTORY

Adopted: March 1994—effective 15 March 1994.

RULE 42
TITLE

The title of these rules is "North Carolina Rules of Appellate Procedure." They may be so cited either in general references or in reference to particular rules. In reference to particular rules the abbreviated form of citation, "N.C. R. App. P. . . .," is also appropriate.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Renumbered: Effective 15 March 1994.
Amended: 18 October 2001—effective 31 October 2001.

APPENDIXES TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Adopted 1 July 1989
Including Amendments through 18 October 2001

Appendix A: Timetables for Appeals

Appendix B: Format and Style

Appendix C: Arrangement of Record on Appeal

Appendix D: Forms

Appendix E: Content of Briefs

Appendix F: Fees and Costs

APPENDIX A
TIMETABLES FOR APPEALS

TIMETABLE OF APPEALS FROM TRIAL DIVISION UNDER ARTICLE II OF THE RULES OF APPELLATE PROCEDURE

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Taking Appeal (civil)	30	entry of judgment (unless tolled)	3(c)
Taking Appeal (agency)	30	receipt of final agency order (unless statutes provide otherwise)	18(b)(2)
Taking Appeal (crim.)	14	entry of judgment (unless tolled)	4(a)
Ordering Transcript (civil, agency)	14	filing notice of appeal	7(a)(1)18(b)(3)
Ordering Transcript (criminal indigent)	14	order filed by clerk of superior court	7(a)(2)
Preparing & delivering transcript		service of order for transcript	7(b)(1)
(civil, non-capital criminal)	60		
(capital criminal)	120		
Serving proposed record on appeal		notice of appeal (no transcript) or reporter's certificate of delivery of transcript	11(b)
(civil, non-capital criminal)	35		
(agency)	35		18(d)
Serving proposed record on appeal (capital)	70	reporter's certificate of delivery	11(b)
Serving objections or proposed alternative record on appeal		service of proposed record	11(c)
(civil, non-capital criminal)	21		
(capital criminal)	35		
(agency)	30	service of proposed record	18(d)(2)
Requesting judicial settlement of record	10	expiration of the last day within which an appellee served could serve objections, etc.	11(c) 18(d)(3)
Judicial settlement of record	20	service on judge of request for settlement	11(c) 18(d)(3)
Filing Record on Appeal in appellate court	15	settlement of record on appeal	12(a)
Filing appellant's brief (or mailing brief under Rule 26(a))	30	Clerk's mailing of printed record—or from docketing record in civil appeals in forma pauperis (60 days in Death Cases)	13(a)
Filing appellee's brief (or mailing brief under Rule 26(a))	30	service of appellant's brief (60 days in Death Cases)	13(a)

Oral Argument	30	filing appellant's brief (usual minimum time)	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	15	Mandate	31(a)

TIMETABLE OF APPEALS TO THE SUPREME COURT FROM THE COURT OF APPEALS UNDER ARTICLE III OF THE RULES OF APPELLATE PROCEDURE

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Petition for Discretionary Review prior to determination	15	docketing appeal in Court of Appeals	15(b)
Notice of Appeal and/or Petition for Discretionary Review	15	Mandate of Court of Appeals (or from order of Court of Appeals denying petition for rehearing)	14(a) 15(b)
Cross-Notice of Appeal	10	filing of first notice of appeal	14(a)
Response to Petition for Discretionary Review	10	service of petition	15(d)
Filing appellant's brief (or mailing brief under Rule 26(a))		Filing notice of appeal Certification of review	14(d) 15(g)(2)
Filing appellee's brief (or mailing brief under Rule 26(a))	30	service of appellant's brief	14(d) 15(g)
Oral Argument	30	filing appellee's brief (usual minimum time)	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	15	Mandate	31(a)

NOTES

All of the critical time intervals here outlined except those for taking an appeal and petitioning for discretionary review or for rehearing may be extended by order of the Court wherein the appeal is docketed at the time. Note that Rule 27 grants the trial tribunal the authority to grant only one extension of time for service of the proposed record. All other motions for extension of the times provided in the rules must be filed with the appellate court to which the appeal of right lies.

No time limits are prescribed for petitions for writs of certiorari other than that they be "filed without unreasonable delay." Rule 21(c).

Appendix A amended effective 1 October 1990; 6 March 1997; 31 October 2001.

APPENDIX B

FORMAT AND STYLE

All documents for filing in either Appellate Court are prepared on 8½ x 11 inch, plain, white unglazed paper of 16 to 20 pound weight. Typing is done on one side only, although the document will be reproduced in two-sided format. No vertical rules, law firm marginal return addresses, or punched holes will be accepted. The papers need not be stapled; a binder clip or rubber bands are adequate to secure them in order.

Papers shall be prepared using at least 12-point type and spacing, so as to produce a clear, black image. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be approximately 6½ inches wide and 9 inches long. Tabs are located at the following distances from the left margin: ½", 1", 1½", 2", 4¼" (center), and 5".

CAPTIONS OF DOCUMENTS.

All documents to be filed in either appellate court shall be headed by a caption. The caption contains: the number to be assigned the case by the Clerk; the Judicial District from which the case arises; the appellate court to whose attention the document is addressed; the style of the case showing the names of all parties to the action; the county from which the case comes; the indictment or docket numbers of the case below (in records on appeal and in motions and petitions in the cause filed prior to the filing of the record); and the title of the document. The caption shall be placed beginning at the top margin of a cover page and, again, on the first textual page of the document.

No. _____ (Number) DISTRICT

(SUPREME COURT OF NORTH CAROLINA)
(or)
(NORTH CAROLINA COURT OF APPEALS)

****

STATE OF NORTH CAROLINA	)	
or	)	
(Name of Plaintiff)	)	From (Name) County
	)	No. _____
v	)	
	)	
(Name of Defendant)	)	

****

(TITLE OF DOCUMENT)

****

The caption should reflect the title of the action (all parties named) as it appeared in the trial division. The appellant or petitioner is not automatically given topside billing; the relative position of the plaintiff and defendant should be retained.

The caption of a record on appeal and of a notice of appeal from the Trial Division should include directly below the name of the county, the indictment or docket numbers of the case in the trial division. Those numbers, however, should not be included in other documents except for a petition for writ of certiorari or other petitions and motions where no record on appeal has yet been created in the case. In notices of appeal or petitions to the Supreme Court from decisions of the Court of Appeals, the caption should show the court of appeals' docket number in similar fashion.

Immediately below the caption of each document, centered and underlined, in all capital letters, should be the title of the document, e.g., PETITION FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31, or DEFENDANT-APPELLANT'S BRIEF. A brief filed in the Supreme Court in a case previously heard and decided by the Court of Appeals is entitled NEW BRIEF.

INDEXES

A brief or petition which is long or complex or which treats multiple issues, and all Appendixes to briefs (Rule 28) and Records on Appeal (Rule 9) must contain an index to the contents.

The index should be indented approximately ¾" from each margin, providing a five-inch line. The form of the index for a record on

appeal should be as follows (indexes for briefs are addressed in Appendix E):

(Record)

INDEX

USE OF THE TRANSCRIPT OF EVIDENCE WITH RECORD ON APPEAL

Those portions asterisked (*) in the sample index above would be omitted if the transcript option were selected under Appellate Rule 9(c). In their place in the record, counsel should place a statement in substantially the following form:

> "Per Appellate Rule 9(c) the transcript of proceedings in this case, taken by (name), court reporter, from (date) to (date) and consisting of (# of pages) pages, numbered (1) through (last page#), and bound in (# of volumes) volumes is filed contemporaneously with this record."

The transcript should be prepared with a clear, black image on 8½ x 11 paper of 16-20 pound substance. Enough copies should be reproduced to assure the parties of a reference copy, and file one

copy in the Appellate Court. In criminal appeals, the District Attorney is responsible for conveying a copy to the Attorney General (App. Rule 9(c)).

The transcript should not be inserted into the record on appeal, but, rather, should be separately bound and submitted for filing in the proper appellate court with the record. Transcript pages inserted into the record on appeal will be treated in the manner of a narration and will be printed at the standard page charge. Counsel should note that the separate transcript will not be reproduced with the record on appeal, but will be treated and used as an exhibit.

TABLE OF CASES AND AUTHORITIES

Immediately following the index and before the inside caption, all briefs, petitions, and motions greater than five pages in length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to A Uniform System of Citation. (14th ed.).

FORMAT OF BODY OF DOCUMENT

The body of the document of records on appeal should be single-spaced with double- spaces between paragraphs. The body of the document of petitions, notices of appeal, responses, motions, and briefs should be double-spaced, with captions, headings, and long quotes single-spaced.

Adherence to the margins is important since the document will be reproduced front and back and will be bound on the side. No part of the text should be obscured by that binding.

Quotations of more than three lines in length should be indented ¾ inch from each margin and should be single-spaced. The citation should immediately follow the quote.

References to the record on appeal should be made through a parenthetic entry in the text. (R. pp. 38-40) References to the transcript, if used, should be made in similar manner. (T. p. 558, line 21)

TOPICAL HEADINGS

The various sections of the brief or petition should be separated (and indexed) by topical headings, centered and underlined, in all capital letters.

Within the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin to margin. Sub-issues should be presented in similar format, but block indented ½ inch from the left margin.

NUMBERING PAGES

The cover page containing the caption of the document (and the index in Records on Appeal) is unnumbered. The index and table of cases and authorities are on pages numbered with lower case roman numerals, e.g., i, ii, iv.

While the page containing the inside caption and the beginning of the substance of the petition or brief bears no number, it is page 1. Subsequent pages are sequentially numbered by arabic numbers, flanked by dashes, at the center of the top margin of the page, e.g. -4-.

An appendix to the brief should be separately numbered in the manner of a brief.

SIGNATURE AND ADDRESS

All original papers filed in a case will bear the original signature of at least one counsel participating in the case, as in the example below. The name, address, telephone number, and e-mail address of the person signing, together with the capacity in which he signs the paper will be included. Where counsel or the firm is retained, the firm name should be included above the signature; however, if counsel is appointed in an indigent criminal appeal, only the name of the appointed counsel should appear, without identification of any firm affiliation. Counsel participating in argument must have signed the brief in the case prior to that argument.

(Retained) ATTORNEY, COUNSELOR, LAWYER & HOWE

By: _____
John Q. Howe

By: _____
M. R. N. Associate
Attorneys for Plaintiff Appellants
P. O. Box 0000
Raleigh, NC 27600
919) 999-9999
howe@aclh.web

(Appointed)_____

John Q. Howe
Attorney for Defendant Appellant
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
howe@aclh.web

Appendix B amended effective 31 October 2001.

APPENDIX C
ARRANGEMENT OF RECORD ON APPEAL

Only those items listed in the following tables which are required by Rule 9(a) in the particular case should be included in the record. See Rule 9(b)(2) for sanctions against including unnecessary items in the record. The items marked by an asterisk (*) could be omitted from the record proper if the transcript option of Rule 9(c) is used, and there exists a transcript of the items.

Table 1

SUGGESTED ORDER IN APPEAL FROM CIVIL JURY CASE

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(a)(1)a.
3. Statement of organization of trial tribunal, per Rule 9(a)(1)b.
4. Statement of record items showing jurisdiction, per Rule 9(a)(1)c.
5. Complaint
6. Pre-answer motions of defendant, with rulings thereon
7. Answer
8. Motion for summary judgment, with rulings thereon (* if oral)
9. Pre-trial order
*10. Plaintiff's evidence, with any evidentiary rulings assigned as error
*11. Motion for directed verdict, with ruling thereon
*12. Defendant's evidence, with any evidentiary rulings assigned as error
*13. Plaintiff's rebuttal evidence, with any evidentiary rulings assigned as error
14. Issues tendered by parties
15. Issues submitted by court

16. Court's instructions to jury, per Rule 9(a)(1)f.
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment
20. Items required by Rule 9(a)(1)i.
21. Entries showing settlement of record on appeal, extension of time, etc.
22. Assignments of error, per Rule 10
23. Names, office addresses, telephone numbers, and e-mail addresses of counsel for all parties to appeal

Table 2

SUGGESTED ORDER IN APPEAL FROM SUPERIOR COURT REVIEW OF ADMINISTRATIVE AGENCY

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(a)(2)a.
3. Statement of organization of superior court, per Rule 9(a)(2)b.
4. Statement of record items showing jurisdiction of the board or agency, per Rule 9(a)(2)c.
5. Copy of petition or other initiating pleading
6. Copy of answer or other responsive pleading
7. Copies of all pertinent items from administrative proceeding filed for review in superior court, including evidence

*8. Evidence taken in superior court, in order received

9. Copies of findings of fact, conclusions of law, and judgment of superior court
10. Items required by Rule 9(a)(2)g.
11. Entries showing settlement of record on appeal, extension of time, etc
12. Assignments of error, per Rule 9(a)(2)h.
13. Names, office addresses, telephone numbers, and e-mail addresses of counsel for all parties to appeal

Table 3

SUGGESTED ORDER IN APPEAL OF CRIMINAL CASE

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(a)(3)a.
3. Statement of organization of trial tribunal, per Rule 9(a)(3)b.
4. Warrant

5. Judgment in district court (where applicable)
6. Entries showing appeal to superior court (where applicable)
7. Bill of indictment (if not tried on original warrant)
8. Arraignment and plea in superior court
9. Voir dire of Jurors
*10. State's evidence, with any evidentiary rulings assigned as error
11. Motions at close of state's evidence, with rulings thereon (* if oral)
*12. Defendant's evidence, with any evidentiary rulings assigned as error
13. Motions at close of defendant's evidence, with rulings thereon (* if oral)
*14. State's rebuttal evidence, with any evidentiary rulings assigned as error
15. Motions at close of all evidence, with rulings thereon (* if oral)
16. Court's instructions to jury, per Rules 9(a)(3)f., 10(b)(2)
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment and order of commitment
20. Appeal entries
21. Entries showing settlement of record on appeal, extension of time, etc
22. Assignments of error, per Rule 9(a)(3)j.
23. Names, office addresses, telephone numbers, and e-mail addresses of counsel for all parties to appeal

Table 4

ASSIGNMENTS OF ERROR

A. Examples related to pre-trial rulings in civil action

Defendant assigns as error:

1. The court's denial of defendant's motion under N.C. R. Civ. P. 12(b)(2) to dismiss for lack of jurisdiction over the person of the defendant on the grounds (that the uncontested affidavits in support of the motion show that no grounds for jurisdiction existed) (or other appropriately stated grounds).

   R. p. 4.

2. The court's denial of defendant's motion under N.C. R. Civ. P. 12(b)(6) to dismiss for failure of the complaint to state a claim upon which relief can be granted, on the ground that the com-

plaint affirmatively shows that the plaintiff's own negligence contributed to any injuries sustained.

R. p. 7.

3. The court's denial of defendant's motion requiring the plaintiff to submit to physical examination under N.C. R. Civ. P. 35, on the ground that on the record before the court, good cause for the examination was shown.

T. vol. 1, p. 137, lines 17-20.

4. The court's denial of defendant's motion for summary judgment, on the ground that there was not genuine issue of fact that the statute of limitations had run and defendant was therefore entitled to judgment as a matter of law.

R. p. 15.

B. Examples related to civil jury trial rulings

Defendant assigns as error the following:

1. The court's admission of the testimony of the witness E.F., on the ground that the testimony was hearsay.

T. vol. 1, p. 295, line 5, through p. 297, line 12.
T. vol. 1, p. 299, lines 1-8.

2. The court's denial of the defendant's motion for directed verdict at the conclusion of all the evidence, on the ground that plaintiff's evidence as a matter of law established his contributory negligence.

R. p. 45.

3. The court's instructions to the jury, R. pp. 50-51, as bracketed, explaining the doctrine of last clear chance, on the ground that the doctrine was not correctly explained.

4. The court's instructions to the jury, R. pp. 53-54, as bracketed, applying the doctrine of sudden emergency to the evidence, on the ground that the evidence referred to by the court did not support application of the doctrine.

5. The court's denial of defendant's motion for a new trial for newly discovered evidence, on the ground that on the uncontested affidavits in support of the motion the court abused its discretion in denying the motion.

R. p. 80; T. vol. 3, p. 764, lines 8 - 23.

C. Examples related to civil non-jury trial

Defendant assigns as error:

1. The court's refusal to enter judgment of dismissal on the merits against plaintiff upon defendant's motion for dismissal made at the conclusion of plaintiff's evidence, on the ground that plaintiff's evidence established as a matter of law that plaintiff's own negligence contributed to the injury.

   R. p. 20.

2. The court's Finding of Fact No. 10, on the ground that there was insufficient evidence to support it.

   R. p. 25.

3. The court's Conclusion of Law No. 3, on the ground that there are findings of fact which support the conclusion that defendant had the last clear chance to avoid the collision alleged.

   R. p. 27.

Appendix C amended effective 1 October 1990; 31 October 2001.

APPENDIX D
FORMS

Captions for all documents filed in the Appellate Division should be in the format prescribed by Appendix B, addressed to the Court whose review is sought.

1. NOTICES OF APPEAL

a. to Court of Appeals from Trial Division

Appropriate in all appeals of right from district or superior court except appeals from criminal judgments imposing sentences of death.

(Caption)

****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

(Plaintiff)(Defendant)(Name of Party) hereby gives notice of appeal to the Court of Appeals of North Carolina (from the final judgment)(from the order) entered on (date) in the (District)(Superior) Court of (name) County, (describing it).

Respectfully submitted this the ___ day of _____, 2__.

s/_____
Attorney for (Plaintiff)(Defendant)
(Address and Telephone)

b. to Supreme Court from a Judgment of the Superior Court Including a Sentence of Death

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Name of Defendant), Defendant, hereby gives notice of appeal to the Supreme Court of North Carolina from the final judgment, entered by (name of Judge), in the Superior Court of (name) County on (date), which judgment included a conviction of murder in the first degree and a sentence of death.

Respectfully submitted this the ___ day of _____, 2__.

s/_____
Attorney for Defendant-Appellant
(Address and Telephone)

c. to the Supreme Court from a Judgment of the Court of Appeals

Appropriate in all appeals taken as of right from opinions and judgments of the Court of Appeals to the Supreme Court under G.S. 7A-30. The appealing party shall enclose a certified copy of the opinion of the Court of Appeals with the notice. To take account of the possibility that the Supreme Court may determine that the appeal does not lie of right, an alternative petition for discretionary review may be filed with the notice of appeal.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff)(Defendant)(Name of party) hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals (describe it), which judgment . . .

(Constitutional question—G.S. 7A-30(1)) . . . directly involves substantial questions arising under the Constitution(s)(of the United States)(and)(or)(of the State of North Carolina) as follows:

(here describe the specific issues, citing Constitutional provisions under which they arise, and showing how such issues were timely raised below and are set out in the record on appeal, e.g.:

"Question 1: Said judgment directly involves a substantial question arising under the Fourth and Fourteenth Amendments to the Constitution of United States and under

Article 1, Section 20 of the Constitution of the State of North Carolina, in that it deprives rights secured thereunder to the defendant by overruling defendant's assignment of error to the denial of his Motion to Suppress Evidence Obtained by a Search warrant, thereby depriving defendant of his Constitutional right to be secure in his person, house, papers, and effects, against unreasonable searches and seizures and violating constitutional prohibitions against warrants issued without probable cause and warrants not supported by evidence. This constitutional issue was timely raised in the trial tribunal by defendant's Motion to Suppress Evidence Obtained by a Search Warrant made prior to trial of defendant (R pp. 7 through 10). This constitutional issue was determined erroneously by the Court of Appeals."

In the event the Court finds this constitutional question to be substantial, petitioner intends to present the following issues in his brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those which are the basis of the constitutional question claim. An issue may not be briefed if it is not listed in the notice of appeal.)

(Dissent—G.S. 7A-30(2))... was entered with a dissent by Judge (name), based on the following issue(s):

(Here state the issue or issues which are the basis of the dissenting opinion in the Court of Appeals. Do not state additional issues as with the constitutional question appeal, above. Any additional issues desired to be raised in the Supreme Court where the appeal of right is based solely on a dissenting opinion must be presented by a petition for discretionary review as to the additional issues.)

Respectfully submitted this the ___ day of _____, 2__.

s/_____
Attorney for (Plaintiff)(Defendant)-Appellant
(Address and Telephone)

2. APPEAL ENTRIES

The appeal entries are appropriate as a ready means of providing in composite form for the record on appeal:

1) the entry required by App. Rule 9(a) showing appeal duly taken by oral notice under App. Rule 3(b) or 4(a), and

2) the entry required by App. Rule 9(a) showing any judicial extension of time for serving proposed record on appeal under App. Rule 27(c).

These entries of record may also be made separately.

Where appeal is taken by filing and serving written notice after the term of court, a copy of the notice with filing date and proof of service is appropriate as the record entry required.

Such "appeal entries" are appropriately included in the record on appeal following the judgment from which appeal is taken.

The judge's signature, while not technically required, is traditional and serves as authentication of the substance of the entries.

(Defendant) gave due notice of appeal to the (Court of Appeals)(Supreme Court). (Defendant) shall have 10 days in which to order the transcript, or, in the alternative, 35 days in which to serve a proposed record on appeal on the appellee. (Plaintiff) is allowed 15 days thereafter within which to serve objections or a proposed alternative record on appeal.

This the ___ day of _____, 2__.

s/_____
Judge Presiding

3. PETITION FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31.

To seek review of the opinion and judgment of the Court of Appeals where appellant contends case involves issues of public interest or jurisprudential significance. May also be filed as a separate paper in conjunction with a notice of appeal to the Supreme Court when the appellant considers that such appeal lies of right due to substantial constitutional questions under G.S. 7A-30, but desires to have the Court consider discretionary review should it determine that appeal does not lie of right in the particular case.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff)(Defendant),(Name of Party), respectfully petitions the Supreme Court of North Carolina that the Court certify for discretionary review the judgment of the Court of Appeals (describing it) on the basis that (here set out the grounds from G.S. 7A-31 which pro-

vide the basis for the petition). In support of this petition, (Plaintiff)(Defendant) shows the following:

Facts

(Here state first the procedural history of the case through the trial division and the Court of Appeals. Then set out factual background necessary for understanding the basis, of the petition.)

Reasons Why Certification Should Issue

(Here set out factual and legal argument to justify certification of case for full review. While some substantive argument will certainly be helpful, the focus of the argument in the petition should be to show how the opinion of the Court of Appeals conflicts with prior decisions of the Supreme Court or how the case is one significant to the jurisprudence of the State or one which offers significant public interest. If the Court is persuaded to take the case, then the appellant may deal thoroughly with the substantive issues in the new brief.)

Issues to be Briefed

In the event the Court allows this petition for discretionary review, petitioner intends to present the following issues in his brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those which are the basis of the petition. An issue may not be briefed if it is not listed in the petition.)

Respectfully submitted this the ___ day of _____, 2__.

s/_____
Attorney for (Plaintiff)(Defendant) Appellant
(Address and Telephone)

Attached to the petition shall be a certificate of service upon the opposing parties and a clear copy of the opinion of the Court of Appeals in case.

4. PETITION FOR WRIT OF CERTIORARI

To seek review (1) of the judgments or orders of trial tribunals in the appropriate appellate court when the right to prosecute an appeal has been lost or where no right to appeal exists; (2) by the Supreme Court of the decisions and orders of the Court of Appeals where no right to appeal or to petition for discretionary review exists or where such right has been lost by failure to take timely action.

(Caption)

****

TO THE HONORABLE (SUPREME COURT)(COURT OF APPEALS) OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions this Court to issue its writ of certiorari pursuant to Rule 21 of the N.C. Rules of Appellate Procedure to review the (judgment)(order)(decree) of the [Honorable (name), Judge Presiding, (name) County Superior (District) Court][North Carolina Court of Appeals], dated (date), (here describe the judgment, order, or decree appealed from), and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding the basis of the petition: e.g. failure to perfect appeal by reason of circumstances constituting excusable neglect; nonappealability of right of an interlocutory order, etc.) (If circumstances are that transcript could not be procured from reporter, statement should include estimate of date of availability, and supporting affidavit from the Court Reporter.)

Reasons Why Writ Should Issue

(Here set out factual and legal argument to justify issuance of writ: e.g., reasons why interlocutory order makes it impractical for petitioner to proceed further in trial court; meritorious basis of petitioner's proposed assignments of error; etc.)

Attachments

Attached to this petition for consideration by the Court are certified copies of the (judgment)(order)(decree) sought to be reviewed, and (here list any other certified items from the trial court record and any affidavits attached as pertinent to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of certiorari to the [Superior Court of (name) County] [North Carolina Court of Appeals] to permit review of the (judgment)(order)(decree) above specified, upon errors [(to be) assigned in the record on appeal constituted in accordance with the Rules of Appellate Procedure][stated as follows: (here list the errors, as issues, in the manner provided for the petition for discretionary review)]; and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted this the ___ day of _____, 2__.

s/_____
Attorney for Petitioner
(Address and Telephone)

(Verification by petitioner or counsel)
(Certificate of service upon opposing parties)
(Attach a clear copy of the opinion, order, etc. which is the subject of the petition and other attachments as described in petition.)

5. PETITION FOR WRIT OF SUPERSEDEAS UNDER RULE 23 AND MOTION FOR TEMPORARY STAY

A writ of supersedeas operates to stay the execution or enforcement of any judgment, order, or other determination of a trial court or of the Court of Appeals in civil cases under Appellate Rule 8 or to stay imprisonment or execution of a sentence of death in criminal cases (other portions of criminal sentences, e.g. fines, are stayed automatically pending an appeal of right).

A motion for temporary stay is appropriate to show good cause for immediate stay of execution on an ex parte basis pending the Court's decision on the Petition for Supersedeas or the substantive petition in the case.

(Caption)

****

TO THE HONORABLE (COURT OF APPEALS)(SUPREME COURT) OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions this Court to issue its writ of supersedeas to stay (execution)(enforcement) of the (judgment)(order)(decree) of the [Honorable _____, Judge Presiding, (Superior)(District) Court of _____ County][North Carolina Court of Appeals] dated _____, pending review by this Court of said (judgment)(order)(decree) which (here describe the judgment, order, or decree and its operation if not stayed); and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding basis of petition and justifying its filing under Rule 23: e.g. trial judge has vacated the entry upon finding security deposited under G.S. Section _____ inadequate; or that trial judge has refused to stay exe-

cution upon motion therefor by petitioner; or that circumstances make it impracticable to apply first to trial judge for stay, etc.; and showing that review of the trial court judgment is being sought by appeal or extraordinary writ.)

Reasons Why Writ Should Issue

(Here set out factual and legal argument for justice of issuing writ; e.g., that security deemed inadequate by trial judge is adequate under the circumstances; that irreparable harm will result to petitioner if he is required to obey decree pending its review; that petitioner has meritorious basis for seeking review, etc.)

Attachments

Attached to this petition for consideration by the court are certified copies of the (judgment)(order)(decree) sought to be stayed and (here list any other certified items from the trial court record and any affidavits deemed necessary to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of supersedeas to the [(Superior)(District) Court of _____ County)][North Carolina Court of Appeals] staying (execution)(enforcement) of its (judgment) (order)(decree) above specified, pending issuance of the mandate to this Court following its review and determination of the(Appeal)(discretionary review) (review by extraordinary writ)(now pending)(the petition for which will be timely filed); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted this the ___ day of _____, 2__.

s/_____
Attorney for Petitioner
(Address and Telephone)

(Verification by petitioner or counsel.)
(Certificate of Service upon opposing party.)

Rule 23(e) provides that in conjunction with such a petition for supersedeas, either as part of it or separately, the petitioner may move for a temporary stay of execution or enforcement pending the Court's ruling on the petition for supersedeas. The following form is illustrative of such a motion for temporary stay, either included in the main petition as part of it or filed separately.

Motion for Temporary Stay

(Plaintiff)(Defendant) respectfully applies to the Court for an order temporarily staying (execution)(enforcement) of the (judg-

ment)(order)(decree) which is the subject of (this)(the accompanying) petition for writ of supersedeas, such order to be in effect until determination by this Court whether it shall issue its writ. In support of this Application, movant shows that (here set out the legal and factual argument for the issuance of such a temporary stay order; e.g., irreparable harm practically threatened if petitioner must obey decree of trial court during interval before decision by Court whether to issue writ of supersedeas).

Motion for Stay of Execution

In death cases, the Supreme Court uses an order for stay of execution of death sentence in lieu of the writ of supersedeas. Counsel should promptly apply for such a stay after the judgment of the Superior Court imposing the death sentence. The stay of execution order will provide that it remains in effect until dissolved. The following form illustrates the contents needed in such a motion.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Now comes the defendant, (name), who respectfully shows the Court:

1. That on (date of judgment), The Honorable _____, Judge Presiding, Superior Court of _____ County, sentenced the defendant to death, execution being set for (date of execution)

2. That pursuant to G.S. 15A-2000(d)(1), there was an automatic appeal of this matter to the Supreme Court of North Carolina, and that defendant's notice of appeal was given (describe the circumstances and date of notice).

3. That the record on appeal in this case cannot be served and settled, the matter docketed, the briefs prepared, the arguments heard, and a decision rendered before the scheduled date for execution.

WHEREFORE, the defendant prays the Court to enter an Order staying the execution pending judgment and further orders of this Court.

Respectfully submitted this the ___ day of _____, 2__.

s/_____
Attorney for Defendant-Appellant
(Address and Telephone)

(Certificate of Service on Attorney General, District Attorney, and Warden of Central Prison)

Appendix D amended effective 6 March 1997; 31 October 2001.

APPENDIX E
CONTENT OF BRIEFS

CAPTION

Briefs should use the caption as shown in Appendix B. The Title of the Document should reflect the position of the filing party both at the trial level and on the appeal, e.g., DEFENDANT-APPELLANT'S BRIEF, PLAINTIFF-APPELLEE'S BRIEF or BRIEF FOR THE STATE. A brief filed in the Supreme Court in a case decided by the Court of Appeals is captioned a "New Brief" and the position of the filing party before the Supreme Court should be reflected, e.g., DEFENDANT-APPELLEE'S NEW BRIEF (where the State has appealed from the Court of Appeals in a criminal matter).

The cover page should contain only the caption of the case. Succeeding pages should present the following items, in order.

INDEX OF THE BRIEF

Each brief should contain a topical index beginning at the top margin of the first page following the cover, in substantially the following form:

INDEX

* * * * *

TABLE OF CASES AND AUTHORITIES

This table should begin at the top margin of the page following the Index. Page reference should be made to the first citation of the authority in each question to which it pertains.

TABLE OF CASES AND AUTHORITIES

* * * * *

QUESTIONS PRESENTED

The inside caption is on "page 1" of the brief, followed by the questions presented. The phrasing of the questions presented need not be identical with that set forth in the assignments of error in the Record; however, the brief may not raise additional questions or change the substance of the questions already presented in those documents. The appellee's brief need not restate the questions unless the appellee desires to present additional questions to the Court.

QUESTIONS PRESENTED

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION?

* * *

STATEMENT OF THE CASE

If the Questions Presented carry beyond page 1, the Statement of the Case should follow them, separated by the heading. If the Questions Presented do not carry over, the Statement of the Case should begin at the top of page 2 of the brief.

Set forth a concise chronology of the course of the proceedings in the trial court and the route of appeal, including pertinent dates. For example:

STATEMENT OF THE CASE

The defendant, John Q. Public, was convicted of first degree rape at the October 5, 1988, Criminal Session of the Superior Court of Bath County, the Honorable I. M. Wright presiding, and received the mandatory life sentence for the Class B felony. The defendant gave written notice of appeal in open court to the Supreme Court of North Carolina at the time of the entry of judgment on October 8, 1988, the transcript was ordered on October 15, 1988, and was delivered to parties on December 10, 1988.

A motion to extend the time for serving and filing the record on appeal was allowed by the Supreme Court on January 12, 1989. The record was filed and docketed in the Supreme Court on February 25, 1989.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Set forth the statutory basis for permitting appellate review. For example, in an appeal from a final judgment to the Court of Appeals, the appellant might state that the ground for appellate review is a final judgment of the superior court under G.S. § 7A-27(b). If the appeal is based on N.C. R. Civ. P. 54(b), the appellant must also state that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. If the appeal is from an interlocutory order or determination based on a substantial

right, the appellant must present, in addition to the statutory authorization, facts and argument showing the substantial right that will be lost, prejudiced, or less than adequately protected absent immediate appellate review.

STATEMENT OF THE FACTS

The facts constitute the basis of the dispute or criminal charges and the procedural mechanics of the case if they are significant to the questions presented. The facts should be stated objectively and concisely and should be limited to those which are relevant to the issue or issues presented.

Do not include verbatim portions of the record or other matters of an evidentiary nature in the statement of the facts. Summaries and record or transcript citations should be used. No appendix should be compiled simply to support the statement of the facts.

The appellee's brief need contain no statement of the case or facts if there is no dispute. The appellee may state additional facts where deemed necessary, or, if there is a dispute of the facts, may restate the facts as they objectively appear from the appellee's viewpoint.

ARGUMENT

Each question will be set forth in upper case type as the party's contention, followed by the assignments of error pertinent to the question, identified by their numbers and by the pages in the printed record on appeal or in the transcript at which they appear, and separate arguments pertaining to and supporting that contention, e.g.,

> I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION.
>
> ASSIGNMENT OF ERROR NO. 2
> (T. p. 45, lines 20-23)

Parties should feel free to summarize, quote from, or cite to the record or transcript during the presentation of argument. If the transcript option is selected under Appellate Rule 9(c), the Appendix to the Brief becomes a consideration, as described in Appellate Rule 28 and below.

Where statutory or regulatory materials are cited, the relevant portions should be quoted in the body of the argument or placed in the appendix to the brief. Rule 28(d)(1)c.

CONCLUSION

State briefly and clearly the specific objective or relief sought in the appeal. It is not necessary to restate the party's contentions, since they are presented both in the index and as headings to the individual arguments.

SIGNATURE AND CERTIFICATE OF SERVICE

Following the conclusion, the brief must be dated and signed, with the attorney's mailing address and telephone number, all indented to the center of the page.

The Certificate of Service is then shown with centered, upper case heading. The certificate itself, describing the manner of service upon the opposing party with the complete mailing address of the party or attorney served is followed by the date and the signature of the person certifying the service.

APPENDIX TO THE BRIEF UNDER THE TRANSCRIPT OPTION

Appellate Rules 9(c) and 28 require additional steps to be taken in the brief to point the Court to appropriate excerpts of the transcript considered essential to the understanding of the arguments presented.

Counsel is encouraged to cite, narrate, and quote freely within the body of the brief. However, if because of length a verbatim quotation is not included in the body of the brief, that portion of the transcript and others like it shall be gathered into an appendix to the brief which is situated at the end of the brief, following all signatures and certificates. Counsel should not compile the entire transcript into an appendix to support issues involving directed verdict, sufficiency of evidence, or the like.

The appendix should be prepared so as to be clear and readable, distinctly showing the transcript page or pages from which each passage is drawn. Counsel may reproduce transcript pages themselves, clearly indicating those portions to which attention is directed.

The Appendix should include a table of contents, showing the pertinent contents of the appendix, the transcript or appendix page reference and a reference back to the page of the brief citing the appendix. For example:

CONTENTS OF APPENDIX

* * * * *

The appendix will be printed with the brief to which it is appended; however, it will not be retyped, but run as is. Therefore, clarity of image is extremely important.

Appendix E amended effective 31 October 2001.

APPENDIX F
FEES AND COSTS

Fees and costs are provided by order of the Supreme Court and apply to proceedings in either appellate court. There is no fee for filing a motion in a cause; other fees are as follows, and should be submitted with the document to which they pertain, made payable to the Clerk of the appropriate appellate court:

Notice of Appeal, Petition for Discretionary Review, Petition for Writ of Certiorari or other extraordinary writ, Petition for Writ of Supersedeas—docketing fee of $10.00 for each document i.e.: docketing fees for a notice of appeal and petition for discretionary review filed jointly would be $20.00.

Petitions to rehear require a docketing fee of $20.00. (Petitions to rehear are only entertained in civil cases.)

Certification fee of $10.00 (payable to Clerk, Court of Appeals) where review of a judgment of Court of Appeals is sought in Supreme Court by notice of appeal or by petition.

An appeal bond of $250.00 is required in civil cases per Appellate Rule 6 and 17. The bond should be filed contemporaneously with the

record in the Court of Appeals and with the notice of appeal in the Supreme Court. The Bond will not be required in cases brought by petition for discretionary review or certiorari unless and until the Court allows the petition.

Costs for printing documents are $1.75 per printed page. The Appendix to a brief under the Transcript option of Appellate Rules 9(c) and 28(b) and (c) will be reproduced as is, but billed at the rate of the printing of the brief.

The Clerk of the Court of Appeals requires that a deposit for estimated printing costs accompany the document at filing. The Clerk of the Supreme Court prefers to bill the party for the costs of printing after the fact.

Court costs on appeal total $9.00, plus the cost of copies of the opinion to each party filing a brief, and are imposed when a notice of appeal is withdrawn or dismissed and when the mandate is issued following the opinion in a case.

Photocopying charges are $.20 per page. The facsimile transmission fee for documents sent from the clerk's office, which is in addition to standard photocopying charges, is $5.00 for the first 25 pages and $.20 for each page thereafter.

Appendix F amended effective 31 October 2001.

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendments to the Settlement Procedures in District Court Actions Involving Family Financial Issues

WHEREAS, section 7A-38.4A of the North Carolina General Statutes established pretrial settlement procedures in district court actions, and

WHEREAS, N.C.G.S. § 7A-38.4A (k) and (o) enables this Court to implement section 7A-38.4A by adopting rules and by adopting standards for certification of mediators and procedures for the enforcement of those standards,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.4A(o), the Settlement Procedures in District Court Actions Involving Family Financial Issues are adopted to read as attached hereto.

These Rules shall be promulgated by publication in the advance sheets of the Supreme Court and the Court of Appeals. They shall be effective on the 16th day of October, 2001.

Adopted by the Court in Conference this 16th day of October, 2001.

s/Butterfield, J.
Butterfield, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

RULE 1. INITIATING SETTLEMENT PROCEDURES

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.

Pursuant to G.S. 7A-38.4A, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent any party to a district court case involving family financial issues, including equitable distribution, child support, alimony, post-separation support action, or claims arising out of contracts between the parties under G.S. 50-20(d), 52-10, 52-10.1 or 52 B shall advise his or her client regarding the settlement procedures approved by these Rules and, at or prior to the scheduling conference mandated by G.S. 50-21(d), shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. ORDERING SETTLEMENT PROCEDURES.

(1) **Equitable Distribution Scheduling Conference.** At the scheduling conference mandated by G.S. 50-21(d) in an equitable distribution action, or at such earlier time as specified by local rule, the Court shall include in its scheduling order a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, other settlement procedure conducted pursuant to these rules, unless excused by the Court pursuant to Rule 1.C.(6) or by the Court or mediator pursuant to Rule 4.A.(2).

(2) Scope of Settlement Proceedings. All other financial issues existing between the parties when the equitable distribution settlement proceeding is ordered, or at any time thereafter, may be discussed, negotiated or decided at the proceeding. In those districts where a child custody and visitation mediation program has been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules only in those cases in which the parties and the mediator have agreed to include them and in which the parties have been exempted from, or have fulfilled the program requirements. In those districts where a child custody and visitation mediation program has not been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules with the agreement of all parties and the mediator.

(3) Authorizing Settlement Procedures Other Than Mediated Settlement Conference. The parties and their attorneys are in the best position to know which settlement procedure is appropriate for their case. Therefore, the Court shall order the use of a settlement procedure authorized by Rules 10-12 herein or by local rules of the District Court in the county or district where the action is pending if the parties have agreed upon the procedure to be used, the neutral to be employed and the compensation of the neutral. If the parties have not agreed on all three items, then the Court shall order the parties and their counsel to attend a mediated settlement conference conducted pursuant to these Rules.

The motion for an order to use a settlement procedure other than a mediated settlement conference shall be submitted on an AOC form at the scheduling conference and shall state:

(a) the settlement procedure chosen by the parties:

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral;

(d) that all parties consent to the motion.

(4) Content of Order. The Court's order shall (1) require the mediated settlement conference or other settlement proceeding be held in the case; (2) establish a deadline for the completion of the conference or proceeding; and (3) state that the parties shall be required to pay the neutral's fee at the conclusion of the settlement conference or proceeding unless otherwise ordered by the Court. Where the settlement proceeding ordered is a judicial settlement conference, the parties shall not be required to pay for the neutral.

The order shall be contained in the Court's scheduling order, or, if no scheduling order is entered, shall be on an AOC form. Any scheduling order entered at the completion of a scheduling conference held pursuant to local rule may be signed by the parties or their attorneys in lieu of submitting the forms referred to hereinafter relating to the selection of a mediator.

(5) Court-Ordered Settlement Procedures in Other Family Financial Cases. Any party to an action involving family financial issues not previously ordered to a mediated settlement conference may move the Court to order the parties to participate in a settlement procedure. Such motion shall be made in writing, state the reasons why the order should be allowed and be served on the non-moving party. Any objection to the motion or any request for hearing shall be filed in writing with the Court within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion and notify the parties or their attorneys of the ruling. If the Court orders a settlement proceeding, then the proceeding shall be a mediated settlement conference conducted pursuant to these Rules. Other settlement procedures may be ordered if the circumstances outlined in subsection (3) above have been met.

(6) Motion to Dispense With Settlement Procedures. A party may move the Court to dispense with the mediated settlement conference or other settlement procedure. Such motion shall be in writing and shall state the reasons the relief is sought. For good cause shown, the Court may grant the motion. Such good cause may include, but not be limited to, the fact that the parties have participated in a settlement procedure such as non-binding arbitration or early neutral evaluation prior to the court's order to participate in a medi-

ated settlement conference or have elected to resolve their case through arbitration under the Family Law Arbitration Act (G.S. 50-41 et seq) or that one of the parties has alleged domestic violence. The Court may also dispense with the mediated settlement conference for good cause upon its own motion or by local rule.

RULE 2. SELECTION OF MEDIATOR

A. SELECTION OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY AGREEMENT OF THE PARTIES. The parties may select a certified family financial mediator certified pursuant to these Rules by agreement by filing with the Court a Designation of Mediator by Agreement at the scheduling conference. Such designation shall: state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules.

In the event the parties wish to select a mediator who is not certified pursuant to these Rules, the parties may nominate said person by filing a Nomination of Non-Certified Family Financial Mediator with the Court at the scheduling conference. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience, or other qualifications of the mediator; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation, if any. The Court shall approve said nomination if, in the Court's opinion, the nominee is qualified to serve as mediator and the parties and the nominee have agreed upon the rate of compensation.

Designations of mediators and nominations of mediators shall be made on an AOC form. A copy of each such form submitted to the Court and a copy of the Court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

B. APPOINTMENT OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY THE COURT. If the parties cannot agree upon the selection of a mediator, they shall so notify the Court and request that the Court appoint a mediator. The motion shall be filed at the scheduling conference and shall state that the attorneys for the parties have had a full and frank discus-

sion concerning the selection of a mediator and have been unable to agree. The motion shall be on an AOC form.

Upon receipt of a motion to appoint a mediator, or in the event the parties have not filed a designation or nomination of mediator, the Court shall appoint a certified family financial mediator certified pursuant to these Rules under a procedure established by said Judge and set out in local order or rule.

The Dispute Resolution Commission shall furnish for the consideration of the District Court Judges of any district where mediated settlement conferences are authorized to be held a list of those certified family financial mediators who request appointments in said district. Said list shall contain the mediators' names, addresses and phone numbers and shall be provided in writing or on the Commission's web site.

C. **MEDIATOR INFORMATION DIRECTORY.** To assist the parties in the selection of a mediator by agreement, the Chief District Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all mediators certified pursuant to these Rules who wish to mediate in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Court in such county and the office of the Chief District Court Judge or Trial Court Administrator in such county or, in a single county district, in the office of the Chief District Court Judge or said judge's designee.

D. **DISQUALIFICATION OF MEDIATOR.** Any party may move a Court of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. **WHERE CONFERENCE IS TO BE HELD.** The mediated settlement conference shall be held in any location agreeable

to the parties and the mediator. If the parties cannot agree to a location, the mediator shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date. The mediator is authorized to assist the parties in establishing a discovery schedule and completing discovery.

The Court's order issued pursuant to Rule 1.A.(1) shall state a deadline for completion of the conference which shall be not more than 150 days after issuance of the Court's order, unless extended by the Court. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION. A party, or the mediator, may move the Court to extend the deadline for completion of the conference. Such motion shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the motion, said party shall promptly communicate its objection to the Court.

The Court may grant the request by entering a written order setting a new deadline for completion of the conference, which date may be set at any time prior to trial. Said order shall be delivered to all parties and the mediator by the person who sought the extension.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set during the conference, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(b) Attorneys. At least one counsel of record for each party whose counsel has appeared in the action.

(2) Any person required to attend a mediated settlement conference shall physically attend until such time as an agreement has been reached or the mediator, after conferring with the parties and their counsel, if any, declares an impasse. No mediator shall prolong a conference unduly.

Any such person may have the attendance requirement excused or modified, including allowing a person to participate by phone, by agreement of both parties and the mediator or by order of the Court. Ordinarily, attorneys for the parties may be excused from attending only after they have appeared at first session.

B. FINALIZING BY NOTARIZED AGREEMENT, CONSENT ORDER AND/OR DISMISSAL. The essential terms of the parties' agreement shall be reduced to writing as a summary memorandum at the conclusion of the conference unless the parties have reduced their agreement to writing, have signed it and in all other respects have complied with the requirements of Chapter 50 of the General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to the its terms.

Within thirty (30) days of reaching agreement at the conference, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate. In the event the parties fail to agree on the wording or terms of a final agreement or court order,

the mediator may schedule another session if the mediator determines that it would assist the parties.

C. **PAYMENT OF MEDIATOR'S FEE.** The parties shall pay the mediator's fee as provided by Rule 7.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES

If any person required to attend a mediated settlement conference fails to attend without good cause, the Court may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party to the action seeking sanctions, or the Court on its own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) **Control of Conference.** The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court upon the recommendation of the Dispute Resolution Commission, which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) **Private Consultation.** The mediator may communicate privately with any participant during the conference. However, there shall be no *ex parte* communication before or outside the conference between the mediator and any counsel or party on any matter touching the proceeding, except with regard to scheduling matters. Nothing in this rule prevents the mediator from engaging in *ex parte* communications, with the consent of the parties, for the purpose of assisting settlement negotiations.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.4A(j).

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) Reporting Results of Conference. The mediator shall report to the Court, or its designee, using an AOC form, within 10 days of the completion of the conference, whether or not an agreement was reached by the parties.

If the case is settled or otherwise disposed of prior to the conference, the mediator shall file the report indicating the disposition of the case, the person who informed the mediator that settlement had been reached, and the person who will present final documents to the court.

If an agreement was reached at the conference, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the persons designated to file such consent judgment or dismissals. If partial agreements are reached at the conference, the report shall state what issues remain for trial. The mediator's report shall inform the Court of the absence without permission of any party or attorney from the mediated settlement conference. The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the mediator to provide statistical data in the report for evaluation of the mediated settlement conference program.

Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the court and sanctions.

(5) **Scheduling and Holding the Conference.** The mediator shall schedule the conference and conduct it prior to the conference completion deadline set out in the Court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless changed by written order of the Court.

(6) **Informational Brochure.** Before the conference, the mediator shall distribute to the parties or their attorneys a brochure prepared by the Dispute Resolution Commission explaining the mediated settlement conference process and the operations of the Commission.

(7) **Evaluation Forms.** The mediator shall distribute to the parties and their attorneys at the conference an evaluation form prepared by the Dispute Resolution Commission. All participants are encouraged to fill out and return the forms to the mediator to further the mediator's professional development.

RULE 7. COMPENSATION OF THE MEDIATOR AND SANCTIONS

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.

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, which accrues upon appointment and shall be paid if the case settles prior to the mediated settlement conference or if the court approves the substitution of a mediator selected by the parties for a court appointed mediator.

C. **PAYMENT OF COMPENSATION BY PARTIES.** Unless otherwise agreed to by the parties or ordered by the Court, the mediator's fee shall be paid in equal shares by the parties. Payment shall be due and payable upon completion of the conference.

D. **INABILITY TO PAY.** No party found by the Court to be unable to pay a full share of a mediator's fee shall be required to pay a full share. Any party required to pay a share of a mediator fee pursuant to Rule 7.B.andC. may move the Court to pay according to the Court's determination of that party's ability to pay.

In ruling on such motions, the Judge may consider the income and assets of the movant and the outcome of the action. The Court shall enter an order granting or denying the party's motion. In so ordering, the Court may require that one or more shares be paid out of the marital estate.

Any mediator conducting a settlement conference pursuant to these rules shall accept as payment in full of a party's share of the mediator's fee that portion paid by or on behalf of the party pursuant to an order of the Court issued pursuant to this rule.

E. **POSTPONEMENT FEES.** As used herein, the term "postponement" shall mean rescheduling or not proceeding with a settlement conference once a date for the settlement conference has been scheduled by the mediator. After a settlement conference has been scheduled for a specific date, a party may not postpone the conference without good cause. A con-

ference may be postponed only after notice to all parties of the reason for the postponement, payment to the mediator of a postponement fee as provided below or as agreed when the mediator is selected, and consent of the mediator and the opposing attorney.

In cases in which the court appoints the mediator, if a settlement conference is postponed without good cause within seven (7) business days of the scheduled date, the fee shall be $125. If the settlement conference is postponed without good cause within three (3) business days of the scheduled date, the fee shall be $250. Postponement fees shall be paid by the party requesting the postponement unless agreed to by the parties. Postponement fees are in addition to the one-time, per case administrative fee provided for in Rule 7.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) shall subject that party to the contempt power of the court.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as mediators. For certification, a person must have complied with the requirements in each of the following sections.

A. Training and Experience.

1. Be an Advanced Practitioner member of the Association for Conflict Resolution who is subject to requirements equivalent to those in effect for Practitioner Members of the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution; or

2. Have completed a 40 hour family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9 and have additional experience as an attorney and/or judge of the General Court of Justice for at least four years who is either:

   (a.) a member in good standing of the North Carolina State Bar, pursuant to Title 27, N.C. Administrative Code.

The N.C. State Bar, Chapter 1, Subchapter A, Section .0201(b) or Section .0201(c)(1), as those rules existed January 1, 2000; or

(b.) a member similarly in good standing of the Bar of another state; demonstrates familiarity with North Carolina court structure, legal terminology and civil procedure; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule.

B. If not licensed to practice law in one of the United States, have completed a six hour training on North Carolina legal terminology, court structure and civil procedure provided by a trainer certified by the Dispute Resolution Commission.

C. Be a member in good standing of the State Bar of one of the United States or have provided to the Dispute Resolution Commission three letters of reference as to the applicant's good character and experience as required by Rule 8.A.

D. Have observed with the permission of the parties five mediated settlement conferences as a neutral observer:

(1) three of which shall be settlement conferences involving custody or family financial issues conducted by a mediator who is certified pursuant to these rules, who is an Advanced Practitioner Member of the Association for Conflict Resolution and subject to requirements equivalent to those in effect for Practitioner Members of the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution, or who is an A.O.C. mediator.

(2) two of which may be mediated settlement conferences ordered by a Superior Court, the North Carolina Office of Administrative Hearings, Industrial Commission or the US District Courts for North Carolina, and conducted by a certified Superior Court mediator.

E. Demonstrate familiarity with the statutes, rules, and standards of practice and conduct governing mediated settlement conferences conducted pursuant to these Rules.

F. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. Applicants for certification and recertification and all certified family financial mediators shall report to the Commission any criminal convictions, disbarments or other disciplinary complaints and actions as soon as the applicant or mediator has notice of them.

G. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission.

H. Pay all administrative fees established by the Administrative Office of the Court in consultation with the Dispute Resolution Commission.

I. Agree to accept as payment in full of a party's share of the mediator's fee as ordered by the Court pursuant to Rule 7.

J. Agree to be placed on at least one district's mediator appointment list and accept appointments, unless the mediator has a conflict of interest which would justify disqualification as mediator.

K. Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include advanced divorce mediation training, attendance at conferences or seminars relating to mediation skills or process, and consultation with other family and divorce mediators about cases actually mediated. Mediators seeking recertification beyond one year from the date of initial certification may also be required to demonstrate that they have completed 8 hours of family law training, including tax issues relevant to divorce and property distribution, and 8 hours of training in family dynamics, child development and interpersonal relations at any time prior to that recertification.)

Certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or

has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

Certification of mediators who have been certified as family financial mediators by the Dispute Resolution Commission prior to the adoption of these Rules may not be revoked or not renewed solely because they do not meet the experience and training requirements in Rule 8.

The Dispute Resolution Commission may certify applicants who satisfy the requirements of Rule 8.B. and 8.D. within six (6) months of the adoption of these Rules if they have satisfied, on the date of the adoption of these Rules, all other requirements of Rule 8 as it existed immediately prior to the adoption of these Rules.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators certified pursuant to these rules shall consist of a minimum of forty hours of instruction. The curriculum of such programs shall include the subjects in each of the following sections.

(1) Conflict resolution and mediation theory.

(2) Mediation process and techniques, including the process and techniques typical of family and divorce mediation.

(3) Knowledge of communication and information gathering skills.

(4) Standards of conduct for mediators.

(5) Statutes, rules, and practice governing mediated settlement conferences conducted pursuant to these Rules.

(6) Demonstrations of mediated settlement conferences with and without attorneys involved.

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty.

(8) An overview of North Carolina law as it applies to custody and visitation of children, equitable distribution, alimony, child support, and post separation support.

(9) An overview of family dynamics, the effect of divorce on children and adults, and child development.

(10) Protocols for the screening of cases for issues of domestic violence and substance abuse.

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

B. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states or approved by the Association for Conflict Resolution (ACR) with requirements equivalent to those in effect for the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule. The Dispute Resolution Commission may require attendees of an ACR approved program to demonstrate compliance with the requirements of Rule 9.A.(5) and 9.A.(8) either in the ACR approved training or in some other acceptable course.

C. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts in consultation with the Dispute Resolution Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES.

Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Court may order the use of those procedures listed in Rule 10.B. unless the Court finds: that the parties did not agree upon the procedure to be utilized, the neutral to conduct it, or the neutral's compensation; or that the procedure selected is not appropriate for the case or the

parties. Judicial settlement conferences may be ordered only if permitted by local rule.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES.

In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) **Neutral Evaluation** (Rule 11), in which a neutral offers an advisory evaluation of the case following summary presentations by each party.

(2) **Judicial Settlement Conference** (Rule 12), in which a District Court Judge assists the parties in reaching their own settlement, if allowed by local rules.

(3) **Other Settlement Procedures** described and authorized by local rule pursuant to Rule 13.

The parties may agree to use arbitration under the Family Law Arbitration Act (G.S. 50-41 et seq) which shall constitute good cause for the court to dispense with settlement procedures authorized by these rules (Rule 1.C.6).

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

(1) **When Proceeding is Conducted.** The neutral shall schedule the conference and conduct it no later than 150 days from the issuance of the Court's order or no later than the deadline for completion set out in the Court's order, unless extended by the Court. The neutral shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the neutral shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(2) **Extensions of Time.** A party or a neutral may request the Court to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. The Court may grant the extension and enter an order setting a new deadline for completion of the settlement procedure. Said order shall be delivered to all

parties and the neutral by the person who sought the extension.

(3) **Where Procedure is Conducted.** Settlement proceedings shall be held in any location agreeable to the parties. If the parties cannot agree to a location, the neutral shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

(4) **No Delay of Other Proceedings.** Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

(5) **Inadmissibility of Settlement Proceedings.** Evidence of statements made and conduct occurring in a settlement proceeding conducted under this section shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim, except in proceedings for sanctions or proceedings to enforce a settlement of the action. No settlement agreement reached at a settlement proceeding conducted pursuant to these Rules shall be enforceable unless it has been reduced to writing and signed by the parties and in all other respects complies with the requirements of Chapter 50 of the General Statutes. However, no evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, or other neutral conducting a settlement proceeding under this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a mediated settlement conference or other settlement procedure in any civil proceeding for any purpose, including proceedings to enforce a settlement of the action, except to attest to the signing of any of these agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators, and proceedings to enforce laws concerning juvenile or elder abuse.

(6) No Record Made. There shall be no stenographic or other record made of any proceedings under these Rules.

(7) Ex Parte Communication Prohibited. Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(8) Duties of the Parties.

(a) Attendance. All parties and attorneys shall attend other settlement procedures authorized by Rule 10 and ordered by the Court.

(b) Finalizing Agreement. If agreement is reached during the proceeding, the essential terms of the agreement shall be reduced to writing as a summary memorandum unless the parties have reduced their agreement to writing, signed it and in all other respects have complied with the requirements of Chapter 50 of the General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to the its terms. Within 30 days of the proceeding, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate.

(c) Payment of Neutral's Fee. The parties shall pay the neutral's fee as provided by Rule 10.C.(12), except that no payment shall be required or paid for a judicial settlement conference.

(9) Sanctions for Failure to Attend Other Settlement Procedures. If any person required to attend a settlement proceeding fails to attend without good cause, the Court may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, neutral fees, expenses and loss of earnings incurred by persons attending the conference.

A party to the action, or the Court on its own motion, seeking sanctions against a party or attorney, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

(10) Selection of Neutrals in Other Settlement Procedures.

Selection By Agreement. The parties may select any person whom they believe can assist them with the settlement of their case to serve as a neutral in any settlement procedure authorized by these rules, except for judicial settlement conferences.

Notice of such selection shall be given to the Court and to the neutral through the filing of a motion to authorize the use of other settlement procedures at the scheduling conference or the court appearance when settlement procedures are considered by the Court. The notice shall be on an AOC form as set out in Rule 2 herein. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

If the parties are unable to select a neutral by agreement, then the Court shall deny the motion for authorization to use another settlement procedure and the court shall order the parties to attend a mediated settlement conference.

(11) Disqualification of Neutrals. Any party may move a Court of the district in which an action is pending for an order disqualifying the neutral; and, for good cause, such order shall be entered. Cause shall exist, but is not limited to circumstances where, if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) Compensation of Neutrals. A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time. The parties shall not compensate a settlement judge.

(13) Authority and Duties of Neutrals.

(a) Authority of Neutrals.

(i) Control of Proceeding. The neutral shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the Proceeding. The neutral shall make a good faith effort to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral. In the absence of agreement, the neutral shall select the date and time for the proceeding. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(b) Duties of Neutrals.

(i) The neutral shall define and describe the following at the beginning of the proceeding:

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(l) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral and the participants;

(ii) Disclosure. The neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(iii) **Reporting Results of the Proceeding.** The neutral shall report the result of the proceeding to the Court in writing within ten (10) days in accordance with the provisions of Rules 11, 12 and 13 herein on an AOC form. The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the neutral to provide statistical data for evaluation of other settlement procedures.

(iv) **Scheduling and Holding the Proceeding.** It is the duty of the neutral to schedule the proceeding and conduct it prior to the completion deadline set out in the Court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral unless said time limit is changed by a written order of the Court.

RULE 11. RULES FOR NEUTRAL EVALUATION

A. **NATURE OF NEUTRAL EVALUATION.** Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of the merits of the case, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. **WHEN CONFERENCE IS TO BE HELD.** As a guiding principle, the neutral evaluation conference should be held at an early stage of the case, after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. **PRE-CONFERENCE SUBMISSIONS.** No later than twenty (20) days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder

shall be a summary of the significant facts and issues in the party's case, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Court.

D. REPLIES TO PRE-CONFERENCE SUBMISSIONS. No later than ten (10) days prior to the date established for the neutral evaluation conference to begin, any party may, but is not required to, send additional written information to the evaluator responding to the submission of an opposing party. The response furnished to the evaluator shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator, if he or she deems it necessary, may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) Evaluator's Opening Statement. At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The facts that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the parties.

(2) Oral Report to Parties by Evaluator. In addition to the written report to the Court required under these rules, at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case.

Such opinion shall include a candid assessment of the merits of the case, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefor. The evaluator shall not reduce his or her oral report to writing and shall not inform the Court thereof.

(3) **Report of Evaluator to Court.** Within ten (10) days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, whether or not an agreement was reached by the parties, and the name of the person designated to file judgments or dismissals concluding the action.

H. **EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS.** If all parties at the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions. If the parties do not reach a settlement during such discussions, however, the evaluator shall complete the neutral evaluation conference and make his or her written report to the Court as if such settlement discussions had not occurred. If the parties reach agreement at the conference, they shall reduce their agreement to writing as required by Rule 10.C.(8)(b).

RULE 12. JUDICIAL SETTLEMENT CONFERENCE

A. **Settlement Judge.** A judicial settlement conference shall be conducted by a District Court Judge who shall be selected by the Chief District Court Judge. Unless specifically approved by the Chief District Court Judge, the District Court Judge who presides over the judicial settlement conference shall not be assigned to try the action if it proceeds to trial.

B. **Conducting the Conference.** The form and manner of conducting the conference shall be in the discretion of the settlement judge. The settlement judge may not impose a settlement on the parties but will assist the parties in reaching a resolution of all claims.

C. **Confidential Nature of the Conference.** Judicial settlement conferences shall be conducted in private. No steno-

graphic or other record may be made of the conference. Persons other than the parties and their counsel may attend only with the consent of all parties. The settlement judge will not communicate with anyone the communications made during the conference, except that the judge may report that a settlement was reached and, with the parties' consent, the terms of that settlement.

D. Report of Judge. Within ten (10) days after the completion of the judicial settlement conference, the settlement judge shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, whether or not an agreement was reached by the parties, and the name of the person designated to file judgments or dismissals concluding the action.

RULE 13. LOCAL RULE MAKING

The Chief District Court Judge of any district conducting settlement procedures under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.4, implementing settlement procedures in that district.

RULE 14. DEFINITIONS

(A) The word, Court, shall mean a judge of the District Court in the district in which an action is pending who has administrative responsibility for the action as an assigned or presiding judge, or said judge's designee, such as a clerk, trial court administrator, case management assistant, judicial assistant, and trial court coordinator.

(B) The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by AOC. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

(C) The term, Family Financial Case, shall refer to any civil action in district court in which a claim for equitable distribution, child support, alimony, or post separation support is made, or in which there are claims arising out of contracts between the parties under GS 50-20(d),52-10, 52-10.1 or 52B.

RULE 15. TIME LIMITS

Any time limit provided for by these rules may be waived or extended for good cause shown. Time shall be counted pursuant to the Rules of Civil Procedure.

AMENDMENTS TO THE REVISED RULES OF PROFESSIONAL CONDUCT CONCERNING ADVERTISING

The following amendments to the Rules and 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 18, 2002.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Revised Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, Rule 7.1, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Revised Rules of Professional Conduct, Rule 7.1, Communications Concerning a Lawyer's Services

Rule 7.1 Communications Concerning A Lawyer's Services

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

~~(a)~~(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

~~(b)~~(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

~~(c)~~(3) compares the lawyer's services with other lawyers' services unless the comparison can be factually substantiated.

(b) A communication by a lawyer that contains a dramatization depicting a fictional situation is misleading unless it complies with paragraph (a) above and contains a conspicuous written or oral statement, at the beginning and the end of the communication, explaining that the communication contains a dramatization and does not depict actual events or real persons.

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 18, 2002.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of February, 2002.

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 6th day of March, 2002.

s/I. Beverly Lake, Jr.
I. Beverly Lake, Jr., Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 6th day of March, 2002.

s/G.K. Butterfield, Jr.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ADMINISTRATIVE COMMITTEE

The following amendments to the Rules and 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 18, 2002.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning reinstatement from inactive membership status, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0900 Procedures for Administrative Committee

.0902 Reinstatement from Inactive Status

(b) Contents of Reinstatement Petition

The petition shall set out facts showing the following:

. . .

(4) [this provision shall be effective for all members who are transferred to inactive status on or after January 1, 1996] if 2 or more years have elapsed between the date of the entry of the order transferring the member to inactive status and the date the petition is filed with the secretary of the State Bar, that during the period of inactive status, the member has completed 15 hours of continuing legal education (CLE) approved by the Board of Continuing Legal Education pursuant to Rule .1519. of this subchapter. Of the required 15 CLE hours, 3 hours must be earned by attending ~~a 3 hour block course~~ three hours of instruction ~~devoted exclusively to the area of~~ in professional responsibility; and

. . .

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 18, 2002.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of February, 2002.

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 6th day of March, 2002.

s/I. Beverly Lake, Jr.
I. Beverly Lake, Jr., Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 6th day of March, 2002.

s/G.K. Butterfield, Jr.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PLAN OF LEGAL SPECIALIZATION

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 18, 2002.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the Plan of Legal Specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .1700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1700, The Plan of Legal Specialization

.1721 Minimum Standards for Continued Certification of Specialists

(c) After the period of initial certification, a specialist may request, in advance and in writing, approval from the board for a waiver of one year of the substantial involvement necessary to satisfy the standards for the specialist's next recertification. The specialist may request a waiver of one year of substantial involvement for every five years that the specialist has met the substantial involvement standard beginning with the period of initial certification. However, none of the years for which a waiver is requested may be consecutive. When a waiver of the substantial involvement requirement is granted, the specialist must satisfy all of the other requirements for recertification.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment

to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 18, 2002.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of February, 2002.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar; it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of March, 2002.

s/I. Beverly Lake, Jr.
I. Beverly Lake, Jr., Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 6th day of March, 2002.

s/G.K. Butterfield, Jr.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

The following amendments to the Rules and 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 18, 2002.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the discipline and disability of attorneys, as particularly set forth in 27 N.C.A.C. 1B, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

.0112 Investigations: Initial Determination

. . .

(i) If at any time prior to a finding of probable cause, the chairperson of the Grievance Committee, upon the recommendation of the counsel or the Grievance Committee, determines that the alleged misconduct is primarily attributable to the respondent's failure to employ sound law office management techniques and procedures, the chairperson of the Grievance Committee may, with the respondent's consent, refer the case to a program of law office management training approved by the State Bar. The respondent will then be required to complete a course of training in law office management prescribed by the chairperson of the Grievance Committee which may include a comprehensive site audit of the respondent's records and procedures as well as continuing legal education seminars. ~~Upon the respondent's successful completion of the prescribed training, the same will be reported to the chairperson of the Grievance Committee, who will order the dismissal of the grievance.~~ If the respondent successfully completes the rehabilitation program, the Grievance Committee can consider that as a mitigating factor and may, for good cause shown, dismiss the grievance. If the respondent fails to cooperate with the training program's employees or fails to complete the prescribed training, that will be reported to the chairperson of the Grievance Committee and the investigation of the original grievance shall resume.

.0118 Disability Hearings

(b) Disability Proceedings Initiated by the North Carolina State Bar

(1) When the North Carolina State Bar obtains evidence that a member has become disabled, the Grievance Committee will conduct a hearing in a manner that will conform as nearly as is possible to the procedures set forth in Rule .0113 of this subchapter. The Grievance Committee will determine whether there is probable cause to believe that the member is disabled within the meaning of Rule .0103~~(18)~~(19) of this subchapter. If the committee finds probable cause, a petition alleging disability will be filed in the name of the North Carolina State Bar by the counsel and signed by the chairperson of the Grievance Committee.

. . .

(4) In any proceeding seeking a transfer to disability inactive status under this rule, the North Carolina State Bar will have the burden of proving by clear, cogent, and convincing evidence that the member is disabled within the meaning of Rule .0103~~(18)~~(19) of this subchapter.

. . .

(c) Disability Proceedings Where Defendant Alleges Disability in Disciplinary Proceeding

(1) If, during the course of a disciplinary proceeding, the defendant contends that he or she is disabled within the meaning of Rule .0103~~(18)~~(19) of this subchapter, the disciplinary proceeding will be stayed pending a determination by the hearing committee whether such disability exists. The defendant will be immediately transferred to disability inactive status pending the conclusion of the disability hearing.

. . .

(3) The defendant will have the burden of proving by clear, cogent, and convincing evidence that he or she is disabled within the meaning of Rule .0103~~(18)~~(19) of this subchapter. If the hearing committee concludes that the defendant is disabled, the disciplinary proceedings will be stayed as long as the defendant remains in disability inactive status.

. . .

(d) Disability Hearings Initiated by a Hearing Committee

(1) If, during the pendency of a disciplinary proceeding a majority of the members of the hearing committee find reason to believe that the defendant is disabled, the committee will enter an order staying the disciplinary proceeding until the question of disability can be determined by the committee in accordance with the procedures set out in Rules .0118(b)(2)-(6) above. The State Bar will have the burden of proving by clear, cogent, and convincing evidence that the defendant is disabled within the meaning of Rule .0103~~(18)~~(19) of this subchapter.

. . . .

.0125 Reinstatement

(c) After transfer to disability inactive status:

. . .

(3) The member will have the burden of proving by clear, cogent, and convincing evidence that he or she is no longer disabled within the meaning of Rule .0103~~(18)~~(19) of this subchapter and that he or she is fit to resume the practice of law.

.0129 Confidentiality

(a) Except as otherwise provided in this rule and G.S. 84-28(f), all proceedings involving allegations of misconduct by or alleged disability of a member will remain confidential until

(1) a complaint against a member has been filed with the secretary after a finding by the Grievance Committee that there is probable cause to believe that the member is guilty of misconduct justifying disciplinary action or is disabled;

(2) the member requests that the matter be made public prior to the filing of a complaint;

(3) the investigation is predicated upon conviction of the member of or sentencing for a crime;

(4) a petition or action is filed in the general courts of justice; ~~or~~

(5) the member files an affidavit of surrender of license; or

(6) a member is transferred to disability inactive status pursuant to Rule .0118(g). In such an instance, the order transferring the member shall be public. Any other materials, including the medical evidence supporting the order, shall be kept confidential unless and until the member petitions for reinstatement pursuant to Rule .0118(c), unless provided otherwise in the order.

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 18, 2002.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of February, 2002.

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 6th day of March, 2002.

s/I. Beverly Lake, Jr.
I. Beverly Lake, Jr., Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 6th day of March, 2002.

s/G.K. Butterfield, Jr.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE MODEL BYLAWS FOR JUDICIAL DISTRICT BARS

The following amendments to the Rules and 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 18, 2002.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the Model Bylaws for Judicial District Bars, as particularly set forth in 27 N.C.A.C. 1A, Section .1000, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .1000, Model Bylaws for Use by Judicial District Bars

.1010 Committees

(a) Standing committee(s): The standing committees shall be the Nominating Committee, Pro Bono Committee, Fee Dispute ~~Arbitration~~ Resolution Committee and Grievance Committee, provided that, with respect to the Fee Dispute ~~Arbitration~~ Resolution Committee and the Grievance Committee, the district meets the State Bar guidelines relating thereto.

(b) Fee ~~Arbitration~~ Dispute Resolution Committee:

(1) The Fee ~~Arbitration~~ Dispute Resolution Committee shall consist of at least six but not more than eighteen persons appointed by the president to staggered three-year terms as provided in the district bar's Fee ~~Arbitration~~ Dispute Resolution Plan.

(2) The Fee ~~Arbitration~~ Dispute Resolution Committee shall be responsible for implementing a Fee ~~Arbitration~~ Dispute Resolution Plan approved by the Council of the North Carolina State Bar to resolve fee disputes efficiently, economically, and expeditiously without litigation.

. . .

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 18, 2002.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of February, 2002.

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 6th day of March, 2002.

s/I. Beverly Lake, Jr.
I. Beverly Lake, Jr., Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 6th day of March, 2002.

s/G.K. Butterfield, Jr.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PRACTICAL TRAINING OF LAW STUDENTS

The following amendments to the Rules and 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 18, 2002.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the practical training of law students, as particularly set forth in 27 N.C.A.C. 1C, Section .0200, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1C, Section .0200, Rules Governing the Practical Training of Law Students

.0202 Definitions

The following definitions shall apply to the terms used in this section:

(1) Legal aid clinic—A department, division, program or course in a law school, approved by the Council of the North Carolina State Bar, which operates under the supervision of an active member of the State Bar and renders legal services to ~~indigent~~ eligible persons.

(2) ~~Indigent~~ Eligible persons—Persons who are unable financially ~~unable~~ to pay for the legal services of an attorney, as determined by a standard established by a judge of the General Court of Justice, a legal services corporation, or ~~the~~ a law school legal aid clinic providing representation. "Eligible persons" includes non-profit organizations serving low-income communities.

. . .

(4) Legal services corporation—A nonprofit North Carolina corporation organized exclusively to provide representation to ~~indigent~~ eligible persons.

. . . .

.0205 Supervision

(a) A supervising attorney shall

(1) be an active member of the North Carolina State Bar who practiced law as a full-time occupation for at least two years;

(2) supervise no more than ~~five~~ two legal interns concurrently, provided, however, ~~unless such~~ there is no limit on the number of legal interns who may be supervised concurrently by an attorney who is a full-time member of a law school's faculty or staff whose primary responsibility is supervising legal interns in a legal aid clinic and, further provided, that an attorney who supervises legal interns through an externship or out-placement program of a law school legal aid clinic may supervise up to five legal interns;

. . . .

.0206 Activities

(c) A legal intern may represent an ~~indigent~~ eligible person, or the state in criminal prosecutions, in any proceeding before a federal, state or local tribunal, including an administrative agency, if prior consent is obtained from the tribunal or agency upon application of the supervising attorney. Each appearance before the tribunal or agency shall be subject to any limitations imposed by the tribunal or agency including, but not limited to, the requirement that the supervising attorney physically accompany the legal intern.

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 18, 2002.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of February, 2002.

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 6th day of March, 2002.

s/I. Beverly Lake, Jr.
I. Beverly Lake, Jr., Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 6th day of March, 2002.

s/G.K. Butterfield, Jr.
For the Court

HEADNOTE INDEX

WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

CRIMINAL LAW—Continued

EVIDENCE

Bumper sticker on defendant's truck—not relevant—not prejudicial—Testimony about a bumper sticker on a truck driven by the defendant in a first-degree murder prosecution was not prejudicial where there was no indication that defendant placed the bumper sticker on the truck and the testimony about the bumper sticker did not go to prove the existence of any fact of consequence to the determination of defendant's guilt, but the evidence of defendant's guilt was overwhelming. **State v. Anthony, 372.**

Corroboration—fact not in issue—The trial court did not err in a capital first-degree murder prosecution by excluding testimony from the managers of two adult-oriented establishments that the victim came to their stores two or three times a month where defendant contended that the testimony would have corroborated his assertion that he met the victim in one of the stores on the night of the victim's death. Neither of the witnesses was able to testify to seeing defendant and the victim together on the night in question; moreover, where and when defendant met the victim was not a disputed fact at trial. **State v. Fair, 131.**

Cumulative effect—not prejudicial—The cumulative effect of any erroneous evidentiary rulings during a capital first-degree murder prosecution did not entitle defendant to a new trial given the greater weight of evidence against defendant. **State v. Anthony, 372.**

Defendant's demeanor after arrest—relevancy—lay opinion—The trial court did not abuse its discretion in a capital first-degree murder prosecution by admitting testimony of two of the State's witnesses concerning defendant's demeanor as calm at the time of his arrest within an hour of shooting the victim. **State v. Lloyd, 76.**

Expert testimony—basis—hearsay—The trial court did not err in a capital prosecution for first-degree murder by allowing an SBI DNA expert to base her testimony in part on bloodstained cloth samples taken by another agent who was unable to testify where the expert examined the pants from which the samples were taken to determine whether the cuttings were from the areas indicated by the other agent's notes. The cuttings and the pants were admitted into evidence, so that defendant was able to cross-examine the expert fully concerning the original location of the blood samples and was free to conduct his own tests, and the jury was free to make its own determination. **State v. Fair, 131.**

Expert testimony—victim's four wounds—pain—The trial court did not err in a capital first-degree murder prosecution by allowing a pathologist to testify that each of the victim's four wounds would have been painful. **State v. Lloyd, 76.**

Guilt of another—mental history—The trial court did not err in a capital first-degree murder prosecution by excluding evidence allegedly indicating that someone else had killed the victim. **State v. May, 172.**

Habit—occasional visits to store—The trial court did not abuse its discretion in a capital prosecution for first-degree murder by determining that the victim's visits to adult-oriented businesses did not constitute relevant evidence of habit. Occasional visits to a store do not rise to the level of regular and systematic conduct. **State v. Fair, 131.**

Habit—speculation into thoughts—There was no prejudicial error in a prosecution for first-degree murder in the admission of testimony that the victim

SEARCH AND SEIZURE—Continued

the seizure was properly upheld on the basis of the plain view doctrine coupled with exigent circumstances and on the ground that the search was incident to a lawful arrest. **State v. Bone, 1.**

SENTENCING

Aggravating factor—armed robbery—carrying concealed weapon—The trial court did not err by aggravating defendant's armed robbery sentence by finding that he was carrying a concealed weapon. **State v. Wilson, 493.**

Capital—acting in concert—*Enmund/Tison* instruction—defendant's state of mind—The trial court did not err in a capital first-degree murder resentencing proceeding by failing to require the jury to make a factual determination of defendant's state of mind concerning the murder pursuant to an *Enmund/Tison* instruction. **State v. Fletcher, 455.**

Capital—aggravating circumstance—especially heinous, atrocious, or cruel murder—instructions—The trial court did not err by giving Pattern Jury Instruction 150.10 on the especially heinous, atrocious or cruel aggravating circumstance in a capital sentencing proceeding. **State v. May, 172.**

Capital—aggravating circumstance—especially heinous, atrocious or cruel—The trial court did not err in a capital sentencing proceeding by submitting the especially heinous, atrocious, and cruel aggravating circumstance where the evidence showed that the victim's death was physically agonizing, involved psychological torture, and was conscienceless. There was evidence which included the victim being helpless to prevent her impending death between the time defendant first shot her and when he flipped her over to shoot her a second time, defendant killing the victim in the presence of her parents, and statements by defendant to several witnesses indicating that she feared defendant, as well as the fact that she had taken out a domestic violence order against him. **State v. Anthony, 372.**

Capital—aggravating circumstance—especially heinous, atrocious, or cruel murder—insufficient evidence—The trial court erred in a capital sentencing proceeding by submitting to the jury the statutory aggravating circumstance under N.C.G.S. § 15A-2000(e)(9) that the murder was especially heinous, atrocious, or cruel, and defendant's sentence of death is vacated. **State v. Lloyd, 76.**

Capital—aggravating circumstance—hindering government function—The trial court did not err in a capital sentencing proceeding by submitting to the jury the aggravating circumstance that the murder was committed to disrupt or hinder the lawful exercise of a governmental function where a domestic violence protective order had been issued after the victim had filed a complaint against defendant, the victim was scheduled to return to court the next day to obtain an extension, defendant was aware of the hearing and had asked that the date be changed, statements by defendant both before and after the shooting reflected his belief that the victim was keeping his children from him, and a restraining order so upset defendant that he ripped the papers and threw the pieces at the door of the victim's apartment. The jury could reasonably find that one reason defendant killed his wife was to stop this proceeding. **State v. Anthony, 372.**

SENTENCING—Continued

Capital—aggravating circumstance—victim engaged in performance of official duties as a witness at time of murder—The trial court erred in a capital first-degree murder prosecution by submitting the N.C.G.S. § 15A-2000(e)(8) aggravating circumstance that the victim was "engaged in" the performance of her official duties as a witness at the time of the murder where the evidence showed that defendant had been charged with assaulting the victim and the victim was to be a witness against defendant but was not actively participating in any of her duties as a witness as the time she was killed. **State v. Long, 534.**

Capital—aggravating circumstance—victim's exercise of official duty as witness—The trial court did not err in a capital sentencing proceeding by submitting the aggravating circumstance that the murder was committed "because of" the victim's exercise of her official duty as a witness where she had previously obtained an ex parte domestic violence protection order, she was scheduled to testify against defendant the day after her murder, defendant had been upset for some time over his separation from the victim and the custody of their children, defendant's own testimony reflected his frustration and anger over these issues, and defendant was aware of the ex parte order and that the victim was going to testify. A reasonable juror could conclude that one reason defendant killed his wife was that she obtained the protective order as an aspect of her official duty as a witness against him. **State v. Anthony, 372.**

Capital—consideration of mitigating circumstances—erroneous instruction—harmless error—Any error by the trial court during a capital sentencing proceeding by its instruction in Issue Three that each juror may consider any mitigating circumstance that the "jury" rather than "juror" determined to exist by a preponderance of the evidence in Issue Two did not preclude an individual juror from considering mitigating evidence that such juror alone found in Issue Two and was harmless. **State v. Bone, 1.**

Capital—death penalty—not disproportionate—A death sentence was not disproportionate where defendant was convicted on the theory of premeditation and deliberation; multiple aggravating circumstances were found to exist; defendant did not show concern for the victims, but attempted to hide his crime; he showed very little remorse; and one of the victims was a small child, less than five years old and under four feet tall, who weighed only 51 pounds. **State v. May, 172.**

Capital—death penalty—not disproportionate—A death penalty was not disproportionate where defendant repeatedly stabbed his victim; stole the man's wallet, money, jewelry, and car; left the man to die; went on a shopping spree with the man's credit cards; was convicted on the basis of premeditation and deliberation; and the jury found three of the four aggravating circumstances which can sustain a death sentence standing alone. **State v. Fair, 131.**

Capital—death penalty—not disproportionate—The trial court did not err by imposing the death penalty in a first-degree murder case where defendant broke into an elderly victim's home at night, stabbed and beat her in various rooms in the house, robbed her, and left her to die. **State v. Fletcher, 455.**

Capital—death penalty—not disproportionate—A sentence of death was not disproportionate where defendant shot his wife while her family watched; inflicted a second wound while the victim begged for her life; reloaded and shot the victim's father and attempted to shoot her mother; there was abundant evi-

SENTENCING—Continued

ry to the capital felony committed by another person and that his participation was relatively minor. **State v. Fletcher, 455.**

Capital—mitigating circumstances—acting under duress or under domination of another person—The trial court did not abuse its discretion in a capital first-degree murder resentencing proceeding by failing to submit to the jury the requested statutory mitigating circumstance under N.C.G.S. § 15A-2000(f)(5) that defendant was acting under duress or under the domination of another person. **State v. Fletcher, 455.**

Capital—mitigating circumstances—combining instead of submitting separately—The trial court did not err in a capital sentencing proceeding by combining requested mitigating circumstances and excluding some submitted mitigating circumstances instead of submitting the proposed circumstances separately and independently. **State v. Taylor, 28.**

Capital—mitigating circumstances—emotional disturbance—drug use and depression—evidence insufficient—Evidence of drug use did not warrant submission of the mental or emotional disturbance mitigating circumstance in a capital sentencing proceeding because voluntary intoxication alone is not sufficient. Although defendant argued that he was depressed, there was no testimony that he had been medically diagnosed as suffering from depression. Moreover, the mere fact that he was depressed or suffering a family crisis prior to the murder does not warrant submission of this mitigator where there is no substantial evidence that he was depressed or in crisis at the time he killed the victim. **State v. Fair, 131.**

Capital—mitigating circumstances—impaired capacity—consideration by jury—The jury in a capital sentencing proceeding did not fail to consider the impaired capacity mitigating circumstance where no juror found it to exist. Although defendant contended that the jury must have failed to consider it because the testimony of his psychiatrist was uncontested, the evidence was in fact contested by lay testimony and defendant did not request a peremptory instruction. Moreover, the jury could have considered that the defense expert interviewed defendant for little more than an hour on one occasion. Finally, the statutory circumstances found by the jury indicate that they considered the evidence with discrimination and not arbitrarily. **State v. Anthony, 372.**

Capital—mitigating circumstances—impaired capacity—drug use—insufficient link to crime—There was insufficient evidence in a capital sentencing proceeding to support submission of the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance of impaired capacity to appreciate the criminality of conduct where defendant relied upon his extensive and continuous drug use. Although drug use can support this mitigator, defendant here did not show a link between his drug use and his allegedly impaired capacity at the time of the murder. His search for drugs that night at most reveals a motive. **State v. Fair, 131.**

Capital—mitigating circumstances—instructions—The trial court did not commit reversible error in light of *McKoy v. North Carolina*, 494 U.S. 433, when it instructed the jury that it must be unanimous in its answers to Issues Three and Four on the Issues and Recommendation as to Punishment form. **State v. Anthony, 372.**

SENTENCING—Continued

WORD AND PHRASE INDEX