NORTH CAROLINA REPORTS

VOLUME 355

SUPREME COURT OF NORTH CAROLINA

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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.
EDWARD THOMAS BRADY[1]

Former Chief Justices

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

Former Justices

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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.
G. K. BUTTERFIELD, JR.

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KIMBERLY WOODELL SIEREDZKI

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1. Elected and sworn in 1 January 2003.

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 F. (TOBY) FITCH, JR.	Wilson
7BC	FRANK R. BROWN	Tarboro
	Second Division	
3B	BENJAMIN G. ALFORD	New Bern
	KENNETH F. CROW[1]	New Bern
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
	KENNETH C. TITUS[2]	Durham
15A	J. B. ALLEN, JR.	Burlington
	JAMES CLIFFORD SPENCER, JR.	Burlington
15B	WADE BARBER	Chapel Hill

DISTRICT	JUDGES	ADDRESS
	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
	OLA M. LEWIS[3]	Southport
16A	B. CRAIG ELLIS	Laurinburg
16B	ROBERT F. FLOYD, JR.	Lumberton
	GARY L. LOCKLEAR	Pembroke
	Fifth Division	
17A	MELZER A. MORGAN, JR.	Wentworth
	EDWIN GRAVES WILSON, JR.[4]	Reidsville
17B	A. MOSES MASSEY	King
	ANDY CROMER[5]	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	SUSAN C. TAYLOR	Monroe
	W. DAVID LEE[6]	Monroe
22	MARK E. KLASS	Lexington
	KIMBERLY S. TAYLOR	Hiddenite
	CHRISTOPHER COLLIER	Mooresville
	Seventh Division	
25A	BEVERLY T. BEAL	Lenoir
	ROBERT C. ERVIN[7]	Lenoir
25B	TIMOTHY S. KINCAID	Hickory
	NATHANIEL J. POOVEY[8]	Hickory
26	SHIRLEY L. FULTON[9]	Charlotte
	ROBERT P. JOHNSTON	Charlotte
	MARCUS L. JOHNSON	Charlotte
	W. ROBERT BELL	Charlotte

DISTRICT	JUDGES	ADDRESS
	RICHARD D. BONER	Charlotte
	J. GENTRY CAUDILL	Charlotte
	DAVID S. CAYER[10]	Charlotte
	YVONNE EVANS[11]	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
	CHARLES PHILLIP GINN[12]	Marshall
28	DENNIS JAY WINNER	Asheville
	RONALD K. PAYNE	Asheville
29	ZORO J. GUICE, JR.	Rutherfordton
	E. PENN DAMERON, JR.[13]	Marion
30A	JAMES U. DOWNS	Franklin
30B	JANET MARLENE HYATT	Waynesville

SPECIAL JUDGES

STEVE A. BALOG	Burlington
G. K. BUTTERFIELD, JR.[14]	Wilson
ALBERT DIAZ[15]	Charlotte
RICHARD L. DOUGHTON	Sparta
THOMAS D. HAIGWOOD	Greenville
D. JACK HOOKS[16]	Whiteville
CLARENCE E. HORTON, JR.	Kannapolis
JACK W. JENKINS	Raleigh
JOHN R. JOLLY, JR.	Raleigh
CHARLES C. LAMM, JR.	Boone
RIPLEY E. RAND	Raleigh
BEN F. TENNILLE	Greensboro
GARY TRAWICK, JR.	Burgaw

EMERGENCY JUDGES

NAPOLEON BAREFOOT, SR.	Wilmington
HENRY V. BARNETTE, JR.	Raleigh
DAVID H. BEARD, JR.[17]	Murfreesboro
ANTHONY M. BRANNON	Durham
ROBERT M. BURROUGHS	Charlotte
CLARENCE W. CARTER[18]	King
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.	Greensboro

DISTRICT	JUDGES	ADDRESS
	DONALD M. JACOBS	Goldsboro
	ROBERT W. KIRBY	Cherryville
	JAMES E. LANNING	Charlotte
	ROBERT D. LEWIS	Asheville
	JAMES D. LLEWELLYN	Kinston
	JERRY CASH MARTIN	King
	PETER M. MCHUGH[19]	Reidsville
	F. FETZER MILLS	Wadesboro
	HERBERT O. PHILLIPS III	Morehead City
	JAMES E. RAGAN III[20]	Oriental
	J. MILTON READ, JR.	Durham
	JULIUS ROUSSEAU, JR.	North Wilkesboro
	THOMAS W. SEAY, JR.	Spencer
	CLAUDE S. SITTON[21]	Morganton
	JAMES R. VOSBURGH[22]	Washington

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. Elected and sworn in 2 January 2003.
2. Elected and sworn in 1 January 2003 to replace David Q. LeBarre who retired 31 December 2002.
3. Elected and sworn in 9 January 2003.
4. Appointed and sworn in 15 May 2003 to replace Peter M. McHugh who retired 31 March 2003.
5. Elected and sworn in 5 January 2003 to replace Clarence W. Carter who retired 31 December 2002.
6. Appointed and sworn in 10 January 2003 to replace Sanford L. Steelman, Jr. who was elected to the Court of Appeals.
7. Elected and sworn in 1 January 2003 to replace Claude S. Sitton who retired 31 December 2002.
8. Elected and sworn in 1 January 2003.
9. Retired 31 January 2003.
10. Elected and sworn in 2 January 2003.
11. Appointed to a new position and sworn in 16 February 2001.
12. Elected and sworn in 1 January 2003.
13. Appointed and sworn in 1 January 2003 to replace Loto Greenlee Caviness who retired 31 August 2002.
14. Appointed and sworn in 1 January 2003.
15. Appointed and sworn in 1 January 2003.
16. Appointed and sworn in 9 January 2003.
17. Appointed and sworn in 20 May 2002.
18. Appointed and sworn in 2 January 2003.
19. Appointed and sworn in 1 April 2003.
20. Appointed and sworn in 9 January 2003.
21. Appointed and sworn in 2 January 2003.
22. Appointed and sworn in 6 January 2003.

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
	PAUL M. QUINN	New Bern
	KAREN A. ALEXANDER	New Bern
	PETER MACK, JR.[1]	New Bern
4	LEONARD W. THAGARD (Chief)	Clinton
	WAYNE G. KIMBLE, JR.	Jacksonville
	PAUL A. HARDISON	Jacksonville
	WILLIAM M. CAMERON III	Richlands
	LOUIS F. FOY, JR.	Pollocksville
	SARAH COWEN SEATON	Jacksonville
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5	JOHN J. CARROLL III (Chief)	Wilmington
	JOHN W. SMITH	Wilmington
	ELTON G. TUCKER	Wilmington
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	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
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	WILLIAM ROBERT LEWIS II	Winton
7	JOHN L. WHITLEY (Chief)	Wilson
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	JOHN M. BRITT	Tarboro
	PELL C. COOPER	Nashville
	ROBERT A. EVANS	Rocky Mount
	WILLIAM G. STEWART	Wilson
	WILLIAM CHARLES FARRIS	Wilson
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	DAVID B. BRANTLEY	Goldsboro

DISTRICT	JUDGES	ADDRESS
	LONNIE W. CARRAWAY	Goldsboro
	R. LESLIE TURNER	Kinston
	ROSE VAUGHN WILLIAMS	Goldsboro
	ELIZABETH A. HEATH[2]	Kinston
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
	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	ALBERT A. CORBETT, JR. (Chief)[3]	Smithfield
	EDWARD H. MCCORMICK	Lillington
	FRANK F. LANIER	Buies Creek
	MARCIA K. STEWART	Smithfield
	JACQUELYN L. LEE	Sanford
	JIMMY L. LOVE, JR.	Sanford
	ADDIE M. HARRIS-RAWLS	Clayton
	GEORGE R. MURPHY[4]	Smithfield
12	A. ELIZABETH KEEVER (Chief)	Fayetteville
	JOHN S. HAIR, JR.	Fayetteville
	ROBERT J. STIEHL III	Fayetteville
	EDWARD A. PONE	Fayetteville
	C. EDWARD DONALDSON	Fayetteville
	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	Exum
14	ELAINE M. O'NEAL (Chief)[5]	Durham
	RICHARD G. CHANEY	Durham
	CRAIG B. BROWN	Durham

DISTRICT	JUDGES	ADDRESS
	ANN E. MCKOWN	Durham
	MARCIA H. MOREY	Durham
	JAMES T. HILL[6]	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)	Lumberton
	HERBERT L. RICHARDSON	Lumberton
	JOHN B. CARTER, JR.	Lumberton
	WILLIAM JEFFREY MOORE	Pembroke
	JAMES GREGORY BELL[7]	Lumberton
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	FREDRICK B. WILKINS, JR.	Wentworth
17B	OTIS M. OLIVER (Chief)	Dobson
	CHARLES MITCHELL NEAVES, JR.	Elkin
	SPENCER GRAY KEY, JR.	Elkin
18	WILLIAM L. DAISY (Chief)[8]	Greensboro
	LAWRENCE MCSWAIN	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
	SUSAN R. BURCH	Greensboro
	THERESA H. VINCENT	Greensboro
	WILLIAM K. HUNTER	Greensboro
19A	WILLIAM G. 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
	SCOTT C. ETHERIDGE[9]	Asheboro
19C	CHARLES E. BROWN (Chief)	Salisbury
	WILLIAM C. KLUTTZ, JR.	Salisbury
	BETH SPENCER DIXON	Salisbury
	KEVIN G. EDDINGER[10]	Salisbury
20	TANYA T. WALLACE (Chief)	Rockingham
	JOSEPH J. WILLIAMS	Monroe

DISTRICT	JUDGES	ADDRESS
	CHRISTOPHER W. BRAGG	Monroe
	KEVIN M. BRIDGES	Albemarle
	LISA D. THACKER	Wadesboro
	HUNT GWYN	Monroe
	SCOTT T. BREWER[11]	Albemarle
21	WILLIAM B. REINGOLD (Chief)	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
	DENISE S. HARTSFIELD[12]	Winston-Salem
22	SAMUEL CATHEY (Chief)	Statesville
	JAMES M. HONEYCUTT	Lexington
	JIMMY L. MYERS	Mocksville
	WAYNE L. MICHAEL	Lexington
	L. DALE GRAHAM	Taylorsville
	JULIA SHUPING GULLETT	Mooresville
	THEODORE S. ROYSTER, JR.	Lexington
	APRIL C. WOOD[13]	Statesville
	MARY F. COVINGTON[14]	Mocksville
23	EDGAR B. GREGORY (Chief)	Wilkesboro
	DAVID V. BYRD	Wilkesboro
	JEANIE REAVIS HOUSTON	Wilkesboro
	MITCHELL L. MCLEAN	Wilkesboro
24	ALEXANDER LYERLY (Chief)	Banner Elk
	WILLIAM A. LEAVELL III	Bakersville
	KYLE D. AUSTIN	Pineola
	BRUCE BURRY BRIGGS	Mars Hill
25	ROBERT M. BRADY (Chief)[15]	Lenoir
	GREGORY R. HAYES	Hickory
	L. SUZANNE OWSLEY	Hickory
	C. THOMAS EDWARDS	Morganton
	BUFORD A. CHERRY	Hickory
	SHERRIE WATSON ELLIOTT[16]	Hickory
	JOHN R. MULL[17]	Hickory
	AMY R. SIGMON[18]	Hickory
26	FRITZ Y. MERCER, JR. (Chief)[19]	Charlotte
	YVONNE M. EVANS	Charlotte
	H. WILLIAM CONSTANGY	Charlotte
	JANE V. HARPER	Charlotte
	PHILLIP F. HOWERTON, JR.	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

DISTRICT	JUDGES	ADDRESS
	BECKY THORNE TIN[20]	Charlotte
	BEN S. THALHEIMER[21]	Charlotte
	HUGH B. CAMPBELL, JR.[22]	Charlotte
	THOMAS MOORE, JR.[23]	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	GARY S. CASH (Chief)[24]	Asheville
	PETER L. RODA	Asheville
	SHIRLEY H. BROWN	Asheville
	REBECCA B. KNIGHT	Asheville
	MARVIN P. POPE, JR.	Asheville
	PATRICIA A. KAUFMANN[25]	Asheville
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
GEORGE T. FULLER	Lexington
RODNEY R. GOODMAN	Kinston
ADAM C. GRANT, JR.	Concord
LAWRENCE HAMMOND, JR.	Asheboro

DISTRICT	JUDGES	ADDRESS
	ROBERT L. HARRELL	Asheville
	JAMES A. HARRILL, JR.	Winston-Salem
	PATTIE S. HARRISON	Roxboro
	ROLAND H. HAYES[26]	Winston-Salem
	ROBERT W. JOHNSON	Statesville
	WILLIAM G. JONES	Charlotte
	LILLIAN B. JORDAN[27]	Asheboro
	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
	MARGARET L. SHARPE	Winston-Salem
	RUSSELL SHERRILL III	Raleigh
	CATHERINE C. STEVENS	Gastonia

RETIRED/RECALLED JUDGES

WILLIAM A. CREECH	Raleigh
T. YATES DOBSON, JR.[28]	Smithfield
ROBERT T. GASH	Brevard
HARLEY B. GASTON, JR.	Gastonia
WALTER P. HENDERSON	Trenton
ELTON C. PRIDGEN	Smithfield
SAMUEL M. TATE	Morganton

1. Appointed and sworn in 31 January 2003 to replace Kenneth F. Crow who was elected to the Superior Court.
2. Elected and sworn in 2 December 2002.
3. Appointed Chief Judge effective 31 March 2003.
4. Appointed and sworn in 30 September 2002 to replace T. Yates Dobson, Jr. who retired 4 July 2002.
5. Appointed Chief Judge effective 1 September 2002.
6. Elected and sworn in 2 December 2002.
7. Appointed and sworn in 28 June 2002.
8. Appointed Chief Judge 1 February 2003.
9. Elected and sworn in 2 December 2002 to replace Lillian B. Jordan who retired 30 November 2002.
10. Elected and sworn in 2 December 2002.
11. Elected and sworn in 2 December 2002.
12. Elected and sworn in 30 December 2002 to replace Roland H. Hayes who retired 13 December 2002.
13. Elected and sworn in 2 December 2002.
14. Elected and sworn in 2 December 2002.
15. Appointed Chief Judge effective 21 November 2002.
16. Elected and sworn in 2 December 2002.
17. Elected and sworn in 2 December 2002.
18. Elected and sworn in 2 December 2002.
19. Appointed Chief Judge 1 March 2003.
20. Elected and sworn in 2 December 2002 to replace Resa L. Harris who retired 30 November 2002.
21. Appointed and sworn in 20 February 2003 to replace Eric Levinson who was elected to the Court of Appeals.
22. Appointed and sworn in 25 April 2003 to replace David S. Cayer who was elected to the Superior Court.
23. Appointed and sworn in 25 February 2003.
24. Appointed Chief Judge effective 2 December 2002 to replace Earl Justice Fowler, Jr. who retired 30 November 2002.
25. Elected and sworn in 2 December 2002.
26. Appointed and sworn in 13 December 2002.
27. Appointed and sworn in 2 December 2002.
28. Appointed and sworn in 5 July 2002.

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CASES REPORTED

ORDERS

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

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

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

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

PETITIONS TO REHEAR

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RULES OF EVIDENCE CITED

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CONSTITUTION OF NORTH CAROLINA CITED

RULES OF APPELLATE PROCEDURE CITED

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I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 14th day of June 2002, and said persons have been issued a certificate of this Board:

Mary Turk-Meena ..... Applied from the State of Ohio
Brian P. Cook ..... Applied from the State of New York

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Board of Law Examiners of the
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Susan McAllister Walker ..... Charlotte

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Charles Ashley Lamm ..... Charlotte
Amy Kathleen Lamoureux ..... Charlotte
James Ellsworth Landis ..... Chapel Hill
Rachel B. Larsen ..... Apex
Leah Cameron Lashley ..... Durham
Nathan James Lashley ..... Raleigh
Janeth Taylor Laumann Connor ..... Charlotte
Jennifer Jung-Wuk Lee ..... Durham
Richard Paul Leissner, Jr. ..... Chapel Hill
Annabel F. Levinsohn ..... Chapel Hill

Christina L. Lewis ..... Greensboro
Megan Walshe Lindholm ..... Raleigh
Jennifer F. Lindow ..... Durham
Emma Marie Lloyd ..... Winston-Salem
Paul John Lloyd ..... Carrboro
Erin Melissa Locklear ..... Durham
Michael Edward Lockridge ..... Graham
Jeffrey Anderson Long ..... Monroe
Blakely Arlene Lord ..... Buies Creek
Keischa Michelle Lovelace ..... Raleigh
Ronald Scott Lovelace ..... Belmont
James Robert Lovett ..... Charlotte
Julianna Patton Lowe ..... Raleigh
Autumn Renee Ludwig ..... Apex
Alexandre Nicolas MacClenahan ..... Charlotte
Robert Nelson Maitland, II ..... Chapel Hill
John Andrew Mandulak ..... Fayetteville
Arron Marlowe-Rogers ..... Winston-Salem
Jennifer Elizabeth Marsh ..... Boston, Massachusetts
Elizabeth Main Templeton Martin ..... Durham
Stephen Daniel Martin ..... Washington, District of Columbia
Travis William Martin ..... Stoneville
Robin Kyle Martinek ..... High Point
Jennifer Nicole Mason ..... Pfafftown
Marlet Lyn Massey ..... Zebulon
Kerry Patrick Mattingly ..... Clemmons
Eli Paul Mazur ..... Chapel Hill
Christopher Timothy McCartan ..... Charlotte
Shauna Denise Squires McClain ..... Durham
Scott Duane McClure ..... Sanford
Justin Paul McCorcle ..... Wilmington
Paul Carson McCoy ..... Scotland Neck
Michelle Elaine McDonald ..... Charlotte
Kimberly Elaine McElrath-Ray ..... Lillington
Jennifer L. McGinnis ..... Durham
Jennifer S. McGuire ..... Sanford
Peter Buckley McGuire ..... Asheville
Matthew Thor McKee ..... Raleigh
J. Wriley McKeown ..... Charlotte
Damon Matthew McLean ..... Durham
Anna Crawford McMillan ..... Cornelius
Shawn Andrew McMillan ..... Cornelius
Heather Ann McTammany ..... Charlotte
Daniel A. Meier ..... Carrboro
Emily Jeffords Meister ..... Greensboro
Jennifer Nicole Mellon ..... Durham
Todd E. Mesibov ..... Chapel Hill
Jason Meulemans ..... Raleigh
Crystal Blackman Mezzullo ..... Fuquay-Varina
Cynthia F. Miller ..... Morganton
Nancy Miller ..... Morrisville

John R. Miller, Jr. ..... Charlotte
Maria Misse ..... Ahoskie
Hilton Stuart Mitchell ..... Durham
Lauren Elizabeth Mobley ..... Wilmington
Linda Konerding Montgomery ..... Charlotte
Robyn Ann Moo-Young Saye ..... Charlotte
Erika Jade Moore ..... Statesville
Jon Ryan Moore ..... Charlotte
Miltonia Tonnassa Moore ..... Williamston
Brian Patrick Morley ..... Williamston, Michigan
Thomas C. Morphis, Jr. ..... Durham
Hugh Holt Morrison, Junior ..... Concord
Mashanda Yvette Mosley ..... Rocky Mount
Stephen Frank Motta ..... Chapel Hill
Kelly Elizabeth Motycka ..... Winston-Salem
Gary Adam Moyers ..... Raleigh
Robert Todd Mozingo ..... Durham
Leanne Livengood Mullis ..... Apex
Mary Ellen Murphy ..... Fargo, North Dakota
Laura Ann Murray ..... Noblesville, Indiana
Patrick Thomas Nadolski ..... Mebane
Mark Andrew Nebrig ..... Charlotte
Lindsey Corliss Neef ..... Carrboro
Andrew Lamberson Nesbitt ..... Asheville
Tina H. Ness ..... Charlotte
Matthew George Nestor ..... Buies Creek
James Taylor Newman, Jr. ..... Fuquay-Varina
Thomas M. Nojunas ..... Philadelphia, Pennslyvania
Bartley Ashton Norman ..... Durham
Erin Nicole Norris ..... Salisbury
Yolanda Lynn Nowlin ..... Raleigh
Craig William Noyes ..... Raleigh
Amy Harrison Nuttall ..... Wendell
Vickie Marie O'Brien ..... Jacksonville
Michael Shamus O'Sullivan ..... Cary
Yoav Oestreicher ..... Charlotte
Linda Reid Oldham ..... Lakeview
Christopher M. Olds ..... Charlotte
John Courtney Olive ..... Charlotte
Dawn Shoultz Opel ..... Winston-Salem
Ryan Benjamin Opel ..... Winston-Salem
John Brantley Ostwalt, Jr. ..... Troutman
James Lamar Palmer ..... Hendersonville
Walter Douglas Palmer ..... Whiteville
Bryant Duke Paris, III ..... Raleigh
Andrew Burton Parker ..... Asheville
Stacey Renee Parker ..... Bessemer City
Robin Diane Vaught Parrish ..... Raleigh
Myra Gooden Pate ..... Elizabethtown
Allison Christy Pauls ..... Charlotte
Jason Michael Peltz ..... Winston-Salem

Sterling Cabot Pendleton ..... Wilmington
John R. Perkins, Jr. ..... Arlington, Virginia
Ellen J. Persechini ..... Collierville, Tennessee
Jill Lynn Peters ..... Greensboro
An Xuan Hoang Pham ..... Chapel Hill
David Hunter Phillips ..... Fayetteville
Tabatha Faye Phillips ..... Greensboro
Michelle Denise Pinto ..... Greensboro
Scott Benjamin Pleune ..... Charlotte
Kelly Lauren Podger ..... Raleigh
Joshua Aaron Pollak ..... Charlotte
Kelly Jeffries Pollock ..... Brandon, Florida
Jared Wade Poplin ..... Charlotte
Bryan A. Powell ..... Raleigh
Sabrina Kathleen Presnell ..... Raleigh
Lori McDowell Price ..... Cary
Aisha Pridgen ..... Knightdale
Melinda Lang Puckett ..... Winston-Salem
Laura Garraway Pugliese ..... Charlotte
Alistair M. Quinlan ..... McLeansville
Charles E. Rawlings ..... Winston-Salem
Jonathan Fisher Ray ..... Charlotte
Dawn Michele Reinhardt ..... Charlotte
John Michael Ricci ..... Greensboro
Matthew Kenneth Rice ..... Portsmouth, Virginia
Robert Kendrick Rice ..... Raleigh
Shelli Henderson Rice ..... Raleigh
Karen Florence Richards ..... Wilmington
Amy E. Richardson ..... Durham
Andrea Bailey Ricks ..... Charlotte
Thomas Duke Ricks ..... Charlotte
Stephanie S. Risk ..... Toledo, Ohio
Wm. Jerad Rissler ..... Raleigh
Mitzi Hornaday Rivers ..... Baltimore, Maryland
Elizabeth Elsing Robbins ..... Raleigh
Keith Roberson ..... Rock Hill, South Carolina
Amy Robinson ..... Rock Hill, South Carolina
Richard T. Rodgers, Jr. ..... Coats
Corey Fredric Rose ..... Chapel Hill
David Jeptha Rose ..... Rocky Mount
Daniel Harris Rosenthal ..... Washington, District of Columbia
Brent Alan Rosser ..... Charlotte
Michelle Karen Rothschild ..... Raleigh
Keith David Rouse ..... Buies Creek
Heather Ann Royster ..... Raleigh
Joshua Bryan Royster ..... Raleigh
D. Scott Rudd ..... Durham
Stephanie A. Russell ..... Winterville
Bradford Hodge Sanders ..... Wilmington
Daron Durant Satterfield ..... Durham
Kimberly Denise Saxton ..... Greensboro

David Benjamin Herren Saye ..... Charlotte
Scott Andrew Schaaf ..... Kernersville
Douglas W. Schreyack ..... Durham
Melinda Christina Seamans ..... Montclair, Virginia
Margaret L. Senter ..... Fayetteville
Edward Robert Sharp ..... Greensboro
Adam Craig Shearer ..... Charlotte
Christy Nell Sherrill ..... Pittsboro
David Everette Sherrill ..... Kannapolis
David Alexander Shuford ..... Hickory
Jennifer Claire Staton Simmons ..... Chapel Hill
Rajdeep Singh ..... Athens, Georgia
Tiffany Dawn Jeffords Skillman ..... Raleigh
Aimee L. Smith ..... Winston-Salem
Jennifer L. Smith ..... Raleigh
Matthew Brian Smith ..... Matthews
Rebecca Lane Smitherman ..... Pfafftown
Richard Brent Spooner, Jr. ..... Charlotte
Venus Yvette Springs ..... Charlotte
Heather Lyn Spurlock ..... South Royalton, Vermont
Markee L. Squire ..... Chapel Hill
Robert Bradley Staley ..... Winston-Salem
Raymond Albert Starling ..... Raleigh
Charles Mark Stevenson ..... Greensboro
Tereina R. Stidd ..... Jacksonville
Randy William Stone ..... Rockville, Maryland
Chad Hunter Stoop ..... Pantego
David Hugh Strickland ..... Winston-Salem
Robin Eason Strickland ..... Knightdale
Karen Ann Strom ..... Greensboro
Cathy Robinson Stroupe ..... Kernersville
Richard Clay Stuart ..... Lewisville
Laura Huntingdon Stubbs ..... Matthews
Hannah Gray Styron ..... Atlantic Beach
David Jonathan Sullivan ..... West End
Robert Ernest Sumner, IV ..... Charlotte
Jeffrey R. Surlas ..... Miami, Florida
Jennifer Ellen Terry ..... Raleigh
Gudrun Elise Thompson ..... Carrboro
Elizabeth Rea Thornton ..... Stephens City, Virginia
Jeffrey H. Tidwell ..... Raleigh
James Edward Todd, Jr. ..... Spring Hope
Eric Carl Trosch ..... Charlotte
Yolanda Michelle Trotman ..... Pittsburgh, Pennslyvania
Heather Teale Twiddy ..... Raleigh
Tonia Trest Twigg ..... Raleigh
Adam M. Tyson ..... Chapel Hill
Robert Charles Van Arnam ..... Cary
Lauren Vaughan ..... Lenoir
Jennifer Merie Vega ..... Durham
Brian Conley Vick ..... Athens, Georgia

Sara Ruth Vizithum ..... Greensboro
Robert W. Waddell ..... Norfolk, Virginia
Jason P. Walton ..... Charlotte
Martha Neya Warren ..... Clinton
Tonja Lafaye Washington ..... Durham
Sandra Denise Watts ..... Durham
Steven Price Weaver ..... Raleigh
Elizabeth Elaine Weeks ..... Fuquay-Varina
Solomon Ben-Zion Weiner ..... Raleigh
Amanda Lynn Weir ..... Durham
Michael Alan Weiss ..... Huntersville
Jacob Holmes Wellman ..... Raleigh
Jason William Wenzel ..... Smithfield
Cameron Sherod Wesley ..... Salisbury
Heath Eric West ..... Wilmington
Jennifer Lynn West ..... Raleigh
Robert Brandon West ..... Winston-Salem
McNeill Yelton Wester ..... Charlotte
Debra Jean Whaley ..... Newport
Andre Courtney Wharton ..... Cary
Devon E. White ..... Raleigh
Lara Paige White ..... Wendell
Frederic W. Whitehurst ..... Bethel
Frank Todd Whitlow ..... Oxford
Kimberly Lea Wierzel ..... Raleigh
Allen Thomas Wiggins ..... Chapel Hill
Christy Elizabeth Wilhelm ..... Raleigh
Brian Michael Williams ..... Raleigh
Ryan Kelsey Williams ..... Erwin
Jeffrey James Wiseman ..... Charlotte
Gregory James Wood ..... Charlotte
Brad Donald Worley ..... Durham
Heather Howell Wright ..... Greensboro
James David Yarbrough, Jr. ..... Pfafftown
Paul H. Zigas ..... Chapel Hill
Scott Paul Zimmerman ..... Apex

Given over my hand and seal of the Board of Law Examiners this the 9th day of September, 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 8th day of October, 2002 and said persons have been issued a license certificate.

John Huske Anderson, Jr. ..... Wrightsville Beach
Miles Nathan Helms ..... Monroe

John Craig Kiser ..... Greensboro
Thomas G. McMurray ..... Greensboro

Given over my hand and seal of the Board of Law Examiners this the 8th day of October, 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 8th day of October 2002, and said persons have been issued a certificate of this Board:

Edward Lee Anderson, II ..... Applied from the State of New York
Henry Edward Phillips, III ..... Applied from the State of Tennessee
Selina Malherbe Brooks ..... Applied from the State of New York
Alfonson McMillian, Jr. ..... Applied from the State of Illinois
Joel Walter Aubrey ..... Applied from the State of Kentucky
Lance E. Gidcumb ..... Applied from the State of Arkansas
Meredith Barg Stone ..... Applied from the State Connecticut

Given over my hand and seal of the Board of Law Examiners this the 8th day of October 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 10th day of October, 2002 and said persons have been issued a license certificate.

Micheal Denny ..... Charlotte
Amy Fitzgerald ..... Charlotte
Elizabeth Brownley Clarke ..... Wilmington

Given over my hand and seal of the Board of Law Examiners this the 10th day of October, 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 11th day of October, 2002 and said person has been issued a license certificate.

Deborah Florence Roberts ..... Asheville

Given over my hand and seal of the Board of Law Examiners this the 11th day of October, 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 14th day of October, 2002 and said persons have been issued a license certificate.

Jaimee Lipscomb Bond ..... Indian Trail
Eugene James Chandler II ..... Charlotte
Barry Livingston Cobb ..... Clearwater, Florida
Jason Bennett Conner ..... Durham
David Iacuzio ..... Charlotte
Karol Virginia Mason ..... Atlanta, Georgia
Brennan Moseley ..... Chapel Hill
Gina Mazzariello Plaue ..... Raleigh
Theodora A. Vaporis ..... Burlington
Heather R. Whitney ..... Lexington, Kentucky
Soren David Windram ..... Durham

Given over my hand and seal of the Board of Law Examiners this the 14th day of October, 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 3rd day of December 2002 and said persons have been issued a license certificate.

Robert M. Tatum ..... Chapel Hill
Alan Gutherie Phillips ..... Chapel Hill
Oheneba Poku-Kankam ..... Charlotte
Adam Eyuel Aberra ..... Charlotte
Michael S. Archer ..... Camp Lejeune
David Conrad Forde ..... Durham
Kenneth T. Palmer ..... Atlanta, Georgia
Raghu Ram Raju ..... Raleigh
Steven Wayne Sebastian ..... Raleigh
Benjamin Small ..... Concord
Joseph Wellspeak ..... Swansboro

Dalton Gwyn Blair ..... Gastonia
Dilcy G. Burton ..... Durham
Jennifer Claire Leisten ..... Durham
Barbara J. Osborne ..... Cary

Given over my hand and seal of the Board of Law Examiners this the 6th day of January, 2003.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners as of the 3rd day of December 2002 and said persons have been issued a license certificate.

Walter P. Carey ..... Applied from the State of Massachusetts
Donald Joseph Banovitz ..... Applied from the State of Colorado
Steven Blaine Ockerman ..... Applied from the State of Missouri
James J. MacCallum ..... Applied from the State of West Virginia
James C. Lanik ..... Applied from the State of Colorado
Thomas A. Killoren, Jr. ..... Applied from the State of Illinois
Spencer Dean Conard ..... Applied from the State of West Virginia
Bradley Jay Thomas ..... Applied from the State of Ohio
Durwin Preston Jones ..... Applied from the State of Connecticut
Janet Jaunita Lennon ..... Applied from the State of New York
Suzanne R. Griffin ..... Applied from the State of Colorado
Jill A Westmoreland ..... Applied from Washington D.C.
Rendi L. Mann-Stadt ..... Applied from the State of Pennsylvania

Given over my hand and seal of the Board of Law Examiners this the 6th day of January, 2003.

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 December, 2002 and said person has been issued a license certificate.

Rasheda Monic Jiles ..... Odentun, Maryland

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

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 24th day of January 2003, and said persons have been issued a certificate of this Board:

John T. Molleur ..... Applied from the State of West Virginia
Christopher Eugene Lindsey ..... Applied from the State of Texas
Rebecca Naomi Mann ..... Applied from the State of Pennsylvania
Patricia L. Brumbaugh ..... Applied from the State New York
Jeffrey Todd Jones ..... Applied from the State of West Virginia
Anne Howard Shelbourne ..... Applied from the State of Kentucky
Timothy O. Shelbourne ..... Applied from the State of Kentucky
Dora Villarreal Torseth ..... Applied from the State of Texas
Robert Stephen Monks ..... Applied from the State of Texas

Given over my hand and seal of the Board of Law Examiners on this the 3rd day of February 2003.

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 28th day of February 2003, and said persons have been issued a certificate of this Board:

Alan L. Briggs ..... Applied from the District of Columbia
Benet E. Bridgeman, Jr. ..... Applied from the State of New York
Daniel James Dolan ..... Applied from the State of New York
Robert M. Moore, Jr. ..... Applied from the State of Minnesota
Gay Peretto ..... Applied from the State of New York
Suzanne Wentzel ..... Applied from the State of Ohio
John A. Zaloom ..... Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners on this the 8th day of April 2003.

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

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

admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 7th day of March 2003, and said persons have been issued a certificate of this Board:

Bradley Shannon Tisdale ..... Applied from the State of Tennessee
Jeffry Fred Turner ..... Applied from the State of Ohio
Jay Parry Monge ..... Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 8th day of April 2003.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 22nd day of March, 2003, and said persons have been issued a certificate of this Board:

Jarett Kane Abramson ..... Raleigh
Vanya Georgette Allen ..... Durham
Donald Bardes ..... Wake Forest
Sybil Helena Barrett ..... Charlotte
Nathan Robert Batts ..... Concord
Sherri Dianne Belk ..... Charlotte
Victoria Lynn Block ..... Vienna, Virginia
Alexandria Starr Bourcier ..... Asheville
Daniel Josev Brewer ..... Charleston, South Carolina
Annette R. Brinson ..... Charlotte
Kay Matkins Burgwyn ..... Whitakers
Margeaux Jean Burke ..... Mooresville
Philip Henry Burrus, IV ..... Lilburn, Georgia
Sarah Elaine Castaner ..... Morrisville
Michael Paul Caviness ..... Chadbourn
Clayton Williams Cheek ..... Elizabeth City
Tushar Vipin Chikhliker ..... Cayce, South Carolina
Anju N. Chopra ..... Chapel Hill
Jonathan Chase Clark ..... Columbus, Ohio
Jill A. Clements ..... Ashtabula, Ohio
Steven Neil Cohen ..... Charlotte
Michael D. Correll ..... Hudson
William T. Culpepper IV ..... Winston-Salem
Kendal Osborne Dameron ..... Harrisburg
Richard Randall Daugherty ..... Chapel Hill
Roderick Glenn Davis ..... Durham
Tamika Roshay Davis ..... Chapel Hill
Deborah J. Dewart ..... Irvine, California
Emily Sutton Dezio ..... Raleigh
Joshua W. Dixon ..... Charleston, South Carolina

Kathleen Cecilia Quinn DuBois ..... Winston-Salem
Jennifer Rae Eaker ..... Cherryville
Latonya Dilligard Edwards ..... Columbia, South Carolina
Timothy Scott Emry ..... Charlotte
James Clarke Ferguson ..... Raleigh
Joseph Robert Foley ..... Burlington
Scott Reynolds Forbes ..... Mooresville
Anne W. Ford ..... Blowing Rock
Courtney Elaine Foreman ..... Davidson
Tonya Camille French ..... Durham
Cameron V. Frick ..... Durham
Anthony Wayne Futrell ..... Virginia Beach, Virginia
Erica Schmell Glass ..... Tarboro
Danielle Kara Greco ..... Charlotte
Benjamin Edward Grimsley ..... Columbia, South Carolina
Jason Tyler Grubbs ..... Kernersville
Anne Marie Haight ..... Mooresville
Karen Michele Haines ..... Taylorsville
Dorothy Hairston ..... Court
Melody Rochelle Hairston ..... Durham
Tracy T. Hatcher ..... Charlotte
J. Noelle Hicks ..... Richmond, Virginia
Robert Jutzi Howell ..... Chapel Hill
Sean M. Jackson ..... Raleigh
Maria Jensen-Guthold ..... Durham
Richard Lynn Jackson ..... Greensboro
Christopher Dean Johnson ..... Conover
James David Johnson ..... Fort Lauderdale, Florida
Michael Patrick Johnson ..... Atlanta, Georgia
Haley Mathews Jonas ..... Charlotte
Bryan Fields Jones ..... Raleigh
Robert Alan Kearbey ..... Durham
Julie L. Kimbrough ..... Chapel Hill
Amy Kristine Kirkhum ..... Raleigh
David James Krall ..... Durham
Ted Bradford LaPorte ..... Huntersville
Rebecca Elizabeth Lem ..... New Bern
Alycia Sarah Levy ..... Raleigh
Richard Brandon Linderman ..... Chapel Hill
Matthew Kent Lively ..... Greensboro
Matthew Anderson Liverman ..... Spartanburg, South Carolina
Lee R. Marler ..... Hickory
Jeffrey Alan Marsigli ..... Raleigh
Matthew Bryan McArthur ..... Raleigh
James Whitfield McGee Jr. ..... Greensboro
Matthew Brenham McKay ..... Charlotte
William Trippe McKeny ..... Mocksville
Rushanna McNair-Wright ..... Durham
Brandy Lynette Meads ..... Buies Creek
Calvin Scott Meyers ..... Greensboro
Lacey Meredith Moore ..... Charlotte

Brian Patrick Mosley ..... Durham
Thomas J. Neagle ..... Chapel Hill
Mindy Beth Newman ..... Greensboro
Tara Lorraine Nichols ..... Durham
Catherine Marie O'Brien ..... Chapel Hill
Shane Casey O'Connor ..... Atlanta, Georgia
Mark Robert Pantano ..... San Angelo, Texas
George Dino Pappas ..... Charlotte
Mark Alexander Pearson ..... Fort Mill, South Carolina
Lee Andrew Peindl ..... Gastonia
Jennifer Perkins ..... Raleigh
Celecia M. Phillips ..... Apex
Michael Christopher Phillips IV ..... Columbia, South Carolina
Cynthia Phillips-Goelling ..... Randleman
Elizabeth S. Phipps ..... Charlotte
Judith Margaret Pope ..... Chapel Hill
Alician Veronica Quinlan ..... Durham
Jennifer Dianne Ray ..... Wilmington
Dustin Cole Read ..... Charlotte
Rhonda Kay Register ..... Fairview
David Travis Robinson ..... Durham
Lisa Jane Rowley ..... Wilkesboro
Janet Elaine Schaufman ..... Fuquay-Varina
Harry Brent Shadoan ..... Charlotte
Pankaj Kashiram Shere ..... Apex
Robert Morgan Smith ..... Goldsboro
Mary Snyder ..... Indianapolis, Indiana
Melissa Kay Stacy ..... Beckley, West Virginia
Samantha Kathryn Stokes ..... Winston-Salem
Anthony Odell Strickland ..... Roanoke Rapids
Joel Stroud ..... Chapel Hill
Stephanie Marie Talbert ..... Greensboro
Lucy Olivia Tanner ..... Battleboro
Erika Danielle Taylor ..... Raleigh
Robert Train, III ..... Pittsboro
Robert Ray Underwood, II ..... Hope Mills, South Carolina
Scoti Lee Ussery ..... Elizabethtown
Antoinette Lois Van-Riel ..... Winston-Salem
Ricardo Velasquez ..... Durham
Christy-Anne Venn Betler ..... Charlotte
Stephanie Lynne Villaver ..... Jacksonville
Stephen Fredrick Wallace ..... High Point
Java O. Warren ..... Charlotte
Elizabeth Gail Watkins ..... Charlotte
David A. Wijewickrama ..... Asheville
Jonathan Charles Windham ..... Gastonia
Andrea Winters ..... Chapel Hill
Lesley Jean Wiseman ..... Farmville
Christina Carmelle Witte ..... Charlotte
Mikell Holbrook Wyman ..... Columbia, South Carolina
Valerie Schram Zaloom ..... Raleigh

Given over my hand and seal of the Board of Law Examiners on this the 8th day of April 2003.

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. ABNER RAY NICHOLSON

No. 564A99

(Filed 1 February 2002)

1. Jury— selection—capital trial—request for individual voir dire

The trial court did not abuse its discretion in a double capital first-degree murder prosecution by denying defendant's request for individual voir dire pursuant to N.C.G.S. § 15A-1214(j) during jury selection based on pretrial publicity, because: (1) defendant failed to support his original motion for individual voir dire with any facts or allegations concerning pretrial publicity; (2) a prospective juror's comment during collective voir dire stating that she thought the case was a tragedy did not unduly taint other prospective jurors in the panel; and (3) defendant failed to carry his burden of showing any particular harm resulting from the denial of his motion.

2. Jury— selection—capital trial—peremptory challenges—racial discrimination

The trial court did not abuse its discretion in a double capital first-degree murder prosecution by allowing the State to exercise its peremptory challenges against four African-American prospective jurors even though defendant contends the challenges were used in a racially discriminatory manner, because: (1) defendant failed to make a prima facie showing that the State

exercised a peremptory challenge on the basis of race regarding two of the jurors when defendant and both of the victims were African-American, several of the State's key witnesses were African-American, the record does not reveal any comments or conduct by the State that would lead to an inference of discrimination, and the two jurors expressed serious reservations about imposing the death penalty; (2) the State offered race-neutral reasons for its challenge of another prospective juror including the juror's equivocal answers regarding the death penalty and the State's lack of confidence that deliberations would be fair to both sides; and (3) the State's acceptance rate of fifty percent of African-American jurors tends to refute a prima facie showing of discrimination.

3. Jury— selection—capital trial—challenge for cause—death penalty views—rehabilitation

The trial court did not abuse its discretion in a double capital first-degree murder prosecution by allowing the State's challenge for cause of a prospective juror who stated on voir dire that he was not sure he could fairly consider both life imprisonment without parole and the death penalty, and by denying defendant's request to rehabilitate the juror, because: (1) the juror stated he had strong reservations about the death penalty and that he questioned his ability to impose punishment fairly; (2) the juror left the trial judge with the impression that the juror would be unable to faithfully and impartially follow the law in the guilt-innocence phase of the trial; and (3) defendant has failed to show how further questioning would have illuminated or changed the juror's answers.

4. Criminal Law— courtroom bailiff also witness for State—motion for mistrial

The trial court did not abuse its discretion in a double capital first-degree murder prosecution by denying defendant's motion for a mistrial after the trial judge discovered that one of the witnesses for the State was serving as a courtroom bailiff, because: (1) the witness was positioned at the back door of the courtroom for several days, and his duties included opening the doors to the courtroom as needed; (2) the witness had no direct contact or communication with the jury; (3) the trial court relieved the witness of his duties as bailiff for the remainder of the trial once it was alerted to the witness's dual role; (4) mere presence in the courtroom is not sufficient to establish that the bailiff had cus-

tody of the jury; and (5) the likelihood that the outcome of the trial would have been different had the witness not served as bailiff is negligible.

5. Evidence— limitation on ability to show self-defense—gratuitous self-defense instruction

The trial court did not abuse its discretion in a double capital first-degree murder prosecution by excluding the testimony of two psychiatrists tending to show defendant's perception of the need to use deadly force to defend himself because: (1) there was no evidence to support a finding that defendant formed a belief that it was necessary to kill either his wife or the chief of police to protect defendant from death or serious harm; (2) defendant is not entitled to argue self-defense while still insisting that he did not fire a gun at anyone and that he did not intend to shoot anyone; (3) expert testimony was irrelevant since defendant's own testimony showed that he did not believe it was necessary to use deadly force against any individuals to protect himself; and (4) the self-defense instruction defendant received in this case was a benefit to which he was not entitled, and defendant was not allowed to present additional evidence in support of a defense not warranted by the evidence.

6. Evidence— prior crime or bad acts of victim—embezzlement from employer—motion in limine

The trial court did not abuse its discretion in a double capital first-degree murder prosecution by allegedly granting the State's motion in limine prohibiting defendant from introducing evidence concerning embezzlement by one of the victims from her employer, because: (1) there is nothing in the record to show that the trial court ever granted the State's motion in limine when the trial court merely postponed ruling until defendant indicated he was interested in entering into that line of inquiry; and (2) defendant never indicated he wanted to ask these questions, and he told the trial court he was not attempting to inquire about the alleged embezzlement.

7. Evidence— hearsay—excited utterance—state of mind exception

The trial court did not abuse its discretion in a double capital first-degree murder prosecution by allowing statements of the victim wife through the victim's mother that the victim told her stepfather that defendant had a gun and said he was going to kill

her, and that the victim told her mother that defendant said on the day of the killing that he did not want anyone else at the house when he came to pick up his clothes but the victim was going to have the police serve defendant with a warrant when he came to her house, because: (1) the first statement falls under the N.C.G.S. § 8C-1, Rule 803(2) excited utterance exception since it was made under stress caused by defendant who at that time was allegedly threatening the victim in the back of the witness's car, and the statement was made spontaneously without time for reflection; and (2) the statements concerning defendant coming to the house falls under the N.C.G.S. § 8C-1, Rule 803(3) state of mind exception to show the sequence of events on the day of the killings and to illustrate the victim's then-existing intent to protect herself by calling the police and having defendant served with the warrant.

8. Homicide— first-degree murder—premeditation and deliberation—sufficiency of evidence

The trial court did not abuse its discretion by denying defendant's motion to dismiss the two first-degree murder charges even though defendant contends there was insufficient evidence of premeditation and deliberation, because the State presented evidence that: (1) defendant and his wife victim had been having marital difficulties near the time of the killings; (2) the wife told her parents that defendant had choked her on one occasion and had threatened to kill her on another; (3) defendant retrieved his pistol from the pawn shop one day prior to the killings; (4) eyewitnesses saw defendant punch the victim in the mouth on the day of the killing; (5) defendant requested that the victim be alone at her house after the victim asked him to come get his clothes, and defendant brought his gun; (6) defendant shot the chief of police victim in the face as the chief tried to serve defendant with a warrant, and the chief's sidearm was still in its holster when he was shot; (7) the wife ran from defendant as he chased her with his gun and defendant shot her after she tripped and fell onto the floor; and (8) defendant fired at least five shots that day, most of them at close range, and he fled the scene after the killings, disposing of the gun along the way.

9. Sentencing— capital—victim impact statements

The trial court did not abuse its discretion in a double capital first-degree murder sentencing proceeding by allowing the State to present a victim impact statement under N.C.G.S.

§ 15A-833(a)(1), because: (1) the statements of the victim wife's mother concerning the impact of her daughter's death on her family properly related the extent of the psychological and emotional injury caused by defendant without being unduly prejudicial; (2) there was no evidence in the record showing the jury was swayed to base its decision solely on the mother's statements; and (3) none of the aggravating circumstances submitted to the jury derived from the victim impact evidence, and the State did not ask the jury to base its decision on this evidence.

10. Sentencing— capital—defendant's death—family impact evidence

The trial court did not abuse its discretion in a double capital first-degree murder sentencing proceeding by denying defendant's request to present family impact evidence, because: (1) the voir dire testimony of defendant's sister-in-law as to the stress and sickness in her family since the time of the killing did not go to any aspect of defendant's character, record, or circumstance of the offense; and (2) the statements did not reduce defendant's moral culpability.

11. Sentencing— capital—prosecutor's argument—defendant's possible future conduct—defendant's courtroom demeanor

The trial court did not err in a double capital first-degree murder sentencing proceeding by failing to intervene ex mero motu during the State's closing arguments referencing defendant's possible future conduct and defendant's courtroom demeanor, because: (1) the State's comment on the possibility of defendant's future dangerousness to prison staff and inmates was appropriate; (2) the State engaged in permissible argument when it asked the jury to recommend death specifically to deter defendant from committing another murder; and (3) the State acted within the bounds of propriety when it characterized defendant as seeming bored with the courtroom proceedings, and the State's remarks pertaining to defendant's courtroom conduct were permissible since his demeanor was before the jury at all times.

12. Sentencing— capital—prosecutor's argument—jury as voice of community—victim impact statements

The trial court did not err in a double capital first-degree murder sentencing proceeding by failing to intervene ex mero motu during the State's closing arguments referencing the jury as

the voice of the community and using victim impact statements, because our Supreme Court has upheld arguments that remind the jury that its verdict will send a message to the community or function as the conscience of the community as long as the State does not encourage the jury to consider public sentiment in its deliberations.

13. Sentencing— capital—prosecutor's argument—remuneration of defendant's expert witnesses

The trial court did not err in a double capital first-degree murder sentencing proceeding by allowing the State's closing arguments concerning remuneration of defendant's expert witnesses including the statement that the experts would not get paid unless they said what defendant wanted to hear, because: (1) the argument simply illustrated discrepancies between the diagnoses made by two of defendant's expert witnesses; and (2) the experts' conflicting testimony prompted the State to question their credibility and impartiality.

14. Sentencing— capital—aggravating circumstances—murder committed to avoid lawful arrest

The trial court did not err in a double capital first-degree murder sentencing proceeding by submitting the N.C.G.S. § 15A-2000(e)(4) aggravating circumstance that the murder of the chief of police victim was committed for the purpose of avoiding or preventing lawful arrest, because: (1) the evidence tends to show that defendant knew the police were looking for him as a result of his assault on his wife; (2) the facts that defendant departed when police responded after the assault, defendant demanded that no police be at the victim wife's trailer when he arrived, and defendant's repeated phone calls to question whether there was anyone else at the trailer before he arrived all tended to show that defendant was attempting to avoid arrest; and (3) when the chief of police victim informed defendant that the chief had a warrant for defendant's arrest, defendant shot him.

15. Sentencing— capital—aggravating circumstances—capital felony committed against law enforcement officer engaged in official duties

The trial court did not err in a double capital first-degree murder sentencing proceeding by submitting the N.C.G.S. § 15A-2000(e)(8) aggravating circumstance that the capital felony

was committed against a law enforcement officer while engaged in the performance of his official duties in the case involving the chief of police victim, because: (1) the evidence established that the chief of police was engaged in his official duties as a law enforcement officer at the time of the killing when he arrived at the victim wife's trailer in uniform with a warrant for defendant's arrest; and (2) defendant himself testified that the chief told defendant that he was serving a warrant for defendant's arrest.

16. Sentencing— capital—aggravating circumstances—murder committed to avoid lawful arrest—capital felony committed against law enforcement officer engaged in official duties

The trial court did not err in a double capital first-degree murder sentencing proceeding by submitting both the N.C.G.S. § 15A-2000(e)(4) aggravating circumstance that the murder of the chief of police victim was committed for the purpose of avoiding or preventing lawful arrest and the N.C.G.S. § 15A-2000(e)(8) aggravating circumstance that the capital felony was committed against a law enforcement officer while engaged in the performance of his official duties in the case involving the chief of police victim even though defendant contends the two aggravating circumstances allegedly rely on the same evidence, because: (1) submission of both the (e)(4) and (e)(8) aggravating circumstances in a single case address different aspects of the crime; (2) the (e)(4) circumstance was submitted in this case to show that one of defendant's motivations in shooting the chief of police victim was to avoid arrest for the previous assault of defendant's wife, which addressed defendant's subjective motivation for the killing; and (3) the (e)(8) circumstance was submitted in this case to show that the chief of police was performing an official duty when he responded to the call from defendant's wife, which addressed the factual basis of defendant's crime.

17. Sentencing— capital—aggravating circumstances—murder part of a course of conduct

The trial court did not err in a double capital first-degree murder sentencing proceeding by submitting the N.C.G.S. § 15A-2000(e)(11) aggravating circumstance that the murder was part of a course of conduct including the commission by defendant of other crimes of violence, because: (1) evidence that a defendant killed more than one victim is sufficient to support this

aggravating circumstance, and the evidence in this case reveals that the two killings were committed within moments of each other, within feet of each other, and with the same weapon; and (2) a different result would not have been probable even if the trial court had explicitly specified the evidence which the jurors were to consider.

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

The trial court did not err in a double capital first-degree murder sentencing proceeding by its instruction on the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance that defendant has no significant history of prior criminal activity when the trial court added the additional phrase "before the date of the murder," because: (1) the additional language was a correct statement of the law since the (f)(1) circumstance applies only to criminal activity occurring before the murder for which a defendant is being tried; (2) the instruction revealed that the jurors were not permitted to refuse to give this circumstance mitigating value if they found it to exist; and (3) the trial court did not convert the statutory mitigating circumstance into a nonstatutory mitigating one simply by adding clarifying language.

19. Sentencing— capital—mitigating circumstances—defendant acted under duress or domination of another person

The trial court did not err in a double capital first-degree murder sentencing proceeding by failing to submit the N.C.G.S. § 15A-2000(f)(5) mitigating circumstance that defendant acted under duress or the domination of another person, because although the evidence viewed in the light most favorable to defendant tends to show that the victim wife induced defendant to come to the trailer so that defendant could be arrested and that defendant may be susceptible to pressure from her generally, there is no evidence showing that the wife's actions pressured defendant into using deadly force against her or the chief of police victim through duress or dominance.

20. Sentencing— capital—nonstatutory mitigating circumstances—limitations on defendant's intellectual functioning

The trial court did not err in a double capital first-degree murder sentencing proceeding by failing to submit defendant's requested nonstatutory mitigating circumstance that defendant

had limitations on his intellectual functioning, because the mitigating circumstance was subsumed in the circumstances already submitted to the jury.

21. Sentencing— capital—mitigating circumstances—peremptory instruction

The trial court did not err in a double capital first-degree murder sentencing proceeding by failing to give a peremptory instruction on four statutory mitigating circumstances including the N.C.G.S. § 15A-2000(f)(1) mitigator of no significant prior criminal history, the N.C.G.S. § 15A-2000(f)(2) mitigator that the capital felony was committed while defendant was under the influence of mental or emotional disturbance, the N.C.G.S. § 15A-2000(f)(6) mitigator that the impaired capacity of defendant made him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, and the N.C.G.S. § 15A-2000(f)(7) mitigator concerning the age of defendant at the time of the crime, because: (1) the State presented evidence that defendant had an earlier conviction for assault on a female, that defendant choked his wife, defendant hit his wife in the mouth, and defendant threatened to kill his wife on various occasions; (2) an expert testified that while she found defendant had borderline intellectual functioning, she did not believe he suffered from a psychotic disorder and cross-examination of another expert revealed weaknesses in his diagnosis of defendant as having psychological problems; and (3) defendant's mental age was by no means established by a consensus of experts.

22. Sentencing— capital—nonstatutory mitigating circumstances—peremptory instruction

The trial court did not err in a double capital first-degree murder sentencing proceeding by failing to give a peremptory instruction for each nonstatutory mitigating circumstance, because: (1) defendant did not submit his request for a particular instruction on the nonstatutory mitigating circumstances in writing, but merely asked the trial court to give something similar to pattern jury instruction 150.11; (2) defendant failed to specifically address each mitigating circumstance when he requested a peremptory instruction for the nonstatutory mitigating circumstances; and (3) defendant has made no argument that the evidence supporting the nonstatutory mitigating circumstances was uncontroverted or credible.

23. Sentencing— capital—mitigating circumstances—jury instruction

The trial court did not commit plain error in a double capital first-degree murder sentencing proceeding by failing to fully and completely instruct the jury regarding the mitigating circumstances submitted in the case involving the chief of police victim, because: (1) the trial court is not required to repeat a definition each time a word or term is repeated in the charge when it has once been defined; (2) no expression of opinion arises merely from the comparative amount of time devoted to giving an instruction; (3) defendant has failed to carry his burden of showing that he was prejudiced by the trial court's decision not to repeat the explanations of each mitigating circumstance when the jury was fully and carefully instructed regarding its consideration of mitigating circumstances; (4) the trial court expressly instructed the jury that it should consider each mitigating circumstance in reference to the death of the chief of police and that it should consider the law as the trial court had previously explained it as to those circumstances; and (5) the trial court merely avoided unnecessary repetition of information already given.

24. Sentencing— capital—oral instructions—consideration of nonstatutory mitigating circumstances in relation to statutory catchall

The trial court did not commit plain error in a double capital first-degree murder sentencing proceeding by its oral instructions to the jury for consideration of nonstatutory mitigating circumstances in relation to the statutory catchall circumstance, because: (1) defendant has produced no evidence to show that the jury's treatment of the catchall mitigator resulted from jury confusion; and (2) viewed in their entirety and within the context they were given, the trial court's instructions as to the catchall mitigator presented the law fairly and clearly.

25. Sentencing— capital—mitigating circumstances—wording of catchall mitigator on punishment form

The trial court did not commit plain error in a double capital first-degree murder sentencing proceeding by its wording of the catchall mitigating circumstance under N.C.G.S. § 15A-2000(f)(9) on the punishment forms which omitted the final phrase "one or more of us finds this circumstance to exist," because: (1) the fail-

ure of any juror to find such a circumstance based on his own personal review of the evidence does not necessarily mean the jurors misunderstood or misapplied the instruction; and (2) there was no reasonable probability that the omission of the phrase had any impact on the jurors' failure to find the catchall circumstance or on the verdict given the trial court's oral instructions and the language on the forms.

26. Constitutional Law— right to present own theory of case—impeachment of defendant as witness—proof of an unrelated crime—instruction on limited purpose

The trial court did not violate defendant's Sixth Amendment constitutional right to develop and present his own theory of the case free from outside interference in a double capital first-degree murder trial by granting the State's motion to submit North Carolina pattern jury instruction 105.40 concerning impeachment of defendant as a witness by proof of an unrelated crime, because: (1) the record contains no evidence that this instruction interfered with defendant's right to develop and present his own theory of the case; and (2) the prosecution was free to argue defendant's conviction to the jury for purposes of impeaching his testimony since it had properly elicited evidence of the conviction on previous cross-examination and therefore the prior conviction was already subject to the jury's consideration.

27. Homicide— first-degree murder—self-defense—pattern jury instruction

The trial court did not err in a double capital first-degree murder trial by denying defendant's request to substitute language in North Carolina pattern jury instruction 206.10 on self-defense to use the phrase "to kill the victim" instead of "to use deadly force against the victim," because: (1) defendant's evidence did not support a self-defense instruction at all; and (2) defendant presented no evidence to show that his use of deadly force was intended only to disable, and not to kill, his two victims.

28. Sentencing— death penalty—not disproportionate

The trial court did not err in a double capital first-degree murder trial by sentencing defendant to the death penalty, because: (1) defendant was convicted of two counts of first-degree murder on the basis of malice, premeditation, and delib-

eration; (2) defendant deliberately murdered a law enforcement officer for the purpose of evading lawful arrest; (3) the Supreme Court has never found a death sentence disproportionate in a case where the jury has found a defendant guilty of murdering more than one victim; (4) the jury found the course of conduct aggravating circumstance under N.C.G.S. § 15A-2000(e)(11), which standing alone is sufficient to support a sentence of death; and (5) defendant murdered his wife in their home.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two sentences of death entered by Ragan, J., on 18 November 1999 in Superior Court, Wilson County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. Heard in the Supreme Court 14 May 2001.

Roy Cooper, Attorney General, by Ralf F. Haskell, Special Deputy Attorney General, for the State.

Thomas R. Sallenger for defendant-appellant.

MARTIN, Justice.

On 11 September 1997 Abner Ray Nicholson (defendant) was indicted for the first-degree murders of his wife, Gloria Brown Nicholson (Mrs. Nicholson), and the Sharpsburg Police Department Chief of Police, Willard Wayne Hathaway (Chief Hathaway). Defendant was also indicted for the attempted first-degree murder of Mrs. Nicholson's stepfather, Marvin Roscoe Badger (Badger). Defendant was tried capitally at the 25 October 1999 Criminal Session of Superior Court, Wilson County. The jury found defendant guilty of each count of first-degree murder and not guilty of attempted first-degree murder. Following a capital sentencing proceeding, the jury recommended a sentence of death for each first-degree murder conviction, and the trial court entered judgment in accordance with those recommendations.

The state presented evidence at defendant's trial which is summarized as follows. Defendant and Mrs. Nicholson lived in a trailer on Weaver Circle in Sharpsburg, North Carolina, along with Mrs. Nicholson's two daughters, ages three and eight. One of the Nicholsons' neighbors, Emily McKenzie (McKenzie), first became aware the Nicholsons were having marital problems on 15 July 1997. On that day, Mrs. Nicholson went to McKenzie's house with her children and asked to use McKenzie's telephone. Mrs. Nicholson looked

upset and explained that she and defendant had argued, and that she and the children were going to her mother's house. McKenzie talked to the children and noticed they seemed very distant, as if they had been through a difficult experience.

On 16 July 1997, defendant visited the Hardly Able Pawn and Gun Shop in Sharpsburg. There, he retrieved a Bauer .25-caliber automatic pistol with a pearl handle that he had pawned in early June of that year. Later that day, defendant and Mrs. Nicholson went to the Badgers' house to speak to Mrs. Nicholson's mother and stepfather about the state of their relationship. Mrs. Nicholson told her parents she did not want to be married anymore. Defendant said that he wanted to work things out but that his wife did not. Mrs. Nicholson asked her husband to tell her parents what he had done. When defendant said he had not done anything, Mrs. Nicholson got up and demonstrated how he had attempted to choke her in April of that year. Mrs. Badger told defendant she did not want her daughter to be with him any more.

On the evening of 16 July 1997, the Nicholsons and the Badgers took Mrs. Nicholson's youngest daughter to the emergency room because she had a fever. The Nicholsons rode together in the backseat of Mr. Badger's van. During the trip to the hospital, defendant could be heard whispering to Mrs. Nicholson. At one point, Mrs. Nicholson said, "No. No. No. I ain't gonna (sic) do it. I don't want that." After more whispering, Mrs. Nicholson told her stepfather that defendant had threatened to kill her and had told her he was carrying a gun. Defendant then said, "No, I didn't. I was lying. I ain't got no gun." When they arrived at the hospital, defendant did not go inside with the rest of the family and could not be located when they were ready to go home.

After leaving the hospital, Mrs. Nicholson and the Badgers drove to the Nicholsons' trailer so Mrs. Nicholson could get some clothes. Mr. Badger walked inside with her to use the bathroom. They found defendant inside, lying on the couch. Mr. Badger then went into the bathroom. Mrs. Badger, who was sitting in the van, heard Mrs. Nicholson call her from the front doorway. As Mrs. Badger walked towards the trailer, defendant came out and punched Mrs. Nicholson in the face with his fist. Her nose started to bleed. Mr. Badger heard his stepdaughter "holler," and when he came out of the bathroom, she told him defendant had hit her. Defendant claimed Mrs. Nicholson had been hit by the door.

Mrs. Nicholson called the police, and defendant began walking down the road away from the trailer. Deputy Moss (Moss) of the Sharpsburg Police Department responded to the trailer after receiving a dispatch for a "domestic in progress," "Signal One, armed and dangerous." When Moss arrived, defendant ran into a nearby cornfield, and Moss called for backup. It was now shortly after midnight. Mrs. Nicholson was very upset and told Moss that defendant had punched her, causing the bleeding, and had threatened to kill her if she ever left him. She also said that defendant was armed and that he had pawned his weapon but must have retrieved it. Moss advised her to take her mother and stepfather with her as witnesses to the magistrate's office and swear out a warrant for defendant's arrest, which she did. Before they left, Mr. Badger blocked the back door of the trailer with a couch from the living room so defendant could not get in by that route. Moss stayed at the trailer until about 4:30 a.m. to see if defendant would return to get his car, but he did not. Mrs. Nicholson spent the night at her parents' house.

On the morning of 17 July 1997, Moss informed Chief Hathaway of the incident and told him that a warrant had been sworn out for defendant's arrest. Mrs. Nicholson returned to her trailer around 10:30 a.m. to get some clothes. Her stepfather and her fifteen-year-old brother, Jarrin Brown (Brown), went with her. Her stepfather was unarmed. While there, Mrs. Nicholson called defendant's sister in an attempt to get in touch with defendant. Defendant called her back shortly thereafter, and Mrs. Nicholson asked him to come over and get his clothes. Defendant agreed but said he did not want anyone else to be at the trailer when he arrived.

Mrs. Nicholson then called the police and asked if an officer could leave his car at the station and walk to her trailer. The Assistant Town Clerk answered and told Mrs. Nicholson that her request was against department policy. Chief Hathaway, the only officer on duty, called Mrs. Nicholson back and talked with her further. He explained that he could not leave his car but that he could come over and serve the warrant on defendant. He told Mrs. Nicholson to call him back before she let defendant into the trailer, and he would come over then. Defendant called Mrs. Nicholson a few minutes later and asked if anyone else was at the trailer. Mrs. Nicholson told him "no." She then told her stepfather and brother to wait in the back bedroom until the police arrived.

Defendant arrived at the trailer shortly thereafter and knocked on the door. Mrs. Nicholson stalled by saying she was getting dressed,

and called the police. She then let defendant inside the trailer. Mrs. Nicholson was in the kitchen when defendant entered the trailer, and Mr. Badger and Brown heard her telling defendant she wanted him to get his clothes and leave. When defendant said he did not have anything to put his clothes in, Mrs. Nicholson told him to get a trash bag.

At that point, Chief Hathaway arrived at the trailer in uniform with a piece of paper in his hand. Mrs. Nicholson let him in when he knocked. She then told Mr. Badger and Brown they could come out from the back bedroom. As they walked down the hallway, Chief Hathaway approached defendant. Defendant turned, pushed Chief Hathaway away, dropped the trash bag, and shot the Chief in the face. The Chief fell against defendant, and defendant shoved him back. Chief Hathaway's gun was in his holster when he was shot.

Mr. Badger attempted to open the rear sliding storm door, but before he could open it, defendant chased Mrs. Nicholson past him. As Mr. Badger opened the door and got outside, he heard more shooting. At the same time, Brown turned and started towards the back bedroom. As he did so, he saw his sister lying on the floor near the front door. He watched defendant walk over to her, lean down, and shoot her. Brown ran to the back bedroom and waited there until he heard defendant leave the trailer. He then ran out of the trailer and saw defendant walking towards the cornfield.

Brown went back inside the trailer, saw that his sister was not moving, and saw that Chief Hathaway was still breathing. He grabbed the Chief's radio and attempted to call for help. Brown took the Chief's gun out of its holster in case defendant returned, and he called 911. When police arrived, Brown put Chief Hathaway's gun on a recliner and went outside to meet them. Police later found the Chief's gun, with the safety still on. There was no evidence it had been fired.

Defendant was apprehended around 11:45 p.m. that same day. Defendant told a state trooper who assisted in his apprehension that he had dropped the gun in the woods. The gun that defendant had retrieved from the pawnshop was found the next day in a nearby cornfield. It was later determined that all of the bullets collected for evidentiary purposes in this case had been fired from that gun.

Dr. Thomas Clark, a forensic pathologist in the Office of the Chief Medical Examiner, performed an autopsy on the body of Chief

Hathaway. The autopsy revealed that Chief Hathaway died from a gunshot wound to the head. Dr. Clark concluded that the bullet had entered Chief Hathaway's head below the right eye, passed through his brain, and lodged on the surface of his brain. The bullet was removed during the autopsy. The wound appeared to have been made from a distance of two feet or greater and would have quickly resulted in unconsciousness and death.

Dr. Page Hudson, professor of pathology at East Carolina University, performed an autopsy on the body of Mrs. Nicholson. Dr. Hudson determined the cause of Mrs. Nicholson's death to be gunshot wounds to the head. Mrs. Nicholson had two gunshot wounds to the right side of her scalp, one below the fourth finger on her left hand, and one on the wrist of her right hand. Dr. Hudson opined that the wounds were caused by only two or three bullets and that they passed through Mrs. Nicholson's wrist and hand before striking her head. Dr. Hudson recovered two bullets from Mrs. Nicholson's skull.

Defendant presented evidence at trial as follows. He and Mrs. Nicholson met at Tim's Auto Sales, where they worked together, and were married in January 1997. Defendant stated he suffered from high blood pressure, took medication for it, and had been hospitalized on 4 July 1997 as a result of it. Defendant also said that on 15 July 1997, his wife had taken him to see a "mental health doctor." He stated that during their marriage, Mrs. Nicholson often hit him, but that he never hit her back. He said she carried a gun in her pocketbook and had threatened him with it before. He also said that she had cut him with a knife several times. Defendant further testified that Mr. Badger had previously threatened him with a gun. Defendant testified that on 16 July 1997, his wife tried to cut him with a knife and called him names while they were driving to her parents' house. When they got to the Badgers' house, she continued to try to cut him. Mrs. Nicholson cut his neck and hand, chased him with the knife, and stopped only when her youngest brother ran to tell Mrs. Badger what was happening.

Defendant remembered that one of Mrs. Nicholson's children had gotten sick on 16 July 1997. He explained that when the family arrived at the hospital, he called his ex-girlfriend, Delores Sledge (Sledge), to come pick him up. Sledge took him to his trailer in order for him to get his clothes and car so he could leave. Defendant was still at the trailer when the family returned from the hospital. He told

his wife that he had gone home because he had not taken his medication and was tired and hungry. Defendant testified his wife told her stepfather to take the tags off of defendant's car, told defendant he was not going anywhere, and said he could not get his clothes. As he attempted to leave, defendant said he pushed the screen door out of his wife's hand, and she grabbed the back of his shirt and started hitting him. Defendant told her to stop, and she did, but the screen door sprang back and hit Mrs. Nicholson in the nose, causing it to bleed.

Defendant testified he then walked off, intending to go to his sister's house and wait to get his clothes until the next day. Defendant said he called a woman named Delores Leach (Leach), who picked him up and let him spend the night at her house. The next morning, Leach drove defendant to his sister's house. Mrs. Nicholson called him there, threatened that she had her gun, and said that he needed to come get his things immediately. He borrowed his sister's car and drove to the trailer. When he knocked on the door, his wife told him to wait until she got dressed. She shortly opened the door, then went to the kitchen to get a trash bag for defendant to put his clothes in. As she walked back towards him, she told defendant not to make her shoot him.

Next, defendant remembered a police officer walked into the trailer. Mrs. Nicholson said, "Shoot him, shoot him, if you don't I am." Defendant turned around in a panic and saw the officer walking towards him with his hand on his gun. The officer said he had a warrant for defendant's arrest, hit defendant in the face, and spit in defendant's face. Defendant said at that point he "went blank" and could not see. He heard his wife screaming, the sound of stumbling, and the sound of firing. He then saw his wife falling and thought she was reaching for her pocketbook. It appeared to him that Mr. Badger had a gun. Afraid, he fired two shots into the floor of the trailer as he ran outside. Defendant stated that he was not aiming at anyone and did not hit anyone when he fired. He further testified that Mr. Badger had shot Chief Hathaway in the face when he ran out from the back bedroom, and he assumed it was also Mr. Badger who had shot Mrs. Nicholson.

Two men who had worked with defendant at Tim's Auto Sales testified. Both said defendant was not a violent person and that they had seen Mrs. Nicholson hit defendant and call him names, but they had never seen defendant hit her back. David Lawton said that on 16 July 1997, the week after defendant had quit his job, defendant came to

Tim's Auto Sales to ask for his job back. He said defendant was shaking, had lost weight, and did not seem like himself. Dennis Harper (Harper) testified that defendant was easygoing and in love with his wife. He said that when defendant came into the office on 16 July, he seemed to be under a lot of stress. Defendant asked Harper to call Mrs. Nicholson, saying she was acting strangely, but Harper did not do so.

Another co-worker at Tim's Auto Sales, Stephanie Speight (Speight), said Mrs. Nicholson told her that Mr. Badger had threatened defendant with a gun and that Mrs. Nicholson kept a gun in her pocketbook. Speight testified that Mrs. Nicholson was frequently abusive towards defendant at work and that, at times, she had held Mrs. Nicholson's hands to prevent her from hitting defendant. Speight said she and a sales manager had met with Mrs. Nicholson to warn her that she could be charged with spousal abuse.

Sledge testified that defendant was the father of her daughter. She said that defendant had never hit her but that one time he grabbed her clothes as she was walking away and they began to rip. She said that when she picked defendant up the night before the shootings he had a tissue on his neck and told her that his wife had cut him with a knife. She testified defendant seemed nervous and depressed.

Stephanie Lynch, a neighbor of the Nicholsons, testified that she saw Mrs. Nicholson and Chief Hathaway together almost every day at a local store.

Additional facts are provided as necessary below.

JURY SELECTION

[1] We first address the trial court's denial of defendant's request for individual *voir dire*. Defendant claims that the trial court's summary denial of his request violated his state and federal constitutional rights.

Upon a showing of good cause, the trial court may require jurors to be selected individually in capital cases. N.C.G.S. § 15A-1214(j) (1999). Individual *voir dire* may be appropriate where highly sensitive issues such as pretrial publicity are involved. *See, e.g., State v. Jaynes*, 353 N.C. 534, 544, 549 S.E.2d 179, 189 (2001). The burden rests on the defendant to show the particular harm resulting from the denial of his request for individual *voir dire*. *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). Individual *voir dire* may not necessarily be appropriate, despite pretrial publicity, where none of the jurors indicates that he or she would have difficulty setting aside any pretrial impressions. *State v. Atkins*, 349 N.C. 62, 106, 505 S.E.2d 97, 124 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). Absent an abuse of discretion, we will not disturb the trial court's ruling on a motion requesting individual *voir dire*. *State v. Hyde*, 352 N.C. 37, 46, 530 S.E.2d 281, 288 (2000), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001).

Prior to jury selection, defendant requested individual *voir dire* by written motion, and then presented the motion orally to the trial court. The trial court initially denied the motion. Later, on collective *voir dire*, prospective juror Jones stated she had "[r]ead about [the facts] in the newspaper when it occurred, and . . . thought about what a tragedy it was." Jones also stated that she did not form any opinions as to the guilt or innocence of defendant at that time. Defendant then requested individual *voir dire* as to prospective juror Jones, and the trial court allowed defendant an opportunity to state his reasons therefor. The trial court denied defendant's request, and the *voir dire* of Jones continued as follows:

> Q. The newspaper that you read that had some information that had something about this case, was this a local newspaper here?
>
> A. Juror Number One: Yes, the *Sun Journal*. That's the best of my remembrance.
>
> Q. Without getting into the specific facts about the case, we're not asking about that, the newspaper article that you read about it, did it mention any of the facts and circumstances of the case?
>
> A. Juror Number One: Just what happened, to the best of my recollection. Just what was supposed to have happened, as news articles go.
>
> Q. And . . . at that time, did you form an opinion as to whether or not the person that was charged was guilty or innocent in this case?
>
> A. Juror Number One: No, sir.
>
> Q. Did you form an opinion as to what punishment ought to be if a person was found guilty of what you read about?

A. Juror Number One: No, sir.

Q. Did you discuss what you read in the newspaper with anyone?

A. Juror Number One: I may have mentioned it to my husband, since we are most of the time reading the papers at the same time. Other than that, no.

Q. Did he express any opinion to you about those issues?

A. Juror Number One: No, sir.

Q. Did you express any opinion to him about those issues?

A. Juror Number One: No, sir, except: "What a tragedy."

Defendant argues the statement "What a tragedy" prejudiced him before the entire jury panel and tainted the venire. He contends that because this was a highly publicized case from a small community, individual *voir dire* should have been permitted to allow counsel to discuss the problem of pretrial publicity.

Defendant failed to support his original motion for individual *voir dire* with any facts or allegations concerning pretrial publicity. When he later presented the motion orally to the trial court, defendant simply referred to the prior written motion, adding no supporting facts. The trial court allowed defendant a full opportunity to state his reasons when he requested individual *voir dire* of Jones. He later challenged prospective juror Jones and succeeded in having her removed from the jury panel. Jones stated that she did not form any opinions as to the guilt or innocence of defendant and did not indicate that she would have difficulty setting aside any pretrial impressions if selected. *See Atkins*, 349 N.C. at 106, 505 S.E.2d at 124. These statements were not specific enough to adversely influence the decisions of the other jurors selected. *See Hyde*, 352 N.C. at 49-50, 530 S.E.2d at 290-91 (prospective juror's comment that he would give one of defendant's potential witnesses less credibility since he knew the witness, and another prospective juror's comment that one of defendant's attorneys had "misrepresented" her former son-in-law in a child abuse case did not unduly taint other prospective jurors in the panel). Defendant has failed to carry his burden of showing any particular harm resulting from the denial of his motion for individual *voir dire*. *See Barnes*, 345 N.C. at 208, 481 S.E.2d at 56-57. This argument fails.

[2] Defendant next alleges that his state and federal constitutional rights were violated when the trial court allowed the state to exercise

its peremptory challenges in a racially discriminatory manner. Defendant specifically disputes the state's challenges of prospective jurors Greene, Foye, McCoy, and Smith.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the use of peremptory challenges for racially discriminatory reasons. *Batson v. Kentucky*, 476 U.S. 79, 89, 90 L. Ed. 2d 69, 83 (1986). Article I, Section 26 of the North Carolina Constitution likewise bars race-based peremptory challenges. *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 United States Supreme Court established a three-part test to determine whether the state 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 reviewing the validity of peremptory challenges under the North Carolina Constitution. *State v. Lawrence*, 352 N.C. 1, 13-14, 530 S.E.2d 807, 815-16 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001); *State v. Mitchell*, 321 N.C. 650, 653-54, 365 S.E.2d 554, 556 (1988). The defendant must first 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 trial 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." *Id.* The state's proffered rationale need not be persuasive or even plausible, so long as it appears facially valid and betrays no inherent discriminatory intent. *Id.* at 14, 530 S.E.2d at 816. In the final step under *Batson*, the trial court must decide whether the defendant has shown purposeful discrimination. *Id.* To do this, the trial court considers 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).

The trial court's determination is given deference on review because it is based primarily on firsthand credibility evaluations.

Id. The reviewing court will uphold the trial court as long as its decision is not clearly erroneous. *Lawrence*, 352 N.C. at 14, 530 S.E.2d at 816.

Defendant first argues that the trial court erred by allowing, over defendant's objection, the state's peremptory challenges of prospective jurors McCoy and Smith. It is clear from the record that the trial court's denial of defendant's objection amounted to a finding that defendant had failed to make a *prima facie* showing under the first prong of *Batson*. *See State v. Locklear*, 349 N.C. 118, 138, 505 S.E.2d 277, 289 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999). When the trial court determines that the defendant has failed to make a *prima facie* showing, our review is limited to determining whether the trial court's ruling on this point was in error. *State v. Smith*, 351 N.C. 251, 262, 524 S.E.2d 28, 37, *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100 (2000); *Locklear*, 349 N.C. at 137, 505 S.E.2d at 288.

The factors to review in determining whether a defendant has made a *prima facie* showing include: whether the "prosecutor used a disproportionate number of peremptory challenges to strike African-American jurors in a single case," *Smith*, 351 N.C. at 262, 524 S.E.2d at 37; whether the defendant is a "member of a cognizable racial minority," *State v. Porter*, 326 N.C. 489, 497, 391 S.E.2d 144, 150 (1990); and whether the state's challenges appear to have been motivated by racial discrimination, *id.* Other factors a court may examine include "the victim's race, . . . the race of the State's key witnesses," and "whether the prosecutor made racially motivated statements or asked racially motivated questions of black prospective jurors . . . that raise[d] an inference of discrimination." *State v. Gregory*, 340 N.C. 365, 397-98, 459 S.E.2d 638, 656 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996).

Defendant and both of the victims in this case were African-American. Several of the state's key witnesses were also African-American. The record does not reveal any comments or conduct by the state that would lead to an inference of discrimination. *See id.* While the state did exercise its first two peremptory challenges to excuse African-American jurors, those excusals took place too early in *voir dire* to establish a pattern of discrimination. *See Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88; *Gregory*, 340 N.C. at 397-98, 459 S.E.2d at 656. Defendant alleges racial discrimination based on the fact that the only two prospective jurors in the first panel to be peremptorily

challenged, McCoy and Smith, were African-American. While this is true, the record also reveals that, of a panel of twelve prospective jurors, prospective jurors McCoy and Smith were the only two to express serious reservations about imposing the death penalty. *See Porter*, 326 N.C. at 498, 391 S.E.2d at 151 (noting that in evaluating a *prima facie* case under *Batson*, the trial court must gauge whether similarly situated white veniremen escaped the state's challenges). The responses of these prospective jurors, even if insufficient to support a challenge for cause, see *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88, are relevant to a determination of whether defendant has made a *prima facie* showing, *see State v. Williams*, 343 N.C. 345, 359, 471 S.E.2d 379, 387 (1996), *cert. denied*, 519 U.S. 1061, 136 L. Ed. 2d 618 (1997). As defendant has failed to make a *prima facie* showing of racial discrimination under *Batson*, the trial court's ruling was not in error. *See Smith*, 351 N.C. at 262, 524 S.E.2d at 37. Defendant's argument as to prospective jurors McCoy and Smith is without merit.

Defendant next alleges that the state's peremptory challenge of prospective juror Foye was racially discriminatory. When the trial court denied defendant's *Batson* objection to Foye's dismissal, the state proceeded to give reasons for its challenge as follows:

> [O]ur only desire is to have a jury that can be fair and impartial to both the State and the defendant. And, there were sufficient reasons in each case. . . . [T]he man says he was opposed to the death penalty, and then he turned around and said he could do the other. And, he's obviously—he doesn't know what he's saying, or he's too equivocal to be a reliable juror. That was our reason for excusing him.

Because the state presented reasons for its challenges despite defendant's failure to make a *prima facie* showing of racial discrimination, we proceed with our analysis under *Batson*. *See State v. Smith*, 352 N.C. 531, 540, 532 S.E.2d 773, 780 (2000) (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), *cert. denied*, —— U.S. ——, 149 L. Ed. 2d 360 (2001). We next ask whether the state provided a race-neutral reason for its peremptory challenge. *See Lawrence*, 352 N.C. at 14, 530 S.E.2d at 815.

The record reveals that the state challenged prospective juror Foye because of his equivocal answers regarding the death penalty and because the state was not confident that his deliberations would

be fair to both sides.[1] The state asserted on *voir dire* of Foye that it wanted "a jury that can be fair and impartial to both the State and the defendant." A statement such as this tends to rebut an inference of discrimination. *See Golphin*, 352 N.C. at 427, 533 S.E.2d at 211. In short, the state's race-neutral reasons are more than adequate to satisfy its burden under the second prong of *Batson*. *See Williams*, 343 N.C. at 359, 471 S.E.2d at 387. The trial court did not err in allowing the state's peremptory challenge of prospective juror Foye.

Finally, defendant alleges that the state's peremptory challenge of prospective alternate juror Greene was racially discriminatory. As was the case for prospective jurors McCoy and Smith, the trial court found that defendant failed to make a *prima facie* showing of racial discrimination as to Greene. Our review is thus limited to determining whether the trial court's finding was in error. *See Smith*, 351 N.C. at 262, 524 S.E.2d at 37. In weighing an allegation of intentional discrimination, the reviewing court may consider the state's acceptance rate of African-American prospective jurors. *Fletcher*, 348 N.C. at 318, 500 S.E.2d at 683. We therefore determine whether the state had accepted African-American jurors at this point in the *voir dire* proceedings.

The state exercised four peremptory challenges to excuse four African-American prospective jurors out of eight questioned. The state argues, and defendant does not contest, that the state accepted four African-American jurors to serve on the jury. This acceptance rate (50%) tends to refute a *prima facie* showing of discrimination. *See id.* at 318-19, 500 S.E.2d at 683-84; *see also State v. Allen*, 323 N.C. 208, 219, 372 S.E.2d 855, 862 (1988) (41% acceptance rate of African-American jurors—seven out of seventeen tendered—failed to establish *prima facie* showing of discrimination), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990); *State v. Abbott*, 320 N.C. 475, 481-82, 358 S.E.2d 365, 369-70 (1987) (40% acceptance rate of African-American jurors—two out of five tendered—failed to establish *prima facie* showing of discrimination); *State v. Belton*, 318 N.C. 141, 159-60, 347 S.E.2d 755, 766 (1986) (50% acceptance rate of African-American jurors—six out of twelve tendered—failed to establish *prima facie* showing of discrimination), *overruled on other*

1. Prospective juror Foye stated, "I don't believe in the death penalty. . . . I ain't (sic) never believed in it." When asked whether he could fairly consider both life imprisonment and death as punishments, Foye responded, "No, I couldn't." Finally, when asked whether he could nonetheless set aside his opinion and follow the law, Foye answered, "I could follow the law," and indicated that he could set aside his personal beliefs were he instructed to do so.

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). After analysis of the selection and composition of the jury in this case, we conclude defendant failed to make a *prima facie* showing of discrimination with respect to prospective alternate juror Greene. Thus, defendant's argument is without merit.

[3] Defendant next argues that the trial court erred by allowing the state's challenge for cause of prospective juror Ray. This dismissal, defendant alleges, violated his constitutional rights because it resulted in a death sentence imposed by a jury from which a prospective juror had been improperly excluded. Defendant further contends he should have been allowed to attempt to rehabilitate the prospective juror. He maintains additional questions would likely have elicited different answers from Ray.

A prospective juror may be excused for cause if his or her "views 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), *quoted in State v. Quesinberry*, 319 N.C. 228, 235, 354 S.E.2d 446, 450 (1987). When a juror "voice[s] general objections to the death penalty or express[es] conscientious or religious scruples against its infliction," this is not, in itself, a sufficient basis for excusal. *Witherspoon v. Illinois*, 391 U.S. 510, 522, 20 L. Ed. 2d 776, 784-85 (1968). A prospective juror in a capital case must be able to state clearly, however, that he or she is willing to temporarily set aside those concerns and beliefs and to fairly and impartially follow the law. *Lockhart v. McCree*, 476 U.S. 162, 176, 90 L. Ed. 2d 137, 149-50 (1986); *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 907-08 (1993). The reviewing court must defer to the trial court's discretion where responses are "at best equivocal" as to whether the juror could impartially follow the law. *State v. Bowman*, 349 N.C. 459, 471, 509 S.E.2d 428, 436 (1998), *cert. denied*, 527 U.S. 1040, 144 L. Ed. 2d 802 (1999); *see also* N.C.G.S. § 15A-1212(8) (1999) (providing that a challenge for cause may be made on the grounds that a juror would be unable to render a verdict in accordance with the laws of North Carolina); *State v. Nobles*, 350 N.C. 483, 497, 515 S.E.2d 885, 893 (1999) (quoting *Wainwright v. Witt*, 469 U.S. 412, 425, 83 L. Ed. 2d 841, 852 (1985)) (holding that where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law, we defer to the final decision of the trial court).

Prospective juror Ray stated on *voir dire* that he was "not sure" he could fairly consider both life imprisonment without parole and the death penalty. When asked if he was against the death penalty, Ray said, "I'm not opposed, I'm not against it." Ray stated he felt his ability to render a fair and impartial decision was impaired by his prior experiences as a soldier in Vietnam: "After I came back from Viet Nam, that was enough for me for seeing murder and being around it and all. . . . I don't want to put myself in that position where I have to make that choice if I don't have to. . . . I've just seen enough of that. And, that's something I don't want to be a part of."

Prospective juror Ray was questioned at length about his ability to render a decision that complied with the law. When asked whether he could faithfully apply the law in this case, he replied, "To be honest, I really don't know. In my heart now, I'd say no." Towards the end of the state's questioning, Ray was asked:

> [THE STATE]: Would you be able to sit and listen to the evidence as presented in the first phase of this trial, which would be the guilt or innocence phase . . . and be able to render a decision on guilt or innocence that would be fair to both sides?
>
> [PROSPECTIVE JUROR RAY]: I'd really like to say yes. But the whole thing of it is, once you've come to a decision if it's against him, and then it comes up to life or death, I'm not sure if I could vote on that to take a man's life.
>
> [THE STATE]: Well, could you return a verdict of guilty if you were satisfied, beyond a reasonable doubt, of the defendant's guilt of each charge, knowing that the defendant might receive the death penalty?
>
> [PROSPECTIVE JUROR RAY]: To be truthful, I'm not sure.

The trial court excused Ray for cause, finding, "because of his past experiences and his personal opinions, that his ability to serve on this jury . . . and[] render a fair and impartial verdict would be prevented or substantially impaired." The trial court then denied defendant's request to rehabilitate Ray.

As a preliminary matter, we note that the trial court properly excluded prospective juror Ray for cause under the standard delineated in *Quesinberry*. *See* 319 N.C. at 235, 354 S.E.2d at 450. Ray stated that he had strong reservations about the death penalty and

that he questioned his ability to impose punishment fairly. Ray also left the trial judge with the definite impression that he would be unable to faithfully and impartially follow the law in the guilt-innocence phase of the trial. We therefore defer to the decision of the trial court, which ruled in its discretion that these statements would prevent or substantially impair Ray's duties as a juror. *See Brogden*, 334 N.C. at 43, 430 S.E.2d at 908.

We further hold that the trial court did not abuse its discretion when it denied defendant's request for rehabilitation. Unless the prospective juror has "expressed unequivocal opposition to the death penalty in response to questions propounded by the prosecutor and the trial court," the trial judge may be deemed to have abused his or her discretion for denying a rehabilitation request. *State v. Cummings*, 326 N.C. 298, 307, 389 S.E.2d 66, 71 (1990). Nonetheless, absent a showing on appeal that further questioning by defendant would likely have produced different answers, the trial court's refusal to allow juror rehabilitation is not an abuse of discretion. *State v. Oliver*, 302 N.C. 28, 40, 274 S.E.2d 183, 191 (1981).

Nowhere in the nine pages of transcript covering prospective juror Ray's *voir dire* does Ray clearly state that he could set aside his beliefs concerning the death penalty, nor does he indicate that he could fairly and impartially follow the law. *Brogden*, 334 N.C. at 43, 430 S.E.2d at 907-08. Instead, the transcript reveals that prospective juror Ray candidly related his military experience and explained why, as a result of it, he would have difficulty following the law. Defendant has failed to show how further questioning would have illuminated or changed Ray's answers. *See Oliver*, 302 N.C. at 40, 274 S.E.2d at 191. Indeed, it is possible that further questioning of prospective juror Ray, on what was to him a personal and sensitive matter, could have amounted to harassment. *See Cummings*, 326 N.C. at 307, 389 S.E.2d at 71 (denial of rehabilitation "prevents harassment of the prospective jurors based on their personal views toward the death penalty"). Accordingly, the trial court did not err in excusing prospective juror Ray for cause.

GUILT-INNOCENCE PHASE

[4] Defendant next contends the trial court erred by denying his motion for mistrial after the trial judge discovered that one of the witnesses for the state, Deputy Moss, was serving as a courtroom bailiff. Defendant argues that Deputy Moss, when acting as bailiff, served as an officer in charge of the jury. Accordingly, defendant contends that

prejudice should have been conclusively presumed and his motion for mistrial granted.

This Court has consistently held that "where a witness for the State acts as custodian or officer in charge of the jury in a criminal trial, prejudice is conclusively presumed, and the defendant must have a new trial." *State v. Jeune*, 332 N.C. 424, 431, 420 S.E.2d 406, 410 (1992). To determine whether a witness for the state has 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." *State v. Mettrick*, 305 N.C. 383, 386, 289 S.E.2d 354, 356 (1982).

Where witnesses for the state have had the opportunity to engage in conversation with the jury outside of the courtroom or have been actual custodians of the jury such that the jurors were dependent on the witnesses for information or services, such contact has been deemed conclusively prejudicial regardless of whether any showing of actual prejudice is made. *See, e.g., State v. Wilson*, 314 N.C. 653, 655-56, 336 S.E.2d 76, 76-77 (1985) (contact presumed prejudicial where a spouse of the prosecutor served as bailiff and engaged in "friendly conversation" with jurors during breaks in their deliberations); *Mettrick*, 305 N.C. at 386, 289 S.E.2d at 356 (contact presumed prejudicial where witness-bailiffs transported jurors on multi-hour trips between counties such that the "jurors' lives, safety and comfort were in these officers' hands" and the jurors "were in these . . . officers' custody and under their charge out of the presence of the court for protracted periods of time with no one else present").

In contrast, when the jury's contact with witnesses for the state has been "brief, incidental, [and] entirely within the courtroom," we have held that such exposure was without legal significance and have not presumed prejudice. *State v. Flowers*, 347 N.C. 1, 21, 489 S.E.2d 391, 402 (1997) (contact not presumed prejudicial where witness-bailiff let jurors in and out of the courtroom and directed them to their seats), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998); *see also State v. Braxton*, 352 N.C. 158, 185, 531 S.E.2d 428, 444 (2000) (contact not presumed prejudicial when bailiff participated in courtroom demonstration), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *State v. Call*, 349 N.C. 382, 403, 508 S.E.2d 496, 509-10 (1998) (contact not presumed prejudicial when law enforcement witnesses passed out Bibles and told jurors which hand to raise to take their oath); *Jeune*, 332 N.C. at 432-33, 420 S.E.2d at 411 (contact not presumed prejudicial when witness-bailiff opened the jury room door

and gate to the jury box and told jurors to take their seats); *State v. Macon*, 276 N.C. 466, 473, 173 S.E.2d 286, 290 (1970) (contact not presumed prejudicial when witness-bailiffs opened the door to send jurors out or call them into the courtroom as needed).

In the present case, Deputy Moss was positioned at the back door of the courtroom for several days, and his duties included opening the doors to the courtroom as needed. He had no direct contact or communication with the jury. When alerted to Deputy Moss's dual role as witness and bailiff, the trial court relieved Deputy Moss of his duties as bailiff for the remainder of the trial.

Deputy Moss's responsibilities as bailiff for defendant's trial never required him to act in a custodial role or as the officer in charge of the jury. He was not in the presence of the jury outside of the courtroom, had no communication with the jurors, did not lead them in or out of the courtroom, and had no custodial authority over them. The exposure of the jurors to Deputy Moss in his role as bailiff appears to have been extremely limited. Accordingly, prejudice cannot be conclusively presumed, and no actual prejudice has been shown. *See Flowers*, 347 N.C. at 21, 489 S.E.2d at 402.

To support his argument for a new trial, defendant cites *Wilson*, 314 N.C. at 655-56, 336 S.E.2d at 76-77, for the principle that, solely as a result of his status as a courtroom bailiff, Deputy Moss was an officer in charge of the jury. We have stated, however, that "it is incorrect to read *Wilson* for the proposition that a bailiff in a criminal trial is *necessarily* a custodian or officer in charge of the jury so as to require a conclusive presumption of prejudice." *Jeune*, 332 N.C. at 433, 420 S.E.2d at 411. "Mere presence in the courtroom is not sufficient" to establish that the bailiff had custody of the jury. *Braxton*, 352 N.C. at 185, 531 S.E.2d at 444. A presumption of prejudice does not arise from Deputy Moss's limited exposure to the jury. In any event, the likelihood that the outcome of the trial would have been different had Deputy Moss not served as bailiff is negligible. Accordingly, any constitutional error was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (1999). This argument fails.

[5] Defendant next contends that his rights were violated when the trial court limited his ability to present evidence showing he acted in self-defense. Defendant testified that at the trailer, he felt trapped, feared for his life, and heard gunfire. He argues that the excluded evidence, including the testimony of two expert witnesses, would tend

to show that he fired his gun in response to a perceived threat of imminent death or serious injury to himself.

At trial, defendant attempted to introduce the testimony of Dr. Lubica Fedor (Dr. Fedor), a staff psychiatrist at the Edgecombe-Nash Mental Health Center who had evaluated defendant on 15 July 1997. Defendant contends that Dr. Fedor's testimony was relevant to show defendant's state of mind on the day of the shootings and, in particular, to show defendant's perception of the need to use deadly force to defend himself. The trial court did not allow Dr. Fedor to testify.

We first note that the trial court erred by instructing the jury on self-defense. This Court has held that a defendant is entitled to a self-defense instruction "if there is any evidence in the record from which it can be determined that it was necessary or reasonably appeared to be necessary for him to kill his adversary in order to protect himself from death or great bodily harm." *State v. Bush*, 307 N.C. 152, 160, 297 S.E.2d 563, 569 (1982). If, however, no such evidence is presented, a defendant is not entitled to an instruction on self-defense. *Id.* In the present case, there was no evidence to support a finding that defendant in fact formed a belief that it was necessary to kill either his wife or Chief Hathaway to protect himself from death or serious injury. Defendant testified that he felt afraid and fired two shots into the floor of the trailer as he ran outside. He asserted that he did not intend to hit anyone and denied shooting either his wife or Chief Hathaway. Defendant further testified he was not in a position to have been able to cause the wounds that killed his wife, even when he was firing his weapon, and speculated that her stepfather, Mr. Badger, was actually responsible for the killings.

To recall the words of a recent case,

> defendant is not entitled to an instruction on self-defense while still insisting that he did not fire the pistol at anyone, that he did not intend to shoot anyone and that he did not [know anyone had been shot]. Clearly, a reasonable person believing that the use of deadly force was necessary to save his or her life would have pointed the pistol at the perceived threat and fired at the perceived threat. The defendant's own testimony, therefore, disproves the first element of self-defense.

State v. Williams, 342 N.C. 869, 873, 467 S.E.2d 392, 394 (1996) (defendant claimed he only shot warning shots and did not intend to hit anyone); *see also State v. Lyons*, 340 N.C. 646, 662, 459 S.E.2d 770,

779 (1995) ("from defendant's own testimony regarding his thinking at the critical time, it is clear he meant to scare or warn and did not intend to shoot anyone," but rather intended to shoot at the top of a door); *State v. Reid*, 335 N.C. 647, 671, 440 S.E.2d 776, 789-90 (1994) (defendant cannot claim self-defense while also asserting that he did not aim his gun at the victim and did not hold the weapon that killed the victim); *Bush*, 307 N.C. at 159-60, 297 S.E.2d at 568 ("defendant's self-serving statements that he was 'nervous' and 'afraid' and that he thought he was 'protecting [him]self' " did "not amount to evidence that the defendant had formed any subjective belief that it was necessary to kill the deceased in order to save himself from death or great bodily harm") (emphasis omitted).

Defendant contends that Dr. Fedor's testimony would have helped the jury understand why defendant felt it necessary to use deadly force to protect himself against his alleged attackers. Nonetheless, because defendant's own testimony showed he did not believe it necessary to use deadly force against any individuals to protect himself, the expert testimony of Dr. Fedor was irrelevant. Defendant was not entitled to introduce expert testimony to bolster a defense which was not supported by the evidence at trial. *See Williams*, 342 N.C. at 873, 467 S.E.2d at 394.

Further, "[w]hen a trial court undertakes to instruct the jury on self-defense in a case in which no instruction in this regard is required, the gratuitous instructions on self-defense are error favorable to defendant." *Reid*, 335 N.C. at 672, 440 S.E.2d at 790. The self-defense instruction defendant received in this case was a benefit to which he was not entitled. Accordingly, defendant may not now complain that because the jury considered self-defense, he should have received the additional benefit of Dr. Fedor's testimony in support of that defense. Further, even assuming *arguendo* that it was error to exclude testimony supporting defendant's self-defense claim while allowing the jury to be instructed on self-defense, we again note that the self-defense instruction was not justified by the facts of this case. Because the unwarranted instruction helped, rather than hindered, defendant's case, he was not prejudiced by the exclusion of Dr. Fedor's testimony. *See id.* This argument is without merit.

In a similar vein, defendant argues that he should have been allowed to introduce the testimony of Dr. James Bellard, a forensic psychiatrist. Defendant argues that Dr. Bellard's testimony, like that of Dr. Fedor, was relevant to the issue of self-defense because it would have shed light on defendant's state of mind at the time of the

killings and on his perception that he was in imminent danger. For the same reasons that he was not prejudiced by the exclusion of Dr. Fedor's testimony, defendant was not prejudiced by the exclusion of Dr. Bellard's testimony. As discussed above, defendant was not entitled to an instruction on self-defense. *See Williams*, 342 N.C. at 873, 467 S.E.2d at 394. Dr. Bellard's testimony was therefore irrelevant to the issues at trial. The instruction given by the trial court inured only to defendant's benefit, and he was not entitled to present additional evidence in support of a defense not warranted by the evidence. *See Reid*, 335 N.C. at 671-72, 440 S.E.2d at 789-90. Accordingly, defendant's argument is without merit.

[6] Defendant also asserts that the trial court erroneously granted the state's motion *in limine*, which prohibited defendant from introducing evidence concerning alleged embezzlement by Mrs. Nicholson from her employer, Tim's Auto Sales. Defendant contends that he was entitled to introduce this evidence to explain the great stress he was experiencing at the time of the killings and to bolster his claim of self-defense.

The state filed its motion *in limine* on the morning of 2 November 1999, the second day of trial. The state requested that the trial court prohibit defendant from questioning witnesses about the alleged embezzlement on the grounds that it was unproven and irrelevant and would therefore be prejudicial. Before bringing the jury into the courtroom, the trial court discussed the motion with the parties. The state explained why it hoped to prohibit that line of questioning, and the following colloquy occurred:

> THE COURT: Okay. Does the defense wish to be heard?
>
> [DEFENSE COUNSEL]: Judge, I don't know that now is the time to get into it or not. Certainly from what I can glean—
>
> THE COURT: Well, let me—
>
> [DEFENSE COUNSEL]: —the type of witnesses coming up at this time, none of that certainly would, at this point in time.
>
> THE COURT: Okay. Let—
>
> [DEFENSE COUNSEL]: Probably the interest of justice would be served to move on, but I will guarantee the Court that we will not, not until we have the opportunity to have the Motion heard.
>
> THE COURT: Okay. That's what I was getting at.

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: Before, the best way to handle these Motions in Limine, before you get to that point, before you folks raise that issue, I expect you to come to the bench, let's talk about it, and then I'll make a decision at that point in time.

It's understood from that (indicating) side that that will not be raised until such time as you have approached the bench and gotten permission to do so, and if necessary, we've had a hearing about that.

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: Okay. Okay. That's good enough for now.

The issue did not arise again until the presentation of defendant's evidence, when defendant called Dennis Harper, a former employee of Tim's Auto Sales. Harper testified that he had worked with defendant and Mrs. Nicholson at Tim's Auto Sales and explained what he knew about the Nicholsons' relationship. Harper testified that both of the Nicholsons had stopped working at Tim's Auto Sales and recounted a time when defendant returned to talk to the store owner. The following exchange occurred:

[DEFENSE COUNSEL]: When you say he was stressed out, what do you mean—he was under stress, what do you mean by that;

Explain to the jury what you mean?

[HARPER]: Well, they both had lost their jobs, well, I think [defendant] just went ahead and quit.

[THE STATE]: I'm going to OBJECT.

THE COURT: Well.

[THE STATE]: He didn't ask him that.

THE COURT: OVERRULED.

Defense counsel then asked to approach the bench, and all parties conferred out of the hearing of the jury.

[DEFENSE COUNSEL]: I know you don't want me to get into that area. I didn't mean for him to go into that, so if you want me to approach him and tell him not to go into that.

THE COURT: I want you to instruct the witness not to go into that.

Defense counsel then asked Harper to try to avoid testifying about why Mrs. Nicholson left her employment at Tim's Auto Sales. Harper said he understood, and resumed testifying once the attorneys had returned to their respective counsel tables.

These transcript excerpts illustrate that on 2 November 1999 the trial court discussed the state's motion *in limine* with the parties and inquired into whether the motion should be heard. Defense counsel advised the trial court there was not a need for a hearing at that time. Defense counsel further volunteered that he would not inquire into the alleged embezzlement until the motion was heard. Defense counsel agreed that, before entering into such inquiry when examining witnesses, he would approach the bench and request permission from the trial court. The trial court indicated it would conduct a hearing at that time if necessary.

At the time Harper began to testify about why the Nicholsons might have left their employment at Tim's Auto Sales, the state objected on the basis that Harper's answer was nonresponsive. The trial court overruled the objection. At the bench, defense counsel told the trial court he had not intended to inquire into the alleged embezzlement. Defense counsel did not request permission to enter into such an inquiry, nor did he ask to have a hearing on the subject at that time.

It does not appear from the above, and there is nothing in the record to show, that the trial court ever granted the state's motion *in limine*. Rather, it appears the trial court merely postponed ruling until defendant indicated he was interested in entering into that line of inquiry. Defendant never so indicated and in fact told the trial court he was not attempting to inquire about the alleged embezzlement during the examination of Harper. The trial court thus never ruled on the motion *in limine*, as the need never arose. Accordingly, defendant's argument that the trial court erred in granting the motion *in limine* is without merit.

[7] Defendant's next argument concerns the admission of statements made by the victim, Mrs. Nicholson. Defendant maintains that these statements constituted inadmissible hearsay. He contends that the trial court improperly relied upon the catchall hearsay exception, N.C.G.S. § 8C-1, Rule 804(b)(5) (1999), in admitting the challenged

statements without first engaging in the inquiry required by *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986).

The challenged statements were offered by Ella Badger, the victim's mother. Mrs. Badger testified that she heard defendant and Mrs. Nicholson whispering in the back of the car during the trip to the hospital on the evening of 16 July 1997. She could not understand what they were saying until her daughter said to defendant, "No. No. No. I ain't gonna (sic) do it. I don't want that." Then Mrs. Nicholson said, "Daddy, Abner Ray back here talking about he got a gun, and he gonna (sic) kill me." Mrs. Badger also testified that on the day of the killings, her daughter told her that she wanted to go home to get some clothes. Once Mrs. Nicholson arrived at home, she called her mother and told her that she had talked to defendant and asked him to come get his clothes. According to Mrs. Badger, her daughter told her that defendant did not want anyone else at the house when he came to pick up his clothes. Mrs. Nicholson spoke to her mother one more time before her death to tell her that she had called the police and that they had advised her not to let defendant into the house, but to call them back once he arrived.

The prohibition against hearsay bars the admission of out-of-court statements offered to prove the truth of the matter asserted. N.C.G.S. § 8C-1, Rule 801(c) (1999). Numerous exceptions to the hearsay rule exist, however, so that out-of-court statements may be admissible under some circumstances. Rule 803(2), pertaining to "excited utterances," is one such exception. N.C.G.S. § 8C-1, Rule 803(2) (1999). The excited utterance hearsay exception allows admission of out-of-court statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.* To qualify as an excited utterance, the statement must relate " '(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)).

Rule 803(3) provides another exception to the hearsay rule, under which a statement may be offered for the purpose of showing "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). This Court has interpreted Rule 803(3), the "state of mind" hearsay exception, to include statements of then-existing intent to engage in future acts.

Braxton, 352 N.C. at 190, 531 S.E.2d at 447; *State v. Taylor*, 332 N.C. 372, 386, 420 S.E.2d 414, 422 (1992). The Rule 803(3) exception is limited by the requirement that the evidence be relevant to the case. *State v. Meekins*, 326 N.C. 689, 695, 392 S.E.2d 346, 349 (1990).

In the absence of a more specific exception, otherwise inadmissible hearsay may be introduced under the catchall hearsay exception when the declarant is unavailable. N.C.G.S. § 8C-1, Rule 804(b)(5) (1999). Courts must carefully scrutinize evidence offered under the catchall exception, as its residual nature makes it a potential avenue for abuse. *State v. McElrath*, 322 N.C. 1, 16, 366 S.E.2d 442, 451 (1988).

Mrs. Badger overheard Mrs. Nicholson's statements, "No. No. No. I ain't gonna (sic) do it. I don't want that," and, "Abner Ray back here talking about he got a gun, and he gonna [sic] kill me." These statements are excited utterances, made under the stress caused by defendant, who at that time was allegedly threatening the victim in the back of the Badgers' car, and made spontaneously, not as a product of reflection. *See Maness*, 321 N.C. at 459, 364 S.E.2d at 351. Rule 803(2) therefore allows the admission of these statements into evidence.[2] Also admitted into evidence were Mrs. Nicholson's statements regarding her desire to go home to get some clothes, her request to defendant to come get his clothes, and her assertion that she had called the police to serve defendant with a warrant. These statements fall under the state of mind exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(3). They are relevant to show the sequence of events on the day of the killings. *See Meekins*, 326 N.C. at 695, 392 S.E.2d at 349. Further, they illustrate Mrs. Nicholson's then-existing intent to protect herself by calling the police and having defendant served with the warrant. *See* N.C.G.S. § 8C-1, Rule 803(3); *Braxton*, 352 N.C. at 190, 531 S.E.2d at 447. Although defendant asserts that the trial court improperly admitted these statements under the Rule 804(b)(5) catchall exception, our review of the record convinces us otherwise. The admission of these statements was proper under the hearsay exceptions detailed in Rules 803(2) and 803(3), and not the

2. In the transcript of this exchange, Mrs. Badger testified that defendant said, "I was lying. I ain't got no gun." It is unclear whether defendant contests the admission of his alleged statement. Assuming that he does contest its admission, the trial court did not err in allowing it because this statement falls within the hearsay exception for admissions by a party-opponent. N.C.G.S. § 8C-1, Rule 801(d) ("A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity . . . .").

catchall hearsay exception in Rule 804(b)(5). This argument is therefore without merit.

[8] Defendant next challenges the trial court's denial of his motion to dismiss the two first-degree murder charges. He argues that the state did not present sufficient evidence to show premeditation and deliberation. Rather, defendant asserts that the state's evidence showed only that Mrs. Nicholson had concocted a "bizarre plan" to lure defendant to the trailer and that he was surprised by the presence of Mrs. Nicholson's family and Chief Hathaway. Defendant argues that, under these circumstances, he could not have formed the deliberate and premeditated intent to kill.

The standards guiding our inquiry on this issue are well established. "In ruling on a motion to dismiss a charge of first-degree murder, the trial court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from that evidence." *State v. Ross*, 338 N.C. 280, 287, 449 S.E.2d 556, 562 (1994). Substantial evidence must exist for each element of the offense, and there must also be substantial evidence tending to show that defendant committed the crime. *State v. Carter*, 335 N.C. 422, 429, 440 S.E.2d 268, 271 (1994). Should the state fail to present substantial evidence for each element of first-degree murder, a court should grant a motion to dismiss the charge. *See id.*

First-degree murder is the unlawful killing of a human being with malice, premeditation, and deliberation. N.C.G.S. § 14-17 (1999); *State v. Misenheimer*, 304 N.C. 108, 282 S.E.2d 791 (1981). The element of premeditation requires the state to show that the accused formed the specific intent to kill at some time, however brief, before the killing took place. *Misenheimer*, 304 N.C. at 113, 282 S.E.2d at 795. Deliberation is the intention to kill, and it must be formed not in the heat of passion, but while defendant is in a " 'cool state of blood.' " *State v. Leazer*, 353 N.C. 234, 238, 539 S.E.2d 922, 925 (2000) (quoting *State v. Thomas*, 350 N.C. 315, 347, 514 S.E.2d 486, 506, *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999)); *see also State v. Buffkin*, 209 N.C. 117, 126, 183 S.E. 543, 548 (1936).

Defendant argues that the surprise deliberately sprung upon him by his wife negated the premeditation and deliberation element of first-degree murder. We disagree. Viewing the evidence in the light most favorable to the state, the record shows the killings were premeditated and deliberate. The state presented testimony that defend-

ant and his wife had been having marital difficulties near the time of the killings. Mrs. Nicholson told her parents that defendant had choked her on one occasion and had threatened to kill her on another. On 16 July 1997, one day prior to the killings, defendant retrieved his pistol from the pawnshop where he had previously pawned it. The state presented eyewitness testimony that defendant punched Mrs. Nicholson in the mouth later that same day.

When Mrs. Nicholson asked defendant to come to the trailer on the day of the killings, defendant requested that she be alone when he arrived, and he brought along his gun. The evidence also showed that defendant shot Chief Hathaway in the face as the Chief tried to serve him with a warrant. Although events undoubtedly unfolded quickly in the trailer that day, the fact that the Chief's sidearm was still in its holster when he was shot supports the premeditation element. The state presented evidence tending to show that Mrs. Nicholson ran from defendant as he chased her with his gun and that he shot her after she tripped and fell onto the floor. Evidence was also presented that defendant fired at least five shots that day, most of them at close range, and that he fled the scene after the killings, disposing of the gun along the way. This evidence, considered in the light most favorable to the state, tend to show the killings were premeditated and deliberate. *See Ross*, 338 N.C. at 287, 449 S.E.2d at 562.

Even if we accept defendant's argument that the events on the day of the crime are "unclear at best," we cannot hold that defendant's motion to dismiss should have been granted. Just because the facts of a case are contested and the evidence is circumstantial does not mean that those facts are insufficient to be submitted to a jury, nor does it mean that, viewed in their totality, those facts cannot constitute substantial evidence. *See, e.g., Carter*, 335 N.C. at 429, 440 S.E.2d at 271. We therefore hold that, considered in the light most favorable to the state, substantial evidence of premeditation and deliberation supported the trial court's decision to deny defendant's motion to dismiss and to submit the two first-degree murder charges. *See id.* Accordingly, defendant's argument fails.

CAPITAL SENTENCING PROCEEDING

Defendant presents two separate arguments concerning the presentation of impact statements during the capital sentencing proceeding. Defendant argues that the trial court caused him undue prejudice by allowing the state to present a victim-impact statement. Further, defendant argues that the trial court improperly

denied his request to present family-impact evidence. He asserts that such evidence would establish his identity as an individual whose death would represent a unique loss to society and his family. Furthermore, according to defendant, fairness dictated that his family-impact evidence be admitted to rebut the victim-impact evidence admitted. For purposes of our analysis, we combine these two assignments of error.

[9] The state presented testimony by Mrs. Nicholson's mother, Ella Badger, describing the effect Mrs. Nicholson's death had on Mrs. Nicholson's children, on the victim's brother, and on herself and her husband. Mrs. Badger related how her granddaughter—Mrs. Nicholson's daughter—now lacked the mother figure upon whom she had always relied. She also described the effects on her son Jarrin—Mrs. Nicholson's brother—who was an eyewitness to the murder. He cried constantly, could not bear to turn the lights off, and began to do poorly in school. Mrs. Badger also related that she and her daughter were very close. The trial court allowed this victim-impact statement into evidence over defendant's objection.

In *Payne v. Tennessee*, 501 U.S. 808, 825, 115 L. Ed. 2d 720, 735 (1991), the United States Supreme Court held that victim-impact statements are admissible and relevant to the jury's decision whether to impose the death penalty. North Carolina has adopted this rule to allow evidence of victim impact in sentencing hearings. "A victim has the right to offer admissible evidence of the impact of the crime, which shall be considered by the court or jury in sentencing the defendant. The evidence may include . . . [a] description of the nature and extent of any physical, psychological, or emotional injury suffered by the victim as a result of the offense committed by the defendant." N.C.G.S. § 15A-833(a)(1) (1999). The admissibility of victim-impact statements is limited by the requirement that they not be "so prejudicial as to 'render[] the [trial] fundamentally unfair.' " *Smith*, 352 N.C. at 554, 532 S.E.2d at 788 (quoting *Payne*, 501 U.S. at 825, 115 L. Ed. 2d at 735) (first alteration in original). Our courts have interpreted section 15A-833 to bar evidence that would "sway the sentencing jury to improper considerations in determining defendant's sentence." *Id.* (holding no undue prejudice arose from family member's statements that he felt he had "lost a confidant[e]" and that a "predator had come and taken one of two sibling birds out of the nest").

Mrs. Badger's statements concerning the impact of her daughter's death on her family were not unduly prejudicial. Her description of

her own reaction and the reactions of her family members related the extent of the psychological and emotional injury caused by defendant, falling well within the parameters of the statute. N.C.G.S. § 15A-833; *see also Bowman*, 349 N.C. at 478, 509 S.E.2d at 440 (holding that victim-impact statements by the mothers of the two victims concerning how the murders affected them and their families were not so unduly prejudicial that they rendered the trial fundamentally unfair). Mrs. Badger's statements addressed the " 'specific harm caused by the defendant,' " *Payne*, 501 U.S. at 825, 115 L. Ed. 2d at 735, and " 'remind[ed] the sentencer that . . . the victim is an individual whose death represents a unique loss to society and in particular to [her] family,' " *id.* (quoting with approval *Booth v. Maryland*, 482 U.S. 496, 517, 96 L. Ed. 2d 440, 457 (1987) (White, J., dissenting), *overruled by Payne*, 501 U.S. 808, 96 L. Ed. 2d 720). *Accord Smith*, 352 N.C. at 554, 532 S.E.2d at 788. In our examination of the record, we have found no evidence showing that the jury was swayed to base its decision solely on Mrs. Badger's statements. *See id.* None of the aggravating circumstances submitted to the jury derived from the victim-impact evidence, and the state did not ask the jury to base its decision on this evidence. *See, e.g.*, *Bowman*, 349 N.C. at 478, 509 S.E.2d at 439-40. The trial court thus properly admitted the victim-impact statement.

[10] Defendant also argues that the trial court committed prejudicial error by denying his offer to present evidence showing how his death would affect his family. We disagree. In a capital prosecution, the proper scope of mitigation extends to "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." *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 990 (1978). Mitigating circumstances include extenuating factors, factors that reduce the moral culpability of the killing, and factors that make the killing less deserving of the death sentence than other first-degree murders. *Bowman*, 349 N.C. at 479, 509 S.E.2d at 440. The rule allowing mitigating circumstances, however, does not function to " 'limit[] the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.' " *Id.* (quoting *Lockett*, 438 U.S. at 604 n.12, 57 L. Ed. 2d at 990 n.12) (alteration in original).

The *voir dire* testimony of defendant's sister-in-law as to the stress and sickness besetting her family since the time of the killing did not go to any aspect of defendant's character, record, or

circumstance of the offense. *See id.* We do not doubt the veracity or sincerity of the statements made by defendant's sister-in-law. Testimony concerning the mental and physical condition of defendant's family, however, does not reduce his moral culpability, nor does it illuminate the events of 17 July 1997. *See id.* The trial court therefore did not abuse its discretion in excluding the family-impact statements as irrelevant. These assignments of error concerning victim-impact evidence and family-impact evidence are without merit.

Defendant next argues that the trial court erred in allowing the state to make improper closing arguments during the capital sentencing proceeding. Defendant challenges the state's reference to his possible future conduct and his courtroom demeanor in its closing argument. He asserts that the trial court should have intervened *ex mero motu* when the state told the jury that it represented the "voice and conscience of the community." Finally, defendant appears to challenge the state's use of victim-impact evidence in its closing argument.[3] We consolidate these assignments of error for discussion herein.

When, as in the instant case, defendant fails to object during closing argument,

> 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. —, — L. Ed. 2d — 70 U.S.L.W. 3268 (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.' "

3. Defendant states that he filed a pretrial motion *in limine* to exclude victim-impact evidence. A motion *in limine* is insufficient to preserve for appeal the question of the admissibility of the challenged evidence when the defendant failed to object to that evidence at the time it was offered at trial. *State v. Grooms*, 353 N.C. 50, 540 S.E.2d 713 (2000), *cert. denied*, — U.S. —, — L. Ed. 2d —, 70 U.S.L.W. 3235 (2001). We therefore review the state's argument for gross impropriety. *See Golphin*, 352 N.C. at 452, 533 S.E.2d at 226.

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)].

State v. Anthony, 354 N.C. 372, 427-28, 555 S.E.2d 557, 592 (2001).

As a general rule, counsel possess wide latitude "to argue the facts which have been presented, as well as reasonable inferences that may be drawn therefrom." *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986). In a capital case, the state may argue the possibility that the defendant could pose a danger to prison staff and inmates. *State v. Steen*, 352 N.C. 227, 279, 536 S.E.2d 1, 31 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). This Court has held that it is proper for the state to urge the jury to recommend death specifically to deter the defendant from committing another murder. *State v. Syriani*, 333 N.C. 350, 397, 428 S.E.2d 118, 144, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). Argument may also focus on the defendant's demeanor as displayed throughout the trial. *See State v. Flippen*, 349 N.C. 264, 276, 506 S.E.2d 702, 710 (1998), *cert. denied*, 526 U.S. 1135, 143 L. Ed. 2d 1015 (1999).

[11] Defendant challenges two comments made by the state concerning defendant's possible future conduct and his courtroom demeanor. The state noted, "[I]f [defendant is] sentenced to live in prison, we can't even be sure he's not going to kill again. . . . [W]hat happens when he is pushed to his limits?" The state then told the jury, "[Y]ou've had an opportunity to see [defendant]. There have been some downright emotional moments in this trial. Didn't seem to bother him (indicating). He looks bored to me. Now, ladies and gentlemen, if he doesn't care what happens to him, why should you?" Defendant asserts that these arguments inflamed the jury and introduced prejudice into his trial.

The statements contested by defendant did not cross the line into improper argument. The state's comment on the possibility of defendant's future dangerousness to prison staff and inmates was appropriate under our holding in *Steen*, 352 N.C. at 279, 536 S.E.2d at 31. Similarly, the state engaged in permissible argument when it exhorted the jury to recommend death specifically to deter defendant from committing another murder. *See Syriani*, 333 N.C. at 397, 428 S.E.2d at 144. Furthermore, the state acted within the bounds of propriety when it characterized defendant as seeming "bored" with the courtroom proceedings. *See Flippen*, 349 N.C. at 276, 506 S.E.2d at 710 (holding that state's argument referring to defendant's conduct as "sniveling" was not improper). The state's remarks pertaining to

defendant's courtroom conduct were permissible because his demeanor was " 'before the jury at all times.' " *Id.* (quoting *State v. Myers*, 299 N.C. 671, 680, 263 S.E.2d 768, 774 (1980)). We therefore find no error in the trial court's failure to intervene *ex mero motu* during these portions of the state's closing argument. *See Golphin*, 352 N.C. at 452, 533 S.E.2d at 226.

[12] Defendant next challenges two of the state's references to the jury as the voice of the community. The state told the jury that "these innocent families, people who are served by a good and faithful Police Chief, are waiting for your sentence. Let your sentence . . . send a message to all innocent mothers, to all law enforcement officers, and to all citizens . . . as to what value you have placed on the lives of [the victims]." The state later reminded the jury that it was "the voice and conscience of the community." Defendant contends that the state's argument invited the jurors to ignore the evidence and substitute themselves for the victim's family and the community as a whole. In this argument, defendant appears to assign error to the state's closing argument by challenging the state's use of victim-impact evidence along with its exhortation to the jury to act as the voice of the community.

This Court has upheld arguments that remind the jury that its verdict will send a message to the community or function as the conscience of the community. *Id.* at 471, 533 S.E.2d at 237; *cf. State v. Boyd*, 311 N.C. 408, 418, 319 S.E.2d 189, 197 (1984) (jury's decision cannot be based upon the jury's perceived accountability to the witnesses, to the victim, to the community, or to society in general), *cert. denied*, 471 U.S. 1030, 85 L. Ed. 2d 324 (1985). Indeed, "[p]ermitting the jury to act as the voice and conscience of the community is required because the very reason for the jury system is to temper the harshness of the law with the 'commonsense judgment of the community.' " *State v. Scott*, 314 N.C. 309, 311-12, 333 S.E.2d 296, 298 (1985) (quoting *Taylor v. Louisiana*, 419 U.S. 522, 530, 42 L. Ed. 2d 690, 698 (1975)). The state may not, however, encourage the jury to consider outside factors, such as public sentiment, in its deliberations. *See Golphin*, 352 N.C. at 471, 533 S.E.2d at 237 (noting that "[t]he State cannot encourage the jury to lend an ear to the community").

Our thorough examination of the record leads us to disagree with defendant's characterization of this portion of the state's argument as grossly improper and prejudicial. As it did in *Golphin*, the state in the present case properly reminded the jury that its verdict would "send

a message" to the community. *Id.* The state did not exhort the jury to take into account the specific expectations of the community or the family in coming to a decision. Rather, the state's characterization of the jury as the voice of the community counseled jury members to act in their appropriate role as " 'instruments of public justice.' " *Scott*, 314 N.C. at 311, 333 S.E.2d at 297 (quoting *Smith v. Texas*, 311 U.S. 128, 130, 85 L. Ed. 84, 86 (1940)). The state's argument based on victim-impact evidence did not rise to the level of gross impropriety such that defendant's due process rights were prejudiced. *See Golphin*, 352 N.C. at 452, 533 S.E.2d at 237; *see also State v. Conaway*, 339 N.C. 487, 528, 453 S.E.2d 824, 850 (citing *Payne*, 501 U.S. at 825, 115 L. Ed. 2d at 735), *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995). The trial court therefore did not err in failing to intervene *ex mero motu*, and defendant's arguments are without merit.

[13] Defendant next alleges impropriety in the state's closing argument concerning remuneration of defendant's expert witnesses. Defendant contends he was prejudiced by the state's assertion that defendant's witnesses would not get paid unless they said what defendant wanted to hear.

"[C]ompensation of a defendant's expert witness is clearly an appropriate matter for cross-examination." *Atkins*, 349 N.C. at 83, 505 S.E.2d at 110. This is especially true where discrepancies exist between the opposing parties' experts or where conflicting diagnoses are made; in such cases, the parties may elicit testimony indicative of witness bias. *See id.* at 83, 505 S.E.2d at 110-11. As noted above, counsel are allowed wide latitude in choosing the substance of their closing arguments. *See, e.g., Williams*, 317 N.C. at 481, 346 S.E.2d at 410. "[I]t is not improper for the prosecutor to impeach the credibility of an expert [in] closing argument." *State v. Norwood*, 344 N.C. 511, 536, 476 S.E.2d 349, 361 (1996), *cert. denied*, 520 U.S. 1158, 137 L. Ed. 2d 500 (1997).

Defendant argues that the trial court erred in overruling his objection to the state's closing argument. In the portion of the transcript defendant references, the state argues that defendant's experts "will say whatever they want to say because they don't get paid . . . unless they say what they (indicating) want to hear." Defendant contends that this was an improper attack upon the credibility of his experts.

After careful review of the challenged portions of the transcript, we conclude that there was no error. The state's closing argument

simply illustrated discrepancies between the diagnoses made by Dr. Wolfe and Dr. Warren, two of defendant's expert witnesses. The state asked the jury to consider whether these witnesses were biased. It pointed out that

> if they are biased, then you have to consider really hard what they said. . . . Now, Doctor Warren, when he tested [defendant], he was a seventy-five [IQ] . . . when they give their analysis and their diagnosis, do they use the seventy-five? No. There is no word mentioned in those two reports they have. What they talked about is the sixty-six [IQ], because that's lower. . . . Now, pose that against what . . . Doctor Wolfe said. Who is being objective, who is being subjective?

The experts' conflicting testimony prompted the state to question their credibility and impartiality in its closing argument. Because it was not improper for the state to impeach defendant's experts in this manner, this argument is without merit.

[14] Defendant next assigns error to the trial court's submission of the (e)(4) aggravating circumstance—that the murder was committed for the purpose of avoiding or preventing a lawful arrest—in the case involving Chief Hathaway. *See* N.C.G.S. § 15A-2000(e)(4) (1999). Defendant contends this aggravating circumstance was unsupported by the evidence, which allegedly showed only the bare fact of the killing itself and not any attempt to avoid arrest.

Submission of the (e)(4) aggravating circumstance is proper where the trial court finds "substantial, competent evidence in the record from which the jury can infer that at least one of defendant's purposes for the killing was the desire to avoid subsequent detection and apprehension for a crime." *State v. Hardy*, 353 N.C. 122, 135, 540 S.E.2d 334, 344 (2000), *cert. denied*, — U.S. —, — L. Ed. 2d —, 70 U.S.L.W. 3235 (2001). In determining whether "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." *Syriani*, 333 N.C. at 392, 428 S.E.2d at 141.

The state presented evidence that on 16 July 1997, defendant threatened and assaulted Mrs. Nicholson. Mrs. Nicholson called the police, and defendant ran off when an officer arrived. Mrs. Nicholson went to the magistrate's office and swore out a warrant that night. The next day, when defendant called Mrs. Nicholson, he told her not

to have the "law" or anyone else at the trailer when he arrived to get his clothes. Mrs. Nicholson then called the police department and asked if an officer could be present at her home when defendant came over. Chief Hathaway returned her call, explained he was coming to her house, and told Mrs. Nicholson he had a warrant for defendant's arrest.

Before he went to the trailer, defendant called Mrs. Nicholson again and asked if there was anyone else at the trailer. After Mrs. Nicholson said there was no one else there, defendant went to the trailer. While he waited outside, Mrs. Nicholson called the police. She then let defendant inside to get his clothes. Chief Hathaway responded to the call from the Nicholsons' trailer and told the town clerk as he left that he was on his way to serve the warrant. When Chief Hathaway arrived at the trailer, Mr. Badger looked outside and saw that he had a piece of paper in his hand.

Chief Hathaway knocked on the front door to the trailer, and Mrs. Nicholson told him to come inside. He was dressed in his police uniform. He walked up to defendant, who was on his way to the back bedroom. Chief Hathaway told defendant that he had a warrant for his arrest. The state's evidence showed that defendant turned around, pushed Chief Hathaway away, and shot him in the face. Chief Hathaway's gun was in its holster when he was shot.

We conclude the state presented substantial evidence from which a jury could reasonably conclude that one of the reasons defendant killed Chief Hathaway was to avoid arrest. In the light most favorable to the state, this evidence tends to show that defendant knew the police were looking for him as a result of his assault on his wife on 16 July. Defendant's departure when police responded after the assault, his demand that no police be at the trailer when he arrived, and his repeated phone calls to question whether in fact there was anyone else at the trailer before he arrived all tend to show that defendant was attempting to avoid arrest. The evidence also shows that Chief Hathaway went to Mrs. Nicholson's trailer on 17 July to arrest defendant for assaulting his wife and that when he informed defendant he had a warrant for his arrest, defendant shot him. The jury could reasonably conclude, based on this evidence of record, that one of the reasons defendant shot Chief Hathaway was to avoid arrest. *See Hardy*, 353 N.C. at 135, 540 S.E.2d at 344. Thus, the trial court did not err in submitting the (e)(4) aggravating circumstance to the jury. Defendant's argument is without merit.

[15] In his next argument, defendant asserts that the trial court erroneously submitted the (e)(8) aggravating circumstance—"[t]he capital felony was committed against a law-enforcement officer . . . while engaged in the performance of his official duties or because of the exercise of his official duty"—in the case involving Chief Hathaway. *See* N.C.G.S. § 15A-2000(e)(8). Submission of the (e)(8) aggravating circumstance must be supported by substantial evidence. *See Fletcher*, 348 N.C. at 323, 500 S.E.2d at 686.

Defendant argues that it was error for the court to submit the (e)(8) aggravating circumstance under the "engaged in" prong because the evidence was insufficient to show defendant knew that Chief Hathaway was engaged in the performance of any official duty on the date of the killings. This Court has never addressed whether the trial court may submit the (e)(8) aggravating circumstance under the "engaged in" prong in the absence of evidence tending to show the defendant knew or had reasonable grounds to know that the victim was a law enforcement officer.

In any event, the evidence in the instant case clearly shows that Chief Hathaway was engaged in his official duties as a law enforcement officer at the time of the killing. At trial, the state offered evidence tending to show that Chief Hathaway arrived at the trailer in uniform and in the course of his official duties. Moreover, defendant himself testified that during his encounter with Chief Hathaway, Chief Hathaway told defendant that he was serving a warrant for defendant's arrest. The evidence shows not only that defendant shot an officer who was engaged in the performance of his official duties, but also that defendant was fully aware the officer was performing his official duties at the time defendant fired his gun. This evidence therefore constituted substantial evidence supporting the trial court's submission of the (e)(8) aggravator. Accordingly, defendant's argument is meritless.

[16] Defendant next argues that the trial court erroneously submitted two aggravating circumstances based on the same evidence in the case involving Chief Hathaway. Defendant contends the evidence supporting submission of N.C.G.S. § 15A-2000(e)(4), that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest, completely overlapped and duplicated the evidence supporting the submission of N.C.G.S. § 15A-2000(e)(8), that the capital felony was committed against a law enforcement officer engaged in the performance of his official duties.

This Court has held:

> It is error to submit two aggravating circumstances resting on the same evidence. . . . "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). "Aggravating circumstances are not considered redundant absent a *complete* overlap in the evidence supporting them." [*State v.*] *Moseley*, 338 N.C. [1,] 54, 449 S.E.2d [412,] 444 [(1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995)] (emphasis added).

State v. Wilkinson, 344 N.C. 198, 227-28, 474 S.E.2d 375, 391 (1996). We also have determined that "there is no error in submitting multiple aggravating circumstances provided that the inquiry prompted by their submission is directed at distinct aspects of the defendant's character or the crime for which he is to be punished." *State v. Hutchins*, 303 N.C. 321, 354, 279 S.E.2d 788, 808 (1981).

In particular, this Court has previously held that submission of both the (e)(4) and (e)(8) aggravating circumstances in a single case is not error because they address different aspects of the crime:

> Of the two aggravating circumstances challenged . . . as purportedly being based upon the same evidence, one of the aggravating circumstances looks to the underlying factual basis of defendant's crime, the other to defendant's subjective motivation for his act. The aggravating circumstance that the murder was committed against an officer engaged in the performance of his lawful duties involved the consideration of the factual circumstances of defendant's crime. The aggravating circumstance that the murder was for the purpose of avoiding or preventing a lawful arrest forced the jury to weigh in the balance defendant's motivation in pursuing his course of conduct.

Id. at 355, 279 S.E.2d at 809; *see also Golphin*, 352 N.C. at 482, 533 S.E.2d at 244 (holding that submission of both the (e)(4) and (e)(8) circumstances was proper "where the two circumstances were directed at distinct aspects of the crimes charged"). In the instant case, as noted above in our discussion of the (e)(4) aggravator, evidence was presented that one of defendant's motivations in shooting

Chief Hathaway was to avoid arrest for the previous assault on his wife. Submission of the (e)(4) aggravator was therefore proper to address defendant's "subjective motivation" for the killing. *Hutchins*, 303 N.C. at 355, 279 S.E.2d at 809. Also, as noted above in our discussion of the (e)(8) aggravating circumstance, evidence was presented to show that Chief Hathaway was performing an official duty when he responded to Mrs. Nicholson's call. The trial court thus properly submitted the (e)(8) aggravator to address the "factual basis of defendant's crime." *Id.* In sum, although the same series of events provided the basis for submission of both the (e)(4) and (e)(8) aggravating circumstances, the circumstances focused on different aspects of the crime and were supported by different pieces of evidence. Accordingly, the trial court did not err in submitting both the (e)(4) and (e)(8) aggravating circumstances to the jury. *See id.* at 354, 279 S.E.2d at 808. This argument is without merit.

[17] Next, defendant argues the trial court erred by allowing the jury to consider the (e)(11) aggravating circumstance because the words of the statute are vague and overbroad under the state and federal constitutions and because there was insufficient evidence to support its submission. The (e)(11) aggravating circumstance reads as follows: "The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons." N.C.G.S. § 15A-2000(e)(11). In the present case, the trial court submitted this circumstance to the jury for its separate consideration in connection with each of the two murders.

This Court has repeatedly held that the (e)(11) aggravating circumstance is constitutional and is not vague or overbroad. *See, e.g., State v. Stephens*, 347 N.C. 352, 368, 493 S.E.2d 435, 445 (1997), *cert. denied*, 525 U.S. 831, 142 L. Ed. 2d 66 (1998); *State v. Cole*, 343 N.C. 399, 421, 471 S.E.2d 362, 372-73 (1996), *cert. denied*, 519 U.S. 1064, 136 L. Ed. 2d 624 (1997); *State v. Williams*, 305 N.C. 656, 684-85, 292 S.E.2d 243, 260-61, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982). Moreover, the circumstance was constitutional as applied in the present case. "Evidence that a defendant killed more than one victim is sufficient to support the submission of the course of conduct aggravating circumstance." *Conaway*, 339 N.C. at 530, 453 S.E.2d at 851; *see also State v. Skipper*, 337 N.C. 1, 54, 446 S.E.2d 252, 281-82 (1994) (shooting of two victims within moments of each other was sufficient to establish course of conduct for purposes of the

(e)(11) aggravating circumstance), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995). Considered in a light most favorable to the state, *see Syriani*, 333 N.C. at 392, 428 S.E.2d at 141, the evidence in the instant case was clearly sufficient to justify the submission of the course of conduct aggravating circumstance to the jury: the evidence patently supported a finding that the two killings were committed within moments of each other, within feet of each other, and with the same weapon.

Nonetheless, defendant argues that the trial court's instructions did not provide the jurors with adequate guidance, which left the jury to apply the (e)(11) circumstance to the evidence with unfettered discretion. Defendant did not object to the instructions on this basis at trial or request a limiting instruction. In light of the evidence independently supporting the (e)(11) circumstance in each case, we cannot conclude a different result would have been probable even if the trial court had explicitly specified the evidence the jurors were to consider. *See, e.g., Golphin*, 352 N.C. at 483, 533 S.E.2d at 244. Accordingly, there is no plain error, and defendant's argument is without merit.

[18] Defendant next contends that the trial court erred in its instructions to the jury regarding the (f)(1) statutory mitigating circumstance—"[t]he defendant has no significant history of prior criminal activity," N.C.G.S. § 15A-2000(f)(1). The trial court's instructions in the case involving Mrs. Nicholson included the following: "Consider whether the defendant has no significant history of prior criminal activity before the date of the murder." Defendant contends that it was error of constitutional magnitude for the trial court to add the phrase "before the date of the murder." By doing so, defendant argues, the trial court improperly submitted a nonstatutory mitigating circumstance in place of the statutory one, thereby allowing the jury to refuse to give this circumstance any weight. Defendant did not object to this alleged error at trial. Our review is therefore limited to plain error. *See Braxton*, 352 N.C. at 222, 531 S.E.2d at 465.

We conclude that the trial court's instruction was proper. It is well settled that the (f)(1) circumstance applies only to criminal activity occurring before the murder for which a defendant is being tried. *See State v. Gell*, 351 N.C. 192, 212, 524 S.E.2d 332, 345, *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000); *State v. Coffey*, 336 N.C. 412, 418, 444 S.E.2d 431, 434 (1994). The additional language used by the trial court in the present case was thus a correct

statement of the law. The trial court further instructed the jury that it should find this circumstance if it determined the circumstance to exist by a preponderance of the evidence. Accordingly, it is evident that the jurors were not permitted to refuse to give this circumstance mitigating value if they found it to exist. The trial court did not convert the statutory mitigating circumstance into a nonstatutory one simply by adding clarifying language. This argument is without merit.

[19] Defendant next argues that the trial court erroneously failed to submit the statutory mitigating circumstance that he acted under duress or the domination of another person. *See* N.C.G.S. § 15A-2000(f)(5). Defendant contends this circumstance was supported by evidence that he acted under duress and under the domination of his wife, Mrs. Nicholson.

> It is well established that
>
> where evidence is presented at a capital sentencing proceeding that may support a statutory mitigating circumstance, the trial court has no discretion as to whether to submit the circumstance. The trial court must submit the circumstance if it is supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. In sum, the test for sufficiency of evidence to support submission of a statutory mitigating circumstance is whether a juror could reasonably find that the circumstance exists based on the evidence.

Fletcher, 348 N.C. at 323, 500 S.E.2d at 686 (citations omitted); *see also State v. Holden*, 346 N.C. 404, 438, 488 S.E.2d 514, 532-33 (1997) (holding that burden of proof to establish existence of mitigating circumstances is on defendant and must be shown by preponderance of the evidence), *cert. denied*, 522 U.S. 1126, 140 L. Ed. 2d 132 (1998).

In the present case, defendant contends that the following evidence was sufficient to require submission of the (f)(5) mitigating circumstance: that he suffered from borderline functioning and had a borderline IQ; that his judgment and insight were poor and affected by mental retardation and mental and physical illness; that his wife induced him to come to the trailer so he could be apprehended; and that, according to a forensic psychiatrist, he was under the domination of his wife and his perceptions of events were distorted so that

he misinterpreted what was happening around him. Defendant essentially contends that his wife was responsible for creating a situation with which he could not cope by requesting that he come to the trailer to get his clothes, by assuring him that there would be no one else there, and by calling police to come arrest him. Defendant argues that this constitutes substantial evidence and that the jury should have been allowed to consider whether he acted under duress or under the domination of his wife. We disagree.

The above-listed evidence is insufficient to support the submission of the (f)(5) mitigating circumstance. Although the evidence viewed in the light most favorable to defendant tends to show that Mrs. Nicholson induced defendant to come to the trailer so that he could be arrested and that defendant may have been susceptible to pressure from her generally, there is no evidence showing that Mrs. Nicholson's actions pressured defendant into using deadly force against her or Chief Hathaway through duress or dominance. Therefore, " 'a jury finding of this circumstance would have been based solely upon speculation and conjecture, not upon substantial evidence, and the submission of the instruction would be unreasonable as a matter of law.' " *State v. Anderson*, 350 N.C. 152, 183, 513 S.E.2d 296, 315 (quoting *State v. Daniels*, 337 N.C. 243, 273, 446 S.E.2d 298, 316-17 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995)), *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326 (1999). Accordingly, the trial court properly refused to submit the (f)(5) mitigating circumstance. This argument fails.

[20] Defendant next maintains the trial court should have submitted, as a nonstatutory mitigating circumstance, the alleged limitations of his intellectual functioning. Defendant contends that the trial court's denial of his request for this mitigating circumstance violated his Eighth Amendment rights under the United States Constitution and violated Article I, Sections 19, 23, and 27 of the North Carolina Constitution.[4]

The sentencer in a capital case must be allowed to consider any factor with mitigating value that fairly arises from the evidence. *Skipper v. South Carolina*, 476 U.S. 1, 4, 90 L. Ed. 2d 1, 6 (1986). Upon the defendant's timely written request, the trial court should submit nonstatutory mitigating circumstances that are supported by

4. In this argument, defendant also appears to challenge the trial court's jury charge regarding mitigating circumstances. As we dispose of that argument elsewhere in this opinion, we do not address it here.

the evidence. *State v. Brewington*, 352 N.C. 489, 520, 532 S.E.2d 496, 514 (2000), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001). When the circumstance requested is subsumed in other statutory or nonstatutory mitigating circumstances already submitted, however, the trial court may deny the defendant's request. *Id.* at 521, 532 S.E.2d at 515.

Dr. Wolfe, an expert witness for defendant, testified that defendant's intellectual functioning was "below average." Contending that the evidence supported it, defendant submitted a timely written request for a mitigating circumstance reading: "At the time of the offense, the defendant had some limitations in intellectual functioning." The trial court denied defendant's request after the state objected to it as duplicative.[5] Defendant argues that if, as the trial court told the jury, he has the right to have the jury consider any aspect of his character or record and any of the circumstances of the offense as a basis for a sentence less than death, the trial court should have allowed submission of the requested nonstatutory mitigating circumstance.

The record reveals that the trial court submitted the following nonstatutory mitigating circumstances relating to defendant's limitations in intellectual functioning:

> 5. The defendant has problems reading and writing.
>
> . . . .
>
> 6. The defendant has had a relative lack of education.
>
> . . . .
>
> 8. The defendant suffers from borderline intelligence functioning, having a borderline IQ of 66 to 72.
>
> . . . .
>
> 9. The defendant is mildly mentally retarded.
>
> . . . .

5. The transcript shows that the requested instruction was referred to as "duplicitous." *Webster's* defines "duplicity" as "contradictory doubleness of thought, speech, or action; . . . the belying of one's true intentions by deceptive words or action." *Merriam Webster's Collegiate Dictionary* 359 (10th ed. 1993). Assuming no mistranscription, we assume that the trial judge meant to characterize the instruction as "duplicative," the adjectival form of "duplicate," which is defined as repeating something "over or again often needlessly." *Id.* at 359.

10. The general emotional, physical, and mental condition of the defendant is a mitigating factor[.]

. . . .

15. The defendant's judgment and insight are poor, and his judgment and insight are affected by his mental retardation and mental and physical illness.

. . . .

32. At the time of the offense, the defendant's limited intellectual functioning compromised or decreased his [sic] options available to him to resolve the problem or respond appropriately.

. . . .

39. Any other circumstances arising from the evidence which one or more of you deems to have mitigating value.

The jury found circumstance numbers eight, ten, fifteen, and thirty-two to exist and to have mitigating value. The circumstances submitted allowed the jury to consider and give weight to defendant's limitation in intellectual functioning. As the mitigating circumstance requested by defendant was subsumed in the circumstances already submitted to the jury, *see Brewington*, 352 N.C. at 521, 532 S.E.2d at 515, the trial court properly denied defendant's request. Accordingly, this argument is without merit.

[21] Defendant next argues that the trial court erred in failing to give a peremptory instruction on four statutory mitigating circumstances in both the case involving Mrs. Nicholson and the case involving Chief Hathaway. Defendant claims that there was uncontroverted evidence for each of the following four mitigators submitted: (1) no significant prior criminal history, N.C.G.S. § 15A-2000(f)(1); (2) capital felony committed while the defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (3) impaired capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, N.C.G.S. § 15A-2000(f)(6); and (4) age of the defendant at the time of the crime, N.C.G.S. § 15A-2000(f)(7).

The trial court should give a peremptory instruction for any statutory mitigating circumstance supported by uncontroverted evidence. *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). Even if a peremptory

instruction is given, the weight given to the mitigating circumstance is entirely up to the jury to decide. *State v. Kirkley*, 308 N.C. 196, 220, 302 S.E.2d 144, 158 (1983), *overruled on other grounds by State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988).

After a thorough review of the record, we hold that a peremptory instruction was not warranted for any of these four mitigating circumstances. Where the (f)(1) mitigator is submitted, a jury may take into account any prior criminal activity, not just criminal convictions, of the defendant. *State v. Noland*, 312 N.C. 1, 20-21, 320 S.E.2d 642, 654 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985). The state presented evidence that defendant had an earlier conviction for assault on a female. The state also presented evidence tending to show that defendant choked his wife, hit her in the mouth, and threatened to kill her on various occasions. In light of these controverted facts, the trial court did not err in declining to give a peremptory instruction on the (f)(1) mitigating circumstance.

Defendant produced evidence of mental disturbance and impaired capacity to support the submission of the (f)(2) and (f)(6) mitigators, respectively. The record also contains evidence contradicting these mitigators, however. Dr. Wolfe, a forensic psychiatrist, testified that while she found defendant had borderline intellectual functioning, she did not believe he suffered from a psychotic disorder. Cross-examination of Dr. Warren revealed weaknesses in his diagnosis of defendant as having psychological problems. Dr. Warren admitted that most of the medical history he relied on for his diagnosis contained various inconsistencies, such as the fact that the day after defendant was reported to be "acting like a vegetable," he filled out a form to get his gun out of the pawnshop. Moreover, Dr. Warren testified that the information in the mental health report on defendant came primarily from defendant's wife. After a thorough review of the evidence, we hold that the trial court did not err in failing to give a peremptory instruction on the (f)(2) and (f)(6) mitigators.

When considering the (f)(7) mitigating circumstance—defendant's age—the jury may take into account not only the chronological age of the defendant, but also his experience, his criminal tendencies, and the rehabilitative aspects of his character. *See, e.g., State v. Johnson*, 317 N.C. 343, 393, 346 S.E.2d 596, 624 (1986) (balancing the defendant's chronological age against his emotional age, physical and mental development, and level of experience). When expert testimony constitutes substantial evidence that the defendant's mental age was mitigating at the time of the crime, the trial court must sub-

mit the (f)(7) mitigator. *State v. Zuniga*, 348 N.C. 214, 217, 498 S.E.2d 611, 613 (1998). Unless the defendant's age has mitigating value as a matter of law, a juror need consider the defendant's age only if that juror finds by a preponderance of the evidence that it has mitigating value. *Rouse*, 339 N.C. at 105, 451 S.E.2d at 569.

Defendant was thirty-two years of age at the time of the killings. The expert testimony of Dr. Warren established defendant's mental age at between twelve and one-half and thirteen years of age. Other testimony indicated that defendant was "clearly . . . on the verge between mild mental retardation and borderline IQ." There was also testimony that while defendant had low intellectual functioning, his social skills were described as "pretty good" and as "his biggest strength." While defendant made the threshold showing required for submission of the (f)(7) mitigator, his mental age was by no means established by a consensus of experts. *See id.* (holding that where the evidence establishing mitigating value was contradictory on the mitigating value of defendant's age, "the jurors were properly instructed that it was within their province to determine whether defendant's age had mitigating value"). In light of the contradictory evidence presented, the trial court did not err in refusing defendant's request for a peremptory instruction on the (f)(7) mitigator.

[22] Defendant next argues that the trial court erred by failing to give a peremptory instruction for each nonstatutory mitigating circumstance that was supported by uncontroverted evidence in each case. The trial court submitted to the jury thirty-four nonstatutory mitigating circumstances. The jury found that twelve of them existed and had mitigating value. The state did not challenge any of the mitigating circumstances submitted.

A defendant is entitled to a peremptory instruction on a nonstatutory mitigating circumstance if the evidence supporting it is uncontroverted and manifestly credible. *State v. McLaughlin*, 341 N.C. 426, 449, 462 S.E.2d 1, 13 (1995), *cert. denied*, 516 U.S. 1133, 133 L. Ed. 2d 879 (1996). Peremptory instructions are not required, however, when the evidence supporting the circumstance is controverted. *Golphin*, 352 N.C. at 475, 533 S.E.2d at 240. A general request for a peremptory instruction on all of the mitigating circumstances is not sufficient. *Skipper*, 337 N.C. at 41-42, 446 S.E.2d at 274-75. Rather, the defendant must make a specific request for each mitigating circumstance for which he or she desires a peremptory instruction. *Id.* The trial court does not err in refusing to give peremptory instructions when counsel fails to submit the requested instructions in writing.

White, 349 N.C. at 570, 508 S.E.2d at 275. The trial court should not be required to decide on its own what instructions the defendant may desire. *State v. Green*, 336 N.C. 142, 172-74, 443 S.E.2d 14, 32-33, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

Defendant asked the trial court to instruct the jury that nonstatutory mitigating circumstances, if found, should be given mitigating value: "[W]e're asking that you give something similar to [pattern jury instruction] 150.11." Defendant also made a blanket request for a peremptory instruction on the nonstatutory mitigating circumstances as follows: "[O]n each of the nonstatutory ones, essentially, we would like for the Court to reflect that we have asked each one of those individually, and for the Court to take a look at each one of those individually instead of collectively."

Defendant did not submit his request for a particular instruction on the nonstatutory mitigating circumstances in writing, but merely asked the court to give "something similar" to pattern jury instruction 150.11. The trial court's refusal to give a peremptory instruction as to the nonstatutory mitigating circumstances was therefore not error. *See White*, 349 N.C. at 570, 508 S.E.2d at 275. Further, when he requested a peremptory instruction for the nonstatutory mitigating circumstances, defendant failed to specifically address each mitigating circumstance. Defendant's exhortation that the trial court construe his blanket request as if he had asked for each mitigating circumstance individually is insufficient. *See Skipper*, 337 N.C. at 41-42, 446 S.E.2d at 274-75. Finally, defendant has made no argument that the evidence supporting the nonstatutory mitigating circumstances was uncontroverted or credible. Accordingly, the trial court committed no error in refusing to give peremptory instructions on the nonstatutory mitigating circumstances. This argument is nonmeritorious.

[23] Defendant next contends that the trial court erred by failing to fully and completely instruct the jury regarding the mitigating circumstances submitted in the case involving Chief Hathaway. Defendant asserts that the trial court substituted a shortened form of the relevant instructions in the case of Chief Hathaway, which had the effect of conveying to the jury an impermissible expression of opinion by the trial court on the importance of the mitigating circumstances it was to consider.

The trial court first instructed the jury regarding mitigating circumstances in the murder of Mrs. Nicholson. In reference to the

jurors' consideration of mitigating evidence, the trial court properly instructed the jurors on the definition of the term "mitigating circumstance," the factors the jury was bound to consider in mitigation, the burden of proof, the lack of a unanimity requirement, and the fact that the jurors must consider each mitigating circumstance listed as well as any others they might deem to have mitigating value. The trial court then read the language of each mitigating circumstance listed on the "Issues and Recommendation as to Punishment" form, and gave an explanation of each circumstance.

The trial court next instructed the jury regarding the murder of Chief Hathaway. The trial court instructed the jury on the same mitigating circumstances it had previously discussed in reference to the case involving Mrs. Nicholson's murder. It fully explained, as it had done before in connection with the murder of Mrs. Nicholson, the nature of mitigating evidence and how the jury could consider it. The trial court then instructed the jury as follows:

> Now, it is your duty to consider the following mitigating circumstances, and any others which you find from the evidence.
>
> Now, I went through the law in great detail as to those mitigating circumstances when I discussed with you the Issues as to [Mrs.] Nicholson.
>
> Since the mitigating factors are the same as to the murder of [Chief] Hathaway, I am not going to go through those circumstances, mitigating circumstances again in detail, because I have already explained the law to you.
>
> However, you have a duty to consider each and every one of those circumstances, and consider the law as I have previously given it to you as to those mitigating circumstances.

The trial court next instructed the jury on the language of each mitigating circumstance it was to consider, but omitted the associated explanation for each circumstance that it had given previously in connection with the murder of Mrs. Nicholson.

Defendant contends that by refusing to repeat the explanation of each mitigating circumstance, the trial court did not give the jury the information it needed to make a decision about each circumstance in the case involving Chief Hathaway. Defendant argues he was entitled to have the jury instructed fully in each case. He further asserts that by omitting the associated explanations, the trial court effectively

gave the impression that the mitigating circumstances in the second case were less important, thereby improperly "commenting" on the evidence. We note that defendant did not object to the omission of the explanations at trial. In fact, when asked by the trial court, defendant affirmatively stated that he "did not see any corrections, deletions or additions" to be made to the instructions. Our analysis is therefore limited to plain error.

This Court has previously held that

> N.C.G.S. § 15A-1222 and 15A-1232 prohibit the trial court from expressing an opinion in the presence of the jury on any question of fact to be decided by the jury. " 'In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized.' " *State v. Jones*, 347 N.C. 193, 207, 491 S.E.2d 641, 649 (1997) (quoting *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995)). This Court has also held that
>
> > " '[t]he charge of the court must be read as a whole . . . , in the same connected way that the judge is supposed to have intended it and the jury to have considered it . . . .' *State v. Wilson*, 176 N.C. 751, [754-55,] 97 S.E. 496[, 497] (1918). It will be construed contextually, and isolated portions will not be held prejudicial when the charge as [a] whole is correct. If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal."
>
> *State v. Rich*, 351 N.C. 386, 393-94, 527 S.E.2d 299, 303 (2000) (quoting *State v. Lee*, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970) (alterations in original) (citations omitted)). Finally, we have stated that the trial court's words " 'may not be detached from the context and the incidents of the trial and then critically examined for an interpretation from which erroneous expressions may be inferred.' " *State v. Chandler*, 342 N.C. 742, 752, 467 S.E.2d 636, 641 (quoting *State v. McWilliams*, 277 N.C. 680, 685, 178 S.E.2d 476, 479 (1971)), *cert. denied*, 519 U.S. 875, 136 L. Ed. 2d 133 (1996).

State v. Meyer, 353 N.C. 92, 106, 540 S.E.2d 1, 9 (2000) (citations omitted) (holding that the trial court did not express impermissible opinion when it gave a single instruction on an aggravating circumstance and told the jury to apply that single instruction to its consid-

eration of the appropriate punishment for each of two murders), *cert. denied*, — U.S. —, — L. Ed. 2d —, 70 U.S.L.W. 3235 (2001). The burden rests on the defendant to show he was prejudiced by the trial court's comments. *State v. Davis*, 353 N.C. 1, 41, 539 S.E.2d 243, 269 (2000), *cert. denied*, — U.S. —, — L. Ed. 2d —, 70 U.S.L.W. 3235 (2001).

The main purposes of the jury charge are "clarification of the issues, elimination of extraneous matters, and declaration and application of the law arising upon the evidence." *State v. Jackson*, 228 N.C. 656, 658, 46 S.E.2d 858, 859 (1948). We presume that jurors "pay close attention to the particular language of the judge's instructions in a criminal case and that they undertake to understand, comprehend, and follow the instructions as given." *State v. Trull*, 349 N.C. 428, 455, 509 S.E.2d 178, 196 (1998) (finding trial court did not express an impermissible opinion by giving a "shorthand" instruction for twenty-four nonstatutory mitigating circumstances and tendering a single peremptory instruction for all of those circumstances), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999). Further, "jury instructions should be as clear as practicable, without needless repetition." *Id.* at 455-56, 509 S.E.2d at 196.

This Court has held that "[t]he trial judge is not required to repeat a definition each time a word or term is repeated in the charge when it has once been defined." *Robbins*, 275 N.C. at 549-50, 169 S.E.2d at 866. Further, "[j]ust as the mere fact that the judge may spend more time summarizing the *evidence* for the State does not amount to an expression of opinion, no expression of opinion arises merely from the comparative amount of time devoted to giving an *instruction*." *Porter*, 326 N.C. at 504-05, 391 S.E.2d at 154 (citation omitted) (holding that no impermissible expression of opinion given when trial court spent more time instructing on first-degree murder than on second-degree murder); *see also State v. Matthews*, 299 N.C. 284, 294, 261 S.E.2d 872, 879 (1980) (because the jury had heard all instructions, no error when trial court instructed jury as to one defendant, then stated it would not repeat those instructions but told the jury to apply them to its consideration of the codefendant's case).

Defendant has failed to carry his burden of showing that he was prejudiced by the trial court's decision not to repeat the explanations of each mitigating circumstance. *See Davis*, 353 N.C. at 41, 539 S.E.2d at 269. Our review of the entire jury charge in the present case reveals that the jury was fully and carefully instructed regarding its consideration of mitigating circumstances. The trial court expressly

instructed the jury that it should consider each mitigating circumstance in reference to the death of Chief Hathaway and that it should consider the law as the trial court had previously explained it as to those circumstances. The trial court did not express an impermissible opinion by omitting repetition of the explanation of each mitigating circumstance in its instructions concerning Chief Hathaway's murder, but instead merely avoided unnecessary repetition of information already given. *See Trull*, 349 N.C. at 455-56, 509 S.E.2d at 196. Defendant's argument is nonmeritorious.

[24] Defendant next contends that the trial court's oral instructions did not allow the jury to correctly apply the standard for considering nonstatutory mitigating circumstances to the statutory catchall circumstance. Further, defendant asserts the wording of the catchall mitigating circumstance, N.C.G.S. § 15A-2000(f)(9), printed on the Issues and Recommendation as to Punishment forms used in both cases, erroneously failed to explain the proper standard the jury should apply to determine whether that circumstance existed. Defendant maintains that, because the oral instructions did not match the wording of the Issues and Recommendation as to Punishment forms and did not explain how the jury should apply the oral instructions in conjunction with the forms, the verdict in this case was the product of juror confusion. Defendant contends that the trial court's instructions in this respect amounted to plain error. We address each of these arguments in turn.

The Issues and Recommendation as to Punishment form used in each of defendant's cases contained the following language regarding the (f)(9) catchall mitigating circumstance:

> **ISSUE NUMBER TWO:**
>
> Do you find from the evidence the existence of one or more of the following mitigating circumstances?
>
> . . . .
>
> 39. Any other circumstances arising from the evidence which one or more of you deems to have mitigating value.
>
> ANSWER: _____

The above passage conveys the statutory catchall language, *see* N.C.G.S. § 15A-2000(f)(9), but omits the phrase "one or more of us finds the mitigating circumstance to exist," which would normally follow the answer blank, *see* N.C.P.I.—Crim. 150.10 (1997).

In the case of Mrs. Nicholson, the trial court's oral instructions included the following:

> [I]n considering Issue Two it would be your duty to consider, as a mitigating circumstance, any aspect of the defendant's character or record, and 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.
>
> . . . .
>
> If the evidence satisfies any of you that a mitigating circumstance exists, you would indicate that finding on the Issues and Recommendation form.
>
> . . . .
>
> In any event, you would move to consider the other mitigating circumstances and continue in a like manner until you have considered all of the mitigating circumstances listed on the form, and any others which you deem to have mitigating value. It is your duty to consider the following mitigating circumstances, and any others which you find from the evidence.

At this point the trial court instructed the jury on which specific statutory mitigating circumstances it was to consider. It then instructed the jury as follows concerning nonstatutory mitigating circumstances:

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

The trial court next set out each nonstatutory mitigating circumstance and gave an explanation of each. Finally, it instructed the jury regarding the catchall mitigating circumstance as follows:

"You may consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value."

If one or more of you so find by a preponderance of the evidence you would so indicate by having your foreperson write "yes" in the space provided after this mitigating circumstance on the form.

If none of you find any such circumstance to exist, you would indicate by having your foreperson write "no" in that space.

Regarding the murder of Chief Hathaway, the trial court repeated all of the above instructions with the following exception: it did not separately instruct on the catchall circumstance, but instead instructed the jury to consider the catchall along with the nonstatutory mitigating circumstances, or in other words, to consider first whether the circumstances existed and then whether they had mitigating value.

We note defendant concedes that he did not object to either the written Issues and Recommendation as to Punishment forms or to the oral instructions he now alleges were erroneous. Thus, we review for plain error. "In order to rise to the level of plain error, the error in the trial court's instructions must be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *Holden*, 346 N.C. at 435, 488 S.E.2d at 531.

As to the oral instructions in the case involving the murder of Mrs. Nicholson, we conclude as a preliminary matter that the trial court properly instructed the jury on its consideration of mitigating circumstances. The instructions as to Mrs. Nicholson "properly distinguished between statutory and nonstatutory mitigating circumstances and informed the jurors of their duty under the law." *Davis*, 349 N.C. at 56, 506 S.E.2d at 485.

We first address defendant's argument that the oral instructions did not allow the jury to correctly apply the standard for considering nonstatutory mitigating circumstances to the statutory catchall circumstance. As noted in our discussion of defendant's previous argument, the trial court that fails to repeat its explanation of the mitigating circumstances for each of the charges against the defendant does not commit error. *See Trull*, 349 N.C. at 455-56, 509 S.E.2d at 196. Similarly, the trial court does not necessarily com-

mit error when, as here, it fails to repeat identical instructions regarding the jury's consideration of mitigating circumstances. *See id.* at 455, 509 S.E.2d at 196. Even if we assume *arguendo* that the trial court erred by failing to repeat a separate instruction concerning the catchall mitigating circumstance, it does not rise to the level of plain error.

In considering the catchall circumstance, the jurors must determine first whether the evidence presents any additional mitigating circumstances that are not detailed in either the statutory or nonstatutory mitigating circumstances previously given. If the jurors find any such circumstances, they must then engage in a further determination of whether those circumstances have mitigating value. *See Green*, 336 N.C. at 173, 443 S.E.2d at 32. Accordingly, consideration of mitigating value is an integral second step in the jury's evaluation of whether to find the catchall circumstance. *See Davis*, 349 N.C. at 55, 506 S.E.2d at 485 (the jury must assign value to a mitigating circumstance when it is determining "whether the statutory catchall or the nonstatutory mitigating circumstances exist").

In the case involving Mrs. Nicholson, where defendant admits these instructions were properly given, the jurors did not find the catchall circumstance. The jury, in similar fashion, did not find the catchall circumstance in the case involving Chief Hathaway, which included exactly the same mitigators. In total, the jury found thirteen of the thirty-nine mitigating circumstances presented in the case involving Chief Hathaway.[6] We cannot say that the instructions in the instant case rise to the level of plain error just because the jury did not find the catchall mitigating circumstance. This is the case especially where, as here, defendant has produced no evidence to show that the jury's treatment of the catchall mitigator resulted from juror confusion. We will not disturb the jury's findings based on these factors. We hold that, viewed in their entirety and within the context they were given, the trial court's instructions as to the catchall mitigator presented the law fairly and clearly. *See Rich*, 351 N.C. at 393-94, 527 S.E.2d at 303. Like the trial court's instructions as to the case involving Mrs. Nicholson, these instructions "properly distinguished between statutory and nonstatutory mitigating circumstances and informed the jurors of their duty under the law." *Davis*, 349 N.C. at 56, 506 S.E.2d at 485. Because defendant has not shown that "absent the error, the jury probably would have reached a differ-

6. This count of mitigating circumstances includes the statutory, nonstatutory, and catchall mitigating circumstances submitted.

ent verdict," there was no plain error. *Holden*, 346 N.C. at 435, 488 S.E.2d at 531.

[25] Next, we address defendant's contention that the language on the Issues and Recommendation as to Punishment forms failed to explain the proper standard the jury was to apply. Defendant argues that the written forms made no distinction for the jury as to what standard to apply in determining whether the catchall mitigating circumstance existed by omitting the phrase, "one or more of us finds the mitigating circumstance to exist." Defendant failed to object or call to the attention of the trial court the omission of the words he now says should have been included. Assuming *arguendo* that the trial court erred by omitting the final phrase after the answer blank for the catchall mitigating circumstance, the omission does not rise to the level of plain error such that the instructional omission " 'had a probable impact on the jury's finding that . . . defendant was guilty.' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

As discussed above, the trial court properly instructed the jurors in the case concerning Mrs. Nicholson that they should write in the answer "yes" if one or more of them found the catchall circumstance existed. In the case involving Chief Hathaway, the trial court did not repeat this instruction, but as determined above, if any error was committed, it had no prejudicial impact.[7] The jurors were given general written instructions on both forms, under Issue Two, which directed them to consider whether they found "from the evidence the existence of one or more of the following mitigating circumstances." Each individual juror was to decide under the catchall instruction whether the evidence revealed the existence and mitigating value of any circumstances other than those explicitly listed. The failure of any juror to find such a circumstance based on his or her own personal review of the evidence does not necessarily mean the jurors misunderstood or misapplied the instruction. A defendant must present evidence more compelling than this before we will disturb the product of a jury's deliberations.

Accordingly, given the trial court's oral instructions and the language on the forms, there was no reasonable probability that the

7. On this point, we reiterate our holding in *Trull*, that "jury instructions should be as clear as practicable, without needless repetition." 349 N.C. at 455-56, 509 S.E.2d at 196.

omission of the final phrase, "one or more of us finds this circumstance to exist," had any impact on the jurors' failure to find the catchall circumstance or on the verdict. Thus, any error in the written instructions did not rise to the level of plain error. Defendant's arguments concerning the (f)(9) catchall circumstance fail.

[26] Defendant next argues that his constitutional rights were violated when the trial court granted the state's motion to submit North Carolina pattern jury instruction 105.40. He contends that the instruction violated his Sixth Amendment right to develop and present his own theory of the case free from outside interference.

North Carolina pattern jury instruction 105.40, on impeachment of the defendant as a witness by proof of an unrelated crime, reads:

> When evidence has been received that at an earlier time the defendant was convicted of (a) criminal charge(s), you may consider this evidence for one purpose only. If, considering the nature of the crime(s), you believe that this bears on truthfulness, then you may consider it, together with all other facts and circumstances bearing upon the defendant's truthfulness, in deciding whether you will believe or disbelieve his testimony at this trial. It is not evidence of the defendant's guilt in this case. You may not convict him on the present charge because of something he may have done in the past.

N.C.P.I.—Crim. 105.40 (1986). Defendant testified during the guilt-innocence phase of the trial and was impeached by evidence of a previous conviction for assault on a female. The trial court gave the pattern instruction over defendant's objection. Defendant contends that the instruction forced him to explain the prior conviction to the jury, thus compelling him to adjust his defense to the strategy selected for him by the state.

The Sixth Amendment protects the right of the defense to develop and present its own theory of the case without outside interference. *Strickland v. Washington*, 466 U.S. 668, 689, 80 L. Ed. 2d 674, 692 (1984). State interference with the assistance of counsel is presumed to result in prejudice. *Id.* at 692, 80 L. Ed. 2d at 696. As to the issue of jury instructions, we note that choice of instructions is a matter within the trial court's discretion and will not be overturned absent a showing of abuse of discretion. *See Steen*, 352 N.C. at 249, 536 S.E.2d at 14.

The record contains no evidence that this instruction interfered with defendant's right to develop and present his own theory of the case. The prosecution was free to argue defendant's conviction to the jury for purposes of impeaching his testimony because it had properly elicited evidence of the conviction on previous cross-examination. The prior conviction was thus already subject to the jury's consideration. The trial court properly exercised its discretion in instructing the jury as to the limited purpose for which the prior conviction could be used. *See id.* This argument therefore fails.

[27] In his next argument, defendant contends that the trial court committed error when it denied his request to substitute language in North Carolina pattern jury instruction 206.10 on self-defense. Defendant contends that the trial court was obligated to give his instruction because he asked for it in a timely fashion and in proper form and because it was supported by the evidence.

The trial court must give a requested instruction that is supported by both the law and the facts. *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 trial court commits no error by giving the instruction in substance even if it does not use the exact language requested. *State v. Avery*, 315 N.C. 1, 33, 337 S.E.2d 786, 804 (1985). As to a self-defense instruction in particular, this Court noted in *State v. Watson*, 338 N.C. 168, 449 S.E.2d 694 (1994), *cert. denied*, 514 U.S. 1071, 131 L. Ed. 2d 569 (1995), that "juries can better assess the propriety of the degree of deadly force used by defendant" when instructed in terms of the need to use deadly force rather than the need to kill. *Id.* at 182, 449 S.E.2d at 703. An instruction on the need to use deadly force is appropriate where supported by the evidence. *Id.* The Court in *Watson* went on to say that if the evidence shows that

> [the] defendant intended to use deadly force, to disable the victim but not to kill him, it would be appropriate to instruct in terms of the need to use deadly force, rather than the need to kill . . . .
>
> Where the evidence shows . . . an intent to kill rather than an intent to use deadly force, the trial court should instruct the jury . . . in terms of the need to kill.

Id. at 183, 449 S.E.2d at 703.

Defendant requested that the language contained in footnote number four of North Carolina pattern jury instruction 206.10 on self-

defense be given. This footnote advises the court to "[s]ubstitute 'to use deadly force against the victim' for 'to kill the victim' when the evidence tends to show that the defendant intended to use deadly force to disable the victim, but not to kill the victim." N.C.P.I.—Crim. 206.10 n.4 (1998) (citing *Watson*, 338 N.C. at 182-83, 449 S.E.2d at 703). Defendant maintains that the evidence in the present case supported the "deadly force" language rather than the "to kill" language because his only intent during the shootings was to escape from a volatile situation.

Defendant testified that he did not shoot at either victim, but instead fired two shots into the floor of the trailer as he fled. His testimony indicated that he was scared, but defendant did not say that he fired the gun because of his fear. As detailed in a prior section of this opinion, defendant's evidence did not support a self-defense instruction at all, let alone a self-defense instruction with the "deadly force" language. *See Reid*, 335 N.C. at 671, 440 S.E.2d at 789. In contrast, the state's evidence tended to show that defendant, acting with premeditation and deliberation, shot with the intent to kill the victims. Defendant presented no evidence to show that his use of deadly force was intended only to disable, and not to kill, Chief Hathaway and Mrs. Nicholson. Therefore, even if the evidence had supported a self-defense instruction, an instruction on the need to use "deadly force" rather than "to kill" was not warranted. The trial court therefore did not err in failing to instruct the jury with the exact language defendant requested. *See Avery*, 315 N.C. at 33, 337 S.E.2d at 804. This argument fails.

PRESERVATION ISSUES

Defendant raises ten additional issues that have previously been decided by this Court contrary to his position: (1) whether the use of the word "extenuating" creates an inherent conflict in the pattern jury instruction definition of mitigating circumstances; (2) whether the trial court erred by allowing the state to exercise peremptory challenges against jurors who expressed reservations about the death penalty; (3) whether the trial court erred by instructing the jury it could consider N.C.G.S. § 15A-2000(e)(4) and (e)(8) aggravating circumstances when they do not adequately limit the jurors' discretion; (4) whether the trial court erred by instructing the jury that defendant had the burden of proving mitigating circumstances by a preponderance of the evidence; (5) whether the North Carolina death penalty statute is unconstitutional both facially and as applied; (6) whether the trial court erred when it instructed the jury that it was to

decide whether any of the nonstatutory mitigating circumstances had mitigating value before it could consider those circumstances; (7) whether the trial court erred in failing to instruct the jurors that, even if they found that the aggravating circumstances outweighed the mitigating circumstances and were sufficiently substantial to call for imposition of the death penalty, they still had to determine if death was the appropriate punishment in this case; (8) whether the trial court erred when instructing the jury on Issues Three and Four that it "may" consider mitigating circumstances that it found to exist in Issue Two; (9) whether the trial court erred by failing to order the state to specify the aggravating circumstances on which it would rely to seek the death penalty; and (10) whether the trial court lacked jurisdiction to try defendant for first-degree murder because the short-form indictment did not allege all of the elements of first-degree murder.

We have considered defendant's contentions on these issues and find no reason to depart from our prior holdings. Therefore, we reject these arguments.

PROPORTIONALITY REVIEW

[28] Having concluded that defendant's capital sentencing proceeding was free of prejudicial error, we are required to review and determine: (1) whether the record supports the jury's finding of any aggravating circumstances upon which the sentencing court based its sentence of death; (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 two counts of first-degree murder on the basis of malice, premeditation, and deliberation. In the case involving Mrs. Nicholson, the jury found one aggravating circumstance, that 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 or persons, N.C.G.S. § 15A-2000(e)(11). In the case involving Chief Hathaway, the jury found three aggravating circumstances: (1) the murder was committed for the purpose of avoiding or preventing a lawful arrest, N.C.G.S. § 15A-2000(e)(4); (2) the murder was committed against a law enforcement officer while engaged in the performance of his official duties, N.C.G.S. § 15A-2000(e)(8); and

(3) the murder was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11).

The trial court submitted five statutory mitigating circumstances as to each murder on defendant's behalf. The jury found that one—the murders were committed while the defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2)—existed in connection with each murder. Of the thirty-four nonstatutory mitigating circumstances which were identically submitted for consideration regarding each murder, one or more jurors found that twelve existed and had mitigating value: (1) "defendant suffers from borderline intelligence functioning, having a borderline IQ of 66 to 72"; (2) defendant's "general emotional, physical, and mental condition" is a mitigating circumstance; (3) "defendant's judgment and insight are poor, and his judgment and insight are affected by his mental retardation and mental and physical illness"; (4) "defendant did not initiate the trip to their home the day of the incident—his wife did"; (5) "defendant was told by his wife that there was no warrant for his arrest, [that] no one [was] home but his wife, and that she 'had a piece' "; (6) "defendant felt trapped and cornered on the day of the incident"; (7) "defendant felt that he was set up on the day of the incident"; (8) "defendant was under stress at the time of the offense"; (9) "defendant's actions on the day of the incident were completely out of character for him"; (10) "defendant is slow to anger"; (11) "[a]t the time of the offense, the defendant's limited intellectual functioning compromised or decreased [the] options available to him to resolve the problem or respond appropriately"; and (12) "defendant's perceptions were so distorted that he misinterpreted what was going on around him on the day of the offense."

After thoroughly examining the record, transcript, and briefs in this case, we conclude the evidence fully supports the aggravating circumstances found by the jury. Defendant, however, contends the death sentences were imposed in an arbitrary and capricious manner, evidenced by the fact that the jury imposed death even though it had found several mitigating circumstances in defendant's favor. We disagree. The fact that the jury finds mitigating circumstances to exist does not mean it must sentence defendant to life imprisonment, or that its failure to do so is arbitrary. *See, e.g., Conner*, 345 N.C. at 330, 480 S.E.2d at 630. We find no indication that the death sen-

tences were imposed under the influence of passion, prejudice, or any other arbitrary consideration. We turn now to our final statutory duty of proportionality review.

In conducting our proportionality review, we compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 239, 433 S.E.2d 144, 161 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). One purpose of our proportionality review " 'is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury.' " *Atkins*, 349 N.C. at 114, 505 S.E.2d at 129 (quoting *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988)). We have found the death penalty disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by Gaines*, 345 N.C. 647, 483 S.E.2d 396, *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

We conclude that this case is not substantially similar to any case in which this Court has found the death penalty disproportionate. First, defendant was convicted of first-degree murder on the basis of malice, premeditation, and deliberation. This Court has held that "a finding of premeditation and deliberation indicates "a more calculated and cold-blooded crime." *State v. Lee*, 335 N.C. 244, 297, 439 S.E.2d 547, 575, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994). Here, the evidence shows that defendant had previously been abusive towards his wife, including threatening to kill her; defendant warned her not to have anyone else, including the police, at the trailer when he arrived; defendant came to the trailer armed with a gun; defendant shot Chief Hathaway in the face upon being told that Chief Hathaway had a warrant for his arrest; and then defendant chased down his wife, shooting her two or three times as she was lying helplessly on the floor. Second, the evidence shows that defendant deliberately murdered a law enforcement officer for the purpose of evading lawful arrest. "[T]he N.C.G.S. § 15A-2000(e)(4) and (e)(8) aggravating circumstances reflect the General Assembly's recognition that 'the collective conscience requires the most severe penalty for those who flout our system of law enforcement.' " *Golphin*, 352 N.C. at 487, 533

S.E.2d at 247 (quoting *State v. Brown*, 320 N.C. 179, 230, 358 S.E.2d 1, 33, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987)).

> The murder of a law enforcement officer *engaged in the performance of his official duties* differs in kind and not merely in degree from other murders. When in the performance of his duties, a law enforcement officer is the representative of the public and a symbol of the rule of law. The murder of a law enforcement officer engaged in the performance of his duties in the truest sense strikes a blow at the entire public—the body politic—and is a direct attack upon the rule of law which must prevail if our society as we know it is to survive.

Hill, 311 N.C. at 488, 319 S.E.2d at 177 (Mitchell, J. (later C.J.), concurring in part and dissenting in part), *quoted with approval in State v. McKoy*, 323 N.C. 1, 46-47, 372 S.E.2d 12, 37 (1988), *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). Third, defendant was convicted of two counts of first-degree murder. This Court has never found a death sentence disproportionate in a case where the jury has found a defendant guilty of murdering more than one victim. *See State v. Goode*, 341 N.C. 513, 552, 461 S.E.2d 631, 654 (1995). Fourth, the jury found the course of conduct aggravating circumstance, N.C.G.S. § 15A-2000(e)(11), in connection with each murder. This Court has held that the (e)(11) circumstance, standing alone, is sufficient to support a sentence of death. *See State v. Bacon*, 337 N.C. 66, 110 n.8, 446 S.E.2d 542, 566 n.8 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995). Fifth, and finally, defendant murdered his wife in their home. "A murder in the home 'shocks the conscience, not only because a life was senselessly taken, but because it was taken [at] an especially private place, one [where] a person has a right to feel secure.' " *State v. Adams*, 347 N.C. 48, 77, 490 S.E.2d 220, 236 (1997) (quoting *Brown*, 320 N.C. at 231, 358 S.E.2d at 34) (alterations in original), *cert. denied*, 522 U.S. 1096, 139 L. Ed. 2d 878 (1998).

We also compare the present case with cases in which this Court has found the death penalty proportionate. *See McCollum*, 334 N.C. at 240, 244, 433 S.E.2d at 162, 164. Although this Court considers all the cases in the pool of similar cases when engaging in proportionality review, "we will not undertake to discuss or cite all of those cases each time we carry out the 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). Here, for the reasons discussed in the preceding

paragraph, we find this case more similar to cases in which we have found a sentence of death proportionate than to those in which we have found a sentence of death disproportionate. *See McCollum*, 334 N.C. at 240, 244, 433 S.E.2d at 162, 164.

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

Accordingly, we conclude that defendant received a fair trial and capital sentencing proceeding, free from prejudicial error. Therefore, the judgments of the trial court sentencing defendant to death must be left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. DAVID GAINEY

No. 531A00

(Filed 1 February 2002)

1. Confessions and Incriminating Statements— allegations of harassment, threats, promises—contradictory law enforcement testimony—denial of motion to suppress

The trial court did not err in a capital first-degree murder prosecution by denying defendant's motion to suppress statements to investigators where defendant alleged that he was threatened, harassed, and told that he could avoid the death penalty by confessing, but there was contradictory testimony from law enforcement officers. The trial court's finding of fact that no promises or offers of reward were made was supported by competent evidence in the record, and the court's conclusion that defendant's statement was voluntary is supported by the finding of fact and the law.

2. Jury— selection—capital trial—rehabilitation questions—excusal of prospective juror

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by sustaining the State's objections to three questions during defendant's attempted rehabilitation of a prospective juror or by excusing that juror. The three questions did not address the issue of whether the prospective juror would be able to return a death verdict under any circumstances and the court properly excused her when she stated unequivocally that she could never return a death sentence.

3. Evidence— hearsay—explanation of subsequent actions

The trial court did not err in a capital prosecution for first-degree murder by admitting testimony from the victim's father that someone had telephoned him to say that his son's car would be in a particular place at a particular time where the testimony was admitted not for the truth of the matter asserted, but to explain the action of the witness and the deputies in staking out that location the next morning.

4. Appeal and Error; Constitutional Law— Confrontation Clause—nonhearsay testimony

A first-degree murder defendant's contention that the introduction of testimony about an anonymous telephone call to his father violated his constitutional right to confrontation was not properly before the Supreme Court where defendant objected at trial only on the basis of hearsay, and this testimony was proper nonhearsay evidence. Nonhearsay raises no Confrontation Clause concern.

5. Evidence— expert testimony—firearms identification—admissible

The trial court did not err in a first-degree murder prosecution by admitting the testimony of an SBI agent regarding two bullets found in the victim, despite defendant's contention that the testimony was based on speculation, where the agent was received without objection as an expert in firearms identification and the agent tested the bullets about which he provided an opinion.

6. Robbery— dangerous weapon—sufficiency of evidence—killing victim and taking car

The evidence was sufficient to permit a rational jury to find that defendant robbed the victim with a dangerous weapon where defendant admitted that he called the victim and arranged to meet him; defendant and a friend waited for the victim and pulled a gun when he arrived; the victim was forced into his car with a gun to his head; the friend shot the victim and defendant decided to shoot him twice in the head when he heard him gasping for breath and calling for help; and defendant drove the victim's car until he was apprehended.

7. Robbery— armed—taking car after victim killed—continuous transaction with murder—sufficiency of evidence

The evidence was sufficient to permit a rational jury to find that the victim's murder and the act of stealing his car were so connected as to form a continuous chain of events and to support defendant's conviction of armed robbery where the victim was lured to a church so that defendant and a friend could forcibly take his car; the victim was killed soon after; and defendant claimed the car as his own and used the car in a manner suggesting ownership, driving the car until the day he was apprehended.

8. Kidnapping— first-degree—confinement not inherent in murder—sufficiency of evidence

The trial court did not err by refusing to dismiss a first-degree kidnapping charge for insufficient evidence that the kidnapping was separate from the killing where the victim was lured to a meeting; defendant put a gun to the victim's head and forced him to drive his own car to another location, where he was taken into the woods; he was shot when he tried to get away; the victim was alive when he was placed in the trunk of the car; and he cried out for help before defendant fired the fatal shots. There was ample evidence of confinement not inherent in the first-degree murder.

9. Homicide— first-degree murder—second-degree not submitted—evidence of premeditation and deliberation

The trial court did not err in a first-degree murder prosecution by denying defendant's request for submission of second-degree murder as a possible verdict where defendant presented no evidence; and the State's evidence showed that the victim was

shot six times, that defendant deliberately walked to a car after the victim was wounded to retrieve a gun, that defendant shot the victim twice when he was helpless and crying for help, and that defendant dragged the body into the woods, covered it with leaves and branches, and immediately disposed of the murder weapon and the comforter in which the body had been wrapped. Defendant and an accomplice had talked about stealing the victim's car before the date of the murder and defendant had expressed both before and after the murder his plan to move to California and change his identity.

10. Homicide— instruction on second-degree murder denied— possibility that jury might not believe all of the State's evidence

A first-degree murder defendant was not entitled to an instruction on second-degree murder upon the argument that the jury had to pick and choose between pieces of evidence in order to convict of second-degree murder. A defendant is not entitled to an instruction on a lesser-included offense merely because the jury could possibly believe some of the State's evidence but not all of it.

11. Constitutional Law— argument of counsel—concession of guilt—effective assistance of counsel

There was no error in a capital prosecution for first-degree murder where defendant contended that his counsel made concessions of guilt where counsel merely argued that defendant was guilty as an accessory after the fact if he was guilty of anything. Defendant took counsel's statements out of context and failed to note the consistent theory of the defense that defendant was not guilty.

12. Kidnapping— first-degree—bases of charge—"and" or "or"

There was no plain error in a first-degree kidnapping prosecution where the indictment alleged failure to release in a safe place "and" serious injury while the court's instructions joined the phrases with "or." There is no evidence that the jury erroneously considered the charge and, in reality, only one of the two bases was necessary for the State to convict defendant of first-degree kidnapping.

13. Kidnapping— first-degree—restraint or removal in instruction—confinement in indictment

There was no plain error in a first-degree kidnapping prosecution where the jurors were instructed on "restraint or removal" of the victim, while the indictment asserted confinement. The evidence and defendant's own admission make it clear that the victim was confined, restrained, and removed and there was no reasonable basis for concluding that any different combination of the terms in the instruction would have altered the result.

14. Criminal Law— contact between prosecutor's lunch companion and jurors—mistrial denied

The trial court did not abuse its discretion in a capital first-degree murder prosecution by overruling defendant's motion for a mistrial based on asserted improper contact between two jurors and an individual having lunch with the district attorney. The individual told the court that she was a law student having lunch with a friend who worked in the district attorney's office, that she had attended high school with the two jurors and defendant, and that her interaction with the jurors was limited to telling them that she was in law school and was married. Defendant's trial counsel conceded that he did not believe that the contact was improper.

15. Appeal and Error— preservation of issues—failure to object at trial—failure to assign plain error

There was no error in a capital first-degree murder prosecution in the submission of the aggravating circumstance that the murder was committed during the commission of a kidnapping where defendant alleged that there was insufficient evidence of first-degree kidnapping, but did not object at trial based on the insufficiency of the evidence and failed to specifically and distinctly assign plain error.

16. Sentencing— capital—aggravating circumstances—murder committed during kidnapping—murder committed for pecuniary gain—independent evidence

The trial court did not err in a capital sentencing proceeding by submitting the aggravating circumstances that the murder was committed during a kidnapping and that the murder was committed for pecuniary gain where defendant argued that the jury was allowed to find both circumstances based upon the same evi-

dence. There was ample independent evidence supporting each circumstance in that the victim was lured to a meeting and was several times restrained, confined, and moved from place to place; the underlying motive was the theft of the victim's car; and defendant took the car and used it as his own after the victim was killed.

17. Appeal and Error— preservation of issues—failure to object at trial—failure to assign plain error

The defendant in a capital prosecution for first-degree murder did not preserve for appeal the issue of whether there was sufficient evidence of robbery to support the pecuniary gain aggravating circumstance where he made no objection at trial as to the sufficiency of the evidence and did not specifically and distinctly assign plain error.

18. Sentencing— capital—use of same evidence for more than one circumstance—no instruction

There was no error in a capital sentencing proceeding where defendant contended that the court should have instructed the jury that it should not rely on the same evidence to support more than one aggravating circumstance, but the instruction was not necessary because there was distinct and separate evidence supporting both circumstances submitted. Furthermore, defendant did not request the instruction, did not object to the trial court's failure to instruct, did not assign error to the failure to give the instruction, and did not distinctly alleged plain error.

19. Sentencing— capital—mitigating circumstance—no significant history of prior criminal activity—evidence insufficient

The trial court did not err in a capital sentencing proceeding by denying defendant's request to submit the mitigating circumstance that defendant had no significant history of prior criminal activity where some of defendant's witnesses indicated that defendant had not been in "bad trouble" and had not been involved with illegal drugs, but defendant offered no evidence of his criminal record. Defendant had the burden of establishing that he had no significant criminal history and did not do so. N.C.G.S. § 15A-2000(f)(1).

20. Sentencing— capital—mitigating circumstances—mental disturbance—sufficiency of evidence

The trial court did not err in a capital sentencing proceeding by denying defendant's request that the court submit the (f)(2) statutory mitigating circumstance that the crime was committed under the influence of mental or emotional disturbance. Defendant presented no evidence that he acted under the influence of a mental or emotional disturbance at the time of the murder and his expert witness, who testified that defendant suffered from personality disorders, admitted that he had reservations about his opinions because defendant had not cooperated with the evaluation. A trial court is not required to submit a mitigating circumstance unless there is substantial evidence to support it. N.C.G.S. § 15A-2000(f)(2).

21. Sentencing— capital—mitigating circumstances—impaired capacity—sufficiency of evidence

The trial court did not err in a capital sentencing proceeding by denying defendant's request to submit the mitigating circumstance of impaired capacity where defendant's expert testified that defendant suffered from mixed personality disorder but knew what the act of murder was, and further testified that his evaluation was not reliable because defendant would not tell him anything about the date of the murder. Defendant's statements to officers, his actions in organizing the crime, and his actions after the killing indicate that he was aware that his actions were criminal. N.C.G.S. § 15A-2000(f)(6).

22. Sentencing— capital—mitigating circumstances—defendant's age—sufficiency of evidence

The trial court did not err in a capital sentencing proceeding by denying defendant's request for submission of the mitigating circumstance of defendant's age where defendant cited no evidence to support his assertion and there was testimony that defendant had graduated from high school without repeating grades, that he had a stable work history, and that he was the father of five children. N.C.G.S. § 15A-2000(f)(7).

23. Sentencing— capital—nonstatutory mitigating circumstances—peremptory instructions given as a group

The trial court did not err in a capital sentencing proceeding by giving peremptory instructions on nonstatutory mitigating circumstances as a group rather than by repeating the instruction

for each circumstance. The trial court went through each of the nonstatutory mitigating circumstances during the trial conference, the court instructed the jury that circumstances "two through seven" existed as the predicate instruction for each of the nonstatutory circumstances, and defendant failed to object at trial when given the opportunity to do so after the instructions were given. Any possible error from failing to repeat the instruction six times was harmless.

24. Appeal and Error— preservation of issues—failure to object to issues and recommendation as to punishment form

The Supreme Court did not consider the argument of a first-degree murder defendant that the court did not properly set forth nonstatutory mitigating circumstances on the form for Issues and Recommendation as to Punishment where defendant indicated to the trial court that he had no objections to the form.

25. Sentencing— capital—instructions—statutory and nonstatutory mitigating circumstances

The oral instructions given by the trial court, in conjunction with the distinction between the statutory and nonstatutory mitigating circumstances on the issues and recommendation as to punishment form, were sufficient to provide proper instruction for the jurors.

26. Sentencing— capital—instructions—life imprisonment without parole

The trial court's instructions in a capital sentencing proceeding, in conjunction with the trial court's response to a jury question, were both clear and consistent with the statutory requirement for the meaning of the term "life imprisonment." Furthermore, the plain meaning of the term suggests that defendant will spend the rest of his life in prison, and the jurors heard "life imprisonment without parole" numerous times. Finally, defendant made no objection at trial and, in a discussion with the court, confirmed that the court had informed the jurors that "life imprisonment means life imprisonment without parole."

27. Sentencing— capital—nonstatutory mitigating circumstances—rejection by jury not arbitrary

The rejection by the jury of the nonstatutory mitigating circumstances that defendant had demonstrated love and affection

to certain relatives and that his behavior was impaired by professionally diagnosed emotional or mood disorders did not result in an arbitrary death penalty because the jury is free to find that a nonstatutory circumstance does not have mitigating value even if the evidence is uncontradicted.

28. Constitutional Law— effective assistance of counsel—failure to object

The defendant in a capital sentencing proceeding did not demonstrate that his counsel was ineffective in failing to object to alleged errors regarding the admission of statements, jury instructions, and verdict sheets where the alleged errors were without merit, defense counsel's failure to object cannot be said to fall below an objective standard of reasonableness, and the evidence of guilt was overwhelming.

29. Sentencing— capital—proportionality

A death sentence was proportionate where the record fully supported the aggravating circumstances found by the jury, there was no indication that the sentence was imposed under the influence of passion, prejudice, or other arbitrary factors, this case is distinguishable from those cases in which the North Carolina Supreme Court concluded that the death penalty was disproportionate, and this case is more similar to certain cases in which a death sentence was found proportionate than to those in which it was found disproportionate or to those in which juries have consistently returned recommendations of life imprisonment. Moreover, it was noted that similarity is not the last word on proportionality, which ultimately rests upon the judgment of the Court.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Barnette, J., on 13 July 1999 in Superior Court, Harnett County, upon a jury verdict finding defendant guilty of first-degree murder. On 20 November 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 11 September 2001.

Roy Cooper, Attorney General, by Gail E. Dawson and Teresa H. Pell, Special Deputy Attorneys General, for the State.

Sue A. Berry for defendant-appellant.

LAKE, Chief Justice.

Defendant was indicted on 13 April 1998 for one count of first-degree murder, one count of first-degree kidnapping, and one count of robbery with a dangerous weapon. The cases came on for a joint trial at the 28 June 1999 Criminal Session of Superior Court, Harnett County.

On 9 July 1999, the jury returned a verdict of guilty, and following a capital sentencing proceeding, recommended a sentence of death for the first-degree murder. Defendant was sentenced to death and further received a sentence of 117 to 150 months' imprisonment for robbery with a dangerous weapon. The trial court also sentenced defendant to a consecutive term of 46 to 65 months' imprisonment for second-degree kidnapping, finding that the first-degree kidnapping was subsumed in the first-degree murder conviction. For the reasons that follow, we conclude that defendant's trial and sentences, including specifically his capital sentencing proceeding, were free of prejudicial error and that defendant's sentence of death is not disproportionate.

At trial, the State presented forensic evidence and various statements by defendant which were inconsistent in some respects, but in all of which defendant readily admitted active participation in the murder. The State's evidence tended to show that on 3 March 1998, defendant and Larry McDougald lured Dwayne Winfield McNeill, the victim, to Norrington Church on the pretext that he would receive headlight covers to put on his new black Mustang GT. Defendant and McDougald then took McNeill at gunpoint to an uninhabited trailer located near defendant's home. Defendant there shot the victim several times. Defendant put the victim's body, wrapped in a comforter, in the trunk of the victim's car and drove it down Tim Currin Road and then off the road and back into some woods. As he dragged the victim's body further into the woods, he heard the victim say, "[H]elp me." Defendant went back to the car, got his gun, and fired two fatal shots. Defendant left the victim's body about one hundred yards into the woods, covered with pine straw and a tree branch. Defendant immediately disposed of the comforter and gun he had used in the murder, and he cleaned the car.

Around 5 March 1998, Carolyn Campbell, defendant's neighbor, went to a trailer she used for storage. She found bullet holes, pools of blood, and signs that someone had broken into the trailer. Campbell notified the Harnett County Sheriff's Department. They searched the

trailer and found six .22-caliber shell casings. The blood they found in the trailer matched the victim's.

The evidence further showed that on 10 March 1998, Dwight McNeill, the victim's father, received an anonymous phone call that the victim's car would be heading down Highway 87 in Spring Lake about 10:00 a.m. the next morning. Dwight McNeill informed the Harnett County Sheriff's Department, and officers waited the next morning for the Mustang. When the car passed, they immediately stopped the Mustang and found defendant driving the car. Defendant was wearing the victim's black leather jacket and had also taken possession of his wallet.

Defendant made several incriminating statements to investigators at the Harnett County Sheriff's Department. He later led investigators to the victim's body, and he showed them where he disposed of the gun and comforter. Investigators found the comforter but never located the gun. Blood found on the comforter matched the victim's.

On 13 March 1998, Marshall Gainey, defendant's father, contacted investigators and provided them with .22-caliber bullets that had not been fired. The bullets found in Campbell's trailer and those given to investigators by Marshall were all .22-caliber bullets manufactured by Federal.

An autopsy of the victim showed six gunshot wounds: to the forehead, the right eye, the left side of the upper lip, the left side of the chest, the right forearm, and the left upper back. The wounds to the right eye and the chest would have been fatal. The medical examiner also concluded that the bullet fragments removed from the victim's body were .22-caliber.

Defendant acknowledges the first six assignments of error presented in his brief as preservation issues, all of which we address as such later in this opinion. Further, we note that defendant has interspersed preservation issues throughout his brief, all of which are subsequently addressed herein, and that defendant has expressly abandoned a number of assignments of error. Accordingly, we will address defendant's remaining substantive assignments of error sequentially, without numerical reference.

[1] In his next assignment of error, defendant asserts that the trial court unconstitutionally denied his motion to suppress statements to investigators. Defendant contends that his statements were not

knowing, intelligent and voluntary and that they were made in response to impermissible statements by law enforcement officials that defendant would receive a benefit by giving the statements. Defendant did not testify, but he presented an affidavit in support of his motion. Defendant alleged that Lieutenant Billy Wade threatened and harassed him and told him that if he confessed, he could avoid the death penalty.

At the suppression hearing, the State presented the testimony of Special Agent Michael East of the State Bureau of Investigation (SBI) and Lieutenant Billy Wade of the Harnett County Sheriff's Department. Lieutenant Wade testified that he told defendant, "[I]f he wanted to help himself that he could help himself by cooperating." Special Agent East testified that he was unaware of any force used against defendant and that he did not know of any promises or representations being made to defendant. The trial court found as a fact that "[a]t no time prior to or during defendant's interviews did law enforcement officers threaten, strike or coerce him, or make any promises or offers of reward to him." The trial court also concluded, as a matter of law, that all of the statements were made freely and voluntarily.

Defendant concedes that findings of fact made by a trial judge following a *voir dire* on the voluntariness of a confession are conclusive upon this Court if they are supported by competent evidence. *State v. Rook*, 304 N.C. 201, 212, 283 S.E.2d 732, 740 (1981), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982). Conclusions of law that are correct in light of the findings of fact are also binding on appeal. *State v. Howell*, 343 N.C. 229, 239, 470 S.E.2d 38, 43 (1996).

The voluntariness of a confession is determined by the "totality of the circumstances." *State v. Corley*, 310 N.C. 40, 47, 311 S.E.2d 540, 545 (1984). The proper determination is whether the confession at issue was the product of "improperly induced hope or fear." *Id.* at 48, 311 S.E.2d at 545. This Court has held that an improper inducement must promise relief from the criminal charge to which the confession relates, and not merely provide the defendant with a collateral advantage. *State v. Pruitt*, 286 N.C. 442, 458, 212 S.E.2d 92, 102 (1975).

Lieutenant Wade testified that he never made any promises to defendant concerning the disposition of his case, and Special Agent East also testified that he never heard Lieutenant Wade make any promises to defendant.

Accordingly, the trial court's finding of fact that no promises or offer of reward were made to defendant is supported by competent evidence in the record. The trial court's conclusion of law that the statement was voluntary is supported by the finding of fact and the law. Therefore, the trial court properly denied defendant's motion to suppress his statements. This assignment of error is overruled.

[2] Defendant's next assignment of error involves the trial court's sustaining the State's objections to three questions posed during defendant's rehabilitation of prospective juror Barbara Jackson Wheeler. Defendant further asserts that the trial court improperly excused Wheeler over his objection.

When questioned by the prosecutor, Wheeler initially admitted she had "mixed emotions" and was not sure if she could sentence someone to death. She subsequently stated three times that she could never return a death verdict. The prosecutor challenged Wheeler for cause after she stated she could never return a death verdict. The trial court allowed defense counsel the opportunity to question Wheeler further. Defense counsel initially asked Wheeler three general questions as to whether she could follow the law of North Carolina, and counsel did not address the issue as to whether she could impose the death penalty. Finally, defense counsel asked Wheeler: "[U]nder any circumstances could you render a verdict that meant the death penalty?" She replied, "No, sir."

The standard this Court applies when determining when a prospective juror can be excluded for cause because of his or her views on capital punishment is whether the juror's views would " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *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)). Prospective jurors with reservations about imposing the death penalty must be able to " 'state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.' " *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 907-08 (1993) (quoting *Lockhart v. McCree*, 476 U.S. 162, 176, 90 L. Ed. 2d 137, 149-50 (1986)). The granting of a challenge for cause where the juror's fitness is at issue is a matter within the discretion of the trial court and will not be disturbed absent a showing of abuse of discretion. *State v. Dickens*, 346 N.C. 26, 42, 484 S.E.2d 553, 561 (1997).

In the instant case, defendant is unable to show an abuse of discretion by the trial court in granting the State's challenge for cause of prospective juror Wheeler. Wheeler stated three times that she would not be able to impose the death penalty. Where a prospective juror's answers reveal that his views on the death penalty prevent him from following the law, the juror is properly excused for cause. *Wainwright*, 469 U.S. at 424, 83 L. Ed. 2d at 851-52. Regardless of Wheeler's statement that she could "follow the law" of North Carolina, it was reasonable for the trial court to find that she could not. Even if Wheeler's answers had been equivocal, this Court has held that "excusals for cause may properly include persons who equivocate or who state that although they believe generally in the death penalty, they indicate that they personally would be unable or would find it difficult to vote for the death penalty." *State v. Simpson*, 341 N.C. 316, 342-43, 462 S.E.2d 191, 206 (1995), *cert. denied*, 516 U.S. 1161, 134 L. Ed. 2d 194 (1996).

In the instant case, defendant cannot show an abuse of discretion on the part of the trial court in sustaining the State's objections to the three questions. Defendant stated that he was satisfied with each juror and did not exhaust his peremptory challenges; therefore, he cannot show prejudice from the trial court's ruling during rehabilitation of Wheeler. *See State v. Miller*, 339 N.C. 663, 678, 455 S.E.2d 137, 145, *cert. denied*, 516 U.S. 893, 133 L. Ed. 2d 169 (1995).

The trial court also properly sustained the State's objection to three general questions posed by defense counsel that did not address the pertinent issue: whether prospective juror Wheeler would be able to return a verdict of death under any circumstances. The trial court properly excused Wheeler when she unequivocally stated that she could not ever return a sentence of death. This assignment of error is overruled.

[3] In his next assignment of error, defendant argues that the trial court erred as a matter of law or, alternatively, abused its discretion, in overruling his objection to testimony by the victim's father, Dwight McNeill. McNeill testified that he received a phone call on 10 March 1998 from an anonymous caller. He testified, over objection, that the caller told him, "I think I know where your son's Mustang is at, I think I know who's got your car," and "[y]our car will be coming through Spring Lake at approximately 10:00." The caller also told him that the "car has dealer tags on it."

McNeill testified that, in response to the call, he "immediately called the sheriff's department." He also testified that he and his brother and deputies went to Spring Lake the next morning and that when defendant passed by in McNeill's son's car, defendant was immediately apprehended. Defendant contends that this testimony was inadmissible and prejudicial hearsay.

The North Carolina Rules of Evidence define "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). Out-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay. *State v. Call*, 349 N.C. 382, 409, 508 S.E.2d 496, 513 (1998). Specifically, statements are not hearsay if they are made to explain the subsequent conduct of the person to whom the statement was directed. *State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990).

In *Call*, the witness testified as to a phone call he received from his mother telling him that there was a Mexican at her house and that she could not figure out what he wanted. *Call*, 349 N.C. at 409, 508 S.E.2d at 513. The witness testified that he immediately went to his mother's house after receiving the call. This Court determined that the trial court did not commit error in allowing this testimony into evidence for the sole purpose of showing what the witness did after receiving the telephone call.

In the present case, McNeill's testimony was not offered to prove the truth of the matter asserted, but rather to explain his subsequent actions. Without McNeill's statement, it would have been difficult for jurors to understand why deputies were staked out in Spring Lake the next morning, waiting for the victim's car. Accordingly, this testimony was proper nonhearsay evidence, and the trial court did not err in admitting it.

[4] Defendant also now asserts that McNeill's testimony regarding the anonymous call violated his constitutional right to confrontation. This claim is not properly before this Court, as defendant objected to this testimony at trial only on the basis of hearsay. 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).

Notwithstanding, "admission of nonhearsay 'raises no Confrontation Clause concerns.' " *United States v. Inadi*, 475 U.S. 387,

398 n.11, 89 L. Ed. 2d 390, 400 n.11 (1986) (quoting *Tennessee v. Street*, 471 U.S. 409, 414, 85 L. Ed. 2d 425, 431 (1985)), *quoted in State v. Jones*, 322 N.C. 406, 414, 368 S.E.2d 844, 849 (1988). "[A] witness under oath, [who is] subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen, but also as to what he has heard." *Dutton v. Evans*, 400 U.S. 74, 88, 27 L. Ed. 2d 213, 226 (1970).

Accordingly, defendant's assertion that his rights pursuant to the Confrontation Clause were violated by admission of McNeill's statement as to what the anonymous caller said to him is without merit. This assignment of error is overruled.

[5] In his next assignment of error, defendant contends that the trial court erred in admitting the opinion testimony provided by SBI Special Agent Eugene Bishop. Agent Bishop testified that, in his opinion, the two bullets found in the right side of the victim's neck and in his chest were both .22-caliber bullets and had similar rifling characteristics. Defendant asserts that Agent Bishop's testimony as to this opinion was based on mere speculation or conjecture.

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). Expert testimony is properly admissible when the witness, because of his expertise, is in a better position to have an opinion on the matter than is the trier of fact. *State v. Lawrence*, 352 N.C. 1, 17, 530 S.E.2d 807, 818 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001); *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E.2d 905, 911 (1978). The trial court is given great latitude in determining the admissibility of expert testimony. *State v. Taylor*, 354 N.C. 28, 41, 550 S.E.2d 141, 150 (2001); *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984).

Agent Bishop was received without objection by the trial court as an expert in forensic firearms identification. Agent Bishop has been an agent with the SBI for twenty-six years, and he works in the firearms and toolmark section of the crime laboratory. He estimated that he had done in excess of 500 to 1,000 comparisons in matching bullets with the particular gun that fired them. Agent Bishop testified that the six fired cartridge cases found at the Campbell trailer and the

five unfired bullets supplied to the Harnett County Sheriff's Department by defendant's father were all .22-caliber bullets manufactured by Federal. He was also able to conclude that bullet fragments removed from the victim's body were also .22-caliber.

In light of his extensive knowledge of the subject matter, Agent Bishop certainly met the standard of Rule 702 of the North Carolina Rules of Evidence and was in a better position to provide an expert opinion on this subject than was the jury. Furthermore, Agent Bishop tested the bullets upon which he provided his opinion. This assignment of error is without merit and is overruled.

In his next two assignments of error, defendant challenges the sufficiency of the evidence presented in support of his robbery with a dangerous weapon and first-degree murder charges. This Court has held that in ruling on a motion to dismiss for insufficiency of the evidence, 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 is required to present substantial evidence for each element of the offense charged. *Id.* The trial court must consider all evidence presented that is favorable to the State. *State v. Jones*, 342 N.C. 523, 540, 467 S.E.2d 12, 23 (1996). If there is substantial evidence, either direct or circumstantial, that the defendant committed the offense charged, then a motion to dismiss is properly denied. *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

[6] Defendant first contends that the evidence was insufficient to prove that he committed the crime of robbery with a dangerous weapon. The necessary elements of this offense are: (1) an unlawful taking or an attempt to take the personal property from the person or presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of another is either endangered or threatened. *Call*, 349 N.C. at 417, 508 S.E.2d at 518; *see also* N.C.G.S. § 14-87 (1999).

In the case *sub judice*, the evidence viewed in the light most favorable to the State shows that defendant's confession provides adequate support for a finding that defendant took the victim's Mustang from him by threatening his life with a gun. Defendant admitted he called the victim on 3 March 1998 and told him to meet defendant at Norrington Church to pick up some headlight covers. Defendant and his friend McDougald waited for the victim to arrive,

with McDougald hiding in a car behind the church. According to defendant's statements, when the victim arrived and went to the trunk of the car to get the headlight covers, defendant and McDougald pulled a gun on him. They forced the victim back into his car with a gun to his head. Again, according to defendant's statements, McDougald shot the victim, and when defendant heard him gasping for breath and calling for help, defendant decided to put the victim out of his misery by shooting him twice in the head "so he wouldn't suffer like that." Defendant drove the victim's Mustang until he was apprehended on 11 March 1998. This evidence is sufficient to permit a rational jury to find that defendant robbed the victim with a dangerous weapon.

[7] Defendant further contends that he could not have committed the offense of robbery with a dangerous weapon because he took the victim's Mustang only after the victim was dead. This Court has held that "[w]hen, as here, the death and the taking are so connected as to form a continuous chain of events, a taking from the body of the dead victim is a taking 'from the person.' " *State v. Fields*, 315 N.C. 191, 202, 337 S.E.2d 518, 525 (1985). Where a continuous transaction occurs, the temporal order of the threat or the use of a dangerous weapon and the taking is immaterial. *State v. Green*, 321 N.C. 594, 605, 365 S.E.2d 587, 594, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988).

When viewing the evidence in the light most favorable to the State, the robbery of the victim and the murder were all part of a continuous chain of events. Defendant's confession shows that the victim was lured to the church so that defendant and McDougald could forcibly take his car. The evidence further shows that soon thereafter, the victim was killed. Defendant made use of the car in a manner to suggest that he owned the Mustang, he claimed it was his, and he had even put his belongings in the car, thus suggesting ownership. Furthermore, defendant drove the victim's car from the time of the murder until the day he was apprehended. This evidence is sufficient to permit a rational jury to find that the victim's murder and the act of stealing his car were so connected as to form a continuous chain of events. This assignment of error is overruled.

[8] Defendant next contends that the trial court erred in denying his motion to dismiss the first-degree kidnapping charge because there was insufficient evidence that the confinement of the victim was separate and apart from the killing. N.C.G.S. § 14-39(a) provides, in part, 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:
>
> . . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony.

N.C.G.S. § 14-39(a)(2) (1999). As used in our statute, "confine" suggests "some form of imprisonment within a given area, such as a room, a house or a vehicle." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978).

Viewed in the light most favorable to the State, the evidence permitted a rational trier of fact to find that defendant lured the victim to Norrington Church under the pretense that he would be getting headlight covers for his car. When the victim arrived at the church, defendant put a gun to the victim's head and forced him to drive his own car to the Campbell trailer. The victim was then taken into the woods, and when he tried to get away, he was shot. The victim was alive when he was placed in the trunk of the car, as he was crying out for help before defendant delivered the fatal shots. We conclude that these facts provided ample evidence of confinement not inherent in the first-degree murder to support the charge of first-degree kidnapping. This assignment of error is overruled.

[9] In his next assignment of error, defendant contends that the trial court erred in denying his request for submission of second-degree murder as a possible verdict.

Murder in the first degree, the crime of which defendant was convicted, is the "intentional and unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Fisher*, 318 N.C. 512, 517, 350 S.E.2d 334, 337 (1986). Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Brown*, 300 N.C. 731, 735, 268 S.E.2d 201, 204 (1980). A defendant is entitled to have a lesser-included offense submitted to the jury only when there is evidence to support the lesser-included offense. *Id.* at 735-36, 268 S.E.2d at 204.

Here, evidence of the lesser-included offense of second-degree murder is lacking. Defendant presented no evidence, and the State's evidence tended to show that the victim was shot six times. After the victim had been wounded, defendant deliberately walked to the car, got the gun out, and shot the victim twice. Defendant shot the victim as he was helpless and crying out for help. He then dragged the victim's body into the woods and covered it with leaves and branches. Defendant immediately disposed of the murder weapon and the comforter in which the victim's body had been wrapped.

Defendant and McDougald talked about stealing the victim's car before 3 March 1998. Both before and after the murder, defendant expressed to others his plan to move to California and change his identity. The evidence fully supports a finding of premeditation and deliberation and, accordingly, an instruction for first-degree murder. There is no evidence supporting second-degree murder, and to suggest that defendant acted without premeditation and deliberation is to invite total disregard of the evidence.

[10] Defendant further contends that in order to find him guilty of first-degree murder, the jury had to pick and choose between the pieces of evidence it was going to believe. However, a "defendant is not entitled to an instruction on a lesser-included offense merely because the jury could possibly believe some of the State's evidence but not all of it." *State v. Annadale*, 329 N.C. 557, 568, 406 S.E.2d 837, 844 (1991). Defendant, in his brief to this Court, further speculates as to what "could have occurred" in the trailer that would tend to show that premeditation and deliberation were lacking. This Court has noted, however, that "mere speculation is not sufficient to negate evidence of premeditation and deliberation." *State v. Gary*, 348 N.C. 510, 524, 501 S.E.2d 57, 67 (1998). We conclude that the trial court correctly denied defendant's request to submit the offense of second-degree murder to the jury. This assignment of error is overruled.

[11] In his next assignment of error, defendant contends that his counsel made concessions of his guilt, without defendant's express permission, during opening and closing arguments.

In *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), this Court held that a defendant has been denied effective assistance of counsel if his counsel admits his guilt to the jury without his consent. However, argument that

> the defendant is innocent of all charges, but if he is found guilty of any of the charges it should be of a lesser crime because the evidence came closer to proving that crime than any of the greater crimes charged, is not an admission that the defendant is guilty of anything, and the rule of *Harbison* does not apply.

State v. Harvell, 334 N.C. 356, 361, 432 S.E.2d 125, 128 (1993); *see also State v. Greene*, 332 N.C. 565, 572, 422 S.E.2d 730, 733-34 (1992).

In the present case, defense counsel never conceded that defendant was guilty of any crime. Counsel merely noted defendant's involvement in the events surrounding the death of the victim, arguing that "if he's guilty of anything, he's guilty of accessory after the fact. He's guilty of possession of a stolen vehicle." This was hardly the equivalent of admitting that defendant was guilty of the crime of murder. Defendant has taken defense counsel's statements out of context to form the basis of his claim, and he fails to note the consistent theory of the defense that defendant was not guilty. This assignment of error is overruled.

[12] In his next assignment of error, defendant contends that the trial court erred in its instruction to the jury on the first-degree kidnapping charge. He also alleges that the instruction on "failure to release in a safe place" and "serious injury" were joined with "or," while the language of the indictment joined the phrases with "and." Defendant did not object to or make a constitutional claim for these errors at trial, but he now contends that they rise to the level of plain error.

Constitutional questions not raised and passed upon at trial will not be considered on appeal. *Benson*, 323 N.C. at 322, 372 S.E.2d at 519. "In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(c)(4). In order to establish plain error, a defendant must establish that the trial court committed error and that absent this error, the jury would have probably reached a different result. *State v. Morganherring*, 350 N.C. 701, 722, 517 S.E.2d 622, 634 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 322 (2000). The instructional error must be " 'so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him.' " *State v.*

Lucas, 353 N.C. 568, 584, 548 S.E.2d 712, 723 (2001) (quoting *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993)).

Defendant's contention of plain error, based on the indictment being in the conjunctive and the jury instruction in the disjunctive, is without merit. There is no evidence in the record which in any way suggests or infers that any of the jurors erroneously considered the first-degree kidnapping charge in light of this minute discrepancy. The indictment merely informed defendant that the State planned to rely on two bases for proving defendant was guilty of first-degree kidnapping. In reality, only one of the two bases was necessary for the State to convict defendant of first-degree kidnapping. *See State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986) (holding that "[a]lthough the indictment may allege more than one purpose for the kidnapping, the State has to prove only one of the alleged purposes in order to sustain a conviction of kidnapping"). We conclude that the trial court's instruction in this regard was without error.

[13] Defendant further argues that the trial court erred in its instruction on the first-degree kidnapping charge because the instruction permitted the jury to convict on theories of the crime which were not charged in the bill of indictment.

Defendant was tried under N.C.G.S. § 14-39, which requires "confinement, restraint or removal" of the victim "from one place to another." In the trial court's instruction to the jury on first-degree kidnapping as a separate and distinct charge, the jurors were instructed on "restraint or removal," while the indictment asserted "confining." Defendant asserts that this was plain error. Because this issue was not raised before the trial court, it is reviewed under the plain error standard by this Court. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

Defendant relies upon *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986). We find *Tucker* to be distinguishable from this case. In *Tucker*, the indictment alleged removal from one place to another, while the trial court instructed on restraint. *Id.* at 537, 346 S.E.2d at 420. This Court held that the instructional error might have "tilted the scales" and caused the jury to reach its guilty verdict "[i]n light of the highly conflicting evidence in the . . . kidnapping case on the unlawful removal and restraint issues." *Id.* at 540, 346 S.E.2d at 422. The evidence in the case *sub judice* is not highly conflicting. In fact, the evidence and defendant's own admission make it clear that the victim was confined, restrained, and removed during the course of

events, which ultimately resulted in the victim's death. According to defendant's own statement, the victim was forced at gunpoint into his own car and was later held in the trunk of the car.

The trial court's instruction included the terms "restricted his freedom of movement" and "restrained." Restriction, confinement or restraint all require restraint in some form. In *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351, this Court stated:

> As used in G.S. 14-39, the term "confine" connotes some form of imprisonment within a given area, such as a room, a house or a vehicle. The term "restrain," while broad enough to include a restriction upon freedom of movement by confinement, connotes also such a restriction, by force, threat or fraud, without a confinement. Thus, one who is physically seized and held, or whose hands or feet are bound, or who, by the threatened use of a deadly weapon, is restricted in his freedom of motion, is restrained within the meaning of this statute.

The evidence shows that defendant confined, restrained and removed the victim during the course of events on 3 March 1998. Given the strength of the evidence against defendant, including his own admissions, there is no reasonable basis for us to conclude that any different combination of the terms "confine," "restrain" or "remove" in the instruction would have altered the result. We cannot conclude that had the trial court instructed the jury that the defendant had to "confine" the victim to be guilty of first-degree kidnapping, this would have tilted the scales in favor of defendant. This assignment of error is overruled.

[14] In his next assignment of error, defendant contends the trial court erred in overruling his motion for a mistrial based on asserted improper contact between two jurors and an individual visiting the district attorney. During the lunch recess on 11 July 1999, two jurors hugged and spoke with a woman who was having lunch with the district attorney. This woman had been present that day during trial of the case.

Defendant made a motion for a mistrial based on an asserted appearance of inappropriate prejudicial contact between the two jurors and the district attorney's lunch companion. Pursuant to defendant's request, the trial court heard from the district attorney's lunch companion, Amy Elizabeth Blackman Johnson. Johnson told the trial court that she was a law student having lunch with a friend

of hers who worked in the district attorney's office. Johnson had attended high school with the two jurors and defendant. She explained to the court that her interaction with the jurors was very limited, and she merely told them that she was in law school and was married. After hearing from Johnson, the trial court denied defendant's motion for a mistrial.

When a trial court learns of alleged improper conduct with a juror, "the trial court's inquiry into the substance and possible prejudicial impact of the contact is a vital measure for ensuring the impartiality of the juror." *State v. Burke*, 343 N.C. 129, 149, 469 S.E.2d 901, 910-11, *cert. denied*, 519 U.S. 1013, 136 L. Ed. 2d 409 (1996). In *State v. Willis*, 332 N.C. 151, 173, 420 S.E.2d 158, 168 (1992), this Court held that "[i]n the event of some contact with a juror it is the duty of the trial judge to determine whether such contact resulted in substantial and irreparable prejudice to the defendant. It is within the discretion of the trial judge as to what inquiry to make."

Defense counsel told the trial court that he did not "believe anything inappropriate took place, but I think we need to put something on the record." The trial court then questioned Johnson to determine the substance of the conversation that she had with the two jurors.

Furthermore, defendant made no objection to the trial court's ruling on his motion for a mistrial. Immediately before the charge conference began, defendant renewed his motion for a mistrial, but he did not state any grounds upon which he based his motion. He did not at any time ask the trial court to question the two jurors, nor did he try to call additional witnesses to establish a case of inappropriate conduct. The trial court again denied the motion.

Defendant's concern was getting something on the record, and he stated numerous times that he did not think that any inappropriate conduct had taken place. The trial court did exactly what defendant requested by putting its inquiry into the matter on the record. Furthermore, when a defendant fails to object to the trial court's failure to conduct further inquiry into the report of inappropriate juror contact and does not allege plain error, he has waived his right to raise the issue on appeal. *State v. Jaynes*, 342 N.C. 249, 263, 464 S.E.2d 448, 457 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996).

Even if we wanted to address the substance of defendant's claim, he has failed to show an abuse of discretion by the trial court. In light

of the response by Johnson that her conversation was purely personal and unrelated to the case, and defense counsel's own concession that he did not believe that the contact was inappropriate, we conclude that the trial court acted appropriately within its discretion. This assignment of error is overruled.

[15] In his next assignment of error, defendant contends there was error in the submission of the (e)(5) aggravating circumstance, that the murder was committed while defendant was engaged in the commission of a kidnapping, *see* N.C.G.S. § 15A-2000(e)(5) (1999), because there was insufficient evidence to prove first-degree kidnapping beyond a reasonable doubt.

At trial, defendant made no objection to the submission of the (e)(5) aggravator based on the sufficiency of the evidence. In order to preserve an issue for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent. N.C. R. App. P. 10(b)(1); *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991). Defendant has not properly preserved the issue of the sufficiency of the evidence to support the (e)(5) aggravator, and at most, defendant would be entitled to a plain error review of this claim. However, defendant has failed to specifically and distinctly assign plain error, as required by Rule 10(c)(4) of the North Carolina Rules of Appellate Procedure.

[16] Defendant further argues that the trial court improperly allowed the jury to double-count aggravating circumstances by submitting both (e)(5) and (e)(6), that the murder was committed for pecuniary gain, *see* N.C.G.S. § 15A-2000(e)(6). He argues the trial court allowed jurors to find both of these circumstances based on the same evidence.

Defendant objected to the trial court's submission of both the (e)(5) and (e)(6) aggravating circumstances. We conclude that this error was sufficiently preserved.

This Court has held that it is error to submit more than one aggravating circumstance unless each is supported by different evidence. *State v. Quesinberry*, 319 N.C. 228, 239, 354 S.E.2d 446, 452 (1987). However, when there is evidence supporting each aggravating circumstance, the trial court may submit both even though the evidence that supports each may overlap. *State v. Rouse*, 339 N.C. 59, 97, 451 S.E.2d 543, 564 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60

(1995). "Aggravating circumstances are not considered redundant absent a complete overlap in the evidence supporting them." *State v. Moseley*, 338 N.C. 1, 54, 449 S.E.2d 412, 444 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995). This Court has recognized that "in some cases the same evidence will support inferences from which the jury might find that more than one of the enumerated aggravating circumstances is present" and that this will usually occur where the defendant's motive, rather than a specific factual element, is at issue. *State v. Goodman*, 298 N.C. 1, 30, 257 S.E.2d 569, 588 (1979). It is well settled that it is not error to submit to the jury multiple aggravating circumstances, so long as the inquiry that is prompted by their submission is directed at distinct aspects of the defendant's character or the crime for which he is to be punished. *State v. Wilkinson*, 344 N.C. 198, 230, 474 S.E.2d 375, 392 (1996).

In the present case, the trial court instructed the jurors as to the (e)(5) and (e)(6) aggravating circumstances as follows:

> Under the evidence in this case there are two possible aggravating circumstances that you may consider, and the following are those aggravating circumstances. One, "Was this murder committed by the defendant, David Gainey, while he was engaged in the commission of the felony of kidnapping?" And two, "Was this murder committed for pecuniary gain?"
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> . . . .
>
> So, if you find from the evidence beyond a reasonable doubt that when the defendant, David Gainey, or someone he was acting in concert with, killed Dwayne McNeill; that the defendant, or someone he was acting in concert with, unlawfully . . . confined Dwayne McNeill without Dwayne McNeill's consent, and that this confinement was for the purpose of facilitating the commission of the crime of murder, and that this confinement was a separate complete act, independent of and apart from the murder, if the State has proven all of this to you beyond a reasonable doubt, then you would find this aggravating circumstance . . . .
>
> . . . .
>
> Next, consider the second one. . . .
>
> If you find from the evidence beyond a reasonable doubt that when the defendant or someone he was acting in concert with killed Dwayne McNeill, that the defendant, or someone he was

acting in concert with, intended to rob Dwayne McNeill of his automobile and that the robbery was a reason for the killing, then you would find this aggravating circumstance.

Defendant argues that the instructions essentially "ask" the jury to decide whether defendant kidnapped the victim to kill him for pecuniary gain. Defendant does not make reference to any portion of the jury instructions upon which he bases this conclusion, nor does he articulate how each of the aggravating circumstances is supported by the same evidence. At no place in the instructions does the trial court mention that defendant kidnapped the victim for pecuniary gain.

Upon review of the evidence, we find ample independent evidence supporting both the (e)(5) aggravator, on the basis of kidnapping, and the (e)(6) aggravator, on the basis of the theft of the victim's car. The evidence shows clearly that the victim was lured to Norrington Church and was at several times restrained, confined and removed from place to place. The evidence further shows quite clearly that the underlying motivation for all of defendant's actions was the theft of the victim's car. After the victim was killed and his body left in the woods, defendant and his accomplice then took the victim's car, which defendant thereafter used as his own. Accordingly, we conclude there was ample independent evidence supporting the submission of each of these aggravating circumstances without depending on precisely the same evidence. This assignment of error is overruled.

[17] In his next assignment of error, defendant further contends that the trial court erred in submitting the (e)(6) aggravating circumstance to the jury. Initially, defendant contends there was insufficient evidence to support a finding beyond a reasonable doubt of robbery with a dangerous weapon, the underlying felony which elevates the "confinement, restraint or removal" to kidnapping for the submission of (e)(5). *See* N.C.G.S. § 14-39(a)(2). Defendant's assignment of error, however, is based solely on his objection to the submission of robbery with a dangerous weapon, the underlying felony for (e)(5), and to the submission of the (e)(6) pecuniary gain aggravating circumstance. At trial, defendant objected to the submission of robbery with a dangerous weapon in conjunction with the pecuniary gain aggravating circumstance, but made no objection as to the sufficiency of the evidence supporting robbery with a dangerous weapon.

Defendant has failed to properly preserve this issue because of his failure to raise it before the trial court. N.C. R. App. P. 10(b)(1); *Eason*, 328 N.C. at 420, 402 S.E.2d at 814. At most, defendant is entitled to a plain error review of this issue by this Court. However, defendant has failed to specifically and distinctly assign plain error as required by Rule 10(c)(4) of the North Carolina Rules of Appellate Procedure.

[18] Defendant made no request for the trial court to instruct the jury that it should not rely on the same evidence to support both aggravating circumstances. Defendant also failed to assign this omission as error, but refers to it in his brief to this Court. The scope of review by this Court is limited to those assignments that were set out in the record on appeal. N.C. R. App. P. 10(a).

Defendant cites *State v. Jennings*, 333 N.C. 579, 430 S.E.2d 188, *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993), as supporting his contention that the trial court should have instructed the jury that it could not use the same evidence as the basis for a finding of two aggravating circumstances. In *Jennings*, the defendant asserted that the same evidence was necessary to prove both (e)(5), that the murder was committed during a sex offense, and (e)(9), that the murder was "especially heinous, atrocious, or cruel," N.C.G.S. § 15A-2000(e)(9). *Jennings*, 333 N.C. at 627, 430 S.E.2d at 213. The defendant in *Jennings* argued that the evidence of the sex offense was necessary to the jury's finding that the murder was especially heinous, atrocious, or cruel. *Id.* We disagreed, concluding there was substantial evidence of the (e)(9) aggravator apart from evidence the murder was committed during the sex offense. *Id.* The evidence showed that the victim had sustained multiple bruises and cuts to various parts of his body. *Id.* The hotel room had blood splattered on the ceiling, walls, floor and back of the mirror. *Id.* This Court determined the evidence was sufficient to establish that the killing was especially heinous, atrocious, or cruel. *Id.* We addressed the trial court's error in failing to instruct jurors that they could not rely on the same evidence for both circumstances, but noted that the defendant did not object to the trial court's failure to give the instruction. *Id.* at 628, 430 S.E.2d at 214. We held that the failure to instruct did not rise to the level of plain error. *Id.*

As in *Jennings*, in the case *sub judice*, defendant failed to object to the trial court's failure to instruct. Furthermore, defendant did not request the instruction, did not assign error to the failure to give the instruction, and did not distinctly allege plain error in his claim

before this Court. Most significantly, the instruction defendant contends was necessary was not, because there is distinct and separate evidence supporting both aggravating circumstances.

This assignment of error is overruled.

[19] In his next assignment of error, defendant contends the trial court erred by denying his request to submit the (f)(1) mitigating circumstance, that "defendant has no significant history of prior criminal activity," N.C.G.S. § 15A-2000(f)(1).

This Court has held that the proper determination is " 'whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity.' " *State v. Atkins*, 349 N.C. 62, 87-88, 505 S.E.2d 97, 113 (1998) (quoting *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988)), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). A significant history of prior criminal activity, for purposes of (f)(1), is one that is likely to influence the jury's sentence recommendation. *Id.* at 88, 505 S.E.2d at 113. The (f)(1) mitigating circumstance is not supported by the mere absence of any substantial evidence concerning the defendant's prior criminal history. *State v.* Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990); *State v. Hutchins*, 303 N.C. 321, 355-56, 279 S.E.2d 788, 809 (1981). It is the defendant's duty to provide evidence that tends to show the existence of a mitigating circumstance. *Hutchins*, 303 N.C. at 355-56, 279 S.E.2d at 809.

While some of defendant's witnesses indicated that, to the best of their knowledge, defendant had been in no real or "bad trouble" and had not been involved with illegal drugs or weapons, defendant offered no evidence of his criminal record. In *State v. Gibbs*, 335 N.C. 1, 55, 436 S.E.2d 321, 352 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994), the defendant provided this Court with no evidence at all of any prior criminal conviction. We concluded in *Gibbs* that the defendant had provided no support for submission of the (f)(1) mitigator and that the trial court did not err in failing to submit it.

Defendant has the burden of establishing that he has no significant criminal history, and he has not done so in this case. Therefore, the trial court was not required to submit the (f)(1) mitigating circumstance. This assignment of error is overruled.

[20] In his next three assignments of error, defendant contends that the trial court erred in denying his requests to submit mitigating circumstances to the jury.

Initially, defendant asserts error in the trial court's denial of his request to submit the (f)(2) statutory mitigating circumstance, "[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).

At the outset, we note that a trial court is not required to submit a mitigating circumstance unless there is substantial evidence to support it. *Rouse*, 339 N.C. at 100, 451 S.E.2d at 566. The defendant has the burden of proving the "substantial evidence" which tends to show that the mitigating circumstance exists. *Id.* Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Fletcher*, 348 N.C. 292, 323, 500 S.E.2d 668, 686 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 113 (1999).

In considering when the (f)(2) mitigating circumstance may be submitted, this Court has stated that the central question is a defendant's mental and emotional state at the time of the crime. *State v. Hooks*, 353 N.C. 629, 548 S.E.2d 501 (2001); *State v. Bonnett*, 348 N.C. 417, 502 S.E.2d 563 (1998), *cert. denied*, 525 U.S. 1124, 142 L. Ed. 2d 907 (1999). "The use of the word 'disturbance' in the (f)(2) circumstance 'shows the General Assembly intended something more . . . than mental impairment which is found in another mitigating circumstance [N.C.G.S. § 15A-2000(f)(6)].' " *State v. Geddie*, 345 N.C. 73, 102-03, 478 S.E.2d 146, 161 (1996) (quoting *State v. Spruill*, 320 N.C. 688, 696, 360 S.E.2d 667, 671 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 934 (1988)), *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 43 (1997), *quoted in Hooks*, 353 N.C. at 640, 548 S.E.2d at 509.

Dr. Jerry Noble, a clinical psychologist and defendant's expert witness, testified that defendant has a chronic mild depressive condition, a mixed personality disorder with paranoid and schizoid features, and a learning disorder. Dr. Noble further noted that defendant was easily subject to domination by others. Defendant also presented the testimony of a former teacher who testified that defendant had a learning disability.

Defendant now contends that this testimony regarding his low intelligence and mental illness was sufficient to link his mental and

emotional state to the time of the murder. Defendant concludes that a reasonable juror could have inferred from this evidence that he was under the influence of a mental or emotional disturbance at the time of the killing. We disagree.

Dr. Noble admitted that his findings were in doubt, as defendant was guarded in interviews and was hesitant to reveal information about himself. Dr. Noble also testified that defendant made a conscious decision not to participate in the evaluation, and Dr. Noble was unable to perform all of his standard tests on defendant. It is not relevant that defendant has a habit of deferring to others, as the evidence did not show that defendant acted under the domination of anyone. In fact, with each incriminating statement that defendant made to law enforcement officials, his own independent actions in the crime became more apparent. Dr. Noble diagnosed defendant as having learning disorders, but admitted that defendant's last IQ test showed his score to be 89 and that defendant had graduated from high school. Dr. Noble did not testify that it was his opinion that the murder was committed while defendant was under the influence of any mental or emotional disturbance. In fact, he testified that because of defendant's failure to cooperate in the evaluations, he did not have enough information to conclude that defendant was insane, nor was he able to provide an opinion as to defendant's state of mind on 3 March 1998. Dr. Noble opined that defendant's personality disorders existed on 3 March 1998, as he noted that such disorders generally originate in the early growing-up years, but this does not equate to evidence that the murder took place while defendant was under the influence of mental or emotional disturbance.

The evidence defendant submitted was not sufficient to warrant the trial court's submitting the (f)(2) mitigating circumstance. Defendant provided no evidence that he acted under the influence of a mental or emotional disturbance at the time of the murder. Dr. Noble even admitted that he had reservations about his opinions, because of defendant's unwillingness to participate in the evaluation.

[21] Next, defendant suggests the trial court erred in denying his request to submit the (f)(6) mitigating circumstance, that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. *See* N.C.G.S. § 15A-2000(f)(6).

According to the testimony of Dr. Noble, defendant had suffered from a moderately severe to severe mixed personality disorder

since high school, with paranoid and schizoid features which tended to make him restless and impulsive. Dr. Noble also opined that defendant had a tendency to defer to the domination of others, caused from being raised in fear of his alcoholic father.

This does not provide sufficient evidence that defendant did not fully appreciate the criminality of his conduct or that he lacked the ability to conform his acts to the requirements of the law. Dr. Noble opined that on 3 March 1998, defendant knew what the act of murder was, and Dr. Noble was not aware of any psychological disorder that would have prevented defendant from understanding that stealing was wrong. Dr. Noble provided no evidence to suggest that defendant's capacity to appreciate the criminality of his conduct was impaired or that he was unable to conform his conduct to the requirements of law.

Dr. Noble's evaluation, as even he admits, is not reliable. Defendant would not tell him anything about 3 March 1998, and therefore Dr. Noble could make no assessments as to defendant's mental status on that date.

Contrary to defendant's contention, the evidence shows that he did fully understand that his acts were criminal. Defendant's statement to police officers about his conduct leading up to and during the murder demonstrated both purposefulness and deliberation. Defendant organized, designed and executed a scheme in which he lured the victim to the Norrington Church, where he and McDougald waited, and they shot the victim six times. Finally, defendant's actions after killing the victim demonstrate that he was aware that his acts were criminal. Defendant admitted that immediately after the killing he disposed of both the gun and the comforter used in the murder. After the murder, defendant also told friends that he was planning to run away. When he was apprehended, defendant even had a false identification in his possession. These actions show that defendant knew full well the nature of his actions and the criminality of his conduct.

[22] Finally, defendant argues that the trial court erred in denying his request for the (f)(7) mitigating circumstance, defendant's age at the time of the offense. *See* N.C.G.S. § 15A-2000(f)(7). Defendant relies upon the fact that he was twenty-five years old at the time of the murder. Defendant further asserts that the fact that he had an alcoholic father and a chaotic childhood along with his low-average intelligence and learning disability provide substantial

evidence that the (f)(7) circumstance should have been submitted. We disagree.

This Court has repeatedly held that chronological age is not the determinative factor in concluding this mitigating circumstance exists. *State v. Oliver*, 309 N.C. 326, 372, 307 S.E.2d 304, 333 (1983). The defendant's immaturity, youthfulness, or lack of emotional or intellectual development is also relevant. *State v. Bowie*, 340 N.C. 199, 203, 456 S.E.2d 771, 773, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 435 (1995).

Defendant broadly asserts that he submitted "substantial evidence of his immaturity, youthfulness, and lack of emotional and intellectual development at the time of these crimes," yet cites no evidence in the record to support this bare assertion. Further, Dr. Noble testified that defendant had graduated from high school without repeating grades, that he had a stable work history, and that he was the father of five children. We conclude that defendant did not provide evidence sufficient to convince a reasonable juror that defendant's age at the time of the crime was a mitigating circumstance. The trial court did not err in refusing to submit this mitigating circumstance.

These assignments of error are overruled.

[23] In his next assignment of error, defendant contends that the trial court erred by failing to properly give peremptory instructions on the nonstatutory mitigating circumstances. Specifically, he argues the trial court erred in giving the instructions on the nonstatutory mitigating circumstances as a group and in not repeating the peremptory instruction for each individual nonstatutory circumstance. Defendant claims violations of numerous constitutional provisions and, in the alternative, plain error, but he fails to make an argument for either.

Defendant did not raise a constitutional claim before the trial court. Constitutional questions which are not raised and passed upon at trial will not be considered on appeal. *Benson*, 323 N.C. at 322, 372 S.E.2d at 519.

During the trial conference, the trial court went through each of the nonstatutory mitigating circumstances with both the State and defendant to determine whether defendant was entitled to peremptory instructions on the circumstances. Defendant made no objections during this discussion. The trial court instructed the jury as follows:

> You should also consider the following circumstances arising from the evidence which you find to have mitigating value. And this would be—actually be two through seven. If one or more of you find by a preponderance of the evidence that any of these following circumstances exists and also are deemed by you to have mitigating value, you would so indicate by having your foreperson write yes in the space provided. If none of you find the circumstance to exist, or if—well, if none of you deem that these circumstances have mitigating value, then you would indicate by having your foreperson write no in the space provided.
>
> *As to two through seven, I'm going to instruct you that those circumstances do exist.* You will still have to determine whether or not they have mitigating value. I'm going to take them up one at a time now.

(Emphasis added.)

Defendant now contends that these instructions were confusing and that no juror would have been able to discern their meaning. He further asserts that the problem was compounded by the erroneous "Issues and Recommendation as to Punishment" form.

After the trial court gave the jury instructions, the judge inquired as to whether defendant had any objections to the jury instructions given, and defendant stated that he had none. Furthermore, when specifically questioned about the "Issues and Recommendation as to Punishment" form, defendant expressed no objections.

Pursuant to N.C. R. App. P. 10(b)(2), a party is required to object to a jury charge, or any omission therefrom, if he feels aggrieved thereby, before the jury retires. *State v. McNeil*, 350 N.C. 657, 691, 518 S.E.2d 486, 507 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000). At most, in the absence of an objection, defendant is entitled to a plain error review by this Court. *Benson*, 323 N.C. at 322, 372 S.E.2d at 519.

"[D]efendant is entitled to relief only if the instructions amounted to plain error, which is error 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *State v. Parker*, 350 N.C. 411, 427, 516 S.E.2d 106, 118 (1999) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000). It is indeed the rare case when a criminal con-

viction will be reversed on the basis of an improper instruction where the defendant made no objection. *Odom*, 307 N.C. at 661, 300 S.E.2d at 378.

Defendant was entitled to a peremptory instruction as to each of the nonstatutory mitigating circumstances, and as agreed upon during the trial conference, the jurors did receive a peremptory instruction on each. *See State v. White*, 349 N.C. 535, 568, 508 S.E.2d 253, 274 (1998) (holding that a defendant is entitled to a peremptory instruction when the mitigating circumstance is supported by uncontroverted evidence), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999). The fact that the instruction was not repeated six times does not constitute a violation of defendant's constitutional or statutory rights.

This Court has discouraged needless repetition during instructions to the jury. *See, e.g., State v. Dawson*, 278 N.C. 351, 365, 180 S.E.2d 140, 149 (1971) (holding that the needless repetition of a charge in response to jury requests is undesirable and has been held erroneous on occasion). In *State v. Robbins*, 275 N.C. 537, 549-50, 169 S.E.2d 858, 866 (1969), the defendant challenged the trial court's instruction to the jury because the court did not define malice in its instruction on first-degree murder, even though it had been defined previously in the charge. This Court held that "[t]he trial judge is not required to repeat a definition each time a word or term is repeated in the charge when it has once been defined." *Id.*

In the case *sub judice*, the trial court instructed the jurors, "As to two through seven, I'm going to instruct you that those circumstances do exist." This instruction was the predicate instruction for each of the following nonstatutory mitigating circumstances, and defendant failed to find any error in this instruction that was given at trial. Even if the instruction could have been stated more appropriately, every poorly stated instruction does not result in prejudice which requires a new trial. *See State v. Harris*, 290 N.C. 681, 699, 228 S.E.2d 437, 447 (1976).

For the foregoing reasons, we conclude that any possible error resulting from the failure to repeat the jury instruction six times was harmless. This assignment of error is overruled.

[24] In his next assignment of error, defendant contends that the trial court erred by failing to properly set forth the nonstatutory mitigating circumstances on the "Issues and Recommendation as to

Punishment" form. Defendant asserts that this error denied him the right to a fair and reliable trial under the Eighth and Fourteenth Amendments to the United States Constitution. Defendant further argues that this error, in combination with the instructional error addressed above, entitles him to a new sentencing proceeding. We disagree.

Defendant failed to raise his constitutional claims before the trial court; therefore, we will not consider them now. *See Benson*, 323 N.C. at 322, 372 S.E.2d at 519. Defendant expressed to the trial court that he had no objections to the "Issues and Recommendation as to Punishment" form. A defendant is precluded from obtaining relief when the error was invited by his own conduct. *See* N.C.G.S. § 15A-1443(c) (1999); *State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971). Furthermore, defendant had a duty to object before the jury retired. N.C. R. App. P. 10(b)(2); *McNeil*, 350 N.C. at 691, 518 S.E.2d at 507.

[25] The "Issues and Recommendation as to Punishment" form at Issue Two states:

> Do you find from the evidence the existence of one or more of the following mitigating circumstances?
>
> . . . .
>
> Before you answer issue two, consider each of the following mitigating circumstances. In the space after each mitigating circumstance, write "yes" if one or more of you finds that mitigating circumstance by a preponderance of the evidence. Write "no" if none of you finds that mitigating circumstance.

The form then lists the eight possible mitigating circumstances. The two statutory mitigating circumstances, N.C.G.S. § 15A-2000(f)(8) (that defendant aided in the apprehension of another capital felon), (f)(9) (the catchall), are stated and each is followed by this language:

> ANSWER: ____ One or more of us finds this mitigating circumstance to exist.

The six nonstatutory mitigating circumstances are followed by:

> ANSWER: ____ This circumstance does exist and one or more of us finds it to have mitigating value.

The distinction made on the form between statutory and nonstatutory mitigating circumstances, in conjunction with the trial court's

oral instructions, clearly sets forth the peremptory instruction and the nonstatutory mitigating circumstances.

In *State v. Warren*, 348 N.C. 80, 115-17, 499 S.E.2d 431, 450-52, *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998), the defendant claimed that an omission on the "Issues and Recommendation as to Punishment" form had violated his constitutional rights. After the (f)(2) statutory mitigating circumstance was the following: "ANSWER: ____ One or more of us finds this mitigating." *Id.* at 115, 499 S.E.2d at 451. The words "circumstance to exist" were inadvertently omitted from the form. *Id.* The defendant did not object to the form at trial, and this Court found that any error was harmless beyond a reasonable doubt. *Id.* This Court reasoned that the trial court's oral instructions and the language distinguishing the statutory and nonstatutory mitigating circumstances on the form were sufficient to show that there was no reasonable possibility that the omitted words impacted the jury's verdict. *Id.* at 117, 499 S.E.2d at 452.

As in *Warren*, the oral instructions given by the trial court in the case *sub judice*, in conjunction with the distinction between the statutory and nonstatutory mitigating circumstances on the form, were sufficient to provide proper instruction for the jurors. In the case at bar, the trial court did not improperly set forth the nonstatutory mitigating circumstances on the "Issues and Recommendation as to Punishment" form, and this assignment of error is overruled.

[26] In his next assignments of error, defendant contends the trial court erred in submitting to the jury an "Issues and Recommendation as to Punishment" form which described one of the possible punishments as "life imprisonment" rather than "life imprisonment without parole," and thereafter erred in its instructions on the meaning of "life imprisonment." On the form, the choice at Issue One and Issue Three was "life imprisonment," and the choices at Issue Four were "death" or "life imprisonment." During the trial court's instructions to the jury, the court stated: "If you unanimously recommend a sentence of life imprisonment, the court will impose a sentence of life imprisonment without parole."

Defendant asserts that these errors denied him his constitutional right to a fair and reliable sentencing proceeding under the Eighth and Fourteenth Amendments to the United States Constitution. Defendant concludes that he is, therefore, entitled to a new sentencing proceeding.

Defendant did not raise these constitutional claims before the trial court, and constitutional questions not raised before the trial court will not be considered on appeal. *See Benson*, 323 N.C. at 322, 372 S.E.2d at 519. When asked, defendant specifically told the trial court that he had no problems with the "Issues and Recommendation as to Punishment" form. Defendant made no objection after the jury instructions were given, and in a discussion between the trial court and counsel for both sides as to whether the trial court informed jurors that "life imprisonment means life without parole," defense counsel confirmed that the court had provided this instruction.

To the extent that defendant agreed with the trial court's manner of instruction, defendant has invited any alleged error, and he may not obtain relief from such error. *See* N.C.G.S. § 15A-1443(c); *Payne*, 280 N.C. at 171, 185 S.E.2d at 102. Pursuant to N.C. R. App. P. 10(b)(2), a party must object to the jury charge before the jury retires. *See McNeil*, 350 N.C. at 691, 518 S.E.2d at 507.

During the initial portion of the sentencing instructions, the trial court told the jury: "If you unanimously recommend a sentence of life imprisonment, the court will impose a sentence of life imprisonment without parole." During deliberations, the foreperson sent a note to the trial court requesting clarification as to the meaning of a "life sentence." The trial court expressed its intent to instruct the jurors that if they recommend a "life sentence," then such sentence means "life without parole." Defendant made no objection. The trial court thereafter instructed the jury that, "If the jury's recommendation is life imprisonment, then that means that I will sentence him to life without parole." During their closing arguments, both the State and defense counsel referred to "life without parole" several times.

The trial court's instructions were in accord with N.C.G.S. § 15A-2002, which requires the judge to instruct the jury "in words substantially equivalent to those of this section" that a sentence of "life imprisonment" means a sentence of "life without parole." The trial court's instructions, in conjunction with the trial court's response to the jury's question during deliberations, make clear and comport with the statutory requirement for the meaning of the term "life imprisonment." Furthermore, the plain meaning of the term "life imprisonment" suggests that the intent of this sentencing option is that defendant spend the rest of his life in prison. Also, the jurors heard the statement "life imprisonment without parole" numerous times.

Based on the foregoing, we conclude that the "Issues and Recommendation as to Punishment" form properly listed the two sentencing alternatives, and the trial court's instructions adequately defined the option of "life imprisonment." These assignments of error are overruled.

[27] In his next assignments of error, defendant contends that the jury's rejection of two nonstatutory mitigating circumstances violated his state and federal constitutional rights. Specifically, defendant asserts that his death sentence was imposed in an unconstitutionally arbitrary manner.

Defendants in capital sentencing proceedings have no constitutional right requiring jurors to find any nonstatutory mitigating circumstance. "Whether the jury finds a nonstatutory mitigating circumstance depends not only upon whether that circumstance is supported by the evidence, but also upon whether the jury determines that circumstance to have mitigating value." *Rouse*, 339 N.C. at 106, 451 S.E.2d at 570.

Even if the evidence is uncontradicted, the jury is still free to deliberate or to find that the circumstance does not have mitigating value. *See Lawrence*, 352 N.C. at 31, 530 S.E.2d at 826 (holding that jurors may find that a nonstatuory mitigating circumstance exists, but choose not to give that circumstance mitigating value); *State v. Carter*, 342 N.C. 312, 322, 464 S.E.2d 272, 279 (1995) (holding that even when peremptorily instructed, jurors have the right to reject the evidence if they lack faith in its credibility), *cert. denied*, 517 U.S. 1225, 134 L. Ed. 2d 957 (1996).

Initially, defendant refers to the nonstatutory mitigating circumstance, "Consider whether the defendant David Gainey has demonstrated love and affection to his mother, brother, maternal aunt and his five children." Defendant acknowledges that jurors may have rejected this circumstance, not because they did not believe it was supported by the evidence, but because they did not believe it had mitigating value. *See id.*

Next, defendant refers to the nonstatutory mitigating circumstance, "Consider whether the defendant David Gainey's social functioning and behavior are impaired by professionally diagnosed emotional or mood disorders."

Defendant asserts that during the sentencing phase, he introduced compelling evidence in mitigation showing the love that he has

demonstrated for his mother, aunt, brother and children. Defendant further argues that he introduced compelling evidence in mitigation, including the professional diagnosis of his emotional or mood disorders, which impair his social functioning.

The jury was free to reject these two nonstatutory mitigating circumstances on the basis that they had no mitigating value; therefore, defendant is not entitled to a new sentencing proceeding. For the foregoing reasons, we conclude that the jury's sentencing decision not to find the existence of these two nonstatutory mitigating circumstances was not unconstitutionally arbitrary. This assignment of error is overruled.

[28] In his final assignment of error, defendant argues that he was denied effective assistance of counsel because his counsel failed to properly preserve the record for appellate review. Specifically, he contends that his counsel failed to properly preserve errors regarding the admission of his statements, the jury instructions and the verdict sheets. Absent objection, all instructional and evidentiary issues raised before this Court must be tested under the plain error analysis as a result of defense counsel's failure to preserve these issues at the trial court. *See State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). Defendant asserts that application of plain error review, a strenuous analysis, is prejudicial to him. Furthermore, he claims that his counsel's failure to make timely objections in these three areas constituted ineffective assistance of counsel.

To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two-prong test. *See Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). First, he must show that counsel's performance fell below an objective standard of reasonableness. *See State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985). Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different. *Id.* at 563, 324 S.E.2d at 248.

There is a presumption that trial counsel acted in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694. In analyzing the reasonableness under the performance prong, the material inquiry is whether the actions were reasonable considering the totality of the circumstances at the time of per-

formance. *Id.* Reviewing courts should avoid the temptation to second-guess the actions of trial counsel, and judicial review of counsel's performance must be highly deferential. *Id.* Under *Strickland*, a defendant must also show that he was prejudiced by his trial counsel's deficient performance to such a degree that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 80 L. Ed. 2d at 698.

Defendant's argument is broad and addresses no specific instances of error. Defendant has also failed to show how any of these alleged errors, if objected to by counsel, would have been resolved with a different outcome. Furthermore, contrary to N.C. R. App. P. 10(c)(4), defendant has failed to provide this Court with specific and distinct allegations of plain error.

Defendant has not demonstrated to this Court that his counsel was ineffective by failing to object to alleged errors with regard to the admission of his statements, the jury instructions and the verdict sheets. We thus conclude that these alleged errors are without merit and that defense counsel's failure to object to these issues at trial cannot be said to fall below an objective standard of reasonableness. Further, the evidence of defendant's guilt, including his confessions, is overwhelming. Accordingly, defense counsel's failure to object to the alleged errors did not have an impact on the trial that might have resulted in a different outcome. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises thirteen additional issues which he concedes have been previously decided contrary to his position by this Court: (1) the trial court erred by denying defendant's motion to dismiss the short-form indictment; (2) the trial court erred in denying defendant's motion to strike the death penalty from consideration because it violates both the federal and state Constitutions; (3) the trial court erred in denying defendant's motion to prevent the State from death-qualifying the jury; (4) the trial court erred in denying defendant's motion to examine prospective jurors regarding opinions on parole eligibility; (5) the trial court erred in its jury instructions on defendant's burden of proof as to mitigating circumstances; (6) the trial court erred in its jury instruction on Issue Three which did not require jurors to consider mitigating circumstances found in Issue Two; (7) the jury instruction on Issue Four did not require jurors to

consider mitigating circumstances found in Issue Two; (8) the trial court erred in giving a jury instruction which permitted jurors to determine whether each mitigating circumstance, if factually proven, had mitigating value; (9) the trial court erred in its failure to instruct the jury on the effect of a nonunanimous verdict; (10) the jury instructions for Issues One, Three and Four were unconstitutionally vague; (11) the trial court erred in instructing the jury that it had a "duty" to recommend a sentence of death if it found that the mitigating circumstances were insufficient to outweigh the aggravating circumstances; (12) the sentencing jury failed to consider in mitigation "any other circumstance arising from the evidence that one or more of you deems to have mitigating value"; and (13) the standards set by the Supreme Court of North Carolina for its proportionality review pursuant to N.C.G.S. § 15A-2000(d)(2) are vague and arbitrary.

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

PROPORTIONALITY REVIEW

[29] Having concluded that defendant's trial and capital sentencing proceeding were free of prejudicial error, we must now review the record and determine: (1) whether the evidence supports the aggravating circumstances found by the jury and upon which the sentencing court based its sentence of death; (2) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor; and (3) whether the sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2). After thoroughly reviewing the record, transcript and briefs in the present case, we conclude that the record fully supports the aggravating circumstances found by the jury. Further, we find no indication that the sentence of death in this case was imposed under the influence of passion, prejudice or other arbitrary factor. We therefore turn to our final statutory duty of proportionality review.

In the present case, defendant was found guilty of murder under the theories of both premeditation and deliberation and felony mur-

der. Following a capital sentencing proceeding, the jury found the existence of two aggravating circumstances: (i) the murder was committed while defendant was engaged in the commission of a kidnapping, N.C.G.S. § 15A-2000(e)(5); and (ii) the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6).

The trial court submitted and the jury found one statutory mitigating circumstance: that defendant aided in the apprehension of another capital felon. N.C.G.S. § 15A-2000(f)(8). The trial court also submitted the "catchall" mitigating circumstance, but the jury did not find "[a]ny other circumstance arising from the evidence which the jury deems to have mitigating value." N.C.G.S. § 15A-2000(f)(9). Of the six nonstatutory mitigating circumstances submitted, the jury found four to exist.

One purpose of our proportionality review is to "eliminate the possibility that a sentence of death was imposed by the action of an aberrant jury." *State v. Lee*, 335 N.C. 244, 294, 439 S.E.2d 547, 573, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994). Another is to guard "against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). In conducting proportionality review, we compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). This Court has found the death penalty disproportionate in seven cases: *Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *and State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

We find the instant case distinguishable from each of these cases. The jury convicted defendant of first-degree murder under the theories of both premeditation and deliberation and felony murder. "The finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *sentence vacated on other grounds*, 494 U.S.

1023, 108 L. Ed. 2d 604 (1990). In addition, the jury found both of the aggravating circumstances submitted: that the capital felony was committed for pecuniary gain and that it was committed while defendant was engaged in the felony of kidnapping. This Court has held that there are four aggravating circumstances, any of which, standing alone, is sufficient to support 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). The (e)(5) circumstance, which the jury found here, is among those four.

It is also proper for this Court to "compare this case with the cases in which we have found the death penalty to be proportionate." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although this Court reviews all of the cases in the pool when engaging in our duty of proportionality review, we have repeatedly stated that "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.* It suffices to say here that we conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence of death disproportionate or to those in which juries have consistently returned recommendations of life imprisonment. Finally, this Court has noted that similarity of cases is not the last word on the subject of proportionality. *State v. Daniels*, 337 N.C. 243, 287, 446 S.E.2d 298, 325 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995). Similarity "merely serves as an initial point of inquiry." *Id.* Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

Based on the foregoing and the entire record in this case, we cannot conclude as a matter of law that the sentence of death was excessive or disproportionate. We hold that defendant received a fair trial and capital sentencing proceeding, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. KEVIN DOUGLAS JONES

No. 218A00

(Filed 1 February 2002)

1. Jury— selection—capital trial—death penalty views—challenge for cause—assessment of judge

The trial court did not abuse its discretion in a capital trial for first-degree murder by excluding a prospective juror based upon her responses to death penalty questions where the prospective juror expressed a straightforward, religion-based opposition to the death penalty, gave further equivocal answers about following the law, and continued to state that her religious beliefs would impair her ability to be a fair juror. The judge gave counsel wide latitude during a lengthy questioning period, asked questions himself, assessed the prospective juror's responses for the overall effect, and made a decision based on his firsthand impressions.

2. Jury— selection—capital trial—death penalty views—firm opinions opposing—rehabilitation denied

The trial court did not abuse its discretion in a capital prosecution for first-degree murder when it denied defendant the opportunity to question a juror who was excused for cause. The potential juror's answers to general questions about capital punishment consistently reflected both her opposition to the death penalty and a steadfast recalcitrance towards imposing it, the transcript reveals nothing that indicates any inclination to alter or soften her views, and defendant did not proffer any arguments suggesting that his questions might produce different answers.

3. Criminal Law— instructions—reasonable doubt—more than an academic doubt

There was no plain error in a capital first-degree murder prosecution in the trial court's instruction defining reasonable doubt as not being an "academic" doubt. Defendant's argument has been rejected consistently.

4. Trials— closing arguments—standards

A lawyer's function during closing argument is to provide the jury with a summation of the evidence. The argument should be

limited to relevant legal issues and the standards articulated in N.C.G.S. § 15A-1230(a) are applicable to civil as well as criminal cases. The attorney may not become abusive, express his personal belief as to the truth or falsity of the evidence, express his personal belief as to which party should prevail, or make arguments premised on matters outside the record. Trial judges have a two-fold responsibility as overseers of the courts to diligently ensure that attorneys honor their professional obligations and to take appropriate action against opportunists who purposely venture to violate courtroom protocol. Moreover, bearing in mind the reluctance of counsel to interrupt and object during closing argument for fear of incurring jury disfavor, it is incumbent on the trial court to monitor vigilantly the course of arguments, to intervene as warranted, to entertain objections, and to impose remedies pertaining to those objections, including requiring the attorneys to retract improper arguments and instructing the jury to disregard such arguments.

5. Sentencing— capital—prosecutor's argument—invocation of Columbine and Oklahoma City

The trial court in a capital sentencing proceeding abused its discretion by allowing a closing argument which linked the tragedy of the victim's death to the tragedies of Columbine and Oklahoma City. The argument was improper because it referred to events and circumstances outside the record, urged jurors by implication to compare defendant's acts with the infamous acts of others, and attempted to lead jurors away from the evidence by appealing instead to their sense of passion and prejudice.

6. Sentencing— capital—prosecutor's argument—defendant lower than dirt on a snake

The prosecutor's closing argument in a capital sentencing proceeding was grossly improper and prejudicial where the prosecutor said of defendant, "You got this quitter, this loser, this worthless piece of—who's mean . . . He's as mean as they come. He's lower than the dirt of a snake's belly." The prosecutor's repeated degrading comments about defendant shifted the focus from the jury's opinion of defendant's character and acts to the prosecutor's opinion, offered in the form of conclusory name-calling, and were purposely intended to deflect the jury from its proper role as fact-finder by appealing to passion and prejudice.

7. Sentencing— capital—prosecutor's argument—improper—standards

The trial court abused its discretion by allowing a prosecutor undue latitude in a capital sentencing proceeding. An improper argument that was not prejudicial at the guilt phase may be prejudicial during a capital sentencing proceeding, which by its nature involves evidence of defendant's character. It is appropriate for the closing argument in a capital sentencing proceeding to incorporate reasonable inferences and conclusions about defendant drawn from the evidence presented, but conclusory arguments that are not reasonable or that are premised on matters outside the record (such as the name calling and comparisons to infamous acts in this case) cannot be countenanced. An argument must be devoid of counsel's personal opinion, avoid name calling and references to matters beyond the record, be premised on logical deductions rather than appeals to passion or prejudice, and be constructed from fair inferences drawn only from evidence properly admitted at trial.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Greeson, J., on 21 April 2000 in Superior Court, Forsyth County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 17 April 2001.

Roy Cooper, Attorney General, by David F. Hoke, Assistant Attorney General, and William P. Hart, Special Deputy Attorney General, for the State.

J. Clark Fischer for defendant-appellant.

ORR, Justice.

In a superseding indictment issued on 30 August 1999, defendant was charged with the first-degree murder of Ronald Ray Mabe. He was tried capitally at the 10 April 2000 Criminal Session of Superior Court, Forsyth County. The jury found defendant guilty of first-degree murder on three theories—premeditation and deliberation, felony murder, and lying in wait—and, on 21 April 2000, after a capital sentencing proceeding, recommended a sentence of death. The trial judge entered judgment accordingly, and defendant filed a timely notice of appeal to this Court.

After consideration of the questions presented by defendant and a thorough review of the transcript of the proceedings, the record on appeal, the briefs, and oral arguments, we find: (1) no error meriting reversal of defendant's conviction, and (2) reversible error in defendant's capital sentencing proceeding. As a consequence of so holding, it is unnecessary for us to address at this time defendant's additional contention that his death sentence was disproportionate.

Evidence presented during the guilt portion of the trial tended to show that on the evening of 9 November 1998, defendant went to the home of a friend, Samuel Evans, Jr. Defendant told Evans he had traded his car to Evans' brother for some crack cocaine. The two then proceeded to smoke the drugs in one of Evans' cars, which was parked on the property. After consuming the contraband, defendant apparently became concerned that his grandfather would be upset over the loss of his car and that he needed to get it back. He told Evans that he was going to his uncle's house to see "if [he] could borrow some money or something," and he left. Evans testified that he did not know if the victim, Ronald Mabe, was in fact defendant's uncle, but he knew defendant was referring to Mr. Mabe, who lived nearby.

Lynda Reed lived with defendant's father in Albertville, Alabama, in November of 1998. She testified that defendant arrived at their home on 18 November, and that the two had a conversation about Mr. Mabe. According to Ms. Reed, defendant asked if she knew that Mr. Mabe was dead, and she told him "no." When she asked what had happened to Mr. Mabe, defendant started to cry and said, "It was me. I am the one who killed him." After defendant recounted his involvement with Mr. Evans on 9 November, he told Ms. Reed that he went to Mr. Mabe's home because he knew that Mr. Mabe kept money there. He said he planned "to take what he could" in order "to get money for more crack and to get his car back." He then told Ms. Reed that while he was on the way to Mr. Mabe's home, he picked up a two-by-four he found on the side of the road. Ms. Reed further testified that defendant told her that he proceeded to the Mabe home and that he initially struck the victim with the two-by-four when Mr. Mabe answered the door. After the victim fell and began to scream, defendant said he became frightened that someone might hear the commotion, so he struck Mr. Mabe again. According to Ms. Reed, defendant said he struck Mr. Mabe three times in all, and told her that when the victim was finally rendered helpless, defendant took Mr. Mabe's wallet and a handgun hidden under a bed mattress. Other evidence at trial

showed that defendant returned to the Evans residence shortly after the murder and that defendant and Evans traded the stolen gun for crack cocaine later that same night.

Upon hearing defendant's story, Ms. Reed told defendant's father that defendant could not remain in the house. Defendant and his father left shortly thereafter. Ms. Reed later informed the local police about what defendant had told her.

The victim's wallet was later found in a wooded area not far from his home. Police also seized a bloody two-by-four from behind a neighbor's woodshed. A forensic serologist determined that the bloodstains on the wood were of human blood, and a forensic chemist concluded that at least one of two hairs found on the wood were "microscopically consistent with the head hair of Ronald Mabe." Other expert testimony offered by the State tended to show that the victim died of blunt trauma to the head, and that the victim had sustained a series of blunt-trauma injuries. The injuries were consistent with being struck numerous times by a two-by-four.

On appeal to this Court, defendant brings forth eleven questions for review—three dealing with the guilt-innocence portion of his trial, and eight dealing with his sentencing proceeding, including proportionality review.

Jury Selection and Guilt-Innocence Phase Issues

[1] Defendant first contends that he was prejudiced by the exclusion of a prospective juror based upon her responses to questions about her opposition to the death penalty and her apparent inability to impose such a sentence. In defendant's summary view, the *voir dire* of venire woman Karen Strausser failed to demonstrate she would be unable to meet her obligations as a capital juror and that, as a consequence of such failing, her dismissal from the jury panel was improper. We disagree.

The test for determining when a prospective juror may be excused for cause is whether his or her views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 849 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)). Although the fact that a prospective juror voiced reservations about capital punishment or expressed conscientious or religious scruples against its imposition is not, in itself, a sufficient basis for excusal, *see*

Witherspoon v. Illinois, 391 U.S. 510, 522, 20 L. Ed. 2d 776, 785 (1968), we note that the final decision to excuse a prospective juror is within the discretion of the trial court because " '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,' " *State v. Nobles*, 350 N.C. 483, 495, 515 S.E.2d 885, 893 (1999) (quoting *Wainwright*, 469 U.S. at 425-26, 83 L. Ed. 2d at 852); *see also* N.C.G.S. § 15A-1212(8) (1999) (providing that a challenge for cause may be made on the grounds that a juror would be unable to render a verdict in accordance with the laws of North Carolina). Moreover, in a case in which a prospective juror's responses were "at best equivocal," this Court concluded that it "must defer to the trial court's judgment as to whether the prospective juror could impartially follow the law." *State v. Bowman*, 349 N.C. 459, 471, 509 S.E.2d 428, 436 (1998), *cert. denied*, 527 U.S. 1040, 144 L. Ed. 2d 802 (1999).

The juror in question here, Ms. Strausser, was questioned at length by the attorneys for both parties about both her feelings regarding the death penalty and her ability to render a decision that complied with the law. From the outset, Ms. Strausser expressed a straightforward opposition to capital punishment in general and explained that it was religion-based. Nevertheless, when asked whether she could set aside her sentiments and faithfully apply the law, Ms. Strausser initially told the court that she could "if [she] had to." Further inquiry into the matter by the trial judge, the defense, and the prosecution revealed a number of ambivalent, if not contradictory, responses. At one point, Ms. Strausser said that "if [she] had to choose the death penalty, then, by law, [she'd] have to do it"—ostensibly, a qualifying answer. However, she also expressed her opposition to the death penalty numerous times, explained that she would have problems living with herself if she imposed such a penalty, and stated more than once that her religious beliefs would impair her ability to be a fair juror. Moreover, when asked if she would always vote for life imprisonment, Ms. Strausser nodded affirmatively.

Ultimately, the equivocating nature of her responses, in light of the "totality of what she said," led the trial judge to conclude that Ms. Strausser "would be unable to faithfully and impartially apply the law in this case." Consequently, he allowed the State's challenge for cause. *See State v. Smith*, 352 N.C. 531, 545, 532 S.E.2d 773, 783 (2000) (holding that the question of whether a juror's bias makes him excusable for cause is "the court's decision, in the exercise of

its sound discretion and judgment"), *cert. denied*, —— U.S. ——, 149 L. Ed. 2d 360 (2001). We find nothing in the record suggesting that the trial judge abused the discretion accorded him under the circumstances. Amid a lengthy questioning period, he afforded counsel wide latitude, asked questions himself, assessed the prospective juror's responses for their overall effect, and made a decision based on his firsthand impressions. Thus, absent any evidence of discretionary abuse, "we must defer to the trial court's judgment as to whether the prospective juror could impartially follow the law." *Bowman*, 349 N.C. at 471, 509 S.E.2d at 436. As a result, we conclude that defendant's assignment of error on this issue is without merit.

[2] Defendant next argues that the trial court erred when it denied defendant the opportunity to question a juror who was excused for cause. In sum, defendant concludes that the prospective juror, Vicki Kelley, had not expressed an unequivocal opposition to the death penalty during questioning by the prosecution, and thus she was eligible for rehabilitative questioning by the defense. We disagree with both contentions.

A capital defendant is not entitled to rehabilitate a prospective juror if such juror has "expressed unequivocal opposition to the death penalty in response to questions propounded by the prosecutor and the trial court." *State v. Cummings*, 326 N.C. 298, 307, 389 S.E.2d 66, 71 (1990). Moreover, "[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." *State v. Oliver*, 302 N.C. 28, 40, 274 S.E.2d 183, 191 (1981). Thus, in order to determine whether the trial judge in the case *sub judice* abused his discretion by not permitting defendant an opportunity to question Ms. Kelley before granting the State's challenge for cause, we must decide: (1) if her answers and statements to the State's questions amounted to an expressed unequivocal opposition to the death penalty, and (2) if there was any showing that further questioning by defendant would have produced different answers from the prospective juror.

During questioning by the State, Ms. Kelley stated that she did not think she could fairly and impartially consider the death penalty as punishment. She said that her view was based on her personal beliefs, and that the death penalty seemed contradictory to what she

had learned during twenty-five years of practice as a nurse. And while Ms. Kelley at one point said she "hoped" she could follow the law, she also said she would "probably not" be able to give equal consideration to a death penalty option. Perhaps most telling of all was Ms. Kelley's response to the court's inquiry into the case's proper legal standard. When asked whether her views about the death penalty would prevent or substantially impair the performance of her duties as a juror, Ms. Kelley replied, "Yes. In light of how you worded it, yes." Immediately after that response, the court excused the juror and denied defendant's request to question her.

In our view, the trial court did not exceed its discretionary powers by allowing Ms. Kelley to be excused without further questioning. Her answers to general questions about capital punishment consistently reflected both her opposition to the penalty and a steadfast recalcitrance towards imposing it. Moreover, when asked point blank if her views would prevent or substantially impair the performance of her duties as a juror, her reply was a definitive "yes."

Ms. Kelley's final response, by itself, is not necessarily dispositive in determining her perspective on the issue. However, when viewed in context, as a summary culmination of her previous answers and statements, the reply can hardly be construed as anything but an expression of Ms. Kelley's "unequivocal opposition to the death penalty." *Cummings*, 326 N.C. at 307, 389 S.E.2d at 71. We note, too, that after Ms. Kelley was excused, the defense asked merely for an opportunity to question the juror. Defendant proffered no accompanying argument suggesting that his questions might produce different answers from Ms. Kelley, and our independent review of the transcript reveals nothing that indicates any inclination on her part to alter, or even soften, her views. Thus, in sum, we hold that the prospective juror's statements constituted an expression of unequivocal opposition to the death penalty, and that there was an "absence of a showing that further questioning by defendant would likely have produced different answers." *Oliver*, 302 N.C. at 40, 274 S.E.2d at 191. As a result, we conclude the trial judge did not abuse his discretion by excusing the prospective juror when he did. Defendant's claim to the contrary, therefore, is deemed to be without merit.

[3] In his final argument concerning guilt-phase issues, defendant contends the trial court committed plain error by defining reasonable doubt in a manner that was legally incorrect and that lowered the State's burden of proof. More specifically, defendant takes issue with the trial court's explanation that reasonable doubt is "not a mere pos-

sible [doubt], it's not an academic [doubt], and it's not a forced doubt." In defendant's view, the trial court, by defining reasonable doubt as not an "academic" doubt, impermissibly lowered the prosecution's constitutional burden of proof. We disagree.

In preamble to discussion of defendant's substantive argument, we note defendant failed at trial to object to the instruction as given. The North Carolina Rules of Appellate Procedure set forth the necessary procedure for preserving jury instruction issues for appellate review:

> 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 objections; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C. R. App. P. 10(b)(2).

Thus, as defendant did not object to the instruction at trial, he has failed to properly preserve the issue for review by this Court. *See generally* N.C. R. App. P. 10(b)(1). Defendant also made no constitutional claims at trial regarding the instruction in question and therefore will not be heard on any constitutional grounds here. *See State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 518-19 (1988). As a result of the foregoing, our review of the record is limited to determining whether the giving of the instruction in question amounted to plain error. *See* N.C. R. App. P. 10(c)(4); *State v. Hardy*, 353 N.C. 122, 131, 540 S.E.2d 334, 342 (2000), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 70 U.S.L.W. 3235 (2001). Under a plain error analysis, defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result. *See State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). Moreover, we remain mindful that "when the 'plain error' rule is applied, '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.' " *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378 (1983) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)).

As for defendant's substantive contention, this Court has consistently rejected defendant's argument that the trial court's comparative

reference to "academic" doubt was improper. In fact, this very issue was argued and decided against defendant's position in a case recently heard by this Court. *See State v. Hooks*, 353 N.C. 629, 634-35, 548 S.E.2d 501, 506 (2001) (holding that it was not improper for trial court to define reasonable doubt as not, *inter alia*, an academic doubt); *see also State v. Conner*, 335 N.C. 618, 636-38, 440 S.E.2d 826, 836-37 (1994) (approving an instruction defining reasonable doubt as "not a mere vain, fanciful, academic or forced doubt"); *State v. Adams*, 335 N.C. 401, 420-21, 439 S.E.2d 760, 770 (1994) (approving the trial court's definition of reasonable doubt as one that is "not a mere possible, fanciful or academic doubt"). As a result, we conclude that defendant has failed to demonstrate any error at all, much less error that was so fundamental that, absent such error, the jury probably would have reached a different result. *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468 (holding that "[a] prerequisite to our engaging in a 'plain error' analysis is the determination that the instruction complained of constitutes 'error' at all"), *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986). Accordingly, defendant's contentions regarding the instruction on reasonable doubt are without merit.

Sentencing Issues

I.

[4] In assignments of error concerning his sentencing hearing, defendant argues, *inter alia*, that portions of the State's closing argument were so grossly improper that the trial court committed reversible error by: (1) failing to sustain defendant's objection to the State's comparative references to the Columbine school shooting and the Oklahoma City bombing, and (2) failing to intervene *ex mero motu* when the State disparaged defendant by engaging in name-calling and personal insults. We agree with both contentions, and note from the outset that the issue of improper closing arguments has become a mainstay, if not a troublesome refrain, in cases before this Court. In virtually every capital case, many other criminal cases, and a growing number of civil cases, this issue is being vigorously advocated as grounds for reversible error. Therefore, we take this opportunity to revisit in some detail: (1) the limits of proper closing argument, (2) the professional and ethical responsibility of attorneys making such arguments, (3) the duty of our trial judges to be diligent in overseeing closing arguments, and (4) the possible ramifications for failing to keep such arguments in line with existing law.

A lawyer's function during closing argument is to provide the jury with a summation of the evidence, *Herring v. New York*, 422 U.S. 853, 861-62, 45 L. Ed. 2d 593, 599-600 (1975), which in turn "serves to sharpen and clarify the issues for resolution by the trier of fact," *id.* at 862, 45 L. Ed. 2d at 600, and should be limited to relevant legal issues. *See State v. Allen*, 353 N.C. 504, 508-11, 546 S.E.2d 372, 374-76 (2001). Closing argument is a "reason offered in proof, to induce belief or convince the mind," 2 R.C.L. *Arguments of Counsel* § 1, at 404 (1914), and "[t]he sole object of all [such] argument is the elucidation of the truth," *id.*

In the context of a criminal jury trial, specific guidelines for closing argument have been set out by the General Assembly:

> (a) During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C.G.S. § 15A-1230(a) (1999). While this statutory provision is applicable to jury trials in criminal cases, the standards articulated are likewise applicable in civil cases. In closing arguments to the jury, an attorney may not: (1) become abusive, (2) express his personal belief as to the truth or falsity of the evidence, (3) express his personal belief as to which party should prevail, or (4) make arguments premised on matters outside the record.

If attorneys were to scrupulously comply with these seemingly simple requirements, then the issue of alleging improper arguments on appeal would prove an exception instead of the rule. Regrettably, such has not been the case; in fact, it appears to this Court that some attorneys intentionally "push the envelope" with their jury arguments in the belief that there will be no consequences for doing so. *See, e.g.*, *State v. Call*, 353 N.C. 400, 419, 545 S.E.2d 190, 202-03, *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 70 U.S.L.W. 3360 (2001).

In considering the professional obligation of counsel, we call attention to Rule 12—"Courtroom decorum"—in the General Rules of Practice for the Superior and District Courts, which provides, in pertinent part: "Abusive language or offensive personal references are

prohibited," "[t]he conduct of the lawyers before the court and with other lawyers should be characterized by candor and fairness," and "[c]ounsel are at all times to conduct themselves with dignity and propriety." Gen. R. Pract. Super. and Dist. Ct. 12, paras. 7, 8, 2, 2002 Ann. R. N.C. 10. Further, the Rules of Professional Conduct of the North Carolina State Bar provide in the preamble that "[a] lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." R. Prof. Conduct N.C. St. B. 0.1 preamble, para. 1, 2002 Ann. R. N.C. 560. Professional conduct Rule 3.4(e), meanwhile, provides additional guidance; it requires that a lawyer *shall not*,

> in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, . . . or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.

R. Prof. Conduct N.C. St. B. 3.4(e), 2002 Ann. R. N.C. 630.

We do not imply that every improper argument necessarily constitutes a violation of these rules of professional practice and conduct; rather, we emphasize that attorneys appearing before our courts are expected, *at a minimum*, to conduct themselves in accordance with such rules. In a similar vein, trial judges have a twofold responsibility as overseers of our courts: (1) to diligently ensure that attorneys honor the aforementioned professional obligations, and (2) to take appropriate action against opportunists who purposely venture to violate courtroom protocol. *See, e.g., Couch v. Private Diagnostic Clinic*, 351 N.C. 92, 520 S.E.2d 785 (1999) (remanding case to trial court for hearing to determine sanctions against the offending attorney); *see also Couch v. Private Diagnostic Clinic*, 147 N.C. App. ——, 554 S.E.2d 356 (2001) (upholding trial court sanctions against attorney who violated rules of professional conduct during closing arguments at trial; sanctions included suspension of the attorney's practicing privileges for a year and a $50,000-plus penalty).

In considering specific cases of improper argument, we acknowledge our oft-quoted refrain—"that counsel are given wide latitude in arguments to the jury and are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence." *See, e.g., State v. Richardson*, 342 N.C. 772, 792-

93, 467 S.E.2d 685, 697, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996). However, "wide latitude" has its limits. In *Couch*, the attorney in question "engaged in a grossly improper jury argument that included at least nineteen explicit characterizations of the defense witnesses and opposing counsel as liars." 351 N.C. at 93, 520 S.E.2d at 785. While our divided Court did not grant the defendant-hospital a new trial, the Court unanimously remanded the case to the trial court for the determination of the appropriate sanction, holding that the attorney's conduct violated Rule 12 of the General Rules of Practice for the Superior and District Courts and was not in conformity with the Rules of Professional Conduct. *Id.*

With regard to criminal cases, this Court has on numerous occasions found closing arguments to be outside the bounds of propriety, with varying consequences. For some violations—those in which the defendant failed to object or that lacked a definitive showing of prejudice caused by the improper argument—we have opted to warn or discipline the offending attorney in lieu of awarding a new trial. *See, e.g.*, *State v. Gell*, 351 N.C. 192, 216, 524 S.E.2d 332, 347 (affirming this Court's long-held view that it is improper for prosecutors to make Bible-based arguments to the jury), *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000). However, in cases of clear-cut violations—those couched as appeals to a jury's passions or that otherwise resulted in prejudice to a defendant—this Court has not hesitated to overturn the results of the trial court. *State v. Smith*, 279 N.C. 163, 165-67, 181 S.E.2d 458, 459-60 (1971) (reversing defendant's rape conviction because of the prosecutor's "inflammatory and prejudicial" closing argument, in which the prosecutor described defendant as "lower than the bone belly of a cur dog"); *see also State v. Miller*, 271 N.C. 646, 659-61, 157 S.E.2d 335, 344-47 (1967) (holding that the prosecutor committed reversible error by, *inter alia*, calling defendants "storebreakers" and expressing his opinion that a witness was lying).

As for the effect of a defendant's failure to object to improper remarks, this Court is mindful of the reluctance of counsel to interrupt his adversary and object during the course of closing argument for fear of incurring jury disfavor. Thus, it is incumbent on the trial court to monitor vigilantly the course of such arguments, to intervene as warranted, to entertain objections, and to impose any remedies pertaining to those objections. Such remedies include, but are not necessarily limited to, requiring counsel to retract portions of an argument deemed improper or issuing instructions to the jury to disregard such arguments.

In sum, with regard to the substantive analysis pertaining to the limits of closing argument, we note that Justice Carlisle W. Higgins, while writing for a unanimous Court in *State v. Smith*, 279 N.C. 163, 181 S.E.2d 458, some thirty years ago, articulated precisely what this Court is now reiterating. We quote in its entirety the substantive portion of that opinion:

> The foregoing are the more flagrant of the solicitor's transgressions. Too much of his argument, however, was pitched in the same tone. When the prosecutor becomes abusive, injects his personal views and opinions into the argument before the jury, he violates the rules of fair debate and it becomes the duty of the trial judge to intervene to stop improper argument and to instruct the jury not to consider it. Especially is this true in a capital case. When it is made to appear the trial judge permitted the prosecutor to become abusive, to inject his personal experiences, his views and his opinions into the argument before the jury, it then becomes the duty of the appellate court to review the argument. "In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence." *Berger v. United States*, 295 U.S. 78, 89, 79 L. Ed. 1314[, 1321 (1935)].
>
> In *State v. Miller*, 271 N.C. 646, 157 S.E.2d 335 (also a Mecklenburg County case), Chief Justice Parker for this Court said: "It is especially proper for the court to intervene and exercise power to curb improper arguments of the solicitor when the State is prosecuting one of its citizens, and should not allow the jury to be unfairly prejudiced against him."
>
> Pertinent to the present inquiry is the opinion of Mr. Justice Sutherland in *Berger v. United States*, [295 U.S. at 88, 79 L. Ed. at 1321]:
>
> > The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike

> foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Smith, 279 N.C. at 166-67, 181 S.E.2d at 460 (citations omitted).[1]

II.

[5] The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection. *See, e.g., State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E.2d 110, 122 (1984) (holding that appellate courts will review the exercise of such discretion when counsel's remarks are extreme and calculated to prejudice the jury); *see also State v. Riddle*, 311 N.C. 734, 738, 319 S.E.2d 250, 253 (1984). In order to assess whether a trial court has abused its discretion when deciding a particular matter, this Court must determine if the ruling "could not have been the result of a reasoned decision." *State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996). Thus, the question before us is whether the trial court failed to make a reasoned decision when it overruled defendant's timely objection to the prosecutor's references to the Columbine school shooting and the Oklahoma City bombing.

When applying the abuse of discretion standard to closing arguments, this Court first determines if the remarks were improper. As demonstrated in part I of this opinion, improper remarks include statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence, such as the infamous acts of others. Next, we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court. *See Coble v. Coble*, 79 N.C. 589 (1878) (holding that it is reversible error

1. Joining Justice Higgins in the decision were Chief Justice William H. Bobbitt, Associate Justices (and future Chief Justices) Susie Sharp and Joseph Branch, I. Beverly Lake, J. Frank Huskins, and (former Governor) Dan K. Moore.

if the trial court, upon defendant's objection, fails to prevent opposing counsel from unduly humiliating and degrading defendant); *and Tyson*, 133 N.C. at 698, 45 S.E. at 840 (holding that when counsel grossly abuse their privilege of closing arguments, the "presiding judge should interfere at once, when objection is made at the time, and correct the abuse").

We now must apply the above standard of review to the case at bar. In this assignment of error, defendant ultimately contends that, over his objection, the prosecutor, in his closing argument, improperly and prejudicially referred to the "Columbine [school] shootings" and the "Oklahoma City [federal building] bombing[]" as examples of national tragedies.[2] In our view, such remarks cannot be construed as anything but a thinly veiled attempt to appeal to the jury's emotions by comparing defendant's crime with two of the most heinous violent criminal acts of the recent past. Thus, the argument was improper for at least three reasons: (1) it referred to events and circumstances outside the record; (2) by implication, it urged jurors to compare defendant's acts with the infamous acts of others; and (3) it attempted to lead jurors away from the evidence by appealing instead to their sense of passion and prejudice.

The impact of the statements in question, which conjure up images of disaster and tragedy of epic proportion, is too grave to be easily removed from the jury's consciousness, even if the trial court had attempted to do so with instructions. Moreover, the offensive nature of the remarks exceeds that of other language that has been tied to prejudicial error in the past. *See, e.g., State v. Wyatt*, 254 N.C. 220, 222, 118 S.E.2d 420, 421 (1961) (holding that a prosecutor who

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2. The pertinent portion of the prosecutor's analogy in closing argument reads as follows:

> MS. STANTON: Thank you, judge. The United States of America, a great country, indeed around the world for its freedoms: freedom of speech, freedom of privacy in your own home. But with those freedoms comes individual responsibility that every citizen of this country must realize; that to have these freedoms, one is responsible for their own conduct; one is responsible for their own behavior.
>
> A year ago the Columbine shootings; five years ago Oklahoma City bombings. When this nation faces such tragedy—
>
> MR. FINE: Objection.
>
> THE COURT: Overruled.
>
> MS. STANTON: —the laws of this country come in to bring order to that tragedy, to speak to that tragedy. Here we are addressing a tragedy of a man's life. The tragedy not of this defendant, the tragedy of [the victim] Ronald Ray Mabe. . . .

described defendants as "two of the slickest confidence men" committed reversible error); *State v. Tucker*, 190 N.C. 708, 709, 130 S.E. 720, 720 (1925) (holding that it was prejudicial error for a prosecutor to say that the defendants "look[ed] like . . . (professional) bootleggers"); *State v. Davis*, 45 N.C. App. 113, 114-15, 262 S.E.2d 329, 329-30 (1980) (holding that it was prejudicial for a prosecutor to call the defendant a "mean S.O.B."). As a result, we hold that the trial court abused its discretion when it allowed, over defendant's objection, the prosecutor's closing argument linking the tragedies of Columbine and Oklahoma City with the tragedy of the victim's death in this case.

[6] Defendant also contends that he was prejudiced by the trial court's failure to intervene and stop the prosecutor from infecting closing arguments with improper name-calling and/or personal insults. Again, we must agree.

The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999). In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

In applying the aforementioned standard to the facts of the case at bar, we initially note the following: an examination of the transcript reveals that the prosecutor engaged in name-calling during his closing argument; for example, he said to the jury, "You got this quitter, this loser, this worthless piece of--who's mean. . . . He's as mean as they come. He's lower than the dirt on a snake's belly." As previously noted, in order to constitute reversible error, the prosecutor's remarks must be both improper and prejudicial. Improper remarks are those calculated to lead the jury astray. Such comments include references to matters outside the record and statements of personal opinion. *See* part I, *supra*. Improper remarks may be prejudicial either because of their individual stigma or because of the general tenor of the argument as a whole. Here, the prosecutor's charac-

terizations exceed the boundaries of proper argument by incorporating personal conclusions that ultimately amounted to little more than name-calling. What the prosecutor did not do here was argue the evidence and proper inferences and conclusions that addressed the specific issues submitted as to aggravating and mitigating circumstances. Such tactics risk prejudicing a defendant—and do so here—by improperly leading the jury to base its decision not on the evidence relating to the issues submitted, but on misleading characterizations, crafted by counsel, that are intended to undermine reason in favor of visceral appeal.

Moreover, we note that the prosecutor's comment deriding defendant as "lower than the dirt on a snake's belly" is substantively similar to the prosecutor's comments in *Smith*, 279 N.C. at 165, 181 S.E.2d at 459 (prosecutor, amid numerous improper characterizations in closing argument, referred to the defendant as one who was "lower than the bone belly of a cur dog"). The Court in *Smith* ultimately concluded that the prosecutor's comments were prejudicial error and ordered a new trial. *Id.* at 167, 181 S.E.2d at 460-61. Similarly, in the case at bar, we hold that the prosecutor's repeated degradations of defendant: (1) shifted the focus from the jury's opinion of defendant's character and acts to the prosecutor's opinion, offered as fact in the form of conclusory name-calling, of defendant's character and acts; and (2) were purposely intended to deflect the jury away from its proper role as a fact-finder by appealing to its members' passions and/or prejudices. As a consequence, we deem the disparaging remarks grossly improper and prejudicial.

III.

[7] We should note at this point that in determining prejudice in a capital case, such as the one before us, special attention must be focused on the particular stage of the trial. Improper argument at the guilt-innocence phase, while warranting condemnation and potential sanction by the trial court, may not be prejudicial where the evidence of defendant's guilt is virtually uncontested. However, at the sentencing proceeding, a similar argument may in many instances prove prejudicial by its tendency to influence the jury's decision to recommend life imprisonment or death. We also point out that by its very nature, the sentencing proceeding of a capital case involves evidence specifically geared towards the defendant's character, past behavior, and personal qualities. Therefore, it is certainly appropriate for closing argument at the sentencing hearing to incorporate reasonable inferences and conclusions about the defendant that are drawn from the

evidence presented. However, mere conclusory arguments that are not reasonable—such as name-calling—or that are premised on matters outside the record—such as comparing defendant's crime to infamous acts—do not qualify and thus cannot be countenanced by this or any other court in the state. "If verdicts cannot be carried without appealing to prejudice or resorting to unwanted denunciation, they ought not to be carried at all." *Tucker*, 190 N.C. at 714, 130 S.E. at 723.

Finally, this Court has tried to strike a balance between giving appropriate latitude to attorneys to argue heated cases and the need to enforce the proper boundaries of closing argument and maintain professionalism. The power and effectiveness of a closing argument is a vital part of the adversarial process that forms the basis of our justice system. A well-reasoned, well-articulated closing argument can be a critical part of winning a case. However, such argument, no matter how effective, must: (1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial. Moreover, professional decorum requires that tactics such as name-calling and showmanship must defer to a higher standard. While the melodrama inherent to closing argument might well inspire some attorneys to favor stage theatrics over reasoned persuasion, such preference cannot be countenanced—as either a general proposition or on the facts of the case *sub judice*. As a result, we conclude that the trial court abused its discretion by affording the prosecution undue latitude in its closing arguments at sentencing. Defendant is, therefore, entitled to a new sentencing hearing.

NO ERROR AS TO GUILT-INNOCENCE.

DEATH SENTENCE VACATED; REMANDED FOR NEW CAPITAL SENTENCING PROCEEDING.

STATE OF NORTH CAROLINA v. BILLY RAYMOND ANDERSON

No. 269A00

(Filed 1 February 2002)

1. Jury— selection—capital trial—instructions—personal views

The trial court neither erred nor abused its discretion during jury selection in a first-degree murder prosecution by denying defendant's request for a preselection instruction advising prospective jurors that it was their duty to reflect upon their personal views when deliberating the issue of punishment. Defendant waived review of constitutional challenges by not asserting them at trial, similar instructions have previously been rejected, and the court properly instructed the jury that its duty was to apply the law as given to it by the trial court.

2. Jury— selection—capital trial—prosecutor's questions—duty to vote for death penalty

There was no plain error during jury selection in a first-degree murder prosecution where defendant alleged that the prosecutor was permitted to stake out and indoctrinate prospective jurors by suggesting that they would have a duty to vote for the death penalty and by asking if they would vote to impose the sentence if they were satisfied that it was appropriate.

3. Jury— selection—capital trial—prosecutor's questions—no structural error

There was no structural error in a first-degree murder prosecution from the prosecutor's comments and questions during jury selection. Structural error is a defect affecting the framework in which the trial proceeds rather than simply an error in the trial process. The error asserted here does not fit within that limited class of cases.

4. Constitutional Law— effective assistance of counsel—concession of guilt

A first-degree murder defendant did not have ineffective assistance of counsel where his counsel conceded guilt to some degree of homicide but continued to adhere to the plea of not guilty.

5. Criminal Law— concession of guilt—mentally retarded defendant—inquiry by court

The trial court in a capital first-degree murder prosecution did not fail to conduct an adequate inquiry into defendant's consent to the defense tactic of admitting guilt to some degree of homicide. Defendant was articulate and coherent when questioned by the trial court and there was nothing to suggest that he had been coerced or cajoled into giving his approval. The trial court's inquiry of defendant was sufficient, in light of defendant's mental limitations, to determine whether he knowingly, voluntarily, and intelligently consented to the defense tactic.

6. Jury— selection—capital trial—"strike and replace" method

The trial court did not err in a first-degree murder prosecution by employing the "strike and replace" method of jury selection as mandated by N.C.G.S. § 15A-1214. It is within the province of the legislature to prescribe the method by which jurors are selected, challenged, impaneled, and seated.

7. Jury— selection—capital trial—individual voir dire denied

There was no abuse of discretion in a capital prosecution for first-degree murder where the trial court denied defendant's pretrial motion for individual voir dire and sequestration and defendant did not renew his request after the responses which he contends tainted the venire. Moreover, a similar argument was rejected in a prior case.

8. Sentencing— capital—motion for appropriate relief—mental retardation

A first-degree murder defendant's motion in the Supreme Court seeking relief from his death sentence on the ground that he is mentally retarded was remanded to superior court where the materials before the Supreme Court were not sufficient to determine the motion. N.C.G.S. § 15A-2006.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Haigwood, J., on 26 October 1999 in Superior Court, Craven County, upon a jury verdict finding defendant guilty of first-degree murder. On 19 October 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 11 September 2001.

Roy Cooper, Attorney General, by Barry S. McNeill, Special Deputy Attorney General, and Diane A. Reeves, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Janet Moore, Assistant Appellate Defender, for defendant-appellant.

Smith Helms Mulliss & Moore, LLP, by Neil A. Riemann, on behalf of the American Civil Liberties Union of North Carolina Legal Foundation, the Arc of the United States, the Arc of North Carolina, and the North Carolina Chapter of the American Association on Mental Retardation, amici curiae.

BUTTERFIELD, Justice.

Defendant Billy Raymond Anderson was indicted on 21 July 1998 for the first-degree murder and first-degree rape of Lorraine Watson. Defendant was tried capitally, and the jury returned a verdict of guilty of first-degree murder upon the theories of malice, premeditation, and deliberation and felony murder. The jury also found defendant guilty of first-degree rape. Following a capital sentencing proceeding, the jury recommended that defendant be sentenced to death for the murder conviction, and the trial court sentenced him accordingly. The trial court also sentenced defendant to a consecutive term of 384 to 470 months' imprisonment for the rape conviction. Defendant appeals to this Court as of right from the sentence of death, and on 19 October 2000, this Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of the rape conviction. Thereafter, on 29 August 2001, defendant filed with this Court a motion for appropriate relief from his death sentence on the grounds that he is mentally retarded, as defined in N.C.G.S. § 15A-2005. For the reasons that follow, we hold that defendant received a fair trial, free of prejudicial error. However, we remand this matter to the trial court for a determination of defendant's motion for appropriate relief.

At trial, the State presented evidence tending to show that defendant and the victim were engaged to be married and that, on the morning of 7 July 1998, the victim informed defendant that she wanted to break off the engagement. She also told defendant, who had been living in a mobile home on her parents' property, that she wanted him to move back to Fayetteville with his family. Later that evening, while the couple was cleaning the Vanceboro Medical Center, their part-time job, defendant pleaded with the victim not to terminate their relationship. The victim, nevertheless, remained

adamant about the breakup. Infuriated, defendant pulled out a knife and commanded the victim to have sex with him. Shortly after penetrating the victim, defendant interrupted the sex act. When the victim attempted to flee, defendant attacked her with the knife, cutting her numerous times. He then grabbed an electrical cord from medical equipment that was mounted to the wall and tied the cord around the victim's neck. He also wrapped electrical cords around her left arm and leg.

The following morning, an employee of the medical center discovered the victim lying on the floor of one of the examination rooms. The victim was unclothed, and the cord around her neck suspended her head off the floor. During an autopsy of the victim's body, the medical examiner noted at least seventy-five knife wounds. He concluded that none of these wounds were fatal and that the victim died by asphyxiation. On 9 July 1998, defendant turned himself in to the police and gave a statement confessing to the murder.

PRETRIAL AND JURY SELECTION

[1] Defendant first argues that the trial court erred in denying his request for a preselection instruction advising prospective jurors that it was their duty to reflect upon their personal views when deliberating the issue of punishment. In pertinent part, the requested instruction reads as follows:

> It is acceptable for jurors to possess varying views about the circumstances under which they may feel that the punishment of death should be imposed. When determining those matters in the course of deliberations which call for jurors to make subjective judgments, *you are expected, indeed required, to bring your personal views into play.* In this manner jurors as a group operate to express the conscience of the community on the ultimate question of life or death.

(Emphasis added.) Defendant claims that the court's failure to give the requested instruction violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as Article I, Sections 19, 23, and 24 of the North Carolina Constitution. Defendant contends that the instruction was in accordance with federal constitutional law, which requires jurors in a capital case to provide a "reasoned moral response" to the evidence presented. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 319, 106 L. Ed. 2d 256, 279 (1989). Further, defendant contends that jurors in

North Carolina mistakenly believe that the law prefers the death penalty to life imprisonment and that death is the only legitimate punishment for murder. Therefore, defendant argues, it was incumbent upon the trial court to instruct prospective jurors as requested in order to alleviate their confusion. We find defendant's arguments unpersuasive.

At the outset, we note that defendant did not assert at trial any constitutional basis in support of his request for the instruction. Thus, he has waived appellate review of his constitutional challenges to the court's ruling. *See* N.C. R. App. P. 10(b)(1); *State v. Hyde*, 352 N.C. 37, 43, 530 S.E.2d 281, 290 (2000), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001). The only question properly before us, then, is whether the trial court abused its discretion in declining to instruct the jury per defendant's request. We conclude that it did not.

The trial court is responsible for overseeing the *voir dire* of prospective jurors and for resolving all issues concerning their fitness to serve. *State v. Black*, 328 N.C. 191, 196, 400 S.E.2d 398, 401 (1991). To that end, "[t]he trial court has broad discretion to see that a competent, fair, and impartial jury is impaneled, and its rulings in that regard will not be reversed absent a showing of an abuse of its discretion." *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).

In *State v. Meyer*, 353 N.C. 92, 540 S.E.2d 1 (2000), *cert. denied*, —— U.S. ——, 151 L. Ed. 2d 54 (2001), this Court considered and rejected a similar instruction concerning the role of an individual juror's personal views in the deliberation process. In that case, the defendant asked the trial court to instruct prospective jurors, in pertinent part, as follows:

> "If the jury unanimously finds the existence of an aggravating circumstance, it will be your duty to consider both Life Imprisonment and the Death Penalty, *regardless of your personal views concerning capital punishment. However, you should know that it is acceptable for jurors to have different views about what circumstances call for the death penalty, and to use their personal views in deciding whether the mitigating circumstances outweigh the aggravating circumstances or when deciding whether the aggravating circumstances, when considered with any mitigating circumstances, are sufficiently substantial to call for the death penalty.*"

Id. at 103, 540 S.E.2d at 7-8 (emphasis in original). During the charge conference at the conclusion of the sentencing proceeding, the defendant requested the following similar instruction:

> "Each of you has expressed varying views about the circumstances under which you might feel that the punishment of death should be imposed. You were selected to serve on this jury because of and not in spite of those differences. When determining those matters in the course of your deliberations which call for you to make subjective judgments, you are expected, indeed required, to bring your personal views into play."

Id. at 104, 540 S.E.2d at 8. The trial court declined both requests. In holding that the trial court ruled appropriately, this Court reasoned that the requested instructions misrepresented the applicable law and would have "confuse[d] jurors regarding their duties in a capital case by inviting personal views to trump the rule of law." *Id.* at 105, 540 S.E.2d at 9. The same reasoning applies here, inasmuch as the language of defendant's requested instruction is indistinguishable from that deemed erroneous in *Meyer*. Furthermore, the trial court in the present case properly instructed the jury that its duty was to apply the law as given to it by the trial court, which accurately conveyed to the jury its role in determining defendant's sentence. Accordingly, we hold that the trial court neither erred nor abused its discretion by refusing to give the requested instruction.

[2] Further, defendant contends that, in violation of his rights under the federal and state Constitutions, the trial court permitted the prosecutor to indoctrinate prospective jurors by suggesting that they would have a duty to vote to impose the death penalty. The following fairly represents the tenor of the remarks to which defendant takes exception:

> This is the real thing. Not television, not a movie, this is a real jury. We have got a real victim, Lorraine Watson was murdered as [sic] the defendant that sits here in this courtroom, and we believe based on this evidence and this law, that death is going to be the appropriate sentence in this case.
>
> . . . .
>
> So, I cannot overemphasize to any of you jurors that this is not just an exercise. That if you say I can sit on this jury, that we believe that you will believe that it's your duty at the end of this trial to vote to impose the death sentence.

Defendant also contends that the prosecutor attempted to "stake-out" prospective jurors as to their sentence recommendation by asking questions of the following type: "And if you were satisfied in this case that based on the facts, the law and instructions that death was the appropriate sentence in this case, would you vote to impose the sentence, sir?" Defendant concedes that he did not object to any of the prosecutor's statements or questions at trial; therefore, he now seeks to rely on the doctrines of "plain error" and "structural error."

Generally, a purported error, even one of constitutional magnitude, that is not raised and ruled upon in the trial court is waived and will not be considered on appeal. *State v. Smith*, 352 N.C. 531, 557-58, 532 S.E.2d 773, 790 (2000), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360 (2001); *see also State v. Nobles*, 350 N.C. 483, 498, 515 S.E.2d 885, 895 (1999) ("the rule is that when defendant fails to object during trial, he has waived his right to complain further on appeal"). Rule 10(c)(4) of our Rules of Appellate Procedure provides that an alleged error not otherwise properly preserved may, nevertheless, be reviewed if the defendant "specifically and distinctly contend[s]" that it amounted to plain error. This Court has recognized that "[t]he plain error rule applies only in truly exceptional cases," *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986), and that a defendant relying on the rule bears the heavy "burden of showing . . . (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial," *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997). Examining the prosecutor's statements in the context of the entire record, we conclude that defendant has failed to make such a showing. Moreover, this Court has previously limited application of the plain error doctrine to jury instructions and evidentiary matters. *See, e.g., State v. Atkins*, 349 N.C. 62, 505 S.E.2d 97 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). Thus, defendant's plain error argument fails.

[3] Defendant's argument that the prosecutor's allegedly improper comments and questions constituted "structural error" is equally unavailing. As the United States Supreme Court explained in *Arizona v. Fulminante*, 499 U.S. 279, 310, 113 L. Ed. 2d 302, 331 (1991), "structural error" is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Additionally, the Supreme Court has found structural error to exist in very few cases. *See, e.g., Sullivan v. Louisiana*, 508 U.S. 275, 124 L. Ed. 2d 182 (1993) (erroneous instruction to jury on reasonable

doubt); *Vasquez v. Hillery*, 474 U.S. 254, 88 L. Ed. 2d 598 (1986) (unlawful exclusion of jurors of defendant's race); *Waller v. Georgia*, 467 U.S. 39, 81 L. Ed. 2d 31 (1984) (deprivation of right to public trial); *McKaskle v. Wiggins*, 465 U.S. 168, 79 L. Ed. 2d 122 (1984) (deprivation of right to self-representation at trial); *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963) (total deprivation of the right to counsel); *Tumey v. Ohio*, 273 U.S. 510, 71 L. Ed. 749 (1927) (absence of impartial trial judge). The error asserted here does not fit within this limited class of cases. Therefore, this argument too must fail.

[4] Next, we consider defendant's contention that the trial court erred by allowing defense counsel to concede defendant's guilt to some degree of homicide. During jury *voir dire* and as part of the defense strategy, counsel for defendant acknowledged defendant's responsibility for cutting the victim multiple times and strangling her to death. Defendant contends that this strategy denied him the right to effective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution.

In *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985), this Court espoused the following two-part test for resolving ineffective assistance of counsel claims:

> "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 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 562, 324 S.E.2d at 248 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)) (alteration in original). Here, defendant acknowledges that counsel repeatedly advised the prospective jurors that the defense's factual admissions did not constitute a declaration of defendant's guilt of first-degree murder. Defendant contends, however, that counsel was ineffective for failing to further explain that the admissions similarly were not intended to concede defendant's guilt of first-degree rape or first-degree murder under the theories of felony murder or murder by torture. Defendant argues that without the additional explanation, the jurors were left

with the impression that defendant was admitting his guilt to these crimes.

We do not believe that defense counsel's failure to expressly deny defendant's guilt of the offenses charged under all viable theories was error, much less error " 'so serious as to deprive the defendant of a fair trial.' " *See id.* (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693). Notwithstanding the defense's factual admissions, defendant continued to adhere to his plea of not guilty, which necessarily denied the truth of all material facts tending to establish his guilt. The admission that defendant cut and strangled the victim did not negate his plea, nor did it "relieve the State of the burden of proving its entire case beyond a reasonable doubt as long as defendant stood on his plea of not guilty." *State v. Cutshall*, 278 N.C. 334, 347, 180 S.E.2d 745, 753 (1971). Therefore, defendant's claim that his counsel provided him ineffective assistance is unpersuasive.

[5] Additionally, defendant argues that the trial court failed to conduct an adequate inquiry into whether he knowingly, voluntarily, and intelligently consented to the defense tactic, given his mental retardation and mental illness. After a careful review of the record, we cannot agree.

The record shows that prior to allowing defense counsel to proceed with the admissions, the trial court asked him whether he had discussed the strategy with defendant and whether defendant understood the nature and consequences of the admissions. In response, defense counsel, Mr. Mills, assured the trial court, "Mr. Anderson understands that by admitting that, . . . that he admits that he committed a crime. He does not admit that he committed first-degree murder." The trial court then went on to question defendant about his understanding of the proposed strategy:

> [THE COURT:] Tell me sir, is this something, do you understand what Mr. Mills has said to the Court?
>
> A. Yes, your Honor, I, I fully understand what Mr. Mills and Mr. Jerry Redfern [co-counsel for defendant] are saying.
>
> Q. Tell me how far have you gone [in] school?
>
> A. Twelfth grade.
>
> Q. Do you read and write?

A. Yes, sir.

Q. Do you understand the English language?

A. Well, I am a slow learner, but I can learn.

Q. Graduated from high school?

A. Yes, sir, twelfth.

Q. Do you have any questions about . . . what Mr. Mills proposes to do?

A. Yes, sir, I got one question but—

The trial court then directed defense counsel to leave the courtroom with defendant to confer with him regarding his question. Upon their return to the courtroom, the trial court resumed his questioning of defendant:

Q. Mr. Anderson, have you had an opportunity during that period of time to talk with your attorneys about the question that you had?

A. Yes, sir.

Q. Do you have any question of the Court at this time?

A. No, sir.

Q. Then, based upon what Mr. Mills has described that he proposes to do, is this something that you agree with, sir?

A. Yes, sir.

. . . .

Q. . . . Is this something that you want him to do as a part of his representation of you? That is, do you want him to say the things that he has describ[ed] he proposes to say to the jury?

A. Yes, sir.

. . . .

Q. You talked about it prior to today with him?

A. Yes, sir. We had talked about it again. I mean, many times we talked about it.

Q. Many, many times?

A. And even Mr. Redfern talked about it.

. . . .

Q. Mr. Anderson, specifically, Mr. Anderson, I have heard your attorney say that . . . he proposes to acknowledge to the jury that you in fact stabbed the victim in this case numerous times and strangled her to death.

A. Yes, sir. I fully understand Mr. Mills and Mr. Jerry Redfern. I fully understand that.

. . . .

Q. And you agree with that . . . and are directing them and authorizing them to acknowledge that you, for them to say to the jury that you stabbed the victim numerous times and strangled her to death?

A. Yes, sir. I fully understand that.

Q. And you agree . . . with it, and authorize them to say that?

A. Yes, sir.

We are satisfied that the trial court conducted a thorough inquiry, sufficient to determine whether—in light of defendant's mental limitations—he knowingly, voluntarily, and intelligently consented to the defense tactic. When questioned by the trial court about the matter, defendant was both articulate and coherent. Moreover, there is nothing in the record to suggest that defendant had been coerced or cajoled into giving his approval. Hence, we discern no error in the trial court's decision allowing defense counsel to admit defendant's guilt to some degree of homicide. Defendant's argument, then, is without merit.

[6] Defendant further argues that the trial court committed reversible error by employing the method of jury selection mandated by N.C.G.S. § 15A-1214. Under the statute, the State has the first opportunity to question prospective jurors and exercise its challenges. N.C.G.S. § 15A-1214(d) (1999). As a juror is excused, either for cause or by peremptory challenge, the clerk calls a replacement into the box until the State is satisfied with a panel of twelve jurors. *Id.* Thereupon, the State passes the twelve to the defendant, who then questions the jurors tendered to him and exercises his challenges. N.C.G.S. § 15A-1214(e). Once the defendant indicates his satisfaction with the remaining jurors, the clerk calls replacements for those

excused. *Id.* The State then examines and exercises its challenges only as to the replacement jurors until the box contains twelve jurors satisfactory to the State. N.C.G.S. § 15A-1214(f). The State passes the replacement jurors to the defendant to be examined and challenged, and the process is repeated until both parties have accepted twelve jurors. *Id.*

Prior to trial, defendant objected to the statutory procedure, sometimes referred to as the "strike and replace" method, on the grounds that it violated his rights to due process and equal protection. Defendant claimed that the method gave the State an unfair advantage over him by allowing it a larger pool from which to select favorable jurors and by affording it a better opportunity to compare replacement jurors with remaining jurors. Defendant, therefore, moved for an alternate selection method whereby replacement jurors would be called and examined during defendant's *voir dire* until the defense was satisfied with the twelve jurors remaining in the box. The trial court denied defendant's motion and, in doing so, ruled correctly.

It is within the province of the legislature to prescribe the method by which jurors are selected, challenged, impaneled, and seated. We believe that in enacting N.C.G.S. § 15A-1214, the legislature intended to provide uniformity in the selection of jurors in criminal cases. The trial court followed the statutory procedure and, therefore, committed no error. Moreover, we discourage and disapprove of the use of methods that violate the mandate of N.C.G.S. § 15A-1214. Thus, we reject defendant's argument.

[7] Defendant also challenges as error the trial court's refusal to direct that prospective jurors be questioned separately. "In capital cases the trial judge for good cause shown may direct that jurors be selected one at a time, in which case each juror must first be passed by the State. These jurors may be sequestered before and after selection." N.C.G.S. § 15A-1214(j). This Court has stated that "[N.C.G.S. § 15A-1214(j)] gives neither party an absolute right to such a procedure." *State v. Murphy*, 321 N.C. 738, 740, 365 S.E.2d 615, 617 (1988). Instead, whether to allow individual *voir dire* and sequestration of prospective jurors is a decision squarely within the discretion of the trial court and will not be overruled on appeal unless the party challenging the ruling establishes an abuse of that discretion. *Hyde*, 352 N.C. at 46, 530 S.E.2d at 288. The challenging party must show that the trial court's ruling, when made, " 'was so arbitrary that it

could not have been the result of a reasoned decision.' " *Id.* (quoting *State v. Barts*, 316 N.C. 666, 679, 343 S.E.2d 828, 837 (1986)).

In the instant case, defendant filed a pretrial motion for individual *voir dire* and sequestration of prospective jurors. As grounds for the motion, defendant cited concerns that prospective jurors would become contaminated by the responses of those who had been exposed to the "[e]motionally charged and prejudicial publicity" surrounding the case. Additionally, defendant claimed that collective *voir dire* would preclude jurors from responding candidly and honestly to sensitive and potentially embarrassing questions about their views on capital punishment. The trial court denied defendant's motion. Defendant renewed his motion shortly after the venire was assembled, and it too was denied.

Defendant argues that because the record demonstrates prejudice in the jury selection process, the trial court's ruling was reversible error. Specifically, defendant contends that the venire was tainted when one juror expressed an opinion about defendant's guilt, another "broke down" and wept upon recalling her experience as a rape victim, and yet another made statements tending to discredit psychological experts. Notably, however, defendant did not renew his request for individual *voir dire* at any time after these responses were given. Therefore, review of this issue is waived. In any event, this Court rejected a similar argument in *Hyde*, stating,

> Taken to its logical conclusion, defendant's argument would require individual *voir dire* in every capital case to avoid the potential of a prospective juror saying something unexpected. We conclude that defendant has failed to demonstrate any prejudice in the manner in which the jury was selected and how the trial court abused its discretion in denying defendant's motion.

Id. at 50, 530 S.E.2d at 290-91. As in *Hyde*, we hold that the trial court committed no abuse of discretion by denying defendant's request. We, therefore, overrule defendant's argument.

ADDITIONAL ISSUES

Defendant raises two additional issues pertinent to guilt-innocence that he concedes this Court has previously decided contrary to his position: (1) that the trial court committed constitutional error in denying defendant's motion to dismiss the short-form murder indictment for first-degree murder and (2) that the trial court committed reversible error in excusing nine prospective jurors for cause

because of their inability to return a sentence of death. Defendant raises these issues for purposes of inviting this Court to reconsider its prior holdings and for purposes of preserving these issues in the event of further review. Having considered defendant's arguments on these issues, we find no compelling reason to depart from our prior holdings. Therefore, these arguments are overruled.

DEFENDANT'S MOTION FOR APPROPRIATE RELIEF

[8] Recently, the General Assembly amended our capital punishment statutes to include legislation, effective 1 October 2001, that exempts mentally retarded defendants from receiving the death penalty. Act of Aug. 4, 2001, ch. 346, sec. 1, 2001 N.C. Sess. Laws 45, 45 (adopting N.C.G.S. § 15A-2005). In addition, this legislation makes available post-conviction relief to mentally retarded defendants who have already been sentenced to death. Ch. 346, sec. 3, 2001 N.C. Sess. Laws at 46-47 (adopting N.C.G.S. § 15A-2006). Specifically, N.C.G.S. § 15A-2006 provides as follows:

> In cases in which the defendant has been convicted of first-degree murder, sentenced to death, and is in custody awaiting imposition of the death penalty, the following procedures apply:
>
> (1) Notwithstanding any other provision or time limitation contained in Article 89 of Chapter 15A, a defendant may seek appropriate relief from the defendant's death sentence upon the ground that the defendant was mentally retarded, as defined in G.S. 15A-2005(a), at the time of the commission of the capital crime.
>
> (2) A motion seeking appropriate relief from a death sentence on the ground that the defendant is mentally retarded[] shall be filed:
>
> a. On or before January 31, 2002, if the defendant's conviction and sentence of death were entered prior to October 1, 2001.
>
> b. Within 120 days of the imposition of a sentence of death, if the defendant's trial was in progress on October 1, 2001. For purposes of this section, a trial is considered to be in progress if the process of jury selection has begun.
>
> (3) The motion, seeking relief from a death sentence upon the ground that the defendant was mentally retarded,

shall comply with the provisions of G.S. 15A-1420. The procedures and hearing on the motion shall follow and comply with G.S. 15A-1420.

Pursuant to this new legislation, defendant has filed with this Court a motion for appropriate relief from his death sentence. The materials before this Court are insufficient to enable us to rule on defendant's motion. Therefore, we remand this matter to the superior court for a determination of defendant's motion for appropriate relief. Given our ruling in this regard, we do not reach defendant's arguments pertaining to the sentencing proceeding.

For the reasons stated in the opinion, we find no error at the guilt-innocence phase of defendant's trial; however, we remand for a hearing on defendant's motion for appropriate relief.

NO ERROR IN GUILT-INNOCENCE PHASE; CASE REMANDED FOR A HEARING ON DEFENDANT'S MOTION FOR APPROPRIATE RELIEF.

STATE OF NORTH CAROLINA v. MICHAEL EUGENE REED, II

No. 232PA01

(Filed 1 February 2002)

Jury— selection—challenge for cause—financial concerns about potential impact of jury service

The trial court did not err in a first-degree murder case by failing to allow defendant's challenge for cause under N.C.G.S. § 15A-1212(9) of a prospective juror who expressed financial concerns about the potential impact of jury service even though defense counsel alleges it showed the prospective juror could not render a fair and impartial decision, because: (1) although the juror stated the length of the trial might interfere with his ability to decide or possibly be a fair juror, an examination of his answers throughout the entire voir dire reveals there is no indication that he would not or might not be able to follow the law as given to him by the trial court; (2) the prospective juror repeatedly stated during both the State's and defendant's voir dire that

he could follow the law; and (3) the prospective juror stated during both the State's and defendant's voir dire that he had no outside distractions, that he could be fair to both sides, and that he could listen to all the evidence fairly.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 143 N.C. App. 155, 545 S.E.2d 249 (2001), ordering a new trial on judgments entered 30 March 1999 by Hyatt, J., in Superior Court, Catawba County. Heard in the Supreme Court 15 November 2001.

Roy Cooper, Attorney General, by Buren R. Shields, III, Assistant Attorney General, for the State-appellant.

Mark L. Killian for defendant-appellee.

LAKE, Chief Justice.

Defendant, Michael Eugene Reed, II, was indicted on 7 July 1997 for two counts of first-degree murder and was tried capitally before a jury at the 1 March 1999 Criminal Session of Superior Court, Catawba County. The jury found defendant guilty of one count of first-degree murder by lying in wait and one count of first-degree murder on the basis of malice, premeditation and deliberation. After a capital sentencing proceeding, the jury recommended life imprisonment on both counts. The trial court sentenced defendant to two consecutive terms of life imprisonment without parole. Defendant appealed to the Court of Appeals as of right. On 17 April 2001, a unanimous panel of the Court of Appeals concluded the trial court's failure to allow defendant's challenge for cause to a prospective juror was prejudicial error and ordered a new trial. On 3 May 2001, the State filed with this Court a petition for discretionary review, which the Court granted on 7 June 2001. The sole issue allowed for review by this Court is whether the trial court erred in refusing to allow defendant's challenge for cause to a prospective juror.

A review of the record reflects that following the trial court's initial questioning of all prospective jurors and the State's *voir dire*, the defense attorney began *voir dire* of the twelve prospective jurors passed by the State to the defense. At the start of questions to prospective juror Michael, the defense attorney asked, "[A]re there any particular concerns about any of the questions or statements that have been made here?" The following colloquy ensued:

A. Only on the time period that would be a possible problem for me.

Q. Four to five weeks long trial.

A. Yes.

Q. What concerns you about that?

A. Well, financial obligations for my house payment and stuff and bills. I would not be able to pay them if I am here for that period of time. That would be really on my mind a lot of the time.

Q. Do you think that would be in your thoughts to the point that it would be hard for you to pay attention to the testimony at times in the case?

A. Yes, to a certain degree for the sooner I get done the sooner [I'm] able to get back to work and pay my bills and [meet] my obligations.

Q. Do you think then that might be a factor in your listening to the evidence and deciding the case and deciding the circumstances?

A. It may because like I said, sooner we get finished, the sooner I would be back to my regular schedule and my financial matters.

Q. You are saying it might become hard for you to pay attention and listen to the evidence for you might become impatien[t] and that might interfere with you[r] ability to be a fair [juror]?

A. I might not take my time in the whole proceeding. I think it would interfere with that, yes.

Q. Do you think it might . . . cause you to come to some quick decision knowing the sooner you do that, the sooner you can leave and go back to work?

A. Actually, you know, sooner [I get] done the sooner I get out. It may pose a problem for me.

Q. Do you think it [would] impair your ability to listen to the evidence in the case [fairly]?

A. Yes, I do.

Q. You do?

A. Yes.

At this point, defense counsel asked the trial court to excuse prospective juror Michael for cause. The trial court denied defendant's motion. After the trial court's ruling, defense counsel continued to question this prospective juror. When questioning Michael about his views on the death penalty, defense counsel asked, "[Do] you think that you can listen to all of the evidence fairly?" Michael responded, "Yes. I don't see anything that would interfere with me doing that in this case." Later, during defense counsel's questioning of prospective juror Michael, counsel returned to the subject of Michael's concern with his financial situation, with the following exchange:

> Q. Let me talk about your concern about your financial concern and situation. If you [sit] here for the amount of time and we get to the end of the trial and you were called upon to make the decision, and you have said you don't care what the opinion is of the other jurors, if you were the only one that [was] of the opinion you held and the case could not be over unless you changed your mind, would you then change due [to] the pressure of the financial situation you may have?
>
> A. That puts me in a bad spot. You know what I'm saying. That would really have weight on my mind and I really could not tell you what I would do until I was put in that situation. That is what is hard for me.
>
> Q. Well, what you are telling me, do you think that it might or would have some effect?
>
> A. Yes sir . . . madam.
>
> Q. And on your ability to serve?
>
> A. Most definitely, yes.
>
> Q. On your ability to render a decision in accordance with your own beliefs?
>
> A. Right, because like I said, I will not be out there doing my job and I will be on the street and walking because I just cannot pay my bills.
>
> Q. Exactly.
>
> A. I . . . that would make a difference to me really, you know.

Q. We are looking for jurors in this case that can make the decision, the biggest decision any juror can ever be called upon to make.

A. [That's a lot] to think about.

Q. And that is one of your concerns, having that weigh on your mind and when you are trying to make that decision?

A. Yes.

Q. You feel that would [affect] you?

A. I would not want my problems to override my decision.

Q. And you think that it could do that if you were forced to be here that long?

A. It may. It would probably do so.

Q. Okay.

At this point, defense counsel renewed her challenge for cause of prospective juror Michael. The trial court denied defendant's second challenge. Defendant then employed a peremptory challenge to excuse Michael. After exhausting his peremptory challenges, defendant again renewed the previous challenge for cause of prospective juror Michael. The trial court denied defendant's motion. Defendant requested additional peremptory challenges; and, the trial court also denied this motion.

On appeal, after correctly determining defendant preserved the issue for appeal, the Court of Appeals concluded the trial court's failure to allow defendant's challenge for cause to prospective juror Michael was prejudicial error and ordered a new trial. Specifically, the Court of Appeals found that Michael's answers regarding his financial concerns indicated he could not render a fair and impartial decision and that defendant's challenge for cause should have been allowed pursuant to the catchall provision of N.C.G.S. § 15A-1212, which states in part that "[a] challenge for cause to an individual juror may be made . . . on the ground that the juror . . . [f]or any other cause is unable to render a fair and impartial verdict." N.C.G.S. § 15A-1212(9) (1999). The Court of Appeals also determined the trial court deprived defendant of his right to exercise a peremptory challenge because defendant used a peremptory challenge to excuse prospective juror Michael, exhausted his peremptory challenges and informed the trial court he would have peremptorily challenged a different juror if he had not exhausted his challenges.

The State contends that based on the totality of the *voir dire*, the trial court's denial of defendant's challenge for cause, because of prospective juror Michael's concern about the potential financial impact of jury service, was not an abuse of discretion. The State further contends the Court of Appeals improperly substituted its judgment for that of the trial court and did not correctly apply the abuse of discretion standard. We agree.

The determination of whether excusal for cause is required for a prospective juror is vested in the trial court, N.C.G.S. § 15A-1211(b) (1999), and the standard of review of such determination is abuse of discretion. Such rulings by a trial court will not be overturned on appeal, unless an "abuse of discretion" is established. *State v. Fair*, 354 N.C. 131, 144, 557 S.E.2d 500, 512 (2001) (citing *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)). An "abuse of discretion" occurs where the trial judge's determination is " 'manifestly unsupported by reason' " and is " 'so arbitrary that it could not have been the result of a reasoned decision.' " *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 832 (1985)). With regard to a challenge for cause and the trial court's ruling thereon, "the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record." *Wainwright v. Witt*, 469 U.S. 412, 434, 83 L. Ed. 2d 841, 858 (1985).

The trial court holds a distinct advantage over appellate courts in determining whether to allow a challenge for cause. In *Wainwright*, the United States Supreme Court stated:

> " 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' *Boyd v. Boyd*, 252 N.Y. 422, 429, 169 N.E. 632, 634 [(1930)]."

Wainwright v. Witt, 469 U.S. at 434, 83 L. Ed. 2d at 858 (quoting *Marshall v. Lonberger*, 459 U.S. 422, 434, 74 L. Ed. 2d 646, 659 (1983)).

The standard for determining whether a prospective juror must be excluded for cause is whether the prospective juror's concern

"would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Id.* at 424, 83 L. Ed. 2d at 851-52 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)), *quoted in State v. Mitchell*, 353 N.C. 309, 314, 543 S.E.2d 830, 834, *cert. denied*, — U.S. —, 151 L. Ed. 2d 389 (2001). Whether this standard has been satisfied is also "within the trial court's broad discretion." *Mitchell*, 353 N.C. at 314, 543 S.E.2d at 834. The standard does not require "clarity in the printed record," but rather, with regard to the proper basis for excusal, rests on whether a 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.

On appeal, "[r]eviewing courts are required to pay deference to the trial court's judgment concerning the juror's ability to follow the law impartially." *State v. Taylor*, 354 N.C. 28, 40, 550 S.E.2d 141, 150 (2001) (citing *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)). To determine whether a prospective juror is capable of rendering a fair and impartial verdict, the trial court must "reasonably conclude from the *voir dire* . . . that a prospective juror can disregard prior knowledge and impressions, follow the trial court's instructions on the law, and render an impartial, independent decision based on the evidence." *State v. Jaynes*, 342 N.C. 249, 270, 464 S.E.2d 448, 461 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996), *and quoted in State v. Golphin*, 352 N.C. 364, 420, 533 S.E.2d 168, 207 (2000), *cert. denied*, — U.S. —, 149 L. Ed. 2d 305 (2001).

The Court of Appeals determined that prospective juror Michael asserted that "his financial concerns might affect his ability to render a fair decision" and concluded that "although he would try to be fair to defendant, he might have trouble doing so as a result of his financial concerns." *State v. Reed*, 143 N.C. App. 155, 161, 545 S.E.2d 249, 253 (2001). Defendant contends that Michael was unable to render a fair and impartial verdict based upon his concern with the possible financial impact on him of a long trial, and thus the Court of Appeals was correct in concluding the excusal of prospective juror Michael was required. We disagree.

During jury selection, the trial court initially informed the entire panel of their duties as jurors and questioned the panel, including Michael, on the ability of each prospective juror to follow the law as it pertained to the presumption of innocence, the burden of proof and

the law on sentencing. Prospective juror Michael responded "yes" to each question by the trial court concerning whether he could follow the law. Michael clearly stated that he understood the burden of proof, the punishments for first-degree murder, and the duty of a jury and stated that any personal convictions he had about the death penalty would not interfere with his ability to fulfill that duty.

The prosecutor also questioned Michael about his experience in court as a witness in a prior unrelated case, and he clearly stated, "No sir. I can be fair and treat everyone the same." When inquiring about prospective juror Michael's ability to follow the law, the prosecutor asked:

> Q. Mr. Michael. If the State proves that the case . . . if the State proves its case to you from the evidence and the law and proves all the things necessary for a conviction of first-degree murder, and that is beyond a reasonable doubt, could you vote to find the defendant guilty of first-degree murder?
>
> A. Yes, I can.
>
> Q. And if we go to the second phase of the case, and we present those things to you that we must to get a recommendation of death as the verdict of the jury, would you vote for death?
>
> A. Yes, I would.
>
> Q. And if you are selected say the foreman of this jury, and it comes time to enter the verdict of life or death, are you strong enough to write the word, death, in the space on the form that will [be] given to the jury?
>
> A. Yes, sir.
>
> Q. Would you make us prove more than the law would make us prove for either a conviction of first-degree murder or for a recommendation of death as the punishment for the defendant?
>
> A. No, I will follow the evidence and the law.

This exchange occurred after prospective juror Michael was aware of the estimated time frame.

The Court of Appeals also mentioned the fact that the actual length of trial was one month, suggesting that this fact supports its opinion. However, as noted, during *voir dire* prospective juror Michael was given estimates of the length of trial, by both the State

and defense counsel, and Michael was questioned about any problems this might bring. During the State's *voir dire*, counsel estimated a two- to three-week trial and indicated it could take more or less time than estimated. The State then stated: "So understanding that time frame that we are talking about, probably two weeks and probably three weeks, there are certain questions that I will ask now." The prosecutor indicated the ensuing questions he planned to ask were an attempt to "determine if you are the type of juror that can be fair and impartial to both sides and if the trial were to take two weeks and [possibly] three, would that fit into your being the type of juror that we want from both sides on this case." One of these questions inquired whether anyone had "any outside distractions" such as a spouse's surgery or a child just out of the hospital or "anything of that nature that is so important to [them] that it would be in [their] mind[s] or on [their] mind[s] every day to where [they] could not pay close attention to the testimony and what is taking place in the courtroom." Prospective juror Michael did not indicate any such distractions existed which would prevent him from paying close attention throughout the length of trial. In addition, during defendant's *voir dire*, defense counsel estimated a four- to five-week trial and inquired whether the increase in length changed anyone's personal situation so that it would become a hardship for a juror to serve. For a second time, Michael did not suggest the trial length would cause him any sort of hardship.

Prospective juror Michael did not indicate he had any financial concerns which "might" interfere with his ability to be a fair juror until later during defendant's *voir dire*. The discussions between defense counsel and Michael, as set forth above, are the only transcript references cited in the Court of Appeals' opinion. However, our review of the entire transcript reveals that, in later discussions between defense counsel and prospective juror Michael, he reaffirmed his ability to perform his duty as a juror several times. Defense counsel questioned Michael about his views on the death penalty and asked whether anything about the death penalty might affect his ability to listen to evidence and be fair. Prospective juror Michael responded, "No. I don't see anything." Defense counsel then asked, "[Do] you think that you can listen to all of the evidence fairly?" He replied, "Yes. I don't see anything that would interfere with me doing that in this case." When asked about mitigating circumstances and if he found a circumstance no one else found, could he stand by it, prospective juror Michael answered, "Yes I would." When asked if he

would hold it against defendant if defendant did not testify, Michael answered, "I could listen to it with an open mind and hear it even [though] he did not testify or produce any evidence at all and it would not cause me to be more towards the State than to him." Defense counsel asked whether Michael was willing to follow the instructions of the trial court without forming an opinion until told to do so and whether he could listen to the law and evidence without making up his mind until told to do so. He answered "yes" to both questions. Prospective juror Michael also told defense counsel he could keep an open mind until the trial court instructed him otherwise or until he went back to the jury room to decide the case.

Defendant contends that, under a plain reading of N.C.G.S. § 15A-1212(9), a defendant is allowed to excuse a juror for cause if that juror for any reason is unable to render a fair and impartial verdict. This statute in subsections (1) through (8) lists specific grounds for challenges for cause, while subsection (9), the catchall, states, "[f]or any other cause [the juror] is unable to render a fair and impartial verdict." As discussed above, this determination rests solely in the trial court's discretion and shall not be overturned on appeal unless there exists an abuse of discretion. *State v. Fair*, 354 N.C. at 144, 557 S.E.2d at 512.

The Court of Appeals cited *State v. Hightower*, 331 N.C. 636, 417 S.E.2d 237 (1992), in support of its conclusion that the trial court erred. In *Hightower*, the defendant challenged for cause a juror's stated concern over his ability to render a fair and impartial verdict if the defendant failed to testify. *Id.* at 637, 417 S.E.2d at 238. The juror stated the defendant's failure to testify would "stick in the back of [his] mind" and that it "might hinder" his ability to give an impartial decision. *Id.* at 641, 417 S.E.2d at 240. This Court held the trial court erred in not allowing the challenge for cause of that juror. This case is distinguishable from *Hightower*. Although prospective juror Michael stated the length of trial "might" interfere with his ability to decide or possibly be a fair juror, when his answers throughout the entire *voir dire* are examined, there is no indication that he would not or might not be able to follow the law as given to him by the trial court, as was the case in *Hightower*. On the contrary, Michael repeatedly stated during both the State's and defendant's *voir dire* that he could follow the law. In addition, prospective juror Michael clearly stated during both the State's and defendant's *voir dire* that he had no outside distractions, that he could be fair to both sides and that he could listen to all the evidence fairly.

The underlying concern raised as to prospective juror Michael's ability "to render a fair and impartial verdict" because of the estimated time of trial, as expressed in the Court of Appeals' opinion, is certainly understandable as a real concern in light of the *voir dire* of Michael, which was extensive by both the State and the defense. However, this is a concern which is routinely faced and determined by our trial judges in both civil and criminal cases, particularly where the trial is expected to last beyond several days or a week. Our trial judges are normally presented with this concern by a significant number of our citizens who unfortunately place a higher value on their personal time and convenience than on the performance of this most valuable civic duty. This is particularly true where, as here, the question of time is emphasized and revisited. In the normal course, virtually every prospective juror, and especially those most competent to serve, would have some level of concern, whether or not expressed, about time taken from their usual pursuits, and when such concern is expressed, our trial judges routinely decide whether to excuse based on what they have observed and heard.

The prospective juror in the case *sub judice* clearly was concerned about the possible impact the time of trial would have on him, and clearly he hoped he would not have to serve. To his credit, he also clearly and consistently stated, in light of the estimated time frame, that he could and would follow the law and would "be fair and impartial to both sides." Therefore, an examination of the entire *voir dire* presents no indication that the trial court's decision was " 'manifestly unsupported by reason' " or was " 'so arbitrary that it could not have been the result of a reasoned decision.' " *State v. T.D.R.*, 347 N.C. at 503, 495 S.E.2d at 708 (quoting *White v. White*, 312 N.C. at 777, 324 S.E.2d at 832). To the contrary, the *voir dire* reflects an abundant basis to conclude that this prospective juror would make a good juror, and thus the trial court's rulings were "fairly supported by the record." *Wainwright v. Witt*, 469 U.S. at 434, 83 L. Ed. 2d at 858. Thus, we conclude that the trial court's refusal to grant a challenge for cause for prospective juror Michael was not an abuse of discretion and that no prejudicial error occurred as a result of such rulings.

The Court of Appeals' decision is therefore

REVERSED.

SHELLEY AUSTIN WOOD v. GUILFORD COUNTY, BURNS INTERNATIONAL SECURITY SERVICES CORPORATION, F/K/A BORG-WARNER PROTECTIVE SERVICES CORPORATION AND BURNS INTERNATIONAL SECURITY SERVICES

No. 318PA01

(Filed 1 February 2002)

1. Appeal and Error— preservation of issues—subject matter jurisdiction

The question of subject matter jurisdiction was properly raised for the first time on appeal. Subject matter jurisdiction may be raised at any time, even in the Supreme Court.

2. Workers' Compensation— assault in courthouse—not exclusive remedy

The Workers' Compensation Act did not provide the exclusive remedy for a court employee assaulted in a courthouse, and the Industrial Commission was not the exclusive forum for a claim against the county, because the county was a stranger to the employment relationship between the plaintiff and the Administrative Office of the Courts—a state agency. The county was not assisting the Administrative Office of the Courts nor conducting the business of the courts by providing judicial facilities and security.

3. Cities and Towns; Counties— public duty doctrine—county retaining private security company—courthouse assault

The public duty doctrine barred a negligence claim against a county arising from an assault on a state judicial employee in a courthouse where the county had contracted with a private company for security at the courthouse. The public duty doctrine recognizes that local law enforcement acts for the benefit of the public rather than specific individuals and refuses to judicially impose an overwhelming liability on local government for not preventing every crime. Counties are required by N.C.G.S. § 7A-302 to provide judicial facilities, but the legislature did not intend to subject counties to tort liability for claims arising from third-party criminal conduct, particularly where a county has undertaken security measures not required by statute in an effort to protect the public. *Isenhour v. Hutto*, 350 N.C. 601, is distinguished.

4. Cities and Towns; Counties— public duty doctrine—exceptions—courthouse assault

The two exceptions to the public duty doctrine did not apply to an action by a state judicial employee against a county arising from an assault in a courthouse where plaintiff did not allege a special relationship with this county, plaintiff's status as an employee did not create a special relationship involving greater protection than afforded the general public, the statute requiring that counties provide judicial facilities does not create a special duty to employees working in the courthouses, and the record is devoid of any allegation that this county promised to protect plaintiff from third-party criminal assaults.

5. Immunity— waiver—preceding issue—whether duty exists

A plaintiff's claim that a county waived its protection under the public duty doctrine by hiring a security firm was not addressed because the issue of whether a duty is owed logically precedes waiver, and the county owed no duty to plaintiff individually.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 143 N.C. App. 507, 546 S.E.2d 641 (2001), affirming in part and reversing in part an order entered 29 March 2000 by Albright, J., in Superior Court, Guilford County. Heard in the Supreme Court 14 November 2001.

Fisher, Clinard & Craig, PLLC, by John O. Craig, III, and Shane T. Stutts, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr., and Mark A. Davis; and Jonathan V. Maxwell, Guilford County Attorney, and Mercedes Oglukian Chut, Deputy Guilford County Attorney, for defendant-appellant Guilford County.

MARTIN, Justice.

Plaintiff Shelley Austin Wood initiated this action against defendants for injuries sustained on 31 March 1998 when she was assaulted on the second floor of the Guilford County courthouse (the courthouse). Plaintiff was employed by the Administrative Office of the Courts (AOC) and worked in the courthouse. Plaintiff's assailant was subsequently convicted of attempted first-degree rape and assault with a deadly weapon inflicting serious injury.

On 30 July 1999, plaintiff filed a complaint against Guilford County (the County) and Burns International Security Services Corporation f/k/a Borg-Warner Professional Services Corporation (Burns Security), the firm contracted by the County to provide security at the courthouse, alleging the following claims for relief: (1) the County breached its duty by failing to provide adequate security at the courthouse; (2) Burns Security breached its duty by failing to provide adequate security at the courthouse; (3) as a result of the County's willful and wanton conduct, plaintiff was entitled to punitive damages; and (4) plaintiff, as an AOC employee stationed at the courthouse, was an intended third-party beneficiary of the security contract between the County and Burns Security, which both breached the contract by failing to provide reasonably adequate security at the courthouse.

In its answer, the County asserted governmental immunity and the public duty doctrine as complete bars to plaintiff's action and moved to dismiss the complaint on the ground that plaintiff failed to state a claim for relief under North Carolina Rule of Civil Procedure 12(b)(6). The County also alleged that punitive damages were not recoverable against a local government under North Carolina law.

On 29 March 2000, the trial court entered an order granting the County's motion to dismiss with respect to plaintiff's punitive damages claim but denying the motion with respect to plaintiff's negligence and breach of contract claims. On 7 April 2000, the County filed an interlocutory appeal from the trial court's order. On 15 May 2001, the Court of Appeals entered a decision affirming the trial court's denial of the County's motion to dismiss the negligence claims and reversing the trial court's order with respect to the breach of contract claim. This Court allowed the County's petition for discretionary review on 22 August 2001 to determine (1) whether the Court of Appeals erred in failing to hold that the trial court lacked subject matter jurisdiction over the action, and (2) whether the Court of Appeals erred in failing to determine that plaintiff's claims were barred by the public duty doctrine and governmental immunity.

[1] The County initially raised the defense of subject matter jurisdiction in the Court of Appeals. It argues before this Court that the North Carolina Workers' Compensation Act (the Act) provides the exclusive remedy for a state employee injured while working in a building maintained by the County and that this case should therefore have

been brought before the North Carolina Industrial Commission (the Industrial Commission). Plaintiff argues that the trial court had subject matter jurisdiction over the instant action because the Act does not extend to the type of relationship existing between the County and the State of North Carolina.

At the outset we note that "[t]he question of subject matter jurisdiction may be raised at any time, even in the Supreme Court." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986); *see also* N.C.G.S. § 8C-1, Rule 12(h)(3) (1999). The County therefore properly raised this defense on appeal. Accordingly, the threshold question is whether the trial court properly exercised subject matter jurisdiction over plaintiff's negligence claim against the County.

[2] It is well settled that the Act provides the exclusive remedy when an employee is injured by accident arising out of and in the course and scope of employment. *See* N.C.G.S. § 97-10.1 (1999); *Bryant v. Dougherty*, 267 N.C. 545, 548, 148 S.E.2d 548, 551 (1966). Specifically, the Act bars a worker from bringing a common law negligence action against the employer. *Pleasant v. Johnson*, 312 N.C. 710, 713, 325 S.E.2d 244, 247 (1985); *see also Hicks v. Guilford Cty.*, 267 N.C. 364, 148 S.E.2d 240 (1966). The exclusivity provisions of the Act extend to parties "conducting [the employer's] business," N.C.G.S. § 97-9 (1999), whereby an employer may be liable to an employee under the Act for injuries negligently caused by another employee or by a party acting as an agent of the employer. *See Strickland v. King*, 293 N.C. 731, 733, 239 S.E.2d 243, 244 (1977). This Court has interpreted N.C.G.S. § 97-10—the predecessor to N.C.G.S. § 97-10.1—as allowing an injured worker to bring a common law negligence action against a third party, however, when the third party is a " 'stranger to the employment.' " *Jackson v. Bobbitt*, 253 N.C. 670, 677-78, 117 S.E.2d 806, 811-12 (1961) (quoting *Warner v. Leder*, 234 N.C. 727, 69 S.E.2d 6 (1952), *overruled on other grounds by Woodson v. Rowland*, 329 N.C. 330, 348-49, 407 S.E.2d 222, 233 (1991), *and by Pleasant*, 312 N.C. at 718, 325 S.E.2d at 250) (holding that nonemployee driver was a stranger to the employment because employees injured in car accident did not show that transportation provided was anything more than "gratuitous or a mere accommodation"), *quoted in Pleasant*, 312 N.C. at 713, 325 S.E.2d at 247.

North Carolina law requires counties to provide facilities for the operation of the state's judicial system: "In each county in which

a district court has been established, courtrooms . . . and related judicial facilities (including furniture), as defined in this Subchapter, shall be provided by the county." N.C.G.S. § 7A-302 (1999). In addition to providing judicial facilities, the County elected to provide security for the courthouse through a contract negotiated with Burns Security. The County argues that by providing the courthouse, as well as the security for the courthouse, it was conducting the state's business and therefore was acting as an agent of the state, making the Industrial Commission the proper forum for this action. We disagree.

The County was not employed by the state, nor was it required by the express terms of N.C.G.S. § 7A-302 to provide security for the courthouse. The AOC is responsible for administering the state's judicial system. By providing judicial facilities and contracting with a private security company, the County was not assisting the AOC, nor was the County conducting the business of the AOC for purposes of N.C.G.S. § 97-9. Insofar as its provision of the building and security was concerned, the County remained a stranger to the actual employment relationship existing between plaintiff and the state. Accordingly, we reject the County's argument that the Industrial Commission provided the exclusive forum for the instant action.

The County next argues that the trial court erred by denying its Rule 12(b)(6) motion to dismiss plaintiff's negligence claim on grounds of the public duty doctrine and governmental immunity. Plaintiff argues that both the trial court and the Court of Appeals correctly determined that the public duty doctrine is unavailable to the County and, furthermore, that the County waived its governmental immunity by contracting with Burns Security and requiring that "[the County] be named as an additional insured on the Defendant Burns' liability insurance policy."

We observe that "[a] waiver of governmental immunity . . . does not give rise to a cause of action where none previously existed." *Lynn v. Overlook Dev.*, 98 N.C. App. 75, 79, 389 S.E.2d 609, 612 (1990) *aff'd in part and rev'd in part*, 328 N.C. 689, 403 S.E.2d 469 (1991). Our consideration of the public duty doctrine therefore logically precedes the question of waiver of governmental immunity. In other words, absent the existence of a duty, a waiver of governmental immunity in and of itself affords little aid to a plaintiff seeking to recover damages for a municipality's alleged negligence. *Florence v. Goldberg*, 44 N.Y.2d 189, 195, 375 N.E.2d 763, 766 (1978).

[3] On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted. *Isenhour v. Hutto*, 350 N.C. 601, 604, 517 S.E.2d 121, 124 (1999). Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985).

Actionable negligence occurs only where there is "a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff, under the circumstances in which they were placed." *Mattingly v. N.C. R.R. Co.*, 253 N.C. 746, 750, 117 S.E.2d 844, 847 (1961). Moreover, in the context of the provision of police protection by a local government, the duty breached must be more specific than a duty owing to the general public. *Lovelace v. City of Shelby*, 351 N.C. 458, 526 S.E.2d 652 (2000). This principle of law, known as the public duty doctrine, was first applied by this Court in *Braswell v. Braswell*, 330 N.C. 363, 370, 410 S.E.2d 897, 901 (1991). The doctrine recognizes that a local government entity "and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals." *Id.* Under the public duty doctrine, governmental entities have no duty to protect particular individuals from harm by third parties, thus no claim may be brought against them for negligence. *See id.* This rule acknowledges the limited resources of law enforcement and refuses to impose, by judicial means, an overwhelming burden of liability on local governments for failure to prevent every criminal act. *Id.* at 371, 410 S.E.2d at 901.

In *Braswell*, this Court also recognized that while the public duty doctrine is a necessary and reasonable limitation on liability, there are two well-established exceptions to the doctrine that prevent inequities to certain individuals: (1) when there is a special relationship between the injured party and the police; and (2) when a municipality creates a special duty by promising protection to an individual. *Id.* at 371, 410 S.E.2d at 902.

As applied to local government, this Court has declined to expand the public duty doctrine beyond agencies other than local law enforcement departments exercising their general duty to protect the

public. *Thompson v. Waters*, 351 N.C. 462, 464-65, 526 S.E.2d 650, 651-52 (2000); *Lovelace*, 351 N.C. at 461, 526 S.E.2d at 654. In *Lovelace*, we stated:

> While this Court has extended the public duty doctrine to state agencies required by statute to conduct inspections for the public's general protection, *see Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998); *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 495 S.E.2d 711, *cert. denied*, 525 U.S. 1016, 142 L. Ed. 2d 449 (1998), we have never expanded the public duty doctrine to any local government agencies other than law enforcement departments when they are exercising their general duty to protect the public, *see Isenhour*[, 350 N.C. at 604, 517 S.E.2d at 124] (refusing to extend the public duty doctrine to shield a city from liability for the allegedly negligent acts of a school crossing guard). . . . Thus, the public duty doctrine, as it applies to local government, is limited to the facts of *Braswell*.

351 N.C. at 461, 526 S.E.2d at 654.

In light of the fact that we have previously delineated the boundaries of the public duty doctrine—as applied to local government—to the provision of police protection, *see id.*, the first issue we must address is whether the County, in providing security at the courthouse, was providing a service analogous to police protection to the general public. The Court of Appeals reasoned that the public duty doctrine was inapplicable to the present case because "[d]efendant, as a local government, was not acting in a law enforcement capacity or exercising its general duty to protect the public by providing security to the Courthouse, but was acting as owner and operator of the Courthouse." *Wood v. Guilford Cty.*, 143 N.C. App. 507, 512, 546 S.E.2d 641, 645 (2001).

The Court of Appeals' holding that the public duty doctrine does not preclude local government liability to an individual injured by the intentional criminal act of a third party is inconsistent with the conceptual underpinnings of the public duty doctrine as recognized in *Braswell*: that local government's duty to protect against crime flows to the general public rather than to specific individuals. 330 N.C. at 371, 410 S.E.2d at 901. We observe that N.C.G.S. § 7A-302 essentially renders the County an involuntary landlord by requiring it to provide "courtrooms, office space . . . , and related judicial facilities" for the state's judicial system. We do not believe that the General Assembly intended, by enacting section 7A-302, to subject the County to tort lia-

bility for claims arising from third-party criminal conduct particularly when, as here, the County undertook affirmative security measures not expressly required by section 7A-302 in its apparent effort to protect the public from harm.

Plaintiff argues before this Court that because the hired security guards were not sworn public officers with the full panoply of authority reserved to those in law enforcement (i.e., the power to arrest, to investigate crimes, to operate the County jail, to enforce safety statutes, and to serve warrants and civil court documents), they are not part of a law enforcement *department*, as required by the language in *Lovelace*, nor are they providing *police* protection, as required by *Braswell*. In our view, this is an overly literal reading of the limitations we have placed on the public duty doctrine as applied to local governments in *Lovelace*, and an overly narrow interpretation of the doctrine itself as articulated in *Braswell*. The test of whether the public duty doctrine applies is a functional one and includes consideration of the nature of the duty assumed by the local governmental defendant.

For example, in *Isenhour*, the plaintiff's son was struck by a car and killed after a school crossing guard, stationed at an intersection by the City of Charlotte, gave the child permission to cross the street. 350 N.C. at 608, 517 S.E.2d at 126. Plaintiff brought a negligence action against the city. This Court held that, unlike the provision of police protection to the general public, as in *Braswell*, or the statutory duty of a state agency to inspect various facilities for the benefit of the public, as in *Stone* and *Hunt*, a school crossing guard is employed to provide a protective service to an identifiable group of children. *Isenhour*, 350 N.C. at 607-08, 517 S.E.2d at 126. In its assessment of whether the actions of a crossing guard fall within the intended scope of the public duty doctrine or whether the guard's actions are meaningfully distinct from the law enforcement function in *Braswell*, this Court observed that the protective services of the crossing guard were limited as to time, place, beneficiaries, and purpose. *Id.* The city's provision of a school crossing guard did not equate to, and was meaningfully distinct from, the provision of police protection in *Braswell*, and therefore the public duty doctrine did not apply. *Id.*

In the instant case, the protective services provided at the courthouse through the County's contract with Burns Security are analogous to the police protection provided to the general public in *Braswell*. The rationale underlying the public duty doctrine is thus

applicable. The courthouse security guards were employed to provide protective services, as was the crossing guard in *Isenhour*, but the group the guards were called upon to protect can hardly be characterized as "identifiable," as plaintiff argues. Rather, the protective services provided by Guilford County were intended to benefit the public at large, including those members of the public who worked at the courthouse. Specifically, the protective duty undertaken by the courthouse security guards was not limited in scope to the same degree as the crossing guards in *Isenhour* in respect to time (all day in the present case, as opposed to the specific time periods when children were going to or coming from school in *Isenhour*), place (a whole courthouse building here, as opposed to one narrow strip of road in *Isenhour*), intended beneficiaries (all people entering the building in the instant case, as opposed to schoolchildren only in *Isenhour*) and purpose (the general safeguarding of the public from a multitude of dangers at the courthouse in the instant case, as opposed to the singular purpose of safeguarding schoolchildren from the hazards of vehicular traffic coming from predictable directions in *Isenhour*).

As we have stated on numerous occasions, the public duty doctrine exists to prevent the imposition of an overwhelming burden of liability on governmental agencies with limited resources. *Stone*, 347 N.C. at 481, 495 S.E.2d at 716; *Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 901. The doctrine retains limited vitality, as applied to local government, within the context of government's duty to protect the public generally, *see Southern Ry. Co. v. Mecklenburg Cty.*, 231 N.C. 148, 151, 56 S.E.2d 438, 440 (1949), which is necessarily "limited by the resources of the [local] community." *Florence*, 44 N.Y.2d at 198, 375 N.E.2d at 768.

[4] Having determined that the public duty doctrine bars plaintiff's civil action against the County, we next determine whether either of the recognized exceptions to the doctrine applies. In *Braswell*, we reiterated the example that most commonly gives rise to the special relationship exception to the public duty doctrine: the relationship between the police department and a state's witness or informant who has aided law enforcement officers. *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902. Examining the special relationship exception in the context of the present case, we fail to see how, standing alone, plaintiff's status as an AOC employee working at the courthouse qualifies as "special" for purposes of the public duty doctrine. In other words, having security patrols at the courthouse where plaintiff worked did

not create a special relationship from which accrued greater protective benefits to plaintiff against violent crime than those afforded to the general public using the same courthouse. In any event, plaintiff, in her complaint, failed to allege the existence of a special relationship between her and the County. Accordingly, the special relationship exception to the public duty doctrine is inapplicable to the instant case.

The second recognized exception to the public duty doctrine examines whether a "special duty" arose to a particular individual. Plaintiff must show that an actual promise was made to create a special duty, that this promise was reasonably relied upon by plaintiff, and that this reliance was causally related to the injury ultimately suffered by plaintiff. *See id.* "[T]he 'special duty' exception to the general rule against liability of law enforcement officers for criminal acts of others is a very narrow one; it should be applied only when the promise, reliance, and causation are manifestly present." *Id.* at 372, 410 S.E.2d at 902.

In the present case, as already indicated, the County had a statutory responsibility to provide facilities for operation of the state's judicial system. *See* N.C.G.S. § 7A-302. The statute does not contain any language to suggest the creation of a special duty, however, whereby the County owed employees working in the courthouse greater protection than that owed to the general public using the courthouse. Moreover, the record is devoid of any allegation that the County made a promise to plaintiff to protect her against third-party criminal assaults. Accordingly, as the pleadings fail to allege the existence of a special duty, this exception to the doctrine is inapplicable.

[5] Plaintiff further alleges that the County waived its protection under the public duty doctrine. By hiring a security firm, plaintiff asserts, the County created a duty to courthouse tenants and their employees. This argument essentially restates in different terms the special duty exception to the public duty doctrine. In any event, by contracting with Burns Security, the County was merely executing the law enforcement duties required of it as a local governmental entity. *See Southern Ry. Co.*, 231 N.C. at 151, 56 S.E.2d at 440. Accordingly, plaintiff's waiver argument is without merit.

As previously stated, the issue of whether a duty is owed to a claimant alleging negligence logically precedes the issue of a waiver of governmental immunity. As the County owed no duty to plaintiff

individually, the public duty doctrine operates to foreclose liability against the County on plaintiff's negligence claim. Consequently, we do not address governmental immunity or plaintiff's allegation of waiver of governmental immunity. We express no opinion as to plaintiff's negligence claim against Burns Security at this stage of the proceedings in the trial court.

Accordingly, the Court of Appeals' conclusion that the trial court properly exercised jurisdiction over plaintiff's civil claims against the County is affirmed. The Court of Appeals' determination that the public duty doctrine was inapplicable in the present case is reversed. This case is remanded to the Court of Appeals for further remand to the trial court for further proceedings consistent with this opinion.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

STATE OF NORTH CAROLINA v. BRYANT RENARD FULP

No. 342PA01

(Filed 1 February 2002)

Constitutional Law— right to counsel—waiver—motion to suppress prior convictions

The trial court did not err in a felony possession of stolen goods case by denying defendant's motion to suppress prior convictions under N.C.G.S. § 15A-980 used in finding defendant to be an habitual felon based on its conclusion that defendant waived his right to counsel for the 1993 Rockingham County conviction, because: (1) the findings of fact were sufficient to indicate that the trial court considered the necessary factors under N.C.G.S. § 7A-457 in determining whether defendant had knowingly, intelligently, and voluntarily waived his right to counsel including defendant's age, education, and mental state at the time he signed the waiver; (2) defendant's statements indicated that he knew that he was charged with two felonies and that the assistant district attorney was offering to drop only one of those felonies in exchange for a plea to the other felony and probation, and defendant stated he did not need an attorney in order to avail

himself of this offer; (3) defendant admitted knowing what his rights were and clearly and unequivocally expressed his desire not to have an attorney represent him; (4) the fact that defendant was seventeen years old with a ninth-grade education is not enough, absent other evidence, to conclude that defendant was unable to understand the nature and consequences of the proceedings against him or the decision that he made regarding waiver of counsel; and (5) defendant's signature on the waiver of counsel form combined with his testimony in which he stated multiple times that he did not wish to have an attorney represent him, and the fact that defendant signed a transcript of plea in 1993 acknowledging that he understood his rights, the charges against him, and that he was pleading guilty to a felony, provides added evidence that defendant knowingly, intelligently, and voluntarily waived counsel.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 144 N.C. App. 428, 548 S.E.2d 785 (2001), vacating a conviction for habitual felon status and vacating and remanding for resentencing a conviction for possession of stolen goods, judgment for both convictions having been entered by Greeson, J., on 9 June 1997 in Superior Court, Forsyth County, and a subsequent order entered 8 May 2000, *nunc pro tunc* 1 May 2000, by Greeson, J., in Superior Court, Forsyth County. Heard in the Supreme Court 14 November 2001.

Roy Cooper, Attorney General, by Kimberly W. Duffley, Assistant Attorney General, for the State-appellant.

Kelly Scott Lee and Stuart L. Teeter for defendant-appellee.

American Civil Liberties Union of North Carolina Legal Foundation, by Seth H. Jaffe, Counsel, amicus curiae.

ORR, Justice.

Defendant, Bryant Renard Fulp, was indicted 10 March 1997 for felony possession of stolen goods and as an habitual felon. On 6 June 1997, defendant filed a "Motion to Suppress and Exclude the Use of Prior Void Convictions to Enhance Punishment or Degree of Offense or Impeachment." Pursuant to N.C.G.S. § 15A-980, defendant argued that a 1993 Rockingham County conviction used in the habitual felon indictment was obtained in violation of his right to counsel. On 9 June 1997, a hearing on this motion was held in Superior Court,

Forsyth County. The trial court denied defendant's motion, holding that defendant could not collaterally attack his prior conviction. Thereafter, defendant pled guilty to felony possession of stolen goods and to being an habitual felon, while reserving his right to appeal the trial court's ruling on his motion to suppress prior convictions. On 9 June 1997, the trial judge sentenced defendant to a term of 95 to 123 months' imprisonment.

Upon defendant's appeal of the trial court's denial of his motion to suppress prior convictions, the Court of Appeals, in an unpublished opinion, *State v. Fulp*, 131 N.C. App. 702, 515 S.E.2d 758 (1998), vacated the trial court's order denying defendant's motion to suppress and remanded for a proper determination of defendant's motion based upon the trial court's failure to resolve factual conflicts. Specifically, the Court of Appeals ordered findings as to whether defendant had waived his right to counsel for the 1993 Rockingham County conviction that was used to enhance his punishment under the habitual felon statute.

After a hearing on defendant's motion to suppress prior convictions, the trial court entered an order on 8 May 2000, *nunc pro tunc* 1 May 2000, ultimately concluding that defendant had waived his right to counsel for the 1993 Rockingham County conviction.

Upon defendant's second appeal, the Court of Appeals held that "[t]he trial court's conclusion . . . that defendant's waiver of counsel in the 1993 Rockingham County conviction 'was made knowingly, intelligently, and voluntarily' [was] not adequately supported by its findings of fact." *State v. Fulp*, 144 N.C. App. 428, 432, 548 S.E.2d 785, 787 (2001). In fact, the Court of Appeals concluded that defendant had met his burden of showing by a preponderance of the evidence that he had not waived his right to counsel, *see* N.C.G.S. § 15A-980(c) (1999), and "that the 1993 Rockingham County conviction used in finding defendant to be an habitual felon should have been suppressed." *Fulp*, 144 N.C. App. at 433, 548 S.E.2d at 787. As a result, the Court of Appeals vacated the habitual felon conviction and remanded the case for resentencing on defendant's conviction for possession of stolen goods. *Id.* at 433, 548 S.E.2d at 787-88. On 16 August 2001, we allowed the State's petition for discretionary review. For the reasons set forth below, we reverse the decision of the Court of Appeals.

The State contends that the Court of Appeals erred by holding that the trial court's findings of fact did not adequately support the trial court's conclusion that defendant had effectively waived coun-

sel. More specifically, the State argues that defendant's waiver of counsel in his 1993 Rockingham County conviction was made "knowingly, intelligently, and voluntarily" and that the trial court gave adequate consideration to defendant's age, education, and mental state at the time he signed the waiver. We agree.

N.C.G.S. § 15A-980 governs defendant's motion to suppress a prior conviction in violation of his right to counsel. The statute reads, in pertinent part:

> (a) A defendant has the right to suppress the use of a prior conviction that was obtained in violation of his right to counsel if its use by the State is to impeach the defendant or if its use will:
>
> (1) Increase the degree of crime of which the defendant would be guilty; or
>
> (2) Result in a sentence of imprisonment that otherwise would not be imposed; or
>
> (3) Result in a lengthened sentence of imprisonment.
>
> . . . .
>
> (c) When a defendant has moved to suppress use of a prior conviction under the terms of subsection (a), he has the burden of proving by the preponderance of the evidence that the conviction was obtained in violation of his right to counsel. To prevail, he must prove that at the time of the conviction he was indigent, had no counsel, and had not waived his right to counsel. If the defendant proves that a prior conviction was obtained in violation of his right to counsel, the judge must suppress use of the conviction at trial or in any other proceeding if its use will contravene the provisions of subsection (a).

N.C.G.S. § 15A-980(a), (c). It is uncontroverted that defendant was indigent and had no counsel at the time of his conviction in 1993. Thus, the only issue is whether defendant waived his right to counsel.

This Court has held that a defendant " 'has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes.' " *State v. Thomas*, 346 N.C. 135, 138, 484 S.E.2d 368, 370 (1997) (quoting *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972)). However, "[b]efore allowing a defendant to waive in-court representation by counsel, . . . the trial

court must insure that constitutional and statutory standards are satisfied." *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992). First, defendant's "waiver of the right to counsel and election to proceed *pro se* must be expressed 'clearly and unequivocally.' " *Id.* (quoting *State v. McGuire*, 297 N.C. 69, 81, 254 S.E.2d 165, 173, *cert. denied*, 444 U.S. 943, 62 L. Ed. 2d 310 (1979)). Second, in order to satisfy constitutional standards, the trial court must determine whether defendant "knowingly, intelligently, and voluntarily" waives his right to counsel. *Id.* at 674, 417 S.E.2d at 476 (citing *Faretta v. California*, 422 U.S. 806, 835, 45 L. Ed. 2d 562, 581-82 (1975)). "In order to determine whether the waiver meets [this constitutional] standard, the trial court must conduct a thorough inquiry." *Id.* This Court has held that N.C.G.S. § 15A-1242 satisfies any constitutional requirements by adequately setting forth the parameters of such inquiries. *Id.*; *State v. Gerald*, 304 N.C. 511, 519, 284 S.E.2d 312, 317 (1981); *State v. Thacker*, 301 N.C. 348, 355, 271 S.E.2d 252, 256 (1980).

The statute provides that:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C.G.S. § 15A-1242 (1999). In addition, if a defendant is indigent, "the trial court must obtain a written waiver of the right to counsel" pursuant to N.C.G.S. § 7A-457. *Thomas*, 331 N.C. at 675, 417 S.E.2d at 476. N.C.G.S. § 7A-457 provides in pertinent part:

> (a) An indigent person who has been informed of his right to be represented by counsel at any in-court proceeding, may, in writing, waive the right to in-court representation by counsel, if the court finds of record that at the time of waiver the indigent person acted with full awareness of his rights and of the consequences of the waiver. In making such a finding, the court shall

> consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the crime charged.

N.C.G.S. § 7A-457(a) (1999) (effective until 1 July 2001). The inquiry required under N.C.G.S. § 7A-457 "is similar to the inquiry required under N.C.G.S. § 15A-1242 and may be satisfied in a like manner." *State v. Heatwole*, 344 N.C. 1, 18, 473 S.E.2d 310, 318 (1996), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997). Furthermore, although in *Thomas* the Court stated that there must be a written waiver of the right to counsel for an indigent defendant, 331 N.C. at 675, 417 S.E.2d at 476, in *Heatwole* we concluded that a waiver was not invalid simply because there was "no written record of the waiver," 344 N.C. at 18, 473 S.E.2d at 318. "While N.C.G.S. § 7A-457(a) provides for a written waiver of counsel from an indigent defendant, this section has been construed as directory, not mandatory, so long as the provisions of the statute have otherwise been followed." *Id.* (citations omitted). "Directory" has been defined in *Black's Law Dictionary* as "[a] provision in a statute, rule of procedure, or the like, which is a mere direction or instruction of no obligatory force, and involving no invalidating consequence for its disregard, as opposed to an imperative or mandatory provision, which must be followed." *Black's Law Dictionary* 460 (6th ed. 1990).

In the instant case, the trial court's order of 8 May 2000, *nunc pro tunc 1 May 2000*, contains sufficient findings of fact demonstrating that defendant's waiver of counsel was made "knowingly, intelligently, and voluntarily." N.C.G.S. § 7A-457 does not require the trial court to specifically find and state that it considered those factors outlined in the statute. Rather, the statute requires the trial court only to *consider* those factors when determining whether defendant's waiver of counsel was made "knowingly, intelligently, and voluntarily." The trial court, in its 8 May 2000 order, stated that it "consider[ed] the evidence, the record, and the arguments of counsel" in making its findings of fact. The findings of fact included the following:

> 5. . . . [The trial court in the 1993 action] certified that he FULLY INFORMED defendant in open court of:
>
> a. the charges against him;
>
> b. the nature of and the statutory punishment for each charge; and

c. the nature of the proceeding against him; and

d. his right to have counsel ASSIGNED by the court; and

e. his right to have the ASSISTANCE of counsel to represent him in this action.

6. [The trial court in the 1993 action] further certified that:

a. defendant comprehended the nature of the charges and the proceedings and the range of punishments;

b. defendant understood and appreciated the consequences of his decision; and that

c. defendant voluntarily, knowingly and intelligently elected in open court to be tried in the action WITHOUT THE ASSIGNMENT OF COUNSEL.

The fact that the trial judge did not expressly and specifically state in his findings of fact that he considered defendant's "age, education, familiarity with the English language, mental condition, and the complexity of the crime charged" is not of sufficient consequence to warrant reversal of the court's order. *See* N.C.G.S. § 7A-457. Moreover, defendant was the only person who testified at the 8 March 2000 hearing in which evidence was introduced as to defendant's age, education, and mental condition at the time that he signed the waiver in 1993 and at the time he entered his guilty plea. Thus, by stating in the order that he "consider[ed] the evidence, the record, and the arguments of counsel," we conclude that the trial judge was referring, in part, to defendant's testimony at the hearing concerning his age, education, and mental condition. Therefore, the findings of fact were sufficient to indicate that the trial judge "consider[ed]" the necessary factors under N.C.G.S. § 7A-457 in determining whether defendant had "knowingly, intelligently, and voluntarily" waived his right to counsel.

Furthermore, as previously stated, N.C.G.S. § 7A-457(a) has been construed as directory, not mandatory, and a waiver will not necessarily be invalidated because of the absence of a written record of the waiver. *See Heatwole*, 344 N.C. at 18, 473 S.E.2d at 318. Thus, any deficiency in a written waiver can be overcome by other evidence showing that defendant "knowingly, intelligently, and voluntarily" waived counsel. "[T]he record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free

will." *Thacker*, 301 N.C. at 354, 271 S.E.2d at 256 (citing *Faretta*, 422 U.S. 806, 45 L. Ed. 2d 562).

In this case, defendant's testimony at the 8 March 2000 hearing demonstrates that he "knowingly, intelligently, and voluntarily" waived counsel. During his testimony, defendant stated, in part, the following:

> [DEFENDANT]: [The assistant district attorney] told—she actually told me that I had—well, she actually told me I had two felonies. She told me she would drop one felony for the probation on another felony.
>
> [DEFENDANT'S ATTORNEY]: So, is it your testimony she offered you a plea offer of probation?
>
> [DEFENDANT]: Yes, sir.
>
> . . . .
>
> [DEFENDANT]: When I went in front of the judge, the judge asked me did I want a lawyer. I told him I didn't need no lawyer.
>
> [DEFENDANT'S ATTORNEY]: Let me stop you there. You said you didn't need a lawyer?
>
> [DEFENDANT]: Yes, sir.
>
> [DEFENDANT'S ATTORNEY]: Why did you tell him you didn't need a lawyer?
>
> [DEFENDANT]: I already talked to the DA. I knew I was getting probation. I knew I was going home. I ain't need no lawyer.

Defendant's statements indicate he knew that he was charged with two felonies and that the assistant district attorney was offering to drop only one of those felonies in exchange for a plea to the other felony and probation. Thus, defendant evidences sufficient understanding of the plea agreement to conclude that he did not need an attorney in order to avail himself of the offer.

Another exchange that took place at the 8 March 2000 hearing shows defendant's knowledge of his right to an attorney and his desire to forgo that right. On cross-examination, the following colloquy ensued:

> [ASSISTANT DISTRICT ATTORNEY]: Okay. You remember coming to court January 1993, didn't you?

[DEFENDANT]: Yes, sir.

[ASSISTANT DISTRICT ATTORNEY]: And you don't know the judge's name?

[DEFENDANT]: No, sir.

[ASSISTANT DISTRICT ATTORNEY]: Okay. And you remember him reading your—telling you what your rights were regarding a lawyer?

[DEFENDANT]: Yes, sir.

On recross-examination, the discussion continued as follows:

[DEFENDANT]: . . . [The judge] asked me [in March], did I need an attorney. I told him I didn't need one.

[ASSISTANT DISTRICT ATTORNEY]: You've been in juvenile court before, right?

[DEFENDANT]: Yes, sir.

[ASSISTANT DISTRICT ATTORNEY]: You hired lawyers—you had lawyers, hadn't you?

[DEFENDANT]: Yes, I had a lawyer when I went to juvenile court.

[ASSISTANT DISTRICT ATTORNEY]: Okay. So, you knew what that process was about, didn't you?

[DEFENDANT]: No. My mother handled that.

[ASSISTANT DISTRICT ATTORNEY]: You knew—

[DEFENDANT]: My mother got me a lawyer.

[ASSISTANT DISTRICT ATTORNEY]: You knew that if you were charged with something, Mr. Fulp, you had the right to hire a lawyer and have one represent you, didn't you?

[DEFENDANT]: I knew I had a right to a lawyer.

Thus, defendant admitted knowing what his rights were (which he acknowledged the judge read to him), and once again, he expressed "clearly and unequivocally" his desire not to have an attorney represent him.

Ultimately, defendant had an opportunity to put forth evidence at the 8 March 2000 hearing in order to support his position that he did not "knowingly, intelligently, and voluntarily" waive counsel. As

stated previously, defendant was the only person who testified at this hearing, and he provided no evidence at this hearing that would tend to show that he did not "knowingly, intelligently, and voluntarily" waive counsel. The fact that defendant was seventeen years old with a ninth-grade education is not enough, absent other evidence, to conclude that defendant was unable to understand the nature and consequences of the proceedings against him or the decision that he made regarding waiver of counsel.

Furthermore, we note that although the waiver of counsel form was not completely filled out, defendant did in fact sign the form. This, combined with defendant's testimony in which he stated multiple times that he did not wish to have an attorney represent him, and the fact that defendant signed a transcript of plea in 1993 acknowledging that he understood his rights, the charges against him, and that he was pleading guilty to a felony, provides added evidence that defendant "knowingly, intelligently, and voluntarily" waived counsel. Moreover, along with findings of fact five and six written above, the trial court also found the following:

2. The defendant swore before [a] Deputy Clerk of Superior Court . . . that:

   a. He had been fully informed of the charges against him;

   b. He had been fully informed of the nature of and the statutory punishment for the charge; and

   c. He had been fully informed of the nature of the proceedings against him.

3. He further swore before [the deputy clerk] that he had BEEN ADVISED OF:

   a. His right to have counsel ASSIGNED to assist him AND his right to have the ASSISTANCE of counsel in defending the charge or in handling the proceedings[.]

4. He further swore before [the deputy clerk] that he fully understood and appreciated the consequences of his decision to waive the right to assigned counsel and the right to assistance of counsel.

These findings of fact sufficiently show that defendant was fully aware of his right to counsel; that he understood and appreciated the

consequences of his decision; and that he "knowingly, intelligently, and voluntarily" waived his right to counsel.

Based on defendant's testimony at the 8 March 2000 hearing, the trial court's findings of fact, and the waiver of counsel form, we conclude that the trial court correctly determined that defendant did not show by a preponderance of the evidence, as required by N.C.G.S. § 15A-980(c), that he had not waived his right to counsel. Furthermore, the trial court's conclusion that defendant's waiver of counsel was made "knowingly, intelligently, and voluntarily" was adequately supported by its findings of fact, which in turn was supported by the evidence. Therefore, we reverse the decision of the Court of Appeals and hold that the trial court properly denied defendant's motion to suppress prior convictions.

REVERSED.

IN THE MATTER OF: THE APPEAL OF LEON H. & MARY L. CORBETT FROM THE DECISION OF THE PENDER COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION OF REAL PROPERTY FOR TAX YEAR 1998

No. 363PA00

(Filed 1 February 2002)

Taxation— ad valorem—real property valuation—split of parent parcel

A county was required to determine the listing value of two parcels of land resulting from the split of the previously appraised parent tract in accordance with the schedules, standards, and rules used in the county's most recent general reappraisal or horizontal adjustment rather than by equitably allocating the predivision tract's tax value between the two parcels, because: (1) a division and conveyance of a portion of a previously appraised tax parcel is a "factor" within the meaning of N.C.G.S. § 105-287(a)(3) which allows the property to be reappraised; (2) factors which allow for an increase or decrease in the appraised value of real property in nongeneral reappraisal or horizontal adjustment years are not limited to occurrences affecting the specific property which fall outside the control of the owner; (3) the only statutorily approved method of valuation referred to

in the Machinery Act is a valuation in accordance with the schedules, standards, and rules used in the county's most recent general appraisal or horizontal adjustment; and (4) there is no reference to or authorization for the use of allocation as a permissible valuation method.

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, 138 N.C. App. 534, 530 S.E.2d 90 (2000), reversing an order entered by the Property Tax Commission of North Carolina entered on 24 March 1999 and remanding the matter to the Commission for further review. Heard in the Supreme Court 18 April 2001.

Leon H. Corbett for petitioner-appellees Leon Corbett, pro se, and Mary Corbett.

C.B. McLean Jr. for respondent-appellant Pender County.

LAKE, Chief Justice.

The primary issue raised here on review results from the division of a piece of Pender County real estate into two parcels and questions whether the Pender County Tax Assessor was statutorily required to appraise the individual parcels under the County's schedule of values, standards and rules or whether the assessor should have equitably allocated the original predivision parcel's ad valorem tax value between the two parcels.

The essential facts of this case are undisputed. On 1 January 1995, Leon H. Corbett and his wife, Mary L. Corbett, were the owners of a 1.91-acre tract of residential property, improved with a house, in Pender County. The property bordered on Virginia Creek, which empties into Topsail Sound. Pender County conducted its general reappraisal of real property, pursuant to N.C.G.S. § 105-286, effective 1 January 1995 and assigned a tax value of $196,610 to the property, comprised of $78,619 for the improvements and $117,991 for the land. The tax value was not appealed and remained in effect for the tax years 1996 and 1997.

On 8 December 1997, a general warranty deed was recorded in the Office of the Pender County Register of Deeds, whereby the Corbetts conveyed .69 acres of their land to Edna Brown Wallin, Mrs.

Corbett's sister. As a result of this conveyance, as of 1 January 1998, the Corbetts were owners of record of 1.22 acres of waterfront land, improved with a house, and Ms. Wallin was the owner of record of .69 acres of undeveloped waterfront land.

In 1998, the Pender County assessor gave notice to the Corbetts that the 1998 tax value of their 1.22 acres was $188,718, which was comprised of $78,619 for improvements, an amount unchanged from prior valuations, and a reduced value of $110,099 for the land. The assessor also gave notice to Ms. Wallin that the 1998 tax value of her .69 acres of land was $89,838. Based on these valuations, the additive valuation for both parcels of land was $199,937 versus the prior year's valuation of $117,991, an increase of $81,946.

The Corbetts and Ms. Wallin separately appealed their 1998 property tax valuations to the Pender County Board of Equalization and Review, which affirmed the values assigned. The Corbetts and Ms. Wallin appealed that decision to the North Carolina Property Tax Commission (the Commission), which consolidated the appeals and, after a hearing, separately affirmed the tax values assigned by the Pender County assessor.

Thereafter, the Corbetts and Ms. Wallin separately appealed the decisions of the Commission to the North Carolina Court of Appeals. That court found that the decisions of the Commission were without statutory authority and reversed and remanded the matters to the Commission for an equitable allocation of the 1995 appraised value of the 1.91 acres between the Corbett and Wallin tracts. This Court granted Pender County's petition for discretionary review of both the Corbett and Wallin Court of Appeals' decisions; however, the opinion herein addresses only the questions raised in the petition for discretionary review of *In re Appeal of Corbett*, 138 N.C. App. 534, 530 S.E.2d 90 (2000).

Pursuant to section 105-285 of the Machinery Act, all property subject to ad valorem taxation shall be listed annually. N.C.G.S. § 105-285(a) (1999). Additionally, the ownership of real property for taxation purposes shall be determined as of 1 January, with the exception of limited circumstances which are not applicable to the case at hand. N.C.G.S. § 105-285(d).

In the instant case, in 1998, the Pender County assessor was required to create a new listing for the .69 acres deeded to Ms. Wallin by general warranty deed, which was recorded on 8 December 1997. Additionally, the assessor was required to adjust the listed value of

the Corbett parcel, which had been reduced in acreage by .69 acres. The parties in this case agree that adjusted listings, both in name and value, were necessary.

In order to determine the listing value for each parcel, the assessor applied the appraisal standards, schedules and rules used during the County's last general appraisal in 1995. Petitioners do not challenge the accuracy or legality of the schedules, standards and rules published by the County and do not contend that these schedules, standards and rules were misapplied to their property. Additionally, petitioners agree that valuation through the application of the County's schedules, standards and rules would have been the correct method of valuation had the property (1) been valued as part of a countywide general or horizontal adjustment, provided for by section 105-286; or (2) had the division of their property been a "factor" which required the assessor to increase or decrease the appraised value, pursuant to section 105-287. In fact, petitioners specifically stated on the record that if reappraisal of their property in 1998 was statutorily permissible, they did not object to the valuation reached. Petitioners do contend, however, that the County was not statutorily authorized under section 105-287 to apply the standards, schedules and rules to their property in 1998, and that the 1995 valuation should have been allocated between the two parcels resulting from the split of the parent parcel.

On appeal of the Commission's decision to affirm the County assessor's appraisal, the Court of Appeals held as follows:

> The dispositive issue is whether the increase or decrease in the value of a tract of land formerly valued as one tract, caused by a division of that tract of land into two parts and the conveyance of one of those tracts to another, is a "factor" within the meaning of N.C. Gen. Stat. section 105-287(a)(3), justifying a revaluation of that tract of land.

Corbett, 138 N.C. App. at 536, 530 S.E.2d at 91-92. Restated, the question is whether the conveyance of a portion of a previously appraised tax parcel triggers the provisions of sections 105-287(a)(3) and 105-287(c).

Pursuant to section 105-287(c), if an increase or decrease in the appraised value of real property is required under section 105-287, it "*shall* be made in accordance with the schedules, standards, and rules used in the county's most recent general reappraisal or horizontal adjustment." N.C.G.S. § 105-287(c) (1999) (emphasis added).

Therefore, if the provisions of section 105-287(a)(3) are triggered, it necessarily follows that the *only* statutorily permissible method of valuation is through the application of the County's schedules, standards and rules.

With regard to the applicability of section 105-287(a)(3), the assessor is given statutory authority to adjust the appraised value of real property under certain circumstances. N.C.G.S. § 105-287(a). Circumstances specifically addressed by the statute include the correction of a clerical, appraisal or mathematical error. N.C.G.S. § 105-287(a)(1), (a)(2). The circumstance relevant to the case at hand, however, is "an increase or decrease in the value of the property resulting from a factor other than one listed in subsection (b)." N.C.G.S. § 105-287(a)(3). Although "factor" is not defined within the chapter addressing property taxation, *The Oxford English Dictionary* defines factor as "a circumstance, fact, or influence which tends to produce a result." *The Oxford English Dictionary* 654 (2d ed. 1989). Therefore, pursuant to section 105-287(a)(3), an assessor is required to increase or decrease the appraised value of real property to "[r]ecognize an increase or decrease in the value of the property resulting from a [circumstance] other than one listed in subsection (b)." N.C.G.S. § 105-287(a)(3). In other words, if a circumstance which causes an increase or decrease in valuation is not specifically excluded from reappraisal as a result of being listed in section 105-287(b), there is statutory authorization, indeed a statutory mandate, for an assessor to reappraise the property to recognize the impact of that circumstance.

Circumstances outlined by section 105-287(b) under which an assessor may not increase or decrease the appraised value of real property include normal, physical depreciation of improvements; inflation; or betterments to property, such as landscaping. N.C.G.S. § 105-287(b). The conveyance of a portion of a previously appraised tax parcel, however, is not listed as a circumstance under which an assessor may not increase or decrease the appraised value of the real property. Therefore, based on basic rules of statutory interpretation, we hold that a division and conveyance of a portion of a previously appraised tax parcel is a "factor" within the meaning of section 105-287(a)(3).

The Court of Appeals' holding in the case at hand relied heavily on an opinion of this Court, *In re Appeal of Allred*, 351 N.C. 1, 519 S.E.2d 52 (1999). In *Allred*, an entire parcel of real estate was transferred between owners, and this Court held that the transfer of an

entire, unchanged parcel was not a factor which triggered revaluation under section 105-287(a)(3). *Id.* at 13, 519 S.E.2d at 59. This Court explained that factors

> which would allow for "an increase or decrease in the value of the property," *would include, for example*, a rezoning, a relocation of a road or utility, or *other such occurrence* directly affecting the specific property, which falls outside the control of the owner and is subject to analysis and appraisal under the established schedules of values, standards and rules.

Id. at 12, 519 S.E.2d at 58 (emphasis added).

In quoting the aforementioned *Allred* language, the Court of Appeals added the word "any" in front of a portion taken from the middle of the quote, thereby changing the language from "other such occurrence" to read that "[a]ny 'occurrence directly affecting the specific property, which falls outside the control of the owner,' and not included within the scope of subsection (b), is properly treated as a subsection (a)(3) 'factor'." *Corbett*, 138 N.C. App. at 536, 530 S.E.2d at 92. From this posture, the Court of Appeals reasoned that

> a county can increase or decrease the appraised value of real property under section 105-287(a)(3) only when . . . there has been an "occurrence directly affecting the specific property, which falls outside the control of the owner," not included within the scope of section 105-287(b).

Id. at 537, 530 S.E.2d at 92. Carrying its logic forward, the court held that because

> [t]he division and transfer of the property was . . . within the sole authority of [the] Taxpayers, . . . [i]t follows the division and transfer was *not* a "factor" within the meaning of section 105-287(a)(3) [and] [t]he County, therefore, did not have statutory authority to revalue the 1.91 acre tract . . . as two separate tracts.

Id. (footnotes omitted). Recognizing that the County, nevertheless, had to apply some tax value to the Corbett property which, in order to reflect the reduced acreage, was less than the value derived for the 1.91-acre tract, the court reasoned that allocation of the 1995 valuation between the two tracts was appropriate. *Id.* at 537-38, 530 S.E.2d at 92.

The error in the Court of Appeals' reasoning began when it quoted a portion of a sentence of illustrative language of this Court,

placed the broad adjective "any" in front of it and created new law under the guise that it was legal precedent established by *Allred*. The quotation of a portion of a sentence and the exclusion of modifying words such as "would include" and "for example" misstates the law and creates a narrow interpretation which was not intended by this Court. The *examples* given in *Allred* did not comprise an exhaustive list of all occurrences which would fall under section 105-287(a)(3), nor did the illustrative language state or imply that occurrences within the control of a property owner could not be factors which would allow for reappraisal under that section. There is nothing in the language of section 105-287 which makes a distinction between an occurrence within the control of the owner and an occurrence outside the control of the owner. Therefore, as a point of clarification, factors which allow for an increase or decrease in the appraised value of real property in nongeneral reappraisal or horizontal adjustment years are not limited to occurrences affecting the specific property which fall outside the control of the owner.

As to the Court of Appeals' determination that an allocation of the original 1.91 acre's valuation was required between the two resulting parcels, the *only* statutorily approved method of valuation referred to in the Machinery Act, subchapter II of chapter 105 of our General Statutes, is a valuation in accordance with the schedules, standards and rules used in the County's most recent general appraisal or horizontal adjustment. There is no reference to or authorization for the use of allocation as a permissible valuation method. Certainly, the General Assembly was aware that valuations could be apportioned between parcels and would have included such a provision if it had so intended.

In *Allred*, this Court reiterated, in clear and concise language, the importance of the application of a county's schedules, standards and rules which were established and approved for uniform, countywide application in all property tax appraisals. *See Allred*, 351 N.C. at 10, 13, 519 S.E.2d at 57, 59. The restrictions imposed on assessors by section 105-287, regarding the limited permissibility and method of reappraisal between general reappraisal or horizontal adjustment years, "are designed to promote horizontal equity between owners of similar properties, limit discretionary valuation and ensure reliability to the ad valorem tax process." *Id.* at 4, 519 S.E.2d at 54. In the instant case, the application of the schedules, standards and rules used by the County in its 1995 general appraisal established the valuation the Corbetts' 1.22-acre property would have had if it had existed as of 1

January 1995, the year of the County's most recent general reappraisal. In January 1998, as in the beginning of each year, the County assessor was required to separately list and appraise each parcel under Pender County's adopted schedule of values, standards and rules in a manner consistent with the County's appraisals of other similar parcels in order to achieve uniformity in assessments for tax purposes.

Having reached the conclusion that reappraisal of petitioners' 1.22 acres by Pender County was statutorily required, it may be instructive to summarize how the application of the appraisal standards could result in what would appear to be such a disproportionate reduction ($7,892) in the Corbetts' property valuation as related to the increase ($89,838) in the Wallin property valuation.

It is the duty of appraisers "[i]n determining the true value of land, to consider as to each tract, parcel, or lot separately listed at least its advantages and disadvantages as to location; zoning; quality of soil; waterpower; water privileges; . . . [and] adaptability for agricultural, timber-producing, commercial, industrial, or other uses." N.C.G.S. § 105-317(a)(1) (1999). Based on this statutory duty, counties develop rules for the application of schedules of values and standards to be applied to individual properties depending on such variables as zoning, topography, street access, size, whether there is water frontage, and whether the land is a residential buildable lot or residual acreage. Residual acreage, or excess acreage as it is also designated, is the acreage which is in excess of an owner's developed or developable lot and is typically appraised at a lower value than a "homesite" lot and may be valued on a sliding-scale basis, i.e., the more residual acreage, the less its tax appraisal value per acre. The classification of property into these types of categories is consistent with the intent of taxation based on use, reflected by the statutory requirement that all property be valued at its "true value" in money, taking into account "the uses to which the property is adapted and for which it is capable of being used." N.C.G.S. § 105-283 (1999). In Pender County, under its adopted schedules and rules, if an owner owns more than an acre of residential property, the highest and best use of the first acre, or half acre in some cases, is presumed to be for the residential homesite, and the rest of the acreage is presumed to be "excess" or "residual." For obvious reasons, a taxpayer who owns five acres would prefer to be taxed at a higher rate for only one acre, rather than for five.

In the instant case, the Corbetts' original 1.91-acre lot was valued as one acre of developed waterfront acreage with .91 acres of excess acreage. The .91 acres was valued at a much lower rate than the one acre of developed waterfront acreage. When the Corbetts transferred the .69-acre parcel to Ms. Wallin, under the County's rules, the Corbetts maintained one acre of developed waterfront acreage and their excess acreage was reduced to .22 acres. Therefore, the reduction in their real property tax liability was a result of a decrease in the size of the least expensive, from a tax perspective, piece of land. On the other hand, because the property was split perpendicular to the waterway, Ms. Wallin's .69-acre tract was valued as a .69-acre tract of developed or developable waterfront acreage, which was valued under the schedules and rules in place at a much higher rate per acre than it had been valued when it was categorized as excess acreage.

The appraisals of the Corbett and Wallin properties were calculated by using the Pender County schedules, standards and rules uniformly used in its most recent general reappraisal, and those standards were never objected to by petitioners. Although petitioners may not find the valuation results palatable, the time to object to the categories used by a county, and the schedules, standards and rules of their application, is prior to the adoption of those schedules, standards and rules. *See* N.C.G.S. § 105-317; N.C.G.S. § 105-322.

In summary, based on statutory mandate, once it is determined that valuation or revaluation of a property is statutorily required, any valuation which is not made in accordance with the schedules, standards and rules used in the County's most recent general reappraisal or horizontal adjustment is in violation of the statutory requirements of section 105-287. The Pender County assessor had a statutory obligation to reappraise the Corbetts' real property in 1998 and to use the County's adopted standards, schedules of values and rules in conducting that reappraisal. We, therefore, reverse the decision of the Court of Appeals.

REVERSED.

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

RICH, RICH & NANCE, A NC GENERAL PARTNERSHIP v. CAROLINA CONSTRUCTION CORPORATION

No. 378A01

(Filed 1 February 2002)

Vendor and Purchaser— rule against perpetuities—deferred compensation contract for real estate sale

The rule against perpetuities did not prevent the enforcement of an addendum to a real estate sales contract which provided that an "availability fee" would be paid upon each sale of a lot after the property was subdivided. The fee was a means of deferred compensation and did not relate in terms of title to any existing, underlying property. There was no property to which any interest could vest, and thus no devise of a future interest, so that the policies underlying the rule were not violated. This comports with recent statutory provisions excluding certain kinds of transactions from the Uniform Statutory Rule Against Perpetuities, which was adopted after the date of the sales contract at issue here.

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. 303, 548 S.E.2d 541 (2001), reversing a judgment entered 31 August 1999 by Grant (Cy A.), J., in Superior Court, Pasquotank County, and remanding for entry of judgment in favor of defendant. Heard in the Supreme Court 15 October 2001.

Trimpi, Nash & Harman, L.L.P., by John G. Trimpi, for plaintiff-appellant.

The Twiford Law Firm, L.L.P., by Branch W. Vincent, III, for defendant-appellee.

LAKE, Chief Justice.

The sole question presented for review in this case is whether the rule against perpetuities prevents enforcement of contractual rights found in an addendum to a real estate sales contract providing for a $600 "availability fee" to be paid upon the sale of each lot in a subdivision. The Court of Appeals held that such an agreement violates the rule against perpetuities and, therefore, is unenforceable. *Rich, Rich & Nance v. Carolina Constr. Corp.*, 144 N.C. App. 303, 307, 548

S.E.2d 541, 544 (2001). For the reasons set forth below, we reverse the decision of the Court of Appeals and remand the case to that court for consideration of defendant's additional assignments of error not addressed by the Court of Appeals.

Rich, Rich and Nance, a North Carolina general partnership, owned an 11.89-acre parcel of land known as "Walking Horse Subdivision" in Elizabeth City, North Carolina. On 29 August 1994, plaintiff entered into a contract with LFM Properties to sell this parcel. Based upon their previous negotiations, plaintiff anticipated that at some date in the future LFM Properties would convey its interest in the property under the contract to defendant, which would ultimately subdivide and develop the property into thirty-seven single-family residential lots. Also, on 29 August 1994, LFM Properties and plaintiff executed an addendum to the contract which provided as follows:

> At the close of each of the 37 (thirty-seven) lots of Walking Horse subdivision, LFM Properties and or Carolina Construction Corporation, whomever is owner, agrees to pay to Rich, Rich and Nance the sum of $600.00 (Six Hundred Dollars) per lot as an availability fee. These fees shall survive any and all listing agreements and shall remain as a lien against the lots until they are paid. The sale or transfer of these lots from LFM Properties to Carolina Construction Corporation is exempt from the fee until such time as Carolina Construction Corporation sells the property improved or unimproved.

Plaintiff thus anticipated a total payment from defendant of $97,200: $75,000 at the closing and, based on the addendum agreement, $22,200 over time as the lots in the subdivision were sold.

On 28 April 1995, the sale of the proposed Walking Horse Subdivision closed, and the deed was recorded. Plaintiff sold only 9.38 acres to defendant, but the price and terms of the agreement remained the same. Apparently, plaintiff retained 2.51 acres of the original tract because of its need for an additional drainage area servicing its adjacent development project. Also, at the closing, the parties added a second clause to the addendum that called for inclusion of the availability fee in future restrictive covenants. It stated:

> Upon the subject property being developed by LFM Properties, or its successor in interest, a Declaration of Restrictive Covenants shall be recorded with the subdivision

plat. The Declaration shall refer to the above-mentioned fee agreement and provide record notice thereof.

The parties jointly referred to the deferred money as an "availability fee." However, plaintiff characterized the money owed from the addendum as a deferred portion of the purchase price, an accommodation to the buyer and an interest-free loan until the lots were sold. There are no foreclosure or default terms or acceleration clauses in the addendum with regard to nonpayment. At trial, the president of defendant corporation acknowledged that the arrangement would defer a portion of the purchase price until his corporation could afford to pay it. He also stated that on the day of the closing, he signed the second part of the addendum and that, at the time, he believed the corporation was obligated to pay the $600 per lot fee.

On 30 May 1997, as anticipated by the parties, defendant took title to the property upon delivery of a general warranty deed from LFM Properties, which deed was recorded. There were no exceptions to or restrictions upon this title. Defendant began to develop the property and prepared and recorded restrictive covenants. These covenants did not make reference to the availability fee. The availability fee or deferred payment arrangement mentioned in the first part of the addendum was never recorded. Defendant renamed the development "Carolina Village" and redesigned the subdivision to include thirty-eight lots, instead of the original thirty-seven.

Defendant sold the first lot in Carolina Village on 22 April 1998 and did not pay the fee allegedly owed to plaintiff. Plaintiff, on 15 June 1998, brought suit for breach of contract and sought $600 in damages, alleging anticipatory repudiation and asking for the balance due of $22,200. Plaintiff also sought to require defendant to reference the availability fee in the restrictive covenants and to create a judicial lien on the remaining lots in the subdivision. At the time of trial, only twelve lots had been platted, and defendant had sold nine lots. Approximately 6.9 acres remained undivided.

The trial court entered judgment for plaintiff for monetary damages in the amount of $5,400 based only on defendant's breach of contract in failing to pay the $600 for each of the nine lots then sold. The trial court also provided in its judgment that the $16,800 balance was due in $600 increments as each of the twenty-eight possible remaining lots was sold and, if the undeveloped part of the tract was sold, the entire balance would then be due. In essence, the trial court viewed the availability fee as a deferred portion of the contract price

and did not consider the rule against perpetuities applicable. The trial court did not allow plaintiff to recover on its anticipatory repudiation theory, nor did it require defendant to reference the arrangement in the restrictive covenants or declare a judicial lien.

On appeal, the Court of Appeals held that the trial court's ruling was error, concluding that the rule against perpetuities prevented the enforcement of the addendum. The court ruled that the purported "lien" was not a vested interest, and thus the rule applied. *Rich, Rich & Nance*, 144 N.C. App. at 306-07, 548 S.E.2d at 543-44. The court stated that "[t]he underlying purpose of the rule being to prevent the restraint on alienation, we believe that the perpetual encumbrance on the property which plaintiff seeks to enforce is the sort of impediment to marketability that the rule was meant to prevent." *Id.* at 307, 548 S.E.2d at 544.

On appeal before this Court, the sole issue for our review is whether the rule against perpetuities prevents plaintiff from enforcing against defendant the contractual rights found in the addendum and thus collecting its deferred payments or the availability fee. Plaintiff asserts that the availability fee is merely a contractual provision and that the rule does not apply because the addendum does not restrain alienability and is outside the policy parameters that would invoke the rule. We agree and conclude that the rule does not prevent enforcement of the contractual rights found in the addendum.

As it has evolved in North Carolina, the rule against perpetuities provides as follows:

> No devise or grant of a future interest in property is valid unless the title thereto must vest, if at all, not later than twenty-one years, plus the period of gestation, after some life or lives in being at the time of the creation of the interest. If there is a possibility such future interest may not vest within the time prescribed, the gift or grant is void.

Parker v. Parker, 252 N.C. 399, 402-03, 113 S.E.2d 899, 902 (1960). "Its primary purpose is to restrict the permissible creation of future interests and prevent undue restraint upon or suspension of the right of alienation." *Mercer v. Mercer*, 230 N.C. 101, 103, 52 S.E.2d 229, 230 (1949); *see also* Richard R. Powell, *Powell on Real Property* §§ 71.01[1], 72.01 (Michael Allan Wolf ed., Matthew Bender) (discussing the social purpose of the rule as the regulation of the creation of future interests and limiting restraints on alienation).

The rule was modified by statute in 1995, with the adoption of the Uniform Statutory Rule Against Perpetuities and the creation of a ninety-year wait-and-see period for vesting or termination of nonvested property interests. N.C.G.S. § 41-15 (1999); *see generally* N.C.G.S. ch. 41, art. 2 (1999). Chapter 41, article 2 is not applicable to the addendum in this case because the sales contract involved here predates the statute. We note, however, that the General Assembly has seen fit to exclude certain kinds of transactions from the statutory rule's application, including most nonvested property interests arising out of "nondonative transfers." N.C.G.S. § 41-18(1) (1999); *see also* Ronald C. Link & Kimberly A. Licata, *Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts*, 74 N.C. L. Rev. 1783, 1799-1800 (1996) [hereinafter Link & Licata] (discussing the effects of N.C.G.S. § 41-18(1)). The exclusion of most nondonative transfers, i.e., commercial-type transactions, from the rule is contrary to the common law, but reflects a decision by the General Assembly that the rule "is a wholly inappropriate instrument of social policy to use as a control over such arrangements." N.C.G.S. § 41-18 official commentary; *cf.* Ronald C. Link, *The Rule Against Perpetuities in North Carolina*, 57 N.C. L. Rev. 727, 804-17 (1979) (discussing the application of the common-law rule to commercial interests in North Carolina and concluding that it is better not to apply the rule in such cases); Link & Licata, 74 N.C. L. Rev. at 1814-26 (discussing nondonative transfers and observing that "[t]he application of the Rule Against Perpetuities to nondonative (i.e., commercial) transactions has been particularly nettlesome in North Carolina").

Nevertheless, our common law rule against perpetuities does not exclude commercial interests from its application. *See, e.g., Village of Pinehurst v. Regional Invs. of Moore, Inc.*, 330 N.C. 725, 412 S.E.2d 645 (1992). However, the rule under the common law does not apply in all cases involving commercial transactions. Commercial transactions that do not violate the underlying policies behind the rule against perpetuities, as well as those involving mere contract provisions or present vested interests, do not fit under the umbrella of the common law rule. We need not decide the outer parameters of the rule as it relates to commercial transactions today, however, as we believe that the addendum addressed in the instant case clearly falls outside the intended scope of the rule.

The addendum to the real estate sales contract in the instant case is merely a contractual attempt at creative financing, and it does not

involve the kinds of nonvested future interests for which the rule is intended. Specifically, this contractual arrangement for the future payment of money does not relate in terms of title to any existing, underlying property. There is no property to which any "interest" may vest, and thus there can be no "devise or grant of a future interest" which will affect "the title thereto." *Parker*, 252 N.C. at 402-03, 113 S.E.2d at 902. Plaintiff alleges only that it is owed additional monetary compensation when the parcel of land is sold. Plaintiff cannot claim any interest, present or future, in the land itself, but holds only a continuing contractual right to money already owed for the land, if and when it is sold by defendant. Furthermore, the land underlying the dispute is clearly vested in defendant, and it is not subject to defeasance. Any past or future sale of the lots is not tied to the payment of the availability fee, and because the arrangement was never recorded, title to the land is not encumbered as security for the debt. Defendant's default at the time of each sale would not give rise to any foreclosure proceedings or specific performance remedies which would affect the title to the land as a whole or as to any of the subdivided lots.

As evidenced by their testimony, the principals for both plaintiff and defendant intended the "availability fee" of the addendum to be a means of deferred compensation for plaintiff. A partner from plaintiff partnership testified that he intended the fee to be an interest-free loan to defendant. Defendant's president admitted at trial that he felt obligated to pay the fee at the time of the making of the contract. Furthermore, the parties came to a negotiated, arms-length deal, evidenced by the sales contract and the twice-signed addendum. The designation in the contract for portions of the sale price to be paid as the originally planned thirty-seven lots were sold was merely a convenient way for both parties to allocate payment of the loan.

The addendum is most analogous to a due-on-sale clause, which clauses have been upheld by this Court as indirect or nonsubstantial restraints on alienation. *See Crockett v. First Fed. Sav. & Loan Ass'n of Charlotte*, 289 N.C. 620, 624-25, 224 S.E.2d 580, 584 (1976) (stating that "the due-on-sale clause is part of an overall contract that facilitates the original purchase and, thus, promotes alienation of property"). The principals of both plaintiff and defendant in the instant case appear to be competent to make a contract to suit their interests, and an addendum such as the one here, much like a due-on-sale clause, may be a valid part of any such agreement. *See generally id.* at 630, 224 S.E.2d at 587.

The policy justifications underlying the rule against perpetuities are not implicated here, thus buttressing our view of this case. As noted in *Village of Pinehurst*, the rule " 'evolved to prevent . . . property from being fettered with future interests so remote that the alienability of the land and its marketability would be impaired, preventing its full utilization for the benefit of society at large as well as of its current owners.' " *Village of Pinehurst*, 330 N.C. at 732, 412 S.E.2d at 648 (Meyer, J., dissenting) (quoting *Anderson v. 50 E. 72nd St. Condo.*, 119 A.D.2d 73, 76, 505 N.Y.S.2d 101, 103 (1986), *appeal dismissed*, 69 N.Y.2d 743, 504 N.E.2d 700, 512 N.Y.S.2d 1032 (1987)). No such restraint on marketability or alienation occurs in the instant case.

Plaintiff cannot restrict or prohibit the sale of the lots or land. Defendant is free to sell or hold the tract as it sees fit. Such a contractual agreement hardly seems commensurate with the types of restraint on alienation contemplated by the rule. Defendant's subsequent redesign of the planned subdivision, and its addition or subtraction of residential lots, demonstrates that it is free to develop and market the land as it sees fit. The payment obligation is not tied to a specific part of the property. If the contract is found to be valid, the total amount owed would not change based on the number of lots eventually created and sold.

Defendant has not demonstrated that the payment arrangement provided for in the addendum, and based on the subsequent sale of the land, hinders its ability to market or alienate the property in any way. Defendant has, in fact, sold nine lots in Carolina Village. Plaintiff has no claim on these lots and now seeks only money from defendant. The policy concerns underlying the rule are not present here. If anything, the addendum had the opposite effect, aiding the original alienation or sale of the land and allowing defendant to purchase the parcel at a lower initial price by utilizing, in effect, an interest-free loan. The contract is thus not objectionable as a perpetuity and is therefore not subject to the rule. *See generally Duff-Norton Co. v. Hall*, 268 N.C. 275, 277, 150 S.E.2d 425, 427-28 (1966).

Our holding today does not negate the precedent found in *Village of Pinehurst*. In that case, we held that a preemptive right, i.e., a right of first refusal, to purchase the water and sewer facilities serving the Village of Pinehurst held by the plaintiff violated the rule against perpetuities, and declined to overrule our prior holding in *Smith v. Mitchell*, 301 N.C. 58, 269 S.E.2d 608 (1980). *Village of Pinehurst*, 330 N.C. at 728-29, 412 S.E.2d at 646-47. In that case, we also expressly

declined to make exception to the rule based solely on use of the land for commercial purposes. *Id.* at 729, 412 S.E.2d at 646-47. That case does not, however, stand for the proposition that the rule would apply to all commercial transactions.

The instant case does not involve any sort of preemptive right, which would give us greater pause. *See, e.g., Village of Pinehurst*, 330 N.C. 725, 412 S.E.2d 645; *Smith*, 301 N.C. 58, 269 S.E.2d 608. A preemptive right may be a direct "restraint on the alienability of property in that it has the potential to deter would-be buyers by creating uncertainty and unwillingness to invest time and energy into purchasing the burdened property." *Village of Pinehurst v. Regional Investments of Moore: Perpetuating the Rule Against Perpetuities in the Realm of Preemptive Rights—North Carolina Refuses to Accept an Exception to the Rule*, 71 N.C. L. Rev. 2115, 2130 (1993). No such clear or direct restraint on alienation exists in the present case. The policy considerations that helped to justify our decisions in *Village of Pinehurst* and *Smith* are not present here, and we decline to extend the reach of the rule further into the realm of commercial interests where there is not a clear and direct restraint on alienation or marketability.

Thus, for the foregoing reasons, we conclude that the rule against perpetuities does not prevent the enforcement of the addendum to the real estate sales contract in this case. The addendum does not involve a nonvested future interest and does not violate the policies underlying the rule. Our decision today comports with the General Assembly's recently enacted statutory provisions concerning the inapplicability of the rule to some commercial transactions. We note, however, that defendant has raised other defenses against the payment arrangement which were not addressed by the Court of Appeals. On remand, the Court of Appeals is thus directed to consider these remaining issues not reached in its previous decision.

REVERSED AND REMANDED.

KENDRA J. THIGPEN v. CORAZON NGO, M.D., MARSHALL B. FRINK, M.D., NATIONAL EMERGENCY SERVICES, INC., EMERGENCY PHYSICIANS ASSOCIATION, INC., CP/NATIONAL, INC. A/K/A COMMUNITY PHYSICIANS/NATIONAL, INC., AND ONSLOW COUNTY HOSPITAL AUTHORITY

No. 292A01

(Filed 1 February 2002)

1. Medical Malpractice— certification—interplay of Rules 9(j) and 15

It was not necessary to discuss the interplay between N.C.G.S. § 1A-1, Rules 9(j) and 15 in an action involving the required certification for filing a medical malpractice action where the trial court dismissed the action for failure to comply with Rule 9(j) and did not base its ruling on the interaction of the two rules. *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, is distinguished.

2. Medical Malpractice— certification—added to amended complaint

The trial court correctly dismissed a medical malpractice complaint for failure to comply with N.C.G.S. § 1A-1, Rule 9(j) where plaintiff requested and received a 120-day extension to comply with the certification mandate on the day before the statute of limitations would have expired, filed her complaint without the certification, and filed an amended complaint which included the certification after the statute of limitations had expired. The specific mandate of Rule 9(j) prevails over other general rules; permitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict with the clear intent of the legislature.

3. Medical Malpractice— certification—amended complaint—allegation that review occurred before original complaint—required

An amended medical malpractice complaint which failed to allege that review of the medical care took place before the filing of the original complaint did not satisfy the certification requirements of N.C.G.S. § 1A-1, Rule 9(j). Allowing a plaintiff to file a medical malpractice complaint and then wait until after the filing to have the allegations reviewed by an expert would pervert the purpose of Rule 9(j).

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. 209, 545 S.E.2d 477 (2001), reversing an order entered 17 November 1999 by Hockenbury, J., in Superior Court, Onslow County. On 19 July 2001, the Supreme Court granted defendant Corazon Ngo's and defendant Onslow County Hospital Authority's petitions for discretionary review of additional issues. Heard in the Supreme Court 13 November 2001.

Jimmy F. Gaylor for plaintiff-appellee.

Harris, Creech, Ward and Blackerby, P.A., by C. David Creech and W. Gregory Merritt, for defendant-appellant Corazon Ngo, M.D.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by John D. Madden and Deanna Davis Anderson, for defendant-appellant Onslow County Hospital Authority.

WAINWRIGHT, Justice.

This case arises from an order of the trial court dismissing plaintiff's complaint alleging medical malpractice because of plaintiff's failure to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure and dismissing, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, plaintiff's amendment to the complaint because it is barred by the applicable statute of limitations, N.C.G.S. § 1-15(c) (1999).

Kendra Thigpen (plaintiff) alleges defendants Dr. Corazon Ngo (Ngo) and Onslow County Hospital Authority (OCHA) committed medical malpractice in June 1996. On 8 June 1999, before the three-year statute of limitations was to expire, plaintiff filed a motion to extend the statute of limitations 120 days to file a medical malpractice complaint against defendants. In her motion, plaintiff stated she "need[ed] additional time to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure" and "move[d] to extend the statute of limitations for a period *not to exceed* 120 days." (Emphasis added.) The motion was signed by plaintiff's attorney. Pursuant to Rule 9(j), the trial court granted plaintiff's motion. In the order extending the statute of limitations, the trial court determined that "good cause exists for granting [plaintiff's motion and that] the ends of justice will be served by an extension." The order specifically extended the statute of limitations through 6 October 1999.

On 6 October 1999, the final day of the extended deadline, plaintiff filed a medical malpractice complaint. The complaint did not contain the certification required by Rule 9(j). *See* N.C.G.S. § 1A-1, Rule 9(j) (1999). Namely, the complaint did not specify that the medical care had been reviewed by an expert prior to filing. On 12 October 1999, six days after the statute of limitations expired, plaintiff filed an amended complaint including a certification that the "medical care has been reviewed" by someone who would qualify as an expert.

Defendants Ngo and OCHA filed motions to dismiss on 4 and 10 November 1999, respectively, because plaintiff's amended complaint was not filed prior to the court-extended statute of limitations. On 17 November 1999, the trial court granted both defendants' motions to dismiss pursuant to Rules 9(j) and 12(b)(6). The trial court dismissed plaintiff's complaint with prejudice, finding that "Plaintiff's original Complaint did not contain a certification that the care rendered by Defendants had been reviewed by an expert witness reasonably expected to testify that the care rendered to Plaintiff did not comply with the applicable standard of care as required by Rule 9(j)."

The Court of Appeals reversed the trial court and reinstated plaintiff's cause of action. *Thigpen v. Ngo*, 143 N.C. App. 209, 219, 545 S.E.2d 477, 483 (2001). The Court of Appeals held "plaintiff was entitled to amend her initial complaint to include the necessary Rule 9(j) certification." *Id.* We disagree.

[1] At the outset, we note the Court of Appeals discussed the interplay between Rule 9(j) and Rule 15 of the North Carolina Rules of Civil Procedure. *Id.* at 211-19, 545 S.E.2d at 479-83. We find the relationship between these two rules to be neither dispositive nor relevant to this case. The trial court dismissed plaintiff's complaint with prejudice because it did not comply with Rule 9(j) and was therefore filed outside the statute of limitations. The trial court did not base its ruling on the interaction between Rules 9(j) and 15, and we find it unnecessary to address that relationship here.

The Court of Appeals also relied on this Court's decision in *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 528 S.E.2d 568 (2000), to assist its analysis of the interaction between Rules 9(j) and 15. *Thigpen*, 143 N.C. App. at 213, 545 S.E.2d at 480. In *Brisson*, we held the plaintiffs in a medical malpractice case who failed to include the 9(j) expert certification could take a voluntary dismissal pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil

Procedure to effectively extend the statute of limitations. *Brisson*, 351 N.C. at 597, 528 S.E.2d at 573. We find the facts in *Brisson* distinguishable from those in the present case. Specifically, in *Brisson*, this Court noted the trial judge "reserved ruling on defendants' motion to dismiss," and plaintiffs subsequently took a voluntary dismissal. *Id.* at 592, 528 S.E.2d at 570. Additionally, the plaintiffs in *Brisson* did not request the 120-day extension provided by Rule 9(j). *Brisson*, 351 N.C. 589, 528 S.E.2d 568. In *Brisson*, we stated, "Had the trial court involuntarily dismissed plaintiffs' complaint with prejudice pursuant to defendants' motion *before* plaintiffs had taken the voluntary dismissal, then plaintiffs' claims set forth in the second complaint would be barred by the statute of limitations." *Id.* at 595, 528 S.E.2d at 572. Any reliance by the Court of Appeals on our decision in *Brisson* was thus flawed.

[2] Defendants first argue the trial court's dismissal of plaintiff's complaint was mandatory under Rule 9(j). We agree. The North Carolina Rules of Civil Procedure address pleadings in medical malpractice suits. Rule 9(j) mandates:

> (j) *Medical malpractice.—Any* complaint alleging medical malpractice by a health care provider . . . *shall be dismissed* unless:
>
> (1) The pleading *specifically* asserts that the medical care *has been reviewed* by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
>
> (2) The pleading specifically asserts that the medical care *has been reviewed* by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint . . . .

N.C.G.S. § 1A-1, Rule 9(j), para. 1(1), (2) (emphasis added).

Further, Rule 9(j) allows a plaintiff to extend the filing time to comply with the expert certification requirement:

> Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge . . . may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action *in order to comply with this Rule*, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension.

Id., para. 2 (emphasis added).

"When the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction." *State ex rel. Util. Comm'n v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977). Rule 9(j) clearly provides that "*[a]ny* complaint alleging medical malpractice . . . *shall* be dismissed" if it does not comply with the certification mandate. N.C.G.S. § 1A-1, Rule 9(j), para. 1 (emphasis added). Contrary to the holding of the Court of Appeals, we find the inclusion of "shall be dismissed" in Rule 9(j) to be more than simply "a choice of grammatical construction." *Thigpen*, 143 N.C. App. at 215, 545 S.E.2d at 481. While other subsections of Rule 9 contain requirements for pleading special matters, no other subsection contains the mandatory language "shall be dismissed." This indicates that medical malpractice complaints have a distinct requirement of expert certification with which plaintiffs must comply. Such complaints will receive strict consideration by the trial judge. Failure to include the certification necessarily leads to dismissal.

Rule 9(j) grants a trial judge the discretion to permit a 120-day extension of the statute of limitations "*in order to comply* with this Rule." N.C.G.S. § 1A-1, Rule 9(j), para. 2 (emphasis added). The extension of the statute of limitations is not automatic. The trial judge may allow a motion to extend the statute of limitations only "upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension." *Id.*

Additionally, the plain language of Rule 9(j) requires dismissal but does not specify whether the dismissal shall be with or without prejudice. "The trial court's authority to order an involuntary dismissal without prejudice is . . . in the broad discretion of the trial court. . . ." *Whedon v. Whedon*, 313 N.C. 200, 213, 328 S.E.2d 437, 445 (1985). When acting pursuant to Rule 9(j), trial judges, with their unique perspective, have the discretion to dismiss without prejudice if they see fit.

While our Rules of Civil Procedure contain many rules addressing pleadings generally, Rule 9(j) specifically addresses extensions of time to file a medical malpractice complaint where the complaint lacks expert certification. The title of Rule 9, "Pleading special matters," plainly signals the statute's tailoring to address distinct situations set out in the statute. We have stated:

> "Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, according to the authorities on the question, unless it appears that the legislature intended to make the general act controlling . . . ."

National Food Stores v. N.C. Bd. of Alcoholic Control, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966) (quoting 82 C.J.S. *Statutes* § 369, at 839-43 (1953)), *quoted in McIntyre v. McIntyre*, 341 N.C. 629, 631, 461 S.E.2d 745, 747 (1995). Accordingly, the specific mandate of Rule 9(j) that a medical malpractice claim shall be dismissed if it does not contain the expert certification prevails over other general rules.

Furthermore, our analysis reveals the legislature intended Rule 9(j) to control pleadings in medical malpractice claims. Legislative intent is determined by examining the statute as a whole including the spirit of the act and the objectives the statute seeks to accomplish. *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998). "In the interpretation of statutes the legislative will is the controlling factor." *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 294 (1975).

The General Assembly added subsection (j) of Rule 9 in 1995 pursuant to chapter 309 of House Bill 730, entitled, "An Act to Prevent Frivolous Medical Malpractice Actions by Requiring that Expert Witnesses in Medical Malpractice Cases Have Appropriate Qualifications to Testify on the Standard of Care at Issue and to Require Expert Witness Review as a Condition of Filing a Medical Malpractice Action." Act of June 20, 1995, ch. 309, 1995 N.C. Sess. Laws 611. The legislature specifically drafted Rule 9(j) to govern the initiation of medical malpractice actions and to require physician review as a condition for filing the action. The legislature's intent was to provide a more specialized and stringent procedure for plaintiffs in

medical malpractice claims through Rule 9(j)'s requirement of expert certification prior to the filing of a complaint. Accordingly, permitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature.

In the case at bar, in her original complaint, plaintiff failed to comply with the Rule 9(j) certification mandate. No party disputes that plaintiff requested and received the 120-day extension to comply with the certification mandate on the very day before the three-year statute of limitations would have expired. In spite of the lengthy extension, plaintiff still failed to include any certification in her complaint. In light of the specific, unambiguous, and plain language of Rule 9(j); the legislative intent of the statute; and the record and facts in this particular case, we hold the trial court correctly dismissed plaintiff's complaint.

[3] This Court also granted discretionary review to determine if an amended complaint which fails to allege that review of the medical care in a medical malpractice action took place before the filing of the original complaint satisfies the requirements of Rule 9(j). We hold it does not. To survive dismissal, the pleading must "specifically assert[] that the medical care *has been reviewed.*" N.C.G.S. § 1A-1, Rule 9(j), para. 1(1), (2) (emphasis added). Significantly, the rule refers to this mandate twice (in subsections (1) and (2)), and in both instances uses the past tense. *Id.* In light of the plain language of the rule, the title of the act, and the legislative intent previously discussed, it appears review must occur *before* filing to withstand dismissal. Here, in her amended complaint, plaintiff simply alleged that "[p]laintiff's medical care *has been reviewed* by a person who is reasonably expected to qualify as an expert witness." (Emphasis added.) There is no evidence in the record that plaintiff alleged the review occurred before the filing of the original complaint. Specifically, there was no affirmative affidavit or date showing that the review took place before the statute of limitations expired. Allowing a plaintiff to file a medical malpractice complaint and to then wait until after the filing to have the allegations reviewed by an expert would pervert the purpose of Rule 9(j).

As a final matter, this Court allowed discretionary review of the issue of whether a plaintiff who files a complaint without expert certification pursuant to Rule 9(j) can cure that defect after the applicable statute of limitations expires by amending the complaint as a mat-

ter of right and having that amendment relate back to the date of the original complaint. In light of the particular facts and record before us, we hold discretionary review was improvidently allowed as to this issue.

In sum, based on this record, we hold that once a party receives and exhausts the 120-day extension of time in order to comply with Rule 9(j)'s expert certification requirement, the party cannot amend a medical malpractice complaint to include expert certification. Further, we hold that Rule 9(j) expert review must take place before the filing of the complaint. We therefore reverse the decision of the Court of Appeals with instructions for that court to reinstate the trial court's order dismissing plaintiff's complaint.

REVERSED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

MARTA DOBROWOLSKA, A MINOR, AND PAWEL DOBROWOLSKI, A MINOR, BY AND THROUGH THEIR GUARDIAN AD LITEM, ROBERT DOBROWOLSKI, AND ROBERT DOBROWOLSKI, INDIVIDUALLY v. MICHAEL W. WALL AND THE CITY OF GREENSBORO

No. 270PA00

(Filed 1 February 2002)

On appeal of right of a constitutional question pursuant to N.C.G.S. § 7A-30(1) and on discretionary review pursuant to N.C.G.S. § 7A-31 to review a unanimous decision of the Court of Appeals, 138 N.C. App. 1, 530 S.E.2d 590 (2000), affirming in part and reversing and remanding in part an order for summary judgment entered by Morgan (Melzer A., Jr.), J., on 14 August 1998 in Superior Court, Guilford County. Heard in the Supreme Court 12 March 2001.

Fisher, Clinard & Craig, PLLC, by John O. Craig, III, and Shane T. Stutts, for plaintiff-appellees.

Hill, Evans, Duncan, Jordan & Davis, P.L.L.C., by Polly D. Sizemore and Joseph P. Gram, for defendant-appellant City of Greensboro.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Burley B. Mitchell, Jr., and Tamara P.W. Desai, on behalf of the North

Carolina Association of County Commissioners, amicus curiae.

North Carolina League of Municipalities, by Andrew L. Romanet, Jr., General Counsel, and Gregory F. Schwitzgebel III, Assistant General Counsel, amicus curiae.

Smith Helms Mulliss & Moore, L.L.P., by James G. Middlebrooks and T. Jonathan Adams, on behalf of the North Carolina Council of School Attorneys, amicus curiae.

Tharrington Smith, L.L.P., by Michael Crowell and Deborah Stagner, on behalf of North Carolina School Boards Association, amicus curiae.

Blanchard, Jenkins, Miller & Lewis, P.A., by E. Hardy Lewis, on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART; APPEAL DISMISSED *EX MERO MOTU* IN PART.

IN THE MATTER OF: THE APPEAL OF EDNA BROWN WALLIN FROM THE DECISION OF THE PENDER COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION OF REAL PROPERTY FOR TAX YEAR 1998

No. 362PA00

(Filed 1 February 2002)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 138 N.C. App. 553, 536 S.E.2d 364 (2000), reversing a final decision entered by the Property Tax Commission of North Carolina on 24 March 1999 and remanding the matter to the Commission for further review. Heard in the Supreme Court 18 April 2001.

Leon H. Corbett, Jr., for petitioner-appellee Edna Brown Wallin.

C.B. McLean, Jr., for respondent-appellant Pender County.

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

PER CURIAM.

Pursuant to this Court's opinion in *In re Appeal of Corbett*, 355 N.C. 181, 558 S.E.2d 82 (2002), we reverse the decision of the Court of Appeals.

REVERSED.

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

KENDRA J. THIGPEN v. CORAZON NGO, M.D., MARSHALL B. FRINK., M.D., NATIONAL EMERGENCY SERVICES, INC., EMERGENCY PHYSICIANS ASSOCIATION, INC., CP/NATIONAL, INC. A/K/A COMMUNITY PHYSICIANS/NATIONAL, INC., AND ONSLOW COUNTY HOSPITAL AUTHORITY

No. 332A01

(Filed 1 February 2002)

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. 223, 552 S.E.2d 641 (2001), reversing summary judgment entered 6 December 1999 by Hockenbury, J., in Superior Court, Onslow County. On 19 July 2001, the Supreme Court granted defendants Frink; National Emergency Services, Inc.; and CP/National, Inc.'s petition for discretionary review of additional issues. Heard in the Supreme Court 13 November 2001.

Jimmy F. Gaylor for plaintiff-appellee.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Christopher J. Derrenbacher, for defendant-appellants Marshall B. Frink, M.D.; National Emergency Services, Inc.; and CP/National, Inc., a/k/a Community Physicians/National, Inc.

PER CURIAM.

Pursuant to this Court's opinion in *Thigpen v. Ngo*, 355 N.C. 198, 558 S.E.2d 162 (2002), the decision of the Court of Appeals is

reversed in part and discretionary review was improvidently allowed in part.

REVERSED IN PART AND DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
ROBERT LEWIS McCLAIN	)	

No. 140A00

(Filed 31 January 2002)

Pursuant to N.C.G.S. § 15A-1418, defendant's Motion for Appropriate Relief filed in this Court on 20 December 2001 is allowed for the limited purpose of entering the following orders:

Defendant's Motion for Appropriate Relief is hereby remanded to the Superior Court, Mecklenburg County, for a determination as to whether defendant is mentally retarded as defined by N.C.G.S. § 15A-2005.

It is further ordered that an evidentiary hearing be held on the aforesaid motion and that the resulting order containing the findings of fact and conclusions of law of the trial court determining the motion be transmitted to this Court so that it may proceed with the appeal or enter an order terminating the appeal. Time periods for perfecting or proceeding with the appeal are tolled pending receipt of the order of disposition of the motion in the trial division.

By order of the Court in Conference, this the 31st day of January, 2002.

s/Robert H. Edmunds, Jr.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
ABNER RAY NICHOLSON	)	

No. 564A99

(Filed 1 February 2002)

By order of the Court in Conference, this 31st day of January, 2002, defendant's motion, filed 4 December 2001, for a stay pending a determination of the Motion for Appropriate Relief, is denied. We remand Defendant's Motion for Appropriate Relief, filed 4 December 2001, to the Wilson County Superior Court for determination of the issues contained therein regarding whether the death sentences imposed upon Defendant violate N.C.G.S. § 15A-2005.

s/G.K. Butterfield, Jr.
For the Court

AMERICAN RIPENER CO. v. TOLSON

No. 674P01

Case below: 147 N.C. App. 142

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002.

ARCHER v. ROCKINGHAM CTY.

No. 480P01

Case below: 144 N.C. App. 550

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002. Justice Edmunds recused.

ASHTON v. CITY OF CONCORD

No. 430A01

Case below: 144 N.C. App. 722

Motion by defendant to dismiss the appeal for lack of substantial constitutional question allowed 31 January 2002.

CHARLOTTE-MECKLENBURG HOSP. AUTH. v. BRUTON

No. 475P01

Case below: 145 N.C. App. 190

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002.

CITIZENS FOR RESPONSIBLE ROADWAYS v.
N.C. DEP'T OF TRANSP.

No. 540P01

Case below: 145 N.C. App. 497

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002.

DUNCAN v. DUNCAN

No. 668P01

Case below: 147 N.C. App. 152

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002.

GASKILL v. JENNETTE ENTERS., INC.

No. 671P01

Case below: 147 N.C. App. 138

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002.

HAMILTON v. BECK (formerly *Hamilton v. Freeman*)

No. 685P01

Case below: *Hamilton v. Freeman*, 147 N.C. App. 195

Motion by defendants for temporary stay allowed 10 January 2002.

HAWLEY v. WAYNE DALE CONSTR.

No. 626P01

Case below: 146 N.C. App. 423

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 18 December 2001.

IN RE APPEAL OF BRIARFIELD FARMS

No. 682P01

Case below: 147 N.C. App. 208

Petition by respondent (Alamance County) for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002.

IN RE ESTATE OF CRAVER

No. 680P01

Case below: 147 N.C. App. 313

Motion by respondent (Kenneth Wayne Craver) for temporary stay denied 20 December 2001. Petition by respondent (Kenneth Wayne Craver) for writ of supersedeas denied 31 January 2002. Petition by respondent (Kenneth Wayne Craver) for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002.

IN RE ESTATE OF MONK

No. 648P01

Case below: 146 N.C. App. 695

Petition by respondent for writ of supersedeas denied 31 January 2002. Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002. Justice Butterfiled recused.

IN RE SEALEY

No. 693P01

Case below: 147 N.C. App. 313

Petition by respondent (Tonya Goodson) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 31 January 2002.

IN RE WALLIN

No. 362PA00

Case below: 138 N.C. App. 553

Motion by taxpayer appellee to dismiss appeal denied 31 January 2002.

IN RE WILL OF McCAULEY

No. 649PA01

Case below: 147 N.C. App. 116

Petition by respondent (Max McCauley) for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 31 January 2002.

LEGRANDE v. STATE

No. 462A01-7

Case below: Stanly County Superior Court

Motion by plaintiff pro se civil claim against the state for malicious and deliberate erroneous convictions, imprisonments and sentence to death in capital case 95CRS567, 847 from Stanly County dismissed 31 January 2002.

LINDSEY v. BODDIE-NOELL ENTERS., INC.

No. 679A01

Case below: 147 N.C. App. 166

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 31 January 2002.

LUDWIG v. HUANG

No. 697P01

Case below: 147 N.C. App. 786

Petition by defendant pro se for discretionary review pursuant to G.S.7A-31 denied 31 January 2002.

MARCUM v. EDWARDS

No. 606P01

Case below: 145 N.C. App. 502

Petition by Allied Holdings, Inc. (Statutory Subrogee) for discretionary review pursuant to G.S.7A-31 denied 18 December 2001.

McFADDEN v. WAKE CTY. BD. OF EDUC.

No. 373P01

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 31 December 2001.

PHILLIPS v. RESTAURANT MGMT. OF CAROLINA, L.P.

No. 605P01

Case below: 146 N.C. App. 203

Petition by defendant (Restaurant Management of Carolina, L.P.) for discretionary review pursuant to G.S. 7A-31 denied 31 December 2001.

PITTS v. AMERICAN SEC. INS. CO.

No. 369PA01

Case below: 144 N.C. App. 1

Petition by defendants (American Security Insurance Company, Standard Guaranty Insurance Company, and Wachovia Bank of N.C., N.A.) for discretionary review pursuant to G.S. 7A-31 allowed 31 January 2002. Justice Edmunds recused.

RAY v. LEWIS HAULING AND EXCAVATING, INC.

No. 482P01

Case below: 145 N.C. App. 94

Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 31 January 2002.

ROBINSON v. BYRD

No. 511A01

Case below: 145 N.C. App. 503

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 31 January 2002. Motion by defendant to strike petition for discretionary review as to additional issues denied 31 January 2002.

RUSSOS v. WHEATON INDUS.

No. 461P01

Case below: 145 N.C. App. 164

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002.

SCHLOSSBERG v. GOINS

No. 28P01

Case below: 141 N.C. App. 436

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002. Conditional petition by defendant for discretionary review pursuant to G.S. 7A dismissed as moot 31 January 2002.

SHAMMA v. ALKHALDI

No. 590P01

Case below: 354 N.C. 365

146 N.C. App. 447

Motion by plaintiff to rehear petition for discretionary review pursuant to Rule 31 denied 31 January 2002.

SHARPE v. WORLAND

No. 21P02

Case below: 147 N.C. App. 782

Motion by defendant (Wesley Long Community Hospital) for temporary stay allowed 14 January 2002.

SHERWIN-WILLIAMS CO. v. ASBN, INC.

No. 538P01

Case below: 144 N.C. App. 176

Petition by defendant (Nathan Alberty) for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002.

SIMS v. FLACCAMIO

No. 646P01

Case below: 146 N.C. App. 748

Petition by intervenor (Hart) for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002.

STAMM v. SALOMON

No. 477P01

Case below: 144 N.C. App. 672

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002. Notice of appeal by defendants pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 31 January 2002.

STATE v. ALSTON

No. 416A92-3

Case below: Warren County Superior Court

Application by defendant for writ of habeas corpus denied 7 January 2002. Petition by defendant for writ of certiorari to review the order of the Superior Court, Warren County, denied 4 January 2002.

STATE v. BAILEY

No. 677P01

Case below: 147 N.C. App. 313

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002

STATE v. BARBER

No. 637P01

Case below: 147 N.C. App. 69

Petition by Attorney General for writ of supersedeas denied 31 January 2002. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 31 January 2002. Motion by defendant to dismiss petition for discretionary review dismissed as moot 31 January 2002. Temporary stay dissolved 31 January 2002.

STATE v. BLACKMON

No. 650P01

Case below: 146 N.C. App. 749

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 31 January 2002.

STATE v. CARPENTER

No. 696P01

Case below: 147 N.C. App. 386

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero moto 31 January 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002.

STATE v. CHAMBERLAIN

No. 664P01

Case below: 146 N.C. App. 752

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002.

STATE v. CORNELL

No. 530P01

Case below: 145 N.C. App. 237

Petition by petitioners (Connecticut Indemnity Co. and Black Jack Bail Bonds) for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002.

STATE v. CRAIG

No. 257A82-4

Case below: Cabarrus County Superior Court

Motion by Attorney General to reconsider the Court's February 1, 2001 order remanding case to superior court dismissed 8 January 2002.

STATE v. DUCKER

No. 377P01

Case below: 143 N.C. App. 716

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002. Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 31 January 2002.

STATE v. GRAY

No. 556A93-2

Case below: Lenoir County Superior Court

Motion by defendant to remove counsel and appoint new counsel remanded 18 December 2001 for hearing to determine whether to remove current counsel and appoint new counsel.

STATE v. HARRIS

No. 550P01

Case below: 145 N.C. App. 570

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002. Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 31 January 2002. Motion by Attorney General to deny petition for discretionary review dismissed as moot 31 January 2002.

STATE v. HEARST

No. 684PA01

Case below: 147 N.C. App. 298

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 31 January 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 31 January 2002.

STATE v. IVEY

No. 501A98

Case below: Robeson County Superior Court

Motion by defendant for new trial allowed 31 January 2002. Motion by defendant for remand for evidentiary hearing dismissed as moot 31 January 2002.

STATE v. KRIDER

No. 279A00-2

Case below: 145 N.C. App. 711

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 31 January 2002.

STATE v. LAFORTE

No. 687P01

Case below: 147 N.C. App. 525

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002. Motion by Attorney General to dismiss appeal dismissed as moot 31 January 2002.

STATE v. LEE

No. 673A01

Case below: 146 N.C. App. 753

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 31 January 2002.

STATE v. MCMILLIAN

No. 5P02

Case below: 147 N.C. App. 707

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002.

STATE v. MITCHELL

No. 672A01

Case below: 146 N.C. App. 753

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 31 January 2002.

STATE v. PARKS

No. 644P01

Case below: 146 N.C. App. 568

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 31 January 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002.

STATE v. RHEW

No. 642P01

Case below: 146 N.C. App. 751

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002.

STATE v. SAGUILAR

No. 496P01

Case below: 139 N.C. App. 452

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 31 January 2002.

STATE v. SANCHEZ

No. 16P02

Case below: 147 N.C. App. 619

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002. Conditional petition by Attorney General for discretionary review pursuant to G.S. 7A-31 dismissed as moot 31 January 2002.

STATE v. SANFORD VIDEO & NEWS, INC.

No. 638P01

Case below: 146 N.C. App. 554

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 31 January 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002.

STATE v. SCOTT

No. 598PA01

Case below: 146 N.C. App. 283

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 31 January 2002. Motion by defendant to dismiss denied 31 January 2002. Conditional petition by defendant for discretionary review as to additional issues of the decision of the North Carolina Court of Appeals denied 31 January 2002.

STATE v. SIMUEL

No. 449P01

Case below: 145 N.C. App. 205

Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002.

STATE v. SMITH

No. 660P01

Case below: 146 N.C. App. 754

Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002.

STATE v. SULLIVAN

No. 692P01

Case below: 147 N.C. App. 314

Petition by defendant for writ of certiorari to review the decision of the North Carolina court of Appeals denied 31 January 2002.

STATE v. TABRON

No. 686P01

Case below: 147 N.C. App. 303

Motion by Attorney General for temporary stay denied 2 January 2002. Petition by Attorney General for writ of supersedeas allowed 31 January 2002. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 31 January 2002.

STATE v. TINGLE

No. 454P01

Case below: 145 N.C. App. 206

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002.

STATE v. TUCKER

No. 669P01

Case below: 146 N.C. App. 754

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002.

STATE v. VARDIMAN

No. 619A01

Case below: 146 N.C. App. 381

Motion by Attorney General to dismiss appeal allowed 14 January 2002. Motion by defendant for reconsideration of dismissal dismissed 31 January 2002.

STATE v. WILLIAMSON

No. 624P01

Case below: 146 N.C. App. 325

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 31 January 2002.

STATE v. WOODARD

No. 519PA01

Case below: 146 N.C. App. 75

354 N.C. 579

Conditional petition by defendant as to additional issues in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31 allowed 20 December 2001.

SUNSCRIPT PHARMACY CORP. v. N.C. BD. OF PHARMACY

No. 14P02

Case below: 147 N.C. App. 446

Motion by plaintiff for temporary stay allowed 10 January 2002.

VAUGHN v. CVS REVCO D.S., INC.

No. 441P01

Case below: 144 N.C. App. 534

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 31 January 2002.

WASHINGTON v. MITCHELL

No. 676P01

Case below: 146 N.C. App. 720

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 31 January 2002.

WILKERSON v. MacCLAMROCK

No. 6P02

Case below: 146 N.C. App. 448

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 31 January 2002.

PETITIONS TO REHEAR

BURGESS v. BUSBY

No. 196PA01

Case below: 354 N.C. 351

Petition by defendant to rehear pursuant to Rule 31 denied 20 December 2001.

DISCIPLINARY HEARING COMM'N OF THE
N.C. STATE BAR v. FRAZIER

No. 72PA01

Case below: 354 N.C. 555

141 N.C. App. 514

Petition by N.C. State Bar to rehear pursuant to Rule 31 denied 31 January 2002. Petition by defendant pro se to rehear pursuant to Rule 31 denied 31 January 2002. Motion by defendant pro se pursuant to Appellate Rule 37 dismissed 31 January 2002. Motion by defendant pro se in the cause No. 97CVS17, No. COA99-1367, No. 72PA01 pursuant to Rule 37 dismissed 31 January 2002. Motion by defendant pro se in addendum and dimunition Appellate Rule 31 dismissed 31 January 2002. Petition by defendant pro se for writ of supersedeas of the judgment of the Wake County Superior Court denied 31 January 2002. Motion by defendant pro se in addendum to the record Rule 31 dismissed 31 January 2002. Justice Edmunds recused.

SPEAGLE v. SEITZ

No. 32PA01

Case below: 354 N.C. 525

Motion by defendant to rehear pursuant to Rule 31 denied 31 January 2002. Justice Edmunds recused.

LINDA FARRIS, PETITIONER v. BURKE COUNTY BOARD OF EDUCATION, RESPONDENT

No. 272PA01

(Filed 7 March 2002)

1. Schools and Education— dismissal of teacher—case manager's report—school board review—whole record test—judicial review

The whole record test is mandated by N.C.G.S. § 115C-325(j2)(2) for a school board's review of a case manager's report and recommendation concerning a career teacher. Judicial review of the school board's action is under N.C.G.S. § 150B-51; in this case, the school board's action was reviewed for "wrongful procedure."

2. Schools and Education— dismissal of teacher—case manager hearing—exclusion of evidence—notice requirements

The case manager did not err by excluding evidence from a hearing concerning the dismissal of a career teacher where the evidence was not included in the list of witnesses and exhibits furnished to the teacher. Although the formal rules of evidence do not apply to a hearing before a case manager, there is no ambiguity in the notice requirements of N.C.G.S. § 115C-325(j)(5). While a superintendent is not required to set out the facts supporting termination in complete detail, the excluded evidence in this case was readily available at the time the synopsis of the evidence was prepared and its prejudicial impact was readily apparent.

3. Schools and Education— dismissal of teacher—review of case manager's decision—whole record considered by case manager

A school board initially reviewing the results of a case manager's hearing on the dismissal of a career teacher is bound by the whole record admitted and considered by the case manager. The board may view evidence excluded by the case manager but later submitted to the board in making its initial determination of whether the case manager addressed all critical issues, but N.C.G.S. § 115C-325(j2)(7) contemplates a remand to the case manager if the majority of the board determines that the case manager did not address a critical factual issue. In this case, the

board failed to follow the statutory procedure and is bound by the case manager's findings of fact.

4. Schools and Education— dismissal of teacher—case manager's report—conclusions of law excluded

Respondent school board, when considering the remanded dismissal of a career teacher, shall not consider certain paragraphs in the case manager's report because those paragraphs amounted to conclusions of law.

5. Schools and Education— dismissal of teacher—ex parte contact between board and attorney—due process

A career teacher's due process rights were not violated in her dismissal where she alleged that the decision was not made by an unbiased and impartial decision-maker, based upon identical findings of fact in the school board's decision and proposed findings submitted to the case manager by an attorney whose role was equivocal. Although the teacher argued that the only reasonable inference was improper ex parte contact, she failed to establish a record supporting her contention; there is no reason on this record to make any assumption other than that the respondent, after making its decision, asked the attorney to prepare findings, as is common in civil cases. In the absence of evidence to the contrary, N.C.G.S. § 115C-44(b) requires an interpretation of the record consistent with proper action by all parties.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 143 N.C. App. 77, 544 S.E.2d 578 (2001), reversing and remanding a judgment signed by Caldwell, J., on 13 October 1999 in Superior Court, Burke County. On 19 July 2001, the Supreme Court allowed petitioner's conditional petition for discretionary review as to an additional issue. Heard in the Supreme Court 12 December 2001.

Elliot Pishko Gelbin & Morgan, P.A., by J. Griffin Morgan, for petitioner-appellant and -appellee.

Starnes, Teele, Aycock & Haire, P.A., by Samuel E. Aycock, for respondent-appellant and -appellee.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by John W. Gresham and S. Luke Largess, on behalf of the North Carolina Association of Educators, amicus curiae.

Tharrington Smith, L.L.P., by Michael Crowell, on behalf of the North Carolina School Boards Association, amicus curiae.

EDMUNDS, Justice.

Petitioner Linda Farris (petitioner) was employed by respondent Burke County Board of Education (respondent), teaching educable mentally handicapped children in the sixth, seventh, and eighth grades. Petitioner began her employment with respondent in 1970 and thereafter attained tenured status as a teacher.

The record indicates that petitioner's teaching methods and skills were considered acceptable and unremarkable through most of her career. However, in 1998, doubts arose. On 12 June 1998, Dr. Tony M. Stewart (Stewart), respondent's superintendent, wrote petitioner to inform her that the principal of her school, Charles W. Sherrill, had recommended that petitioner not be rehired for the upcoming school year and that Stewart agreed with the recommendation. In that same letter, Stewart added that he wished to meet with petitioner on 16 June 1998 to review with her the facts behind this decision.

When petitioner failed to meet with Stewart after receiving his 12 June 1998 letter, he sent her a second letter on 29 June 1998. This letter advised petitioner that she had waived her opportunity to respond to Stewart about the recommendation that she not be rehired and, in addition, informed her that she had fourteen days to file a request in writing for either "(i) a hearing on the grounds for [Stewart's] proposed recommendation by a case manager, or (ii) a hearing within five (5) days before the board [i.e., respondent] on [Stewart's] recommendation." The letter included the following language:

> GROUNDS FOR DISMISSAL
>
> The grounds for your dismissal are inadequate performance, insubordination, and neglect of duty, pursuant to N.C.G.S. § 115C-325(e)(1)(a), (c), and (d).
>
> BASIS FOR THE CHARGES
>
> Attached to this letter . . . is a summary of the factual basis for my recommendation that you not be rehired for the coming school year. You have repeatedly ignored direct orders from your principals[,] both oral and written. You created, and refused to correct, health and fire hazards, which endangered your students.

> You refused to follow directives regarding curriculum, and you misrepresented the status of your plan book.
>
> The administration has demonstrated a thoughtful, patient, persistent but unavailing effort to get you to recognize that you were not properly managing your classroom and to correct the situation. Any or all of the referenced acts constitute inadequate performance, insubordination[,] and neglect of duty.

Stewart attached to this letter a nine-page "Chronological Listing Documentation & Correspondence Concerning [Petitioner]." This list, intended to substantiate the decision to terminate petitioner, detailed letters, conferences, memoranda, and the like circulated between petitioner and others in the school system.

On 10 July 1998, petitioner responded by requesting a hearing before a case manager, and in a letter dated 12 August 1998, petitioner asked Stewart to provide her copies of the documents described in the attachment to his 29 June 1998 letter. Stewart complied on 20 August 1998. On 31 August 1998, petitioner requested from Stewart a list of witnesses, a summary of the witnesses' anticipated testimony, and a copy of any documents Stewart intended to provide the case manager at the upcoming hearing. That same day, Stewart provided petitioner a list of potential witnesses. The list also included the following information:

> Each of the above individuals will testify about the events that culminated in Dr. Stewart's decision to recommend to [respondent] that [petitioner's] contract not be renewed for the next year.
>
> With regard to documents that I plan to introduce, I may present any of the documents that I have previously provided to you. Additionally, I will present reports from the fire marshall [sic] and possibly the health department, neither of which are [sic] currently in my possession.

The hearing before the case manager was held on 3 September 1998 and 8 October 1998. At the hearing, petitioner objected to certain evidence that had not been set out in Stewart's 29 June 1998 notice. This evidence included photographs of petitioner's classroom purporting to show roach droppings and a rat's nest in addition to clutter, letters to petitioner, and the testimony of two witnesses whose names had been provided, but not the pertinent substance of their testimony. One of these witnesses, Beth Wright (Wright), peti-

tioner's teacher assistant, testified that petitioner used classroom time to talk to friends on the telephone and to call a psychic hotline, that petitioner had returned her students three hours late from a field trip to Biltmore Estate because petitioner spent over an hour and a half in the gift shop, that petitioner had called an African-American student a "monkey," that petitioner would give massages to individuals while students were present in the classroom, and that petitioner spent only about ten percent of her time teaching. The other witness, Joel Hastings (Hastings), Director of Exceptional Children, testified about petitioner's failure to maintain some of her students' records necessary for continued state and federal funding, and petitioner's relationship with a particular student. Hastings also expressed concern that "there was the lack of quality individualized instruction in the [petitioner's] classroom, plus there was a fear of intimidation if someone went to an administrator about those concerns." The case manager held in abeyance her rulings on petitioner's objections to this evidence.

On 9 November 1998, the case manager filed a report that included findings of fact and a recommendation that Stewart's grounds for petitioner's dismissal were not substantiated by a preponderance of the evidence. That same day, Stewart wrote petitioner informing her that he intended to submit a written recommendation to respondent that petitioner be terminated. Accordingly, petitioner requested a hearing before respondent. On 18 November 1998, Stewart recommended in writing to respondent that petitioner be terminated, stating:

> The grounds for my recommendation are inadequate performance, insubordination, and neglect of duty, pursuant to N.C.G.S. § 115C-325(e)(1)(a), (c)[,] and (d). [Petitioner] repeatedly ignored direct orders, both oral and written, from principals. [Petitioner] created, and refused to correct, health and fire hazards, including giving special education children seriously outdated food, all of which endangered her students. [Petitioner] refused to follow directives regarding curriculum, and she misrepresented the status of her [lesson] plan book.
>
> The administration has demonstrated a thoughtful, patient, persistent but unavailing effort to get [petitioner] to recognize that she was not properly managing her classroom.

Pursuant to requests by both parties, on 24 November 1998, the case manager filed an "Amended Report of Case Manager" in which

she made rulings on evidentiary challenges raised at the hearing, sustaining petitioner's objections to the photographs and the evidence described above offered by Wright and Hastings. In particular, the case manager found that the photographs had not been provided to petitioner in advance of the hearing, as required by N.C.G.S. § 115C-325(j)(5); that the letters were both insufficiently specific to allow petitioner to prepare a defense and outside the scope of the notice provided petitioner by Stewart; and that the testimony of Wright and much of the testimony of Hastings were insufficiently specific and outside the scope of the notice provided petitioner. However, Hastings' testimony as to one inspection of petitioner's classroom, where outdated food was discovered, was admitted. Accordingly, the excluded evidence was not included in the case manager's findings of fact in her amended report, which read in pertinent part:

> 5. That [petitioner] has taught for 28 years in the Burke County Public Schools as a special education teacher. That during the last eight years [petitioner] has taught a self-contained class for the educationally and mentally handicapped. . . .
>
> 6. That each student in [petitioner's] class was required to be taught based on the student's individualized educational plan (IEP). That over the course of 28 years, [petitioner] acquired a large and wide variety of teaching materials that accumulated in her classroom and office to accommodate her students and their special needs. That [petitioner's] classroom was cluttered with these items.
>
> 7. That the clutter in her classroom was of concern to her various principals over the last four years. That at various times and on various occasions, these principals . . . encouraged and requested [petitioner] to clean her classroom. On several occasions, [petitioner] was directed to clean her classroom.
>
> 6. [sic] That during 1995 through 1996, Betty Terrell was the principal at Liberty Middle School[1] and [petitioner's] assigned principal. . . . That Ms. Terrell sent [petitioner] a letter in March, 1996 simply documenting that a general cleaning of her room had

1. The record indicates that petitioner originally was teaching at Liberty Middle School. However, during part of the time of the events discussed in this opinion, she was assigned a classroom at North Liberty School and placed under the supervision of the principal of North Liberty School, while still considered a teacher at Liberty Middle School.

not been accomplished. That Ms. Terrell did not warn [petitioner] that her behavior was insubordinate.

7. [sic] That during 1996 through 1997, Malinda Bollinger was the principal of North Liberty [] School and [petitioner's] assigned principal. . . . On August 14, 1996, Ms. Bollinger specifically directed [petitioner] to clean her classroom and store materials and supplies. That Ms. Bollinger wrote [petitioner] that failure to clean the classroom would constitute insubordination. That [petitioner] complied with that directive on the same day she received Ms. Bollinger's letter and notified Ms. Bollinger in writing of her compliance with these clear and specific instructions. . . .

8. That during 1997 through 1998, Mr. Sherrill was the principal of Liberty Middle School and [petitioner's] assigned principal. That on September 8, 199[7], Mr. Sherrill gave [petitioner] specific directions regarding the cleaning of her classroom. Two months later on November 10, 1997, Mr. Sherrill noted compliance of his instructions by [petitioner].

9. On February 10, 1998, in response to a call from the health department, all the classrooms at North Liberty School were inspected. Items of outdated food were found in [petitioner's] classroom or office.

10. [Petitioner] was not given a warning, a plan for improvement or any written notification that Mr. Sherrill viewed her as being insubordinate or having neglected her duty as a result of the food items that were found in her classroom or office.

11. That despite the ongoing differences regarding the condition of her classroom between [petitioner] and her principals, . . . [petitioner] was evaluated by both Ms. Terrell and Ms. Bollinger as being above standard in every teaching function. [Petitioner] was observed and evaluated by Mr. Sherrill on December 8, 1997. . . . Mr. Sherrill evaluated [petitioner] as being standard in two of the categories he observed and below standard in the other three categories he observed. [Petitioner] was again evaluated on May 4, 1998 by evaluators who did have some training and experience in special education and was found to be performing at standard in each category they observed which were the same categories evaluated by Mr. Sherrill. On June 2, 1998, Mr. Sherrill completed a Teacher Performance Appraisal

Instrument for [petitioner]. He rated her at being standard in the three categories in which he had previously found her to be below standard. Then, although never having given her any documentation or warnings, he rated her as being below standard or unsatisfactory in three categories in which he had never previously evaluated her.

12. That on two occasions, Mr. Sherrill claimed that [petitioner] was insubordinate because she failed to have lesson plans in a lesson plan book as she had been instructed. Mr. Sherrill offered into evidence blank pages of a lesson plan book. However, additional pages obtained by Mr. Sherrill consist of lengthy instructions written for substitute teachers which would not fit within a lesson plan book. Mr. Sherrill did not request the lesson plan book from [petitioner]. [Petitioner] testified that she maintained a lesson plan. On May 4, 1998, [petitioner] was observed by assistant principal Susan Jones and by Jeannette N. Davis. The Formative Observation Data Analysis of this observation does not note the failure to maintain a lesson plan book. That a former principal and a teacher of the in-school suspension program (ISS) at Liberty Middle School, testified that anytime one of [petitioner's] students was sent to in-school suspension they always came with a lesson plan.

13. Two long[-]term special education teachers testified that they reviewed the individualized educational plans of [petitioner's] students and [petitioner's] lesson plan book. Ms. Horn testified that formal lesson plans were not always necessary in a special education class like the one [petitioner] taught. Both teachers testified that the individualized education plans for [petitioner's] students were well thought out and appropriated [sic]. Further, both teachers confirmed that [petitioner's] method of teaching, including the utilization of recipes and field trips, were [sic] effective methods of teaching middle school educationally mentally handicapped children and focused on appropriate lessons which would help these children in the future.

. . . .

16. Except for his approximately one hour observation of [petitioner] on December 8, 1997, Mr. Sherrill spent no other time observing [petitioner] or monitoring her teaching ability. Mr. Sherrill failed to make suggestions to [petitioner] for professional improvement following his December 8, 1997 observation and

evaluation of [petitioner]. Following his December 8, 1997 observation of [petitioner], Mr. Sherrill did not provide [petitioner] any assistance in becoming a more effective teacher. He did not devise a professional growth plan. He did not request the assistance of other special education teachers or of [Hastings]. . . . Mr. Sherrill failed to document[] ways in which he had helped [petitioner] become a more effective professional at a time when he was recommending her dismissal.

17. There was a[n] evidentiary objection as to the maintenance of IEP folders by [petitioner]. The only evidence introduced to show that [petitioner] had not properly maintained the IEP folders was the testimony of Mr. Hastings. This evidence is outside the factual basis stated by Dr. Stewart as the basis for his decision to terminate [petitioner].

18. Four parents of former students of [petitioner] testified at the hearing. Each parent testified as to having observed [petitioner] in the classroom or on field trips. Each parent testified that his/her child made progress in [petitioner's] classroom. Each parent testified that if given the opportunity they would have [petitioner] teach their child again.

19. [Petitioner] was not insubordinate and did not willfully disregard directions of her employer or refuse to obey a reasonable order.

20. [Petitioner's] teaching performance was not inadequate.

21. [Petitioner] did not neglect her duty.

Based on these findings, the case manager recommended that "the [s]uperintendent's grounds for dismissal are not substantiated by a preponderance of [the] evidence."

The case manager's amended findings did not affect Stewart's decision to proceed to a hearing before respondent. Accordingly, Stewart forwarded to respondent the entire record of the hearing held before the case manager, including the evidence to which petitioner's objections had been sustained. On 21 December 1998, petitioner wrote attorney Larry A. Ballew (Ballew), objecting to the material that had been excluded by the case manager. On 12 January 1999, respondent held a hearing on this matter. It heard no evidence in addition to that presented to the case manager, but petitioner and Stewart were permitted to make oral arguments before respondent in

a closed session. Respondent "unanimously determined that the case manager's findings of fact were not supported by substantial evidence when the record was reviewed as a whole and therefore made . . . alternative findings of fact." These "alternative findings of fact" included matters excluded by the case manager:

> 44. At the case manager['s] hearing, [Wright], the teacher assistant in [petitioner's] classroom for the previous two years stated, and we find as a fact, that [petitioner] would spend as much as three to four hours per day on the telephone, leaving the kids to the assistant to teach. The telephone conversations were unrelated to the classroom and concerned [] [petitioner's] joint-venture in a flea market, her massage business, or the psychic hot-line.
>
> . . . .
>
> 48. [Petitioner] did not spend a complete day doing instruction to the children, during the two years that [Wright] was her assistant. The most time that [petitioner] spent in any one day actually teaching was two hours. [Petitioner] spent less than 10% of her time actually teaching the children in her care.
>
> . . . .
>
> 53. [Petitioner] referred to a black student as a "monkey." This racial slur caused the student and his parents great concern.
>
> 54. [Petitioner] took the class on a field trip to the Biltmore House in Asheville. The children's parents were told that the children would be back at 5:00 p.m. [Petitioner] did not have the children back until 8:00 p.m. and did not call anyone to say they would return late. The reason they were late returning is because [petitioner] wanted to go shopping after the field trip.
>
> 55. Pictures taken of [petitioner's] classroom illustrated the testimony shown in the transcripts. The classroom was cluttered, old food was present throughout the room and the storage areas, [and] roach droppings and a rat's nest were clearly visible.
>
> 56. In March of 1998, the Director for Exceptional Children, [Hastings], in a review of the Exceptional Children records in [petitioner's] class were incomplete [sic]. Mr. Hastings directed [petitioner] to make the necessary corrections. Mr. Hastings['] testimony was that such incomplete records could

have resulted in a loss of funding had they not be[en] corrected before an audit.

Respondent concluded that its findings "substantiate the [s]uperintendent's grounds for dismissal, inadequate performance, insubordination, and neglect of duty as set forth in N.C.G.S. § 115C-325(e)(1)(a), (c)[,] and (d)" and that petitioner did not suffer any prejudicial error. Accordingly, respondent terminated petitioner's employment.

Petitioner appealed to the Superior Court, Burke County. That court held that respondent's decision to terminate petitioner was supported by substantial evidence from the whole record and affirmed the termination decision. Petitioner appealed to the North Carolina Court of Appeals, which reversed and remanded the case to the Superior Court, Burke County, "for further remand to [r]espondent for it to either reject Stewart's recommendation or 'accept or modify the recommendation and dismiss, demote, reinstate, or suspend' [p]etitioner. N.C.G.S. § 115C-325(j1)(5) (1999). Respondent's decision must be based on the findings made by the case manager." *Farris v. Burke Cty. Bd. of Educ.*, 143 N.C. App. 77, 88, 544 S.E.2d 578, 585 (2001). This Court allowed respondent's petition for discretionary review to consider the Court of Appeals' interpretation of the statutes applicable to teacher dismissal. We also allowed petitioner's conditional petition for discretionary review to consider an issue that had been raised by assignment of error in the Court of Appeals but not resolved in that court's opinion, that is, whether petitioner's due process rights to have the termination decision made by an impartial decision-maker had been violated. As to the first issue, we affirm the holding of the Court of Appeals, as modified below. As to the second issue, we overrule petitioner's assignment of error.

I.

[1] To avoid possible confusion, we take this opportunity to clarify the standard of review. Respondent school board's review of the case manager's report and recommendation is controlled by N.C.G.S. § 115C-325(j2)(2). Although respondent purported to apply the 'whole record test' mandated by this statute in its initial review of the case manager's amended report, we hold that respondent did not administer this test properly, as detailed below. However, a different statute controls judicial review of a school board's action. Accordingly, we apply the standards set out in N.C.G.S. § 150B-51. *Overton v. Goldsboro City Bd. of Educ.*, 304 N.C. 312, 283 S.E.2d 495

(1981). In light of the particular posture of the case at bar, we review respondent's action to determine whether its decision was based upon "wrongful procedure." N.C.G.S. § 150B-51(b)(3) (1999); *see Evers v. Pender Cty. Bd. of Educ.*, 104 N.C. App. 1, 407 S.E.2d 879 (1991), *aff'd per curiam*, 331 N.C. 380, 416 S.E.2d 3 (1992).

[2] We first consider the procedure followed by the case manager and by respondent. As detailed above, Stewart provided petitioner with an extensive list of witnesses and exhibits in his 12 August 1998 notice. However, the list was not comprehensive, and Stewart presented additional evidence at the hearing before the case manager, including photographs of petitioner's classroom and testimony relating to petitioner's classroom behavior. Petitioner objected, and the case manager ultimately sustained the objection and excluded the evidence.

We hold that the case manager's decision to exclude the evidence was proper. Although the statute provides that formal rules of evidence do not apply to a hearing before a case manager, N.C.G.S. § 115C-325(j)(4), there is no ambiguity in the notice requirements set out in section 115C-325(j)(5), which provides in pertinent part:

> At least five days before the hearing [before a case manager], the superintendent shall provide to the career employee a list of witnesses the superintendent intends to present, a brief statement of the nature of the testimony of each witness and a copy of any documentary evidence the superintendent intends to present. . . . Additional witnesses or documentary evidence may not be presented except upon a finding by the case manager that the new evidence is critical to the matter at issue and the party making the request could not, with reasonable diligence, have discovered and produced the evidence according to the schedule provided in this subdivision.

N.C.G.S. § 115C-325(j)(5). While Stewart did provide in apt time the names of all witnesses, his summary of the evidence to be presented by those witnesses omitted significant portions of their testimony, such as petitioner's alleged neglect of her students so she could use the telephone and the delayed return from the Biltmore Estate. In addition, petitioner was not provided copies of the photographs of her classroom that purportedly showed a cluttered and unsanitary environment. There is no suggestion in the record that this evidence could not have been discovered with reasonable diligence and produced to petitioner in accordance with the statutory

timetable. Consequently, the case manager's only choice was to exclude this evidence.

In so holding, we do not suggest that a superintendent is required to set out the facts supporting a case for termination in complete detail prior to a hearing before a case manager. The provisions of chapter 115C do not mirror the discovery proceedings in either criminal or civil cases. Stewart's provision to petitioner of a nine-page synopsis of the evidence was a commendable effort to ensure the statutory requirements were met. Nevertheless, the excluded evidence was available to Stewart at the time the synopsis was prepared and its prejudicial impact was readily apparent, but it was not included in the "brief statement of the nature of the testimony of [the] witness," N.C.G.S. § 115C-325(j)(5). Under the facts before us, we believe the existence of this evidence should have been disclosed to petitioner prior to the hearing.

[3] Stewart then resubmitted to respondent all the evidence that had been submitted at the case manager's hearing, including the evidence that had been excluded by the case manager. Stewart's theory in so doing was that respondent could consider the excluded evidence pursuant to section 115C-325(j2)(7), which provides in pertinent part:

> The board shall accept the case manager's findings of fact unless a majority of the board determines that the findings of fact are not supported by substantial evidence when reviewing the record as a whole. In such an event, the board shall make alternative findings of fact.

N.C.G.S. § 115C-325(j2)(7). Respondent argues that because the statute calls for application of a 'whole record test' at this stage, it was not bound by evidentiary rulings of the case manager and was entitled to consider all the evidence presented at the hearing, specifically including the evidence disallowed by the case manager. Petitioner answers that respondent's review was limited to the 'whole record' properly before the case manager, an interpretation that would foreclose respondent's consideration of evidence excluded by the case manager.

Section 115C-325(j2)(7) further provides:

> If a majority of the board determines that the case manager did not address a critical factual issue, the board may remand the findings of fact to the case manager to complete the report to the

> board. If the case manager does not submit the report within seven days receipt of the board's request, the board may determine its own findings of fact regarding the critical factual issues not addressed by the case manager. The board's determination shall be based upon a preponderance of the evidence.

Id.

We believe this statutory framework is consistent with petitioner's interpretation that a board initially reviewing the results of a case manager's hearing is bound by the 'whole record' admitted and considered by the case manager. However, because (j2)(7) contemplates a remand to the case manager "[i]f a majority of the board determines that the case manager did not address a critical factual issue," the school board may nevertheless view evidence excluded by the case manager but later submitted to the board in making its initial determination whether the case manager addressed all critical issues. In fact, the case manager's amended report here cited this excluded evidence.

In the case at bar, the board failed to follow statutory procedure. If a board chooses not to accept the case manager's report as submitted, then pursuant to section 115C-325(j2)(7) the board should determine either (1) that the case manager's findings of fact are not supported by substantial evidence admissible under section 115C-325, in which case it can make alternative findings of fact; or (2) that the case manager failed to consider a critical factual issue, in which case the board should remand the matter for the case manager to make additional findings of fact. Where a board's conclusion that the case manager failed to consider a critical factual issue is based upon the case manager's rulings excluding evidence, the case manager, on remand, remains bound by the provisions of N.C.G.S. § 115C-325 and within those limits may either reconsider or reaffirm those evidentiary rulings. A board may thereafter substitute its findings of fact for those of the case manager only if the case manager does not respond to the board's request within seven days.

The board here followed none of the permissible alternatives. Instead, it attached additional findings of fact to those already made by the case manager and mislabeled the result as "alternative findings of fact." Because the board did not follow proper procedures, we hold that it was bound by the case manager's findings of fact. *See* N.C.G.S. § 150B-51(b)(3).

[4] Our inquiry does not end here, however. We turn next to the 24 November 1998 "Amended Report of Case Manager," which has been quoted in some detail above. Section 115C-325(i1)(2) provides in relevant part:

> The case manager shall make all necessary findings of fact, based upon the preponderance of the evidence, on all issues related to each and every ground for dismissal and on all relevant matters related to the question of whether the superintendent's recommendation is justified. The case manager also shall make a recommendation as to whether the findings of fact substantiate the superintendent's grounds for dismissal.

N.C.G.S. § 115C-325(i1)(2). As noted above, we agree with the Court of Appeals that, pursuant to N.C.G.S. § 115C-325, sufficient admissible evidence was presented to the case manager to support her findings of fact and that respondent was bound by those findings of fact. However, nowhere does this statute allow the case manager to reach conclusions of law. Although the distinction between findings of fact and conclusions of law can be elusive, *see, e.g., Harris v. Walden*, 314 N.C. 284, 333 S.E.2d 254 (1985); *Dunevant v. Dunevant*, 142 N.C. App. 169, 542 S.E.2d 242 (2001), paragraphs numbered 19, 20, and 21 of the "Amended Report of Case Manager," quoted above, do not set out facts found by the case manager. These paragraphs instead amount to the case manager's conclusions of law. *See, e.g., Crump v. Board of Educ.*, 79 N.C. App. 372, 339 S.E.2d 483 (conclusion that plaintiff insubordinate based upon findings of fact), *disc. rev. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986). As such, these paragraphs are not binding on respondent. Accordingly, on remand respondent shall not consider paragraphs 19, 20, and 21 of the case manager's amended report. The holding of the Court of Appeals is affirmed as modified.

II.

[5] Petitioner claims that her due process rights were violated because the decision to terminate her employment was not made by an unbiased and impartial decision-maker. This contention is based upon alleged *ex parte* communication between respondent and attorney Ballew in the termination proceedings. We initially observe that the extent of Ballew's representation is not well-defined in the record. Ballew first discussed petitioner's termination with Stewart in March 1998, before petitioner was notified of the recommendation that she not be rehired. On 18 June 1998, Ballew wrote petitioner's

counsel, identifying himself as "the attorney for the Burke County School Board," but at the case manager's hearing in September and October 1998, he represented Stewart. In a letter written 9 November 1998 to the case manager, Ballew identified himself as the "Attorney for Burke County Public Schools," but at the hearing before respondent in January 1999, Ballew again argued on behalf of Stewart; in fact, respondent's findings of fact recite that "Superintendent Tony M. Stewart was present and represented by attorney Larry A. Ballew." Ballew signed respondent's answer to petitioner's appeal to superior court, and when the record of the instant appeal was settled, Ballew signed as "Attorney for Respondent." On the basis of this record, Ballew's role is undeniably equivocal.

Petitioner's allegations of *ex parte* communication between Ballew and respondent are based upon circumstantial evidence. At the end of her hearing, the case manager asked both Ballew and petitioner's counsel to submit proposed findings of fact. Ballew submitted a proposal, but the case manager ultimately drafted her own findings of fact and amended findings of fact, recommending against petitioner's dismissal. Stewart then advised petitioner that he intended to recommend to respondent that petitioner's contract not be renewed. No new evidence was heard at the hearing before respondent, but Ballew argued on behalf of Stewart. When respondent later issued its findings of fact, they were virtually identical to those submitted by Ballew to the case manager, to the point where the same mistakes could be found in both. For example, both Ballew's proposed findings to the case manager and respondent's findings misidentified petitioner by stating: "This letter was adequate to apprize *Ms. Branch* of the charges against her." (Emphasis added.) Petitioner argues that the only reasonable inference from this resemblance is that Ballew had improper *ex parte* contact with respondent that prevented respondent from properly carrying out its duties.

We have held that whenever a school board considers a case in which it might deprive a teacher of employment, "it is fundamental to the concept of due process that the deliberative body give that person's case fair and open-minded consideration." *Crump v. Board of Educ.*, 326 N.C. 603, 613, 392 S.E.2d 579, 584 (1990). However, we have also recognized that "due process is a somewhat fluid concept, and that determining what process is 'due' at a school board hearing is very different from evaluating the procedural protections required in a court of law." *Id.* at 615, 392 S.E.2d at 585.

The Court of Appeals considered an analogous issue in *Hope v. Charlotte-Mecklenburg Bd. of Educ.*, 110 N.C. App. 599, 430 S.E.2d 472 (1993). In that case, the petitioner, a teacher who was dismissed on grounds of inadequate performance, insubordination, and neglect of duty, claimed a due process violation because the attorneys for the school board and for the school superintendent were members of the same firm. The Court of Appeals noted that "although the [b]oard was required to provide petitioner with all the essential elements of due process, it was permitted to operate under a more relaxed set of rules than is a court of law." *Id.* at 602, 430 S.E.2d at 474. The Court of Appeals observed that the board was responsible for making the ultimate decision, not its attorney, who acted only in an advisory capacity, and held that "[t]he possibility that the [b]oard obtained information from [its] attorney about the case does not establish a due process violation." *Id.* at 603, 430 S.E.2d at 474.

Hope can be distinguished from the case at bar because, as petitioner points out, a single attorney rather than different members of one firm arguably represented both respondent and Stewart at different points in the proceeding. Nevertheless, we evaluate petitioner's due process claim in light of section 115C-44(b), which provides that "[i]n all actions brought in any court against a local board of education, the order or action of the board shall be presumed to be correct and the burden of proof shall be on the complaining party to show the contrary." N.C.G.S. § 115C-44(b) (1999). Consequently, we review the record to determine whether petitioner has carried her burden of overcoming the presumption of regularity.

A petitioner claiming a due process violation must have some opportunity to create a record to rebut the statutory presumption. In instances where, as here, a petitioner has a good-faith reason to question the propriety of a board's actions, chapter 115C provides that he or she may appeal to superior court. N.C.G.S. § 115C-325(n). Although that statute does not set out the procedure to be followed in such an appeal, in practice it appears that the superior courts have been conducting hearings, *see, e.g.*, *Taborn v. Hammonds*, 324 N.C. 546, 380 S.E.2d 513 (1989); *In re Freeman*, 109 N.C. App. 100, 426 S.E.2d 100 (1993), and the judgment of the superior court in the case at bar recites that the case came on for a hearing and was heard. Where the appeal to the superior court presents a petitioner his or her first opportunity to establish a record supporting allegations of impropriety before a board, as in the case at bar, it is incumbent upon

the petitioner to create a record supporting the allegations at that time for any further reviewing courts.

Petitioner focuses on the patent similarities between the proposed findings of fact submitted by Ballew to the case manager and the ultimate findings of fact issued by respondent. These similarities leave little doubt that respondent somehow obtained a copy of Ballew's proposal. However, although these documents were available to petitioner at the time of her appeal to superior court, she failed to establish a record supporting her contention that such contact was improper and violated her due process rights. There is no indication when the contact took place, i.e., that Ballew had improper *ex parte* contact with respondent in his capacity as attorney for Stewart before respondent reached its decision. As observed in *Hope*, the board is the decision-making body, and there is no reason based on this record to make any assumption other than that the respondent, after making its decision, asked Ballew to prepare findings of fact. Similar procedures are routine in civil cases, where a judge is permitted to ask the prevailing party to draft a judgment. *See* N.C.G.S. § 1A-1, Rule 58 (1999); *see also Stachlowski v. Stach*, 328 N.C. 276, 401 S.E.2d 638 (1991). In the absence of evidence to the contrary, N.C.G.S. § 115C-44(b) constrains us to adopt an interpretation of the record consistent with proper action by all parties. Accordingly, we hold that petitioner was not denied her due process rights. This assignment of error is overruled.

MODIFIED AND AFFIRMED.

Justice ORR concurs in the result only.

STATE OF NORTH CAROLINA v. CARLOS CANADY

No. 115A00

(Filed 7 March 2002)

1. Evidence— hearsay—testimony of detective—information received from prison inmate told by another inmate

The trial court erred in a double first-degree murder case by allowing hearsay testimony from a detective concerning information he received from a prison inmate that the inmate was told by

another prison inmate about the murders, including the fact that defendant and another young man killed the victims, because: (1) the detective's testimony provided more than a mere explanation of his subsequent actions when the detective provided details contained in the prison inmate's statement such as how defendant broke into the victim's house through a window, that defendant went into the bathroom with a rifle and shot one of the victims, and that defendant fled with a money bag; (2) the State's closing argument reveals that the State relied on the detective's testimony as substantive evidence of the details of the murder and to imply defendant had given a detailed confession of his alleged crimes; and (3) despite the trial court's limiting instruction, the detective's testimony went so far beyond the confines of this instruction that the jury could not reasonably have restricted its attention to any nonhearsay elements in the detective's testimony.

2. Evidence— denial of opportunity to cross-examine— impeachment—motive

The trial court erred in a double first-degree murder case by denying defendant the opportunity to fully cross-examine a detective concerning portions of his testimony concerning information he received from a prison inmate that the inmate was told by another prison inmate about the murders, including the fact that defendant and another young man killed the victims, because: (1) defendant's proposed questions were designed to impeach the segment of the detective's testimony that provided details of defendant's alleged crimes, and once the trial court permitted the detective to testify on direct examination to these details, the trial court should have permitted defendant to present any evidence that would have been proper to impeach the two prison inmates if either of them had testified; and (2) defendant's proposed questions also appear proper to determine whether the detective's subsequent investigation included an examination of the prison inmate's motive for implicating defendant and the inmate's other potential sources of information.

3. Discovery— names of informants—information someone other than defendant committed offenses

The trial court erred in a double first-degree murder case by failing to require the State to disclose names of informants with material exculpatory information that someone other than defendant committed the offenses, because: (1) defendant could

not effectively use the information at trial; (2) defendant needed access to these individuals to interview them and develop leads; and (3) there is a reasonable probability that if defendant had access to informants who had names of others involved in the murders, such information could have swayed the jury to reach a different outcome.

4. Constitutional Law— right to confrontation—expert testimony about murder weapon—failure to allow opportunity to examine expert's testing procedure and data

The trial court erred in a double first-degree murder case by allowing an expert to testify about his testing of what appeared to be the murder weapon without allowing defendant an opportunity to examine the expert's testing procedure and data, because: (1) a defendant has a constitutional right to confront his accusers and witnesses against him, including the right to prepare and present a defense; and (2) defendant was not provided with the right to present a full defense.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Hudson, J., on 22 November 1999 in Superior Court, Robeson County, upon a jury verdict finding defendant guilty of first-degree murder. On 28 March 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 11 December 2001.

Roy Cooper, Attorney General, by Joan M. Cunningham, Assistant Attorney General, and William P. Hart, Special Deputy Attorney General, for the State.

Center for Death Penalty Litigation, by Jonathan E. Broun, for defendant-appellant.

WAINWRIGHT, Justice.

On 3 March 1997, Carlos Canady (defendant) was indicted for the murders of Hiram and Michael Burns, one count of second-degree burglary, one count of robbery with a dangerous weapon, and one count of conspiracy to commit armed robbery. Defendant was tried capitally, and the jury found him guilty of first-degree murder of

Hiram Burns on a theory of lying in wait and guilty of first-degree murder of Michael Burns under the felony murder rule. Defendant was also found guilty of the other charges. In the death of Hiram Burns, the jury recommended and the trial judge sentenced defendant to death. In the death of Michael Burns, the jury recommended and the trial judge sentenced defendant to life imprisonment. The jury also found defendant guilty of the remaining charges, and the trial court sentenced defendant to consecutive terms of imprisonment.

Evidence presented at trial showed Hiram Burns (Hiram) and his son, Michael Burns (Michael), lived in Rennert, North Carolina. Michael had severe brain damage. On Sunday, 13 December 1992, the victims' dead bodies were found in their home. Each had died from gunshot wounds.

In 1996, an inmate at Pender County Correctional Unit told police defendant and a young man, eventually identified as Lacoma Locklear (Lacoma), were involved in the murders. Lacoma, who was only fourteen years old in 1992, testified that on 12 December 1992 he and defendant went to Rennert because defendant said he knew a man who ran a store there and they could rob the man. Lacoma said he and defendant entered the man's house through a window. Defendant was carrying a rifle. A few minutes later, a man entered the house, and Lacoma heard three shots from the bathroom where defendant was. The man fell to the floor, and Lacoma heard two more shots. Lacoma stated that after the shooting defendant grabbed a brown paper bag from the man on the floor, and Lacoma and defendant ran out the front door. The bag fell and tore, and Lacoma could see it contained money. Lacoma stated defendant threw the rifle off the Kirby Bridge. Investigators subsequently found a Universal .30-caliber Carbine semiautomatic rifle near the Kirby Bridge in the Lumber River at the point Lacoma indicated.

Defendant presented evidence that Lacoma told several people he and defendant did not kill the Burnses. Lacoma said, among other things, "Me and Carlos ain't killed nobody," and "We hadn't done a thing." Two witnesses, Steve Jones (Steve) and Paladin Jones (Paladin), testified Billy Ray Jones (Billy Ray) told them he killed the Burnses. Steve testified Billy Ray told him details of the crime including who helped him, how they got in the window, and that Hiram had a money bag in his hands when he entered the house. Paladin testified that he heard Billy Ray describe details of the murders and that Billy Ray went to Paladin's house the night before the murders took

place to borrow a gun which Paladin refused to lend. On rebuttal, the State called Billy Ray, who denied committing the murders.

Defendant assigns error to several of the trial court's rulings. We agree with defendant that the trial court's rulings on at least four specific issues were erroneous. Although none of the trial court's errors, when considered in isolation, were necessarily sufficiently prejudicial to require a new trial, the cumulative effect of the errors created sufficient prejudice to deny defendant a fair trial. Accordingly, a new trial is required.

[1] First, defendant assigns error to the trial court's allowance of testimony from Detective James Carter concerning information he received from a prison inmate about the murders. Carter testified his investigation included an interview with prison inmate George Blackwell. According to Carter, Blackwell said another inmate, Woody Butler, told Blackwell defendant and another young man killed the victims. Defendant argued at trial this testimony constituted inadmissible hearsay because it was offered for "the truth of the matter asserted." The State argued the testimony was not offered for its truth, but to show the witness's conduct after he received the information. The trial court overruled defendant's objection and instructed the jury as follows:

> COURT: All right, members of the jury, this witness is going to relate to you conversations that he had with another person.
>
> The State is not offering the substance of that conversation for the truthfulness of what the other person asserted, but to explain to you what this witness, Mr. Carter, did as a result of receiving that information.
>
> You should consider it for that reason, and that reason, only.

Following the trial court's instruction, Carter testified before the jury under direct examination by the State as follows:

> Q. What, if anything, did George Blackwell tell you when you met with him at the Pender Correctional Institute?
>
> MS. BIGGS [defense counsel]: Objection, Judge.
>
> COURT: Overruled.
>
> . . . .
>
> A. Okay. George told me—

MS. BIGGS: Objection for the record, please.

COURT: Overruled.

A. —a boy in prison with him, named Woody Butler, had been talking to him about a man and his son that had been killed in Rennert.

George knew—George told us he knew who killed Hiram and his son. And he said George wanted to talk to me.

Myself and Detective Donald Britt went to the Pender County Correctional Institute to talk with George Blackwell. At 10:30 a.m., myself and Detective Donald Britt talked to George Blackwell in the chapel.

George told us that Woody Butler told him—

MS. BIGGS: Objection, Judge. It has exceeded the question.

COURT: Overruled.

Q. What did George Blackwell tell you in the chapel there at the prison?

A. That a young guy, he didn't know the young guy's name, and Carlos Canady had killed the man and his son in Rennert.

George went on to say that Woody Butler told him—

MS. BIGGS: Objection, Judge. Now it's double hearsay.

COURT: Overruled.

Q. What else did Mr. Blackwell tell you?

A. He went on to say that the man and the boy—George said that Woody said Carlos and the young guy went to the man's house and broke into—

MS. BIGGS: Objection, Judge. This exceeds the scope of voir dire.

COURT: Overruled.

A. —broke into the house through a window. Carlos had a rifle—

MS. BIGGS: Objection. Judge, we want to be heard, please.

COURT: Mr. Deputy, if you'll take the jury to the deliberation room.

At this point, outside the jury's presence, defendant argued Carter's testimony was irrelevant and was merely an attempt to get before the jury inadmissible hearsay and to avoid putting George Blackwell or Woody Butler on the stand. Defendant also argued Carter's testimony was double or triple hearsay, and its prejudicial effects far outweighed any probative value. Defendant further argued Carter could explain his subsequent conduct without going into the details of Blackwell's statement. The trial court overruled defendant's objection, and the State's examination continued in the jury's presence:

> Q. Detective Carter, what did George Blackwell tell you about information he had relating to the murders of Hiram and Michael Burns?
>
> MS. BIGGS [defense counsel]: Objection.
>
> COURT: Overruled.
>
> A. George told us that the—Carlos and the young guy went into the house, went into the bedroom. Carlos—the young guy went into the bedroom with a bat and Carlos went into the bathroom with a rifle.
>
> When the man came down the hall and started in the bedroom where the young guy was, Carlos said, "I couldn't let the man go into the—
>
> MS. BIGGS: Objection.
>
> COURT: Overruled.
>
> A.—where the young guy was with the bat," and that's when he shot them.
>
> Carlos took the money bag and ran and dropped most of—some of the money in the yard.

The State correctly asserts a statement is not hearsay if it is offered for a purpose other than to prove the truth of the matter asserted. *See* N.C.G.S. § 8C-1, Rule 801(c) (1999); *State v. Braxton*, 352 N.C. 158, 190, 531 S.E.2d 428, 447 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). A statement which explains a person's subsequent conduct is an example of such admissible nonhearsay. *State v. Anthony*, 354 N.C. 372, 404, 555 S.E.2d 557, 579 (2001); *State v. Golphin*, 352 N.C. 364, 440, 533 S.E.2d 168, 219 (2000), *cert. denied*, —— U.S. ——, 149 L. Ed. 2d 305 (2001).

In the present case, however, Detective Carter's testimony provided more than a mere explanation of his subsequent actions. Carter provided details contained in Blackwell's statement including how defendant broke into the victims' house through a window, went into the bathroom with a rifle, shot one of the victims, and fled with a bag of money. Moreover, the State relied upon Carter's recitation of Blackwell's detailed statement during the State's closing argument. The State argued:

> So he [Carter] goes and interviews George Blackwell. And Mrs. Biggs kept referring to this as hearsay, as hearsay. Hearsay is evidence that doesn't come in.
>
> MS. BIGGS [defense counsel]: Objection, that's not the law.
>
> THE COURT: Overruled.
>
> MR. BRITT [prosecutor]: James Carter and Donnie Britt went to Pender County, to the prison there where they interviewed George Blackwell. George Blackwell told them he had gotten the information that Carlos Canady had committed those murders. Carlos Canady and a young boy had broken into the house; that Carlos went in there with a rifle; that the young boy went in there with a baseball bat. And they laid in wait. They were going there to rob the man when he came home; and on the way out, they lost some of the money.

This portion of the State's closing argument confirms that the State did not use Carter's statement merely as an explanation of subsequent actions. Instead, the State relied on Carter's testimony as substantive evidence of the details of the murders and to imply defendant had given a detailed confession of his alleged crimes. By using Carter's testimony in this manner, the State undoubtedly sought to prove the truth of the matter asserted. Accordingly, the testimony at issue was inadmissible hearsay. Moreover, despite the trial court's provision of a limiting instruction, we hold Detective Carter's testimony went so far beyond the confines of this instruction that the jury could not reasonably have restricted its attention to any nonhearsay elements in Carter's testimony. *See State v. Austin*, 285 N.C. 364, 367, 204 S.E.2d 675, 677 (1974).

[2] The trial court's error relating to Detective Carter's testimony was not limited to the portions of testimony outlined above. Rather, the error was greatly compounded when the trial court denied

defendant the opportunity to fully cross-examine Carter concerning portions of his testimony.

During his cross-examination of Carter, defendant tried to ask several questions to undermine the credibility of Blackwell's information:

> Q. Did you go talk with Woody Butler?
>
> A. I didn't, but some of the other officers did.
>
> Q. And based on Woody Butler's statement, or based on the information that you understand was taken from Woody Butler, that he never gave George Blackwell that information—
>
> MR. BRITT [prosecutor]: Objection. Move to strike. Would like to be heard.

The State argued these questions solicited inadmissible hearsay. Defendant argued the State had been permitted to ask Carter about statements Butler made to Blackwell, and so it was appropriate for defendant to inquire if Carter talked with Butler and if Butler denied making the statements at issue. After the trial court denied defendant the opportunity to continue this line of questioning, defendant made the following offer of proof:

> Q. Mr. Carter, based on the information that you received from these officers that Woody Butler had denied any knowledge of this incident where he supposedly told George Blackwell this information, did you at any time go talk with George Blackwell after that?
>
> A. No, no, I didn't.
>
> Q. To your knowledge, did any of the other officers ever go talk with John Blackwell—excuse me, George Blackwell again?
>
> A. Yes.
>
> . . . .
>
> Q. Now, George Blackwell is serving—is it a life sentence as a habitual felon?
>
> A. I don't know.
>
> Q. Did you investigate what his motives for telling you this is [sic] or investigate the source of information he received it from?

A. I don't have anything in my notes about that.

Q. Did you even determine if he was in custody or incarcerated at the time the murders happened, or where he was living during that period of time, if he wasn't?

A. No.

. . . .

Q. Did you find out where George Blackwell was from?

A. I knew Blackwell had lived in the Saddletree community at one time. I knew that.

Q. So you knew he had a connection to Robeson County and could have had information about these murders from other sources?

A. Yes.

At this point, the trial court sustained the State's objection and stated defendant was trying to admit hearsay.

After a thorough review, we hold defendant's proposed questions were designed to impeach the segment of Carter's testimony that provided details of defendant's alleged crimes. Once the trial court permitted Carter to testify on direct examination to these details, the trial court should have permitted defendant to present any evidence that would have been proper to impeach Butler or Blackwell if either of them had testified. *See* N.C.G.S. § 8C-1, Rule 806 (1999). Accordingly, because the questions defendant proposed would have been proper if Butler or Blackwell had testified, the trial court erred in failing to allow defendant's questions.

Additionally, during the State's examination, Carter was permitted to testify about the statements Butler made to Blackwell in order to explain Carter's subsequent actions. As such, defendant's proposed cross-examination questions also appear proper to determine whether Carter's subsequent investigation included an examination of Blackwell's motive for implicating defendant and Blackwell's other potential sources of information.

Accordingly, we conclude the trial court not only erred in permitting the State to admit details of the murders via hearsay testimony from Carter, but also erred in denying defendant an opportunity to properly cross-examine Carter concerning these details.

[3] Defendant further contends the trial court erred when it failed to require the State to disclose names of informants with material, exculpatory information that someone other than defendant committed the offenses. We agree with defendant that this potentially exculpatory evidence was material to his defense. This suppression, combined with defendant's other assignments of error, constituted reversible error and denied defendant a fair trial.

Defendant filed multiple motions to require the State to disclose various exculpatory materials. In one motion, defendant specifically requested that the State provide the name of an informant who implicated five other people as being involved in the murders and indicated where the murder weapon could be found. The trial court denied defendant's motion. The trial court also denied a defense motion to disclose "the name[] and address of the subject who was brought back from Mississippi by [police] who made the statements about Thompkins being the 'big man' and had arranged the murders."

In *Brady v. Maryland*, the United States Supreme Court held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (1963). "Favorable evidence is material if there is a 'reasonable probability' that its disclosure to the defense would result in a different outcome in the jury's deliberation." *State v. Strickland*, 346 N.C. 443, 456, 488 S.E.2d 194, 202 (1997), *cert. denied*, 522 U.S. 1078, 139 L. Ed. 2d 757 (1998). The determination of the materiality of evidence must be made by examining the record as a whole. *State v. Howard*, 334 N.C. 602, 605, 433 S.E.2d 742, 744 (1993). The State has not satisfied its duty to disclose unless the information was provided in a manner allowing defendant "to make effective use of the evidence." *State v. Taylor*, 344 N.C. 31, 50, 473 S.E.2d 596, 607 (1996).

Here, defendant had neither the name of the informant who gave the State information about the five individuals nor the name of the subject brought back from Mississippi by police. Defendant thus could not effectively use that information at trial. Defendant needed access to these individuals to interview them and develop leads. There is a reasonable probability that if defendant had access to informants who had names of others involved in the murders, such information could have swayed the jury to reach a different outcome.

Defendant had a right to this information in a timely manner so he could effectively use it.

Our confidence in the outcome of this case is undermined by defendant's inability to interview witnesses with potentially exculpatory information. Accordingly, we hold suppression of this information was error.

[4] In another assignment of error, defendant contends his constitutional rights were violated when the trial court allowed an expert to testify without allowing defendant an opportunity to examine the expert's testing procedure and data. We agree. Considered in isolation, this error may not be sufficiently prejudicial to warrant a new trial, but taken in conjunction with defendant's other assignments of error, it constitutes reversible error.

The State's firearms expert, State Bureau of Investigation Agent Al Langley, testified concerning a gun found in the Lumber River over three years after the crimes occurred. According to Langley, the gun appeared to be the murder weapon. The gun was test-fired, and the spent bullets were compared to those found at the scene.

On defendant's motion, the trial court ordered the State to turn over the test-fired bullets and "underlying data examinations." The State was unable to locate the shells. Defendant requested that the State either retest the gun and provide defendant with the new tested shells or that testimony from the State's firearms expert be excluded. The trial court did not order the State to retest the gun but allowed the State's expert to testify.

A defendant in a criminal proceeding has the constitutional right to confront his accusers and the witnesses against him. U.S. Const. amend. VI; N.C. Const. art. I, §§ 19, 23 (2000). This includes the right to prepare and present a defense. *State v. Graves*, 251 N.C. 550, 557, 112 S.E.2d 85, 91 (1960). This constitutional right " 'ensure[s] the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.' " *State v. Brewington*, 352 N.C. 489, 507, 532 S.E.2d 496, 507 (2000), (quoting *Maryland v. Craig*, 497 U.S. 836, 845, 111 L. Ed. 2d 666, 678 (1990)), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001).

In the present case, defendant was not afforded the opportunity to rigorously test the State's firearms evidence, thus interfering with defendant's right to present a full defense. Therefore, we agree with

defendant that the trial court erred in neither suppressing the testimony of the State's firearms expert nor ordering the State to retest the weapon. When viewed with the other erroneous actions of the trial court, a new trial is required.

In conclusion, while defendant's trial was riddled with errors, we decline to address every potential error as these errors are unlikely to recur at a new trial. We conclude that the errors outlined above, taken as a whole, deprived defendant of his due process right to a fair trial free from prejudicial error.

For the foregoing reasons, we conclude the trial court's errors were prejudicial to defendant's right to a fair trial and defendant is entitled to a new trial.

NEW TRIAL.

GOOD NEIGHBORS OF SOUTH DAVIDSON, AND LARRY BRUCE SUMNER, SR. v. TOWN OF DENTON

No. 170PA01

(Filed 7 March 2002)

Zoning— satellite annexation—spot zoning—rural residences and farms designated for industrial use—reasonable basis test

Defendant town engaged in an improper form of spot zoning when the town designated for industrial use a recently annexed satellite parcel owned by one company in an area zoned by the county for use as rural residences and farms, because the town did not make a clear showing that there was a reasonable basis for its decision when: (1) there is no evidence demonstrating compatibility between the rezoning and an existing comprehensive plan; (2) there is no evidence showing that the town's zoning authority considered the relationship between the envisioned uses of the property and the use present in the adjacent tracts; (3) there is no evidence showing benefits beyond those to the property owner and the town; and (4) there is uncontested evidence of potential detriments to both immediate neighbors and the surrounding community as a whole.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 142 N.C. App. 391, 544 S.E.2d 275 (2001), reversing an order of summary judgment for plaintiffs entered by Wood, J., on 25 August 1999 in Superior Court, Davidson County, and remanding for entry of summary judgment on behalf of defendant. Heard in the Supreme Court 12 September 2001.

John D. Runkle for plaintiff-appellants.

Paul Rush Mitchell for defendant-appellee.

ORR, Justice.

This appeal arises out of a land-use dispute in Davidson County. Plaintiffs ("Good Neighbors"), residents of the county and owners of property surrounding the parcel at issue, contend that defendant ("Town of Denton") engaged in an improper form of spot zoning when it designated for industrial use a recently annexed satellite parcel in an area zoned by Davidson County for use as rural residences and farms. We agree, and for the reasons specified below, we reverse the Court of Appeals with instructions to reinstate the judgment of the trial court.

From the outset, we take special note of the unique—and troubling—factual scenario now before us. Historically, spot-zoning controversies have occurred within the confines of a zoning authority's own borders. In those cases, all affected property owners are subject to the discretion of a single zoning decision maker, a circumstance that logically, and reasonably, limits the scope of any evaluation of the disputed zoning's potential for adverse impact.

However, in the case *sub judice*, no such "normal circumstance" exists. The tract of land at issue is not within the conventional boundaries of a town but instead sits in effect as an island some two miles away. In addition, the tract is surrounded not by town property, but by county property that is subject to the authority of a separate zoning entity. Thus, the alleged spot zoning at issue must be scrutinized from two different perspectives: (1) for its potential impact on the Town of Denton, and (2) for its potential impact on neighboring property owners under the control and zoning authority of Davidson County.

A review of the record reveals the following pertinent facts. Piedmont Chemical Industries, Inc. ("Piedmont"), has been the

owner of a fifty-acre parcel of property in Davidson County since 1978. Neither the property nor its neighboring environs were subject to any zoning restrictions until May 1990, when the county zoned the area for rural agricultural purposes (RA2). Sometime after acquiring the land in 1978 but before 1990, Piedmont began operating a chemical-storage facility on its property. Although such an operation would not be considered a conforming use under the county's 1990 zoning ordinance, Piedmont's existing facility was "grandfathered" by the county and was thus exempted from its zoning restrictions.

In 1991, Piedmont attempted to have its property rezoned for industrial use, but the county turned down the proposal. A second attempt was similarly rebuffed in 1994. Although the record fails to explain precisely why the company pursued the change, a review of the various affidavits and depositions submitted to the trial court suggests that Piedmont was contemplating either: (1) expanding its existing chemical storage capacities, (2) adding chemical manufacturing capabilities, or (3) both.

In 1998, pursuant to N.C.G.S. § 160A-58.1, Piedmont submitted a petition to the Town of Denton for the voluntary satellite annexation of the fifty-acre tract in question. The requested annexation is considered a "satellite" annexation because the property's borders are not contiguous with the town's limits. In fact, the property is located over two miles from Denton's closest contiguous border.

Apparently, officials identified as "the county economic development director," "somebody from [the] [C]ommerce [Department in Raleigh]," and Denton's Town Manager, John Everhart, had urged Piedmont to pursue annexation as a means to gain the zoning change. Certainly, all participants privy to the discussions shared the view that unlike the county, the town would prove amenable to meeting Piedmont's zoning needs.

On 20 April 1998, after a public hearing, Denton's Board of Commissioners approved the satellite annexation of the Piedmont tract. Thus, fifty acres of Piedmont property, none of which was contiguous to Denton's borders, was incorporated into the town by a unanimous vote. Six weeks later, the same board voted to zone ten acres of Piedmont's property as light industrial (LI), with the remaining forty acres classified as heavy industrial (HI). As a result of the town's actions, the parcel stands out from its environs in two significant ways: (1) as a part of the Town of Denton, it is an island severed from its municipality by a gulf of county-controlled lands; and (2) as

a neighboring property, it is a parcel of industrial-zoned land enveloped by rural residences and farms. Moreover, as previously noted, there is an additional consequence of the town's actions: the overall geographical area at issue was rendered subject to the competing interests of two separate zoning authorities.

Prior to trial, defendant Town of Denton moved for summary judgment, arguing that there were no genuine issues of material fact in dispute and that it was entitled to judgment as a matter of law. After considering plaintiffs' complaint and defendant's answer, along with submitted affidavits, maps, meeting minutes, and other documents, the trial court concluded that the zoning at issue was both an illegal form of spot zoning and a prohibited form of contract zoning. In consequence, defendant's motion for summary judgment was denied and summary judgment was instead awarded to plaintiffs. Defendant then appealed the trial court's ruling, without objecting to any portion of the trial court's order, which provided that both parties had stipulated that there were no genuine issues of material fact at issue.

Upon review of the order as stipulated, the Court of Appeals reversed, holding that the annexation and subsequent zoning were valid. Good Neighbors then petitioned this Court for discretionary review, *see* N.C.G.S. § 7A-31 (2002), which was allowed on 3 May 2001.

On appeal to this Court, plaintiffs contend, *inter alia*, that the Town of Denton's zoning ordinance for the Piedmont property is precisely the type of spot zoning proscribed in *Chrismon v. Guilford Cty.*, 322 N.C. 611, 370 S.E.2d 579 (1988), the seminal case on the issue. Spot zoning is defined, in pertinent part, as a zoning ordinance or amendment that "singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to . . . relieve the small tract from restrictions to which the rest of the area is subjected." *Blades v. City of Raleigh*, 280 N.C. 531, 549, 187 S.E.2d 35, 45 (1972), quoted in *Chrismon*, 322 N.C. at 627, 370 S.E.2d 588-89.[1] The practice [of spot zoning] may be

1. Defendant contends that the circumstances of the instant case do not constitute spot zoning because the Town of Denton did not "reclassify" the parcel at issue. In sum, defendant argues that the zoning action at issue was the town's initial attempt to zone the property in any fashion. Therefore, by definition, the town cannot "reclassify" a property that it had not classified in the first place.

In our view, defendant's argument is unavailing because its emphasis is misplaced. For purposes of spot zoning, reclassification is a result rather than an act

valid or invalid, depending on the facts of the specific case. *Chrismon*, 322 N.C. at 626, 370 S.E.2d at 588. In order to establish the validity of such a zoning ordinance, the finder of fact must answer two questions in the affirmative: (1) did the zoning activity constitute spot zoning as our courts have defined that term; and (2) if so, did the zoning authority make a clear showing of a reasonable basis for the zoning. *Id.* at 627, 370 S.E.2d at 589.[2] Factors relevant to the reasonableness inquiry include, but are not necessarily limited to, the size of the tract in question; the compatibility of the disputed zoning action with an existing zoning plan; the benefits and detriments resulting from the zoning for the owner of the parcel, his neighbors, and the surrounding community; and the relationship between the uses envisioned under the new zoning and the uses currently present in the adjacent tracts. *Id.* at 628, 370 S.E.2d at 589.

We pause to note that the collective breadth of the aforementioned factors also defines the scope of the "reasonable basis" inquiry. A zoning authority cannot satisfy the "clear showing of a reasonable basis" requirement simply by cataloguing the many benefits it received as a result of the zoning change. Rather, the zoning authority must demonstrate that the change was reasonable in light of its effect on all involved. Thus, for purposes of spot zoning, a "reasonable basis" is established when a zoning authority "clearly shows" that the potential benefits to the property owner, his neighbors and/or the surrounding community outweigh the potential detriments to those neighbors and/or the surrounding community as a whole. In the context of this case, we note that an assessment of the zoning's impact on neighbors and the surrounding community must include an evaluation of areas that are: (1) beyond the control of the entity making the zoning decision, and (2) under the control of a different zoning authority.

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defined by its designating authorities. That a different zoning authority may have been responsible for the zoning change does not alter the fact that the parcel at issue had changed classifications. After all, when a parcel once limited to agricultural uses is transformed into a parcel capable of housing heavy industry, the result cannot be considered anything but a reclassification of that property. Defendant's argument to the contrary, therefore, is unpersuasive.

2. Defendant argues, and the Court agrees, that as a general proposition, a municipality's zoning actions are presumed to be reasonable and valid. *See e.g., Schloss v. Jamison*, 262 N.C. 108, 115, 136 S.E.2d 691, 696 (1964). However, when assessing a municipality's actions that are construed to be spot zoning, we note that this Court has set aside the aforementioned presumption in favor of requiring the municipality to offer a "clear showing" that there was a "reasonable basis" for its decision. *See Chrismon*, 322 N.C. at 627, 370 S.E.2d at 589.

As for the first question of the spot zoning inquiry under *Chrismon*, the circumstances of this case clearly demonstrate that Piedmont's property was spot zoned under the Town of Denton's ordinance. The parcel, a modest fifty acres and wholly company-owned, was transformed from one of the most restrictive zoning classifications under the county ordinance (residential-agricultural) to one of the most expansive under the town's ordinance (forty acres as heavy industrial and ten acres as light industrial). Thus, the zoning process—which involved a small tract of property that was: (1) owned by a single entity, (2) freed of restrictions imposed on neighboring landowners, and (3) surrounded by a uniformly zoned area—qualified as spot zoning. *Id.* at 627, 370 S.E.2d at 589.

Having determined that the zoning activity at issue constitutes spot zoning, the Court must next examine whether the Town of Denton made a clear showing that there was a reasonable basis for its decision. From the outset, we note that the record on appeal is bereft of all reference to the comprehensive zoning plans of either Davidson County or the Town of Denton. *See* N.C.G.S. § 160A-383 (1999) (primary zoning statute establishing that zoning regulations are to be made in accordance with a comprehensive plan that reflects a zoning authority's overall vision for the area under its control). Thus, we are unable to determine whether the disputed zoning action is compatible with any existing comprehensive plan or plans. As a consequence, this factor can lend no support to any contention by the Town of Denton that there is a clear showing of a reasonable basis for its decision.

With regard to the second factor of the reasonable basis test (the "benefits versus detriments" factor), the Court must consider the effects of the zoning change on the owner of the newly owned property, his neighbors, and the surrounding community. While Piedmont and the Town of Denton clearly benefit under the new zoning scheme—the former gets to expand its business operations while the latter arguably gets jobs and an increase to its tax base—we note that the town's benefits are beyond the scope of our inquiry, which is expressly limited to examining the ordinance's beneficial and detrimental effects on the property owner, his neighbors, and the surrounding community. *Chrismon*, 322 N.C. at 628, 370 S.E.2d at 589.

One example of a qualifying benefit is a showing that neighboring property values would increase as a result of the rezoning. Other benefits previously recognized by the Court, as illustrated in *Chrismon*,

include: (1) a showing of broad-based support for the proposed use of the property, and (2) a showing that many of the surrounding landowners were likely to use the expanded services offered by the property owner seeking the zoning change. *Id.* at 630, 370 S.E.2d at 590. A close examination of the record suggests that defendant has failed to demonstrate how the zoning change at issue would so benefit neighbors and the surrounding community. First, among Piedmont's immediate neighbors, there is no broad-based support for the rezoning. In fact, opposition is widespread. Second, defendant makes no case even suggesting that the surrounding community either needs or will make use of the property's planned expanded services. Finally, defendant makes no claim and offers no evidence suggesting that neighboring properties will increase in value as a result of the rezoning. Defendant merely contends that the new use of the property will not spur adverse economic consequences for the property's neighbors. In our view, even if proven, defendant's contention amounts to a showing of nothing more than a lack of a detriment, which falls short of qualifying as a benefit for purposes of spot-zoning analysis.

On the other hand, there is ample evidence showing that the ordinance will result in detrimental consequences for both neighbors of the property and the surrounding community. The record supports the following undisputed material facts:

> [ ] The Good Neighbors and its members . . . are and will be directly and adversely affected by the proposed chemical plant or by any other . . . heavy industrial use of the property allowed by the Town's zoning ordinance. There is a strong potential for noxious odors fouling the air; noise; spills and leaks of chemicals into drinking water wells; increased truck traffic with hazardous chemicals passing by their homes, schools and water supply watershed; the loss of the use and enjoyment of their property; the loss of property values; and interference with their health, safety and general welfare.
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> . . . .
>
> [ ] The property was rezoned without any consideration of: (a) the lack of any changing conditions in the area; (b) the surrounding active farms and other agricultural uses; (c) the effects of the chemical plant on the greater than the 295 people living within a mile of the plant; (d) the school located within a two-mile radius [of the plant]; (e) the lack of fire and emergency

> services if a spill occurred on the roads or railroads; (f) the approximate five-mile distance to [the] nearest major industry; (g) the location of the west branch of Lick Creek; (h) the need for protection to adjoining property; (i) the effects of the chemical plant on property values; and (j) general health, safety and general welfare.

In addition, we note another adverse consequence that is peculiar to the circumstances of this case. As a result of the satellite annexation that paved the way for the Town of Denton to rezone the Piedmont property, complaining neighbors were left with but one recourse—the state's courts. Although their respective properties surrounded the property at issue, neighboring landowners found themselves without representation in their fight against the zoning change. As residents of a rural section of Davidson County, they had been initially represented by the county's board of commissioners when it twice rejected the zoning change, ostensibly because the board had determined that the proposal was not in the community's best interests. However, in the aftermath of the satellite annexation, when the authority to rezone the parcel shifted from the county to the Town of Denton, Piedmont's neighbors suddenly found themselves outside looking in. Without a say in the annexation process, they had no one to defend their zoning interests and no one to vote out of office for failing to do so. In sum, the Town of Denton could act on the property at issue without fear of political reprisal from the neighboring landowners of Davidson County. From our vantage point, there are precious few circumstances that could prove more detrimental to a surrounding community. Thus, in weighing the lack of evidence showing potential benefits against strong evidence suggesting numerous and significant detriments to neighbors and the surrounding community, we conclude that the "benefits and detriments" factor fails to aid defendant's attempt to provide a clear showing of a reasonable basis for the rezoning.

As for the final factor of the reasonable basis test—evaluating the relationship between the uses envisioned under the new zoning and the uses currently present in adjacent tracts—the Court initially notes that the trial court found that the rural character of the surrounding community showed no signs of changing conditions. We also recognize that Piedmont's use of the property at issue was not in sync with the surrounding community for nearly a decade *before* the Town of Denton's attempt at rezoning. Although exempted from zoning restrictions imposed by the county in 1990, and thus operating

within legal parameters, Piedmont developed and maintained a chemical storage facility on the parcel in an area that was: (1) specifically zoned for farms and residences, and (2) actually composed of such farms and rural residences. Thus, if Piedmont's use of the tract clashed with the property uses of its immediate neighbors prior to the zoning change, can there be any doubt that an expansion of its industrial capacities amid a static agricultural community would serve only to exacerbate the dichotomy even further?

In summary then, of all the individual factors deemed relevant to a spot-zoning inquiry under *Chrismon*, none provide defendant with the required clear showing of a reasonable basis for its actions. In fact, when considered collectively, the factors are rather suggestive of a cavalier unreasonableness on the part of the town. Specifically, there is no evidence demonstrating compatibility between the rezoning and an existing comprehensive plan; no evidence showing that the town's zoning authority considered the relationship between the envisioned uses of the property and the uses present in the adjacent tracts; no evidence of benefits beyond those to Piedmont and the Town of Denton; and strong, uncontested evidence of potential detriments to both immediate neighbors and the surrounding community as a whole. Thus, while we agree with the Court of Appeals' conclusion that the action at issue constituted a form of spot zoning, we do not share its view that the activity was of the legal variety. As a result, we reverse the Court of Appeals on this issue and order that court to reinstate the trial court's grant of summary judgment in favor of plaintiffs, Good Neighbors.

Because our holding on the spot-zoning issue resolves the dispute between these two parties *in toto*, we find it unnecessary to address plaintiffs' additional contentions pertaining to contract zoning and proper scope of review.

REVERSED.

MILON v. DUKE UNIV.

[355 N.C. 263 (2002)]

JAMES DEWEY MILON AND ROSA P. MILON v. DUKE UNIVERSITY; DUKE UNIVERSITY HEALTH SYSTEM, INC.; PRIVATE DIAGNOSTIC CLINIC, L.L.P.; PRIVATE DIAGNOSTIC CLINIC, PLLC; DAVID F. PAULSON, M.D.; PETER S.A. GLASS, M.D.; AND MARY CRODELLE, CRNA

No. 549A01

(Filed 7 March 2002)

Arbitration and Mediation— arbitration agreement—wife signing husband's name—no apparent authority

A decision of the Court of Appeals holding that an agreement to arbitrate a medical malpractice claim was valid is reversed for the reasons stated in the dissenting opinion in the COA that a wife did not have apparent authority to enter into an arbitration agreement on behalf of her husband and the defendants could not have reasonably and prudently relied on the arbitration form as signed by her.

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. 609, 551 S.E.2d 561 (2001), reversing and remanding an order entered 26 June 2000 by Spencer, J., in Superior Court, Durham County. Heard in the Supreme Court 14 February 2002.

Bugg, Wolf & Wilkerson, P.A., by John A. Bugg and William J. Wolf; Miller & Martin LLP, by Gayle Malone, Jr., pro hac vice; and Center for Constitutional Litigation, PC, by John Vail, pro hac vice, for plaintiff-appellants.

Fulbright & Jaworski L.L.P., by John M. Simpson; and Moore & Van Allen, PLLC, by Charles R. Holton, for defendant-appellees Duke University; Duke University Health System, Inc.; Private Diagnostic Clinic, L.L.P.; Private Diagnostic, P.L.L.C.; Peter S.A. Glass, M.D.; and Mary Crodelle, C.R.N.A.; and Patterson, Dilthey, Clay & Bryson, by Mark E. Anderson, for defendant-appellee David F. Paulson, M.D.

Financial Protection Law Center, by Chandra T. Taylor and Mallam J. Maynard, amicus curiae.

Triggs, Beskind, Strickland & Rabenau, P.A., by Donald R. Strickland and Karen M. Rabenau, on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

North Carolina Justice & Community Development Center, by Carlene McNulty, amicus curiae.

Friends of Residents in Long Term Care, Inc. by Thomas W. Henson, Jr., amicus curiae.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals.

REVERSED.

STATE OF NORTH CAROLINA v. RODNEY DALE BUCHANAN

No. 190A00-2

(Filed 7 March 2002)

Confessions and Incriminating Statements— defendant in custody—ultimate inquiry test—suppression of statements before Miranda warnings

The trial court properly applied the "ultimate inquiry" test in determining that defendant was in custody when, after admitting to his station house interrogators that he had participated in a homicide, those same interrogators accompanied him to the bathroom, with an officer staying with defendant at all times; consequently, the trial court properly suppressed any statements defendant made between the time he returned from the bathroom until Miranda warnings were administered to him.

Appeal pursuant to N.C.G.S. § 15A-979(c) from a suppression of evidence order entered 6 July 2001 by Beal, J., in Superior Court, Gaston County. Heard in the Supreme Court 10 December 2001.

Roy Cooper, Attorney General, by William P. Hart, Special Deputy Attorney General, for the State-appellant.

Richard B. Schultz and Edgar F. Bogle for defendant-appellee.

STATE v. BUCHANAN

[355 N.C. 264 (2002)]

PER CURIAM.

Defendant, indicted on two counts of first-degree murder, initially filed a pretrial motion requesting that the trial court suppress statements he made during a station house interview with police. After conducting a hearing on the issue, the trial court ruled that during the interview, defendant was in custody for purposes of *Miranda* warnings. As a result, the trial court ordered all statements made by defendant prior to being given such warnings excluded from trial.

On appeal by the State, this Court held that the trial court used the wrong test in its attempt to determine whether defendant was in custody for purposes of *Miranda* warnings, and ordered the trial court to reconsider the issue under the proper test. *State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001) (holding that the "ultimate inquiry" test shall be used to determine whether an individual is in custody for purposes of *Miranda* warnings). On remand, the trial court, following our mandate, added two findings of fact to its previous findings and reassessed defendant's circumstances under the proper test. The trial court then concluded that a reasonable person in defendant's position would have believed he was in custody—"restrained in his movement to the degree associated with a formal arrest," *id.* at 340, 543 S.E.2d at 828—when, after admitting to his station house interrogators that he had participated in a homicide, those same interrogators accompanied him to the bathroom, with an officer staying with defendant at all times. As a consequence of so concluding, the trial court suppressed any statements defendant made between the time he returned from the bathroom until *Miranda* warnings were properly administered. We affirm.

A trial court's ruling on a motion to suppress is conclusive on appeal "if [it is] supported by competent evidence." *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995). In the case *sub judice*, the trial court properly applied the "ultimate inquiry" test to the evidence as instructed by this Court. The new findings of fact were supported by competent evidence; therefore, the trial court's ruling is conclusive on appeal.

AFFIRMED.

STATE OF NORTH CAROLINA v. RONNIE LANE STANCIL

No. 589A01

(Filed 7 March 2002)

1. Evidence— sexual offense against child—expert testimony

In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has in fact occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility. However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.

2. Evidence— sexual assault—child victim—expert opinion—not plain error

Although the State failed to lay an adequate foundation for the admission of a pediatrician's statement of opinion that a child victim was in fact sexually assaulted under N.C.G.S. § 8C-1, Rule 702, the admission of this testimony did not constitute plain error because the error did not cause the jury to reach a different verdict than it otherwise would have reached in light of the overwhelming evidence against defendant.

Appeal by defendant 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. 234, 552 S.E.2d 212 (2001), finding no error in a judgment entered 16 September 1999 by Winner, J., in Superior Court, Cabarrus County. Heard in the Supreme Court 13 February 2002.

Roy Cooper, Attorney General, by Anne M. Middleton, Assistant Attorney General, for the State.

Michael A. Grace and Christopher R. Clifton for defendant-appellant.

PER CURIAM.

[1] In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding

the victim's credibility. *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987); *State v. Grover*, 142 N.C. App. 411, 543 S.E.2d 179, *aff'd per curiam*, 354 N.C. 354, 553 S.E.2d 679 (2001). However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith. *State v. Hall*, 330 N.C. 808, 818, 412 S.E.2d 883, 888 (1992); *State v. Aguallo*, 322 N.C. 818, 822-23, 370 S.E.2d 676, 678 (1988); *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987).

[2] In the case *sub judice*, although a thorough examination and a series of tests revealed no physical evidence of sexual abuse, the trial court allowed Dr. Prakash, a pediatrician, to testify that the victim was "sexually assaulted and [that there was] also maltreatment, emotionally, physically, and sexually." The doctor based her opinion on two examinations of the child and her review of an in-depth interview with the child by a psychologist. Upon the record before us, the State failed to lay an adequate foundation for the admission of Dr. Prakash's statement of opinion that the victim was *in fact* sexually assaulted under N.C.G.S. § 8C-1, Rule 702.

The defendant did not make a timely objection at trial to Dr. Prakash's statement of opinion. We review for plain error. *See State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). The overwhelming evidence against defendant leads us to conclude that the error committed did not cause the jury to reach a different verdict than it otherwise would have reached. *See State v. Walker*, 316 N.C. 33, 38-39, 340 S.E.2d 80, 83 (1986). Accordingly, although the trial court's admission of the challenged portion of Dr. Prakash's testimony was error, it did not rise to the level of plain error.

MODIFIED AND AFFIRMED.

STATE OF NORTH CAROLINA v. JAMES RUSSELL SMITH

No. 521A01

(Filed 7 March 2002)

Homicide— second-degree murder—death of child—shaking and blunt force injuries—malice

A decision of the Court of Appeals holding that evidence on the issue of malice was not substantial enough to withstand defendant's motion to dismiss a charge of second-degree murder of his two-year old stepdaughter was reversed for the reasons stated in the dissenting opinion in the Court of Appeals that evidence that injuries to the child's head and brain were caused by violent shaking and a blunt force injury to the head was sufficient to support the jury's conclusion that defendant acted with malice and to sustain defendant's conviction of second-degree murder.

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. 1, 551 S.E.2d 889 (2001), reversing and remanding a judgment entered 15 December 1999 by Allen (J.B., Jr.), J. in Superior Court, Orange County. Heard in the Supreme Court 12 February 2002.

Roy Cooper, Attorney General, by Steven M. Arbogast, Special Deputy Attorney General, for the State-appellant.

Miles & Montgomery, by Mark Montgomery, for defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed and this case is remanded to that court to address the remaining assignments of error.

REVERSED AND REMANDED.

CAPITAL OUTDOOR, INC., PETITIONER v. GUILFORD COUNTY BOARD OF ADJUSTMENT, RESPONDENT

No. 603A01

(Filed 7 March 2002)

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. 388, 552 S.E.2d 265 (2001), reversing and remanding a judgment filed 27 April 2000 by Johnson (Marcus L.), J., in Superior Court, Guilford County. Heard in the Supreme Court 13 February 2002.

Waller, Stroud, Stewart & Araneda, LLP, by Betty S. Waller, for petitioner-appellee.

Guilford County Attorney's Office, by Jonathan V. Maxwell, County Attorney, and Mercedes O. Chut, Deputy County Attorney, for respondent-appellant.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals as to the standard of review and remand the case to that court for consideration of the other assignments of error on the merits.

REVERSED.

STATE OF NORTH CAROLINA v. RICKY C. LYTCH

No. 244A01

(Filed 7 March 2002)

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. 576, 544 S.E.2d 570 (2001), finding no error in judgments imposing sentences of life imprisonment without parole entered 28 May 1999 by Ellis, J., in Superior Court, Cumberland County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. Heard in the Supreme Court 11 February 2002.

Roy Cooper, Attorney General, by Norma S. Harrell, Special Deputy Attorney General, for the State.

Staples Hughes, Appellate Defender, by Charlesena Elliott Walker, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

AFFIRMED.

KATHERINE BYRD DOLLEY, PAUL H. DOLLEY, INDIVIDUALLY AND AS GUARDIANS OF NICHOLAS PAUL DOLLEY v. MARY FOWLER PRICE, STUART Y. BENSON, INDIVIDUALLY AND D/B/A STUART Y. BENSON & ASSOCIATES, RLS, AND KAY BAKER AND ASSOCIATES, INC.

No. 255A01

(Filed 7 March 2002)

Appeal by plaintiffs pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 143 N.C. App. 347, 547 S.E.2d 182 (2001), affirming summary judgment entered 6 May 1999 by Lanier, J., and summary judgment entered 5 October 1999 by Cobb, J., in Superior Court, New Hanover County. Heard in the Supreme Court 11 February 2002.

Charles David Morison for plaintiff-appellants.

H. Kenneth Stephens, II, for defendant-appellee Kay Baker and Associates, Inc.; and Roy C. Bain, for defendant-appellee Mary Fowler Price.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. BRYANT EDWARD WILLIAMS

No. 396A01

(Filed 7 March 2002)

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. 526, 548 S.E.2d 802 (2001), reversing and remanding a judgment entered 9 July 1999 by Haigwood, J., in Superior Court, Halifax County. Heard in the Supreme Court 11 February 2002.

Roy Cooper, Attorney General, by K.D. Sturgis, Assistant Attorney General, for the State-appellant.

Staples Hughes, Appellate Defender, by Constance E. Widenhouse, Assistant Appellate Defender, for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. GREGORY LEE NOWELL AND MICHAEL LYNN TAYLOR

No. 433A01

(Filed 7 March 2002)

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. 636, 550 S.E.2d 807 (2001), reversing in part and reversing and remanding in part judgments entered 8 December 1999 by Allsbrook, J., in Superior Court, Halifax County. On 4 October 2001, the Supreme Court granted the State's petition for discretionary review of an additional issue. Heard in the Supreme Court 12 February 2002.

Roy Cooper, Attorney General, by William B. Crumpler, Assistant Attorney General, for the State-appellant.

William F. Dickens, Jr., for defendant-appellee Nowell.

Jesse F. Pittard, Jr., for defendant-appellee Taylor.

American Civil Liberties Union of North Carolina Legal Foundation, by Seth H. Jaffe, amicus curie.

PER CURIAM.

AFFIRMED.

BRIDGESTONE/FIRESTONE, INC. v. OGDEN PLANT MAINTENANCE COMPANY OF NORTH CAROLINA AND THE BUDD GROUP, INC.

No. 439A01

(Filed 7 March 2002)

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. 503, 548 S.E.2d 807 (2001), reversing and remanding an order signed 12 February 2000 by Duke, J., in Superior Court, Wilson County. Heard in the Supreme Court 12 February 2002.

Young Moore and Henderson P.A., by David M. Duke; and Womble Carlyle Sandridge & Rice, P.L.L.C., by Jerry S. Alvis, for plaintiff-appellee.

Ragsdale Liggett PLLC, by George R. Ragsdale and Walter L. Tippett, Jr.; and Yates, McLamb & Weyher, L.L.P., by Rodney E. Pettey, for defendant-appellants.

PER CURIAM.

AFFIRMED.

LORETTA JONES AND MICHAEL JONES V. GMRI, INC. AND RICH PRODUCTS CORPORATION, INC.

No. 444PA01

(Filed 7 March 2002)

On writ of certiorari to review a unanimous, published decision of the Court of Appeals, 144 N.C. App. 558, —— S.E.2d —— (2001), finding no error in a judgment entered 7 January 2000 and an order entered 28 March 2000 by Lanning, J., in Superior Court, Mecklenburg County. Heard in the Supreme Court 13 February 2002.

Crews & Klein, P.C., by Paul I. Klein and Katherine Freeman, for plaintiff-appellants.

Dean & Gibson, L.L.P., by Christopher J. Culp, for defendant-appellees.

Howard, Stallings, From & Hutson, P.A., by John N. Hutson, Jr., amicus curiae.

PER CURIAM.

WRIT OF CERTIORARI IMPROVIDENTLY ALLOWED.

ANNIE MITCHELL REID AND JAMES DONALD REID v. TOWN OF MADISON AND RICHARD KEITH TUCKER, INDIVIDUALLY AND IN OFFICIAL CAPACITY AS EMPLOYEE OF DEFENDANT TOWN OF MADISON

No. 459PA01

(Filed 7 March 2002)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 145 N.C. App. 146, 550 S.E.2d 826 (2001), reversing an order entered by Massey, J., on 20 June 2000 in Superior Court, Rockingham County. Heard in the Supreme Court 14 February 2002.

Clark Bloss & McIver, PLLC, by John F. Bloss, for plaintiff-appellants.

McCall Doughton Blancato & Hart, PLLC, by William A. Blancato, for defendant-appellees.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE v. CANADY

[355 N.C. 277 (2002)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
CARLOS CANADY	)	

No. 115A00

Defendant was granted a New Trial pursuant to *State v. Canady*, 355 N.C. —, — S.E.2d — (March 7, 2002) (No. 115A00). Defendant's motion for appropriate relief is hereby dismissed *without prejudice* as to his right to raise the issue pursuant to N.C.G.S. § 15A-2005 in the trial court.

Defendant's Motion for Imposition of a Life Sentence is denied.

By the order of the Court in Conference, this 6th day of March, 2002.

Butterfield, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
TRAVIS LEVANCE WALTERS	)	

No. 58A02

Pursuant to N.C.G.S. § 15A-1418, Defendant's Motion for Appropriate Relief, filed in this Court on 31 January 2002 is allowed for the limited purpose of entering the following order:

Defendant's Motion for Appropriate Relief is hereby remanded to the Superior Court, Robeson County, for determination as to whether Defendant is mentally retarded as defined by N.C.G.S. § 15A-2005. Defendant's request for appointment of post-conviction counsel, through the Office of Indigent Defense Services, to assist appellate counsel is likewise remanded for determination by the Superior Court.

It is further ordered that a hearing be held within 120 days of this order on the aforesaid motion and that the resulting order containing the findings of fact and conclusions of law of the trial court determining the motion be transmitted to this Court so that it may proceed with Defendant's appeal. Time periods for perfecting or proceeding with the appeal are tolled pending receipt of the order of disposition of the motion in the trial division.

Defendant's request that his death sentence be vacated is denied.

By order of the Court in Conference, this 12th day of March, 2002.

Butterfield, J.
For the Court

ASHLEY STEPHENSON, INDIVIDUALLY, AND AS A RESIDENT AND REGISTERED VOTER OF BEAUFORT COUNTY, NORTH CAROLINA; LEO DAUGHTRY, INDIVIDUALLY, AND AS REPRESENTATIVE FOR THE 95TH DISTRICT, NORTH CAROLINA HOUSE OF REPRESENTATIVES; PATRICK BALLENTINE, INDIVIDUALLY, AND AS SENATOR FOR THE 4TH DISTRICT, NORTH CAROLINA SENATE; ART POPE, INDIVIDUALLY, AND AS REPRESENTATIVE FOR THE 61ST DISTRICT, NORTH CAROLINA HOUSE OF REPRESENTATIVES, AND BILL COBEY, INDIVIDUALLY, AND AS CHAIRMAN OF THE NORTH CAROLINA REPUBLICAN PARTY AND ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED; PLAINTIFFS-PETITIONERS	)	
v.	)	ORDER
GARY BARTLETT, AS EXECUTIVE DIRECTOR OF THE STATE BOARD OF ELECTIONS; LARRY LEAKE, ROSE VAUGHN WILLIAMS, GENEVIEVE C. SIMS, LORRAINE G. SHINN, AND CHARLES WINFREE, AS MEMBERS OF THE STATE BOARD OF ELECTIONS; JAMES B. BLACK, AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; MARC BASNIGHT, AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; MICHAEL EASLEY, AS GOVERNOR OF THE STATE OF NORTH CAROLINA; AND ROY COOPER, AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA; DEFENDANTS-RESPONDENTS	)	

No. 94PA02

The trial court having entered its order on 20 February 2002 and given the extraordinary nature of this civil action, in the exercise of this Court's supervisory authority under Article IV of the Constitution

of North Carolina and to expedite decision in the public interest and in the interest of the orderly administration of justice, the Court, pursuant to Appellate Rule 2, for the purposes set forth below, hereby suspends application of the North Carolina Rules of Appellate Procedure, and orders the following:

1. Defendants' Notice of Appeal, if any, shall be filed in the North Carolina Supreme Court on or before 5 March 2002, and subject to defendants' filing such notice, the schedule set forth in items 2 through 5 herein shall be followed.

2. The settled Record on Appeal shall be filed on or before 12 March 2002.

3. Defendant-appellants' brief shall be filed on or before 21 March 2002.

4. Plaintiff-appellees' brief shall be filed on or before 28 March 2002.

5. The case shall be set for oral argument at a special session to be held at 9:30 a.m., 4 April 2002, in the North Carolina Supreme Court.

By order of the Court in Conference, this the 26th day of February, 2002.

Butterfield, J.
For the Court

STEPHENSON v. BARTLETT

[355 N.C. 281 (2002)]

ASHLEY STEPHENSON, INDIVIDUALLY, AND AS A RESIDENT AND REGISTERED VOTER OF BEAUFORT COUNTY, NORTH CAROLINA; LEO DAUGHTRY, INDIVIDUALLY, AND AS REPRESENTATIVE FOR THE 95TH DISTRICT, NORTH CAROLINA HOUSE OF REPRESENTATIVES; PATRICK BALLENTINE, INDIVIDUALLY, AND AS SENATOR FOR THE 4TH DISTRICT, NORTH CAROLINA SENATE; ART POPE, INDIVIDUALLY, AND AS REPRESENTATIVE FOR THE 61ST DISTRICT, NORTH CAROLINA HOUSE OF REPRESENTATIVES, AND BILL COBEY, INDIVIDUALLY, AND AS CHAIRMAN OF THE NORTH CAROLINA REPUBLICAN PARTY AND ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED; PLAINTIFFS	)	
v.	)	ORDER
GARY BARTLETT, AS EXECUTIVE DIRECTOR OF THE STATE BOARD OF ELECTIONS; LARRY LEAKE, ROSE VAUGHN WILLIAMS, GENEVIEVE C. SIMS, LORRAINE G. SHINN, AND CHARLES WINFREE, AS MEMBERS OF THE STATE BOARD OF ELECTIONS; JAMES B. BLACK, AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; MARC BASNIGHT, AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; MICHAEL EASLEY, AS GOVERNOR OF THE STATE OF NORTH CAROLINA; AND ROY COOPER, AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA; DEFENDANTS	)	

No. 94PA02

The trial court, by order entered in this case on 20 February 2002, concluded that the legislative redistricting plans enacted by the North Carolina General Assembly in November 2001 violate the North Carolina Constitution. On 5 March 2002, Defendants filed notice of appeal in this Court.

The principal legal question raised by the present case, arising under the North Carolina Constitution, is a matter of first impression

for this Court. Notwithstanding the Court's entry of an expedited scheduling order for resolution of this appeal, which provides for oral argument on 4 April 2002, the possibility exists that insufficient time will remain after proper resolution of this appeal by written decision for legislative primary elections, scheduled for 7 May 2002, to proceed in an orderly manner.

In light of the extraordinary nature of this case and the exigency of the circumstances for the legislative candidates and the citizens of this State, Defendants are hereby enjoined from conducting primary elections for the office of Senator in the North Carolina Senate and the office of Representative in the North Carolina House of Representatives, scheduled for 7 May 2002. Nothing in this order shall limit or preclude the North Carolina General Assembly, consistent with applicable law, from enacting legislation to reschedule primary elections for other offices now scheduled for 7 May 2002. This injunction shall remain in effect until further order of this Court.

By unanimous order of the Court in Conference, this 7th day of March, 2002.

I. Beverly Lake, Jr., C.J.
For the Court

AKINS v. CITY OF THOMASVILLE

No. 429P99-2

Case below: 145 N.C. App. 203

Petition by petitioners for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002. Justice Martin recused.

B & F SLOSMAN v. SONOPRESS, INC.

No. 65P02

Case below: 148 N.C. App. 81

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002.

BOONE v. HOME INS./RISK ENTER. MGMT.

No. 61P02

Case below: 147 N.C. App. 313

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 March 2002.

BOWSER v. N.C. DEP'T OF CORR.

No. 52P02

Case below: 147 N.C. App. 308

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002.

BRANCH BANK & TR. CO. v. REFLECTIONS CARWASH

No. 476P01

Case below: 145 N.C. App. 203

Motion by defendants to withdraw petition for discretionary review allowed 5 February 2002.

CACHA v. MONTACO, INC.

No. 50P02

Case below: 147 N.C. App. 21

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 March 2002.

CONWAY v. YEOMANS

No. 20P02

Case below: 148 N.C. App. 214

Notice of appeal by plaintiff pro se pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 6 March 2002. Petition by plaintiff pro se for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002.

DAIMLERCHRYSLER CORP. v. KIRKHART

No. 112P02

Case below: 148 N.C. App. 572

Motion by plaintiff for temporary stay allowed 6 March 2002.

DOE v. JENKINS

No. 317P01

Case below: 144 N.C. App. 131

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002. Conditional petition by defendant (Orange County) for discretionary review pursuant to G.S. 7A-31 dismissed as moot 6 March 2002.

EDDINGS v. SOUTHERN ORTHOPEDIC & MUSCULOSKELETAL ASSOCS., P.A.

No. 10A02

Case below: 147 N.C. App. 375

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 6 March 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002.

FENNELL v. N.C. DEP'T OF CRIME CONTROL AND PUB. SAFETY

No. 561P01

Case below: 145 N.C. App. 584

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 March 2002. Justice Edmunds recused.

HAGER v. SMITH

No. 634P01

Case below: 146 N.C. App. 748

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002.

HAMILTON v. BECK (FORMERLY FREEMAN)

No. 685P01

Case below: 147 N.C. App. 195

Notice of appeal by defendants pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 6 March 2002. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002. Petition by defendants for writ of supersedeas dismissed as moot 6 March 2002. Temporary stay dissolved 6 March 2002.

IN RE APPEAL OF GREENS OF PINE GLEN LTD. PART.

No. 681PA01

Case below: 147 N.C. App. 221

Motion by appellee (Greens of Pine Glen Ltd. Part.) to dismiss the appeal for lack of substantial constitutional question allowed 6 March 2002. Petition by appellant (Durham County) for discretionary review pursuant to G.S. 7A-31 allowed 6 March 2002. Conditional petition by appellee (Greens of Pine Glen Ltd. Part.) for discretionary review as to additional issues pursuant to G.S. 7A-31 denied 6 March 2002.

JENKINS v. CHOONG

No. 42P02

Case below: 147 N.C. App. 780

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002.

N.C. STATE BAR v. TALFORD

No. 24PA02

Case below: 147 N.C. App. 581

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 allowed 6 March 2002.

STATE v. ARNOLD

No. 30A02

Case below: 147 N.C. App. 670

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 6 March 2002.

STATE v. BROOKS

No. 51P02

Case below: 148 N.C. App. 191

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 6 March 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002.

STATE v. CHAMBERS

No. 35A02

Case below: Rowan County Superior Court

Request by defendant pro se for judicial notice on discretionary review of the trial court's decision denying motion for appropriate relief dismissed 6 March 2002.

STATE v. FOREMAN

No. 33P02

Case below: 147 N.C. App. 787

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 6 March 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002.

STATE v. FOWLER

No. 26P02

Case below: 148 N.C. App. 216

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002.

STATE v. GEDDIE

No. 561A94-2

Case below: Johnston County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Johnston County, denied 6 March 2002.

STATE v. HENDERSON

No. 77P02

Case below: 148 N.C. App. 216

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 6 March 2002. Petition by defendant for discretionary review pursuant to G.S. 7A 31 denied 6 March 2002.

STATE v. HICKS

No. 76P02

Case below: 148 N.C. App. 216

Petition by defendant for discretionary review pursuant to G.S. 7A 31 denied 6 March 2002.

STATE v. HYATT

No. 402A00

Case below: 354 N.C. 577

Motion by defendant pro se for rehearing on application for writ of habeas corpus denied 6 March 2002.

STATE v. ISENBERG

No. 73P02

Case below: 148 N.C. App. 29

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 6 March 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 March 2001.

STATE v. JOHNSON

No. 554A01

Case below: 145 N.C. App. 715

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 6 March 2002.

STATE v. JONES

No. 611P01

Case below: 146 N.C. App. 307

Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002.

STATE v. JONES

No. 27P02

Case below: 147 N.C. App. 788

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 March 2002.

STATE v. LAMBERT

No. 610P01

Case below: 146 N.C. App. 360

Notice of appeal by defendant pro se pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 6 March 2002. Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002.

STATE v. LEWIS

No. 9P02

Case below: 147 N.C. App. 525

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 6 March 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002.

STATE v. LOTHARP

No. 106A02

Case below: 148 N.C. App. 435

Motion by plaintiff for temporary stay allowed 26 February 2002. Petition by plaintiff for writ of supersedeas allowed 26 February 2002.

STATE v. MOODY

No. 64A96-4

Case below: Davidson County Superior Court

Petition by defendant for writ of certiorari to review the order of Superior Court, Davidson County, denied 6 March 2002.

STATE v. NEWSOME

No. 670P01

Case below: 146 N.C. App. 754

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 11 February 2002.

STATE v. NICHOLSON

No. 564A99

Case below: 355 N.C. 1

Motion by defendant to stay the mandate denied 11 February 2002.

STATE v. PUGH

No. 13P02

Case below: 147 N.C. App. 789

Notice of appeal by respondent pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 6 March 2002. Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002.

STATE v. PULLEY

No. 71P02

Case below: 148 N.C. App. 217

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 6 March 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002.

STATE v. REEVES

No. 82P02

Case below: 148 N.C. App. 217

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 March 2002.

STATE v. SANTIAGO

No. 59P02

Case below: 148 N.C. App. 62

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002.

STATE v. SEAMON

No. 101P02

Case below: 147 N.C. App. 526

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 March 2002.

STATE v. SMARR

No. 579P01

Case below: 146 N.C. App. 44

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002.

STATE v. YANG

No. 645P01

Case below: 146 N.C. App. 751

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002. Motion by Attorney General to dismiss appeal dismissed as moot 6 March 2002.

STATE ex rel. UTILS. COMM'N v. N.C. PAYPHONE ASS'N

No. 78A02

Case below: 148 N.C. App. 405

Motion by petitioner to dismiss notice of appeal (Carolina Telephone/Sprint) allowed 6 March 2002. Motion by petitioner to dismiss appeal (BellSouth) allowed 6 March 2002. Petition by intervenor-appellant (Carolina Telephone/Sprint) for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002. Petition by plaintiff-appellant (BellSouth) for writ of supersedeas dismissed as moot 6 March 2002. Petition by intervenor-appellant (Carolina Telephone/Sprint) for writ of supersedeas dismissed as moot 6 March 2002.

SUNSCRIPT PHARMACY CORP. v. N.C. BD. OF PHARMACY

No. 14P02

Case below: 147 N.C. App. 446

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002. Petition by plaintiff for writ of supersedeas dismissed as moot 6 March 2002. Motion by plaintiff for temporary stay dissolved 6 March 2002.

WILKERSON v. MACCLAMROCK

No. 6P02

Case below: 355 N.C. 223

Motion by defendant pro se to reconsider petition for writ of certiorari and objection to Supreme Court order dated 4 February 2002 denied 6 March 2002.

WOOD v. N.C. STATE UNIV.

No. 11P02

Case below: 147 N.C. App. 336

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 6 March 2002. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002.

ZIMMERMAN v. EAGLE ELEC. MFG., INC.

No. 44PA02

Case below: 147 N.C. App. 748

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 6 March 2002.

STATE OF NORTH CAROLINA v. LEROY ELWOOD MANN

No. 362A97

(Filed 5 April 2002)

1. **Credit Card Crimes— financial transaction card theft—sufficiency of evidence**

The trial court did not err by denying defendant's motion to dismiss the charge of financial transaction card theft under N.C.G.S. § 14-113.9 based on defendant's unauthorized use of his victim coworker's gas credit card, because: (1) a surveillance videotape of a gas station showed defendant at the station at the time of the purchase with the victim's credit card; and (2) the signature on the credit card receipt was not the victim's signature.

2. **Kidnapping— first-degree—restraint to facilitate robbery—not inherent in robbery**

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree kidnapping under N.C.G.S. § 14-39 based on the theory of defendant unlawfully restraining his victim coworker for the purpose of facilitating the commission of a robbery because the evidence, viewed in the light most favorable to the State, reveals that the restraint to which defendant subjected the victim far exceeded that necessary to and inherent in the armed robbery when: (1) defendant lured the victim to a store near defendant's home under the guise of discussing over lunch his unemployment benefits; (2) defendant then removed his victim to his apartment, where he repeatedly struck her in the face, breaking her nose and severely bruising both eyes; (3) defendant transported the victim to various ATM locations and coerced her into withdrawing money from her accounts; and (4) at some point during the course of these events, defendant forced the victim into the trunk of her car, where defendant eventually shot and killed the victim.

3. **Robbery— intent to deprive owner of property—sufficiency of evidence**

The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon based on defendant's taking of his victim coworker's vehicle, because defendant took and subsequently abandoned the vehicle which

was enough to show his intent to permanently deprive the victim of her property.

4. Homicide— first-degree murder—felony 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 under the theory of felony murder, because there was plenary evidence showing that defendant kidnapped, robbed, and killed his victim coworker as part of a single continuous transaction.

5. Evidence— bad character—promotional photograph—defendant depicted as a rap musician—harmless error

Even though the trial court erred in a first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and financial transaction card theft case by admitting evidence over defendant's objection of a promotional photograph in which defendant was depicted as a rap musician since the photograph did not tend to prove the existence of any fact of consequence to the determination of defendant's guilt, the error was not prejudicial in light of the overwhelming evidence of defendant's guilt.

6. Homicide— first-degree murder—acting in concert instruction

The trial court did not err by submitting to the jury an acting in concert instruction with respect to the charge of first-degree murder, because there was sufficient evidence that defendant and his wife acted in concert to perpetrate the chain of offenses against the victim when the evidence viewed in the light most favorable to the State reveals that: (1) both defendant and his wife were at their apartment at or near the time the victim was beaten and held against her will; (2) a witness testified that two cars, one resembling the victim's car, were on the same side of the bridge where the victim's body was later discovered; and (3) the murder weapon was found in the car defendant's wife had been driving.

7. Criminal Law— prosecutor's argument—defendant wanted to be a rap star

The trial court did not err by failing to intervene ex mero motu in a first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and financial transaction card theft case when the prosecutor argued that defendant was a "wanta be

rap star," because: (1) contrary to defendant's assertion, the prosecutor's remarks were not designed to incite the racial and cultural prejudices of the jurors; and (2) the prosecutor's remarks were intended to describe a possible motive for the crimes including defendant's need for financial means to further his musical aspirations.

8. Criminal Law— prosecutor's argument—flight

The trial court did not err by failing to intervene ex mero motu in a first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and financial transaction card theft case when the prosecutor argued flight to the jury even though the trial court denied the State's request for a flight instruction, because: (1) the trial court's decision to refrain from instruction on flight did not preclude the prosecutor from arguing the facts regarding defendant's behavior when approached by law enforcement officers for further questioning; (2) the prosecutor did not suggest to the jury that an instruction on flight was forthcoming; and (3) the prosecutor did not argue that the evidence of defendant's actions alone was sufficient to establish his guilt.

9. Criminal Law— prosecutor's argument—defense counsel's absurd, distasteful, and disgusting inferences from the evidence

The trial court did not err by failing to intervene ex mero motu in a first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and financial transaction card theft case when the prosecutor argued that defense counsel's inferences for the reason the victim agreed to meet defendant were absurd, distasteful, and disgusting inferences from the evidence, because the prosecutor's argument was well within the bounds of permissible closing argument since he was not attacking defense counsel, but was expressing outrage at the suggestion that the victim agreed to meet defendant for some illicit purpose.

10. Sentencing— first-degree murder—felony murder— *Enmund/Tison* instruction

The trial court did not commit error, much less plain error, in a first-degree murder case based on the felony murder rule by instructing the jury on the *Enmund/Tison* culpability issue because: (1) contrary to defendant's assertion, the finding by the jury that defendant was guilty of first-degree murder under the felony murder rule was not equivalent to a finding that defendant

lacked culpable intent; and (2) collateral estoppel did not preclude submission and resolution of this issue since the jury did not resolve the *Enmund/Tison* culpability issue upon rendering its guilty verdict.

11. Sentencing— capital—aggravating circumstance—murder was especially heinous, atrocious, or cruel

The trial court did not err in a capital first-degree murder case by submitting the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel, because: (1) the evidence reveals that the victim was alive when defendant forced her into the trunk of her car; and (2) a jury could have reasonably inferred that the victim was conscious while trapped inside the trunk and that she tried desperately, but futilely, to free herself as she anticipated the moment when defendant would end her life.

12. Sentencing— capital—aggravating circumstance—murder committed during course of armed robbery

The trial court did not err in a capital first-degree murder case by submitting the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the murder was committed during the course of an armed robbery even though defendant contends that proof of the armed robbery was necessary to establish the offense of kidnapping, which was the felony underlying defendant's first-degree murder conviction, because a crime alleged to be the purpose for which defendant confines and restrains the victim within the meaning of the kidnapping statute under N.C.G.S. § 14-39 does not constitute an element of the kidnapping offense.

13. Sentencing— capital—aggravating circumstance—murder committed for pecuniary gain

The trial court did not err in a capital first-degree murder case by submitting the N.C.G.S. § 15A-2000(e)(6) aggravating circumstance that the murder was committed for pecuniary gain, because the evidence was sufficient to support a finding that the expectation of pecuniary gain drove defendant to commit the crimes that culminated in the victim's murder.

14. Sentencing— capital—death penalty proportionate

The trial court did not err in a first-degree murder case by sentencing defendant to the death penalty, because: (1) the jury found defendant guilty of first-degree murder under the felony

murder rule; (2) the jury found the three aggravating circumstances that defendant committed the murder while engaged in the commission of a robbery, N.C.G.S. § 15A-2000(e)(5), that defendant committed the murder 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); and (3) defendant exhibited no remorse for his crimes and did not take responsibility, but instead took extraordinary measures to conceal them.

15. Sentencing— aggravating factor—defendant took advantage of a position of trust or confidence

The trial court erred by aggravating defendant's sentence for the convictions of robbery with a firearm and financial transaction card theft based on the trial court's finding as an aggravating factor under N.C.G.S. § 15A-1340.16(d)(15) that defendant took advantage of a position of trust or confidence, because: (1) the evidence at most showed that defendant and his victim coworker enjoyed an amiable work relationship and perhaps even a friendship; and (2) the evidence does not demonstrate the existence of a relationship between defendant and victim that was generally conducive to reliance of one upon the other.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Stephens (Donald W.), J., on 15 July 1997 in Superior Court, Wake County, upon a jury verdict finding defendant guilty of first-degree murder. On 29 March 1999, 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 12 December 2001.

Roy Cooper, Attorney General, by John H. Watters, Special Deputy Attorney General, for the State.

Lemuel W. Hinton for defendant-appellant.

BUTTERFIELD, Justice.

On 12 December 1995, the grand jury sitting in Wake County returned indictments against defendant Leroy Elwood Mann for financial transaction card theft, first-degree kidnapping, robbery with a dangerous weapon, and first-degree murder. On 23 April 1996, the grand jury issued a superseding indictment for robbery with a dangerous weapon. Defendant was tried capitally at the 23 June 1997 Criminal Session of Superior Court, Wake County, and was convicted

of first-degree murder upon the theory of felony murder. The jury also found defendant guilty of all the remaining crimes charged. Following a capital sentencing proceeding held pursuant to N.C.G.S. § 15A-2000, the jury recommended the death penalty for the murder conviction. On 15 July 1997, the trial court entered judgment accordingly. The trial court arrested judgment on the kidnapping conviction, as it was the basis of defendant's felony murder conviction. The trial court joined the remaining convictions for purposes of sentencing and imposed a term of 80 to 105 months imprisonment. For the reasons herein given, we conclude that as to the guilt-innocence phase and the capital sentencing proceeding, defendant received a fair trial, free from prejudicial error, and that the sentence of death was not disproportionate. However, for errors committed, we vacate the sentence imposed on defendant's convictions for robbery with a dangerous weapon and financial transaction card theft, and we remand these matters for a new sentencing hearing.

At trial, the State presented evidence tending to show that the victim, Janet Noble Hauser, was defendant's co-worker at Advanced Plastics, Inc. (API). On Sunday, 3 December 1995, API notified defendant that, because of a general reduction in the work force, he was being laid off from his employment and need not report to work the following day. On Monday, 4 December 1995, defendant called Hauser, the executive assistant and bookkeeper at API, and asked her to meet him for lunch to discuss his unemployment benefits. Hauser agreed and, at 12:15 p.m., left the office to meet defendant at the Fresh Market in Falls Village, across the street from the apartment complex where defendant resided with his wife and her daughter.

At approximately 1:00 p.m., Ronald Van Goor, the occupant of the apartment directly below defendant's, heard loud thumping noises coming from defendant's apartment. Van Goor testified that there was also an inordinate amount of vibration emanating from the upstairs apartment, the force of which caused a picture to fall from Van Goor's bedroom wall. According to Van Goor, the ruckus was so intense that it prevented him from taking a nap, and the commotion continued well over an hour.

Sometime between 1:30 and 2:00 p.m., Donna Timm, a receptionist at API, received a telephone call from Hauser, during which she stated, "This is Jan. I went to Chi-Chi's and had lunch. I'm not feeling well, I'm not coming back to work." The call originated from defendant's telephone number. Shortly thereafter, another call was placed

from that number to defendant's wife, Cynthia Mota-Mann, at her place of employment, the Department of Labor. After receiving the call, Mrs. Mann complained that she was not feeling well and asked a co-worker to drive her home. Mrs. Mann returned home at or around 2:15 p.m.

Minutes later, a series of financial transactions involving Hauser's credit and bank accounts began. At 2:26 p.m., someone purchased gasoline at the Tower Texaco gas station with Hauser's credit card. Video surveillance of the gas station revealed defendant as the person who used Hauser's card. Then, at 2:55 p.m., a $100.00 withdrawal was made from Hauser's account at the State Employees' Credit Union, using her ATM card. In the hour that followed, six additional withdrawals of varying amounts were attempted, three of which were completed successfully, at ATM machines located at Beacon Hill Plaza and Knightdale Crossing Shopping Center. Video surveillance of the ATM locations showed defendant in Hauser's presence when several of the transactions were made.

When Hauser failed to return home on the evening of 4 December 1995, her husband reported her missing to the Raleigh Police Department. Proceeding on information that Hauser had left work to meet defendant for lunch, the officers investigating her disappearance went to defendant's home to question him. Upon entering the apartment, the investigators detected a strong odor of bleach and what they believed to be paint or paint thinner. At the request of the officers, defendant voluntarily accompanied them to the police station for questioning. While at the station, defendant told the investigators that Hauser never showed up for their lunch appointment, that he had not seen her, and that he had no idea what had happened to her.

On the afternoon of 5 December 1995, Hauser's body, wrapped in a blanket, was discovered at the bottom of a ravine below the Falls Lake dam. An autopsy of the body revealed a gunshot wound to Hauser's chest, which the medical examiner determined to be the cause of death. Hauser's body also exhibited various facial bruises and lacerations, swelling around the eyes, and a broken nose. The medical examiner could not pinpoint the time of death, but concluded that it had occurred within twenty-four hours of her discovery.

Upon a search of defendant's apartment, officers discovered that one wall of the master bedroom had been freshly painted and that the

carpet had been recently cleaned with a chemical solution. Using an alternative forensic light source, the officers saw blood spattered on the wall underneath the new paint. A crime scene specialist testified that the pattern of the bloodstains was consistent with someone of Hauser's stature sustaining a severe beating about the head. A subsequent search of the car belonging to defendant's wife revealed a carpet-cleaning machine, cleaning chemicals, and a loaded nine-millimeter pistol.

Hauser's car was later discovered in a subdivision near Falls Lake. Investigators found a bullet hole inside the trunk of the car and recovered bullet fragments later determined to have been fired from the pistol found in Mrs. Mann's vehicle. They also found fingerprints on the underside of the trunk's lid at an angle suggesting that the owner of the prints was inside the trunk when they were left. The prints were later identified as Hauser's.

GUILT-INNOCENCE

By assignments of error, defendant contends that the trial court erred in denying his motions to dismiss the charges of financial transaction card theft, first-degree kidnapping, robbery with a dangerous weapon, and first-degree murder. Defendant argues that the State failed to present sufficient evidence to establish that he perpetrated any of these offenses against Hauser. We readily disagree.

The applicable law is well-defined. "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998). Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. *State v. Frogge*, 351 N.C. 576, 584, 528 S.E.2d 893, 899, *cert. denied*, 531 U.S. 994, 148 L. Ed. 2d 459 (2000). As to whether substantial evidence exists, the question for the trial court is not one of weight, but of the sufficiency of the evidence. *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001). In resolving this question, the trial court must examine the evidence in the light most advantageous to the State, drawing all reasonable inferences from the evidence in favor of the State's case. *Id.* Moreover, "[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988); *see also Frogge*, 351 N.C. at 585, 528 S.E.2d at 899.

[1] With regard to the charge of financial transaction card theft, N.C.G.S. § 14-113.9 provides that a person is guilty of the offense if "[h]e takes, obtains or withholds a financial transaction card from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it." N.C.G.S. § 14-113.9(a)(1) (1999). Within the meaning of this provision, a financial transaction card includes "any instrument or device whether known as a credit card . . . or by any other name, issued with or without fee by an issuer for the use of the cardholder . . . [i]n obtaining money, goods, services, or anything else of value on credit." N.C.G.S. § 14-113.8(4)(a) (1999).

Here, the indictment alleged that defendant unlawfully withheld Hauser's Texaco credit card from her control and possession without her consent and for an improper purpose. In support of this charge, the State presented a segment of the surveillance videotape of the Tower Texaco gas station and a credit-card receipt for the purchase of gasoline at approximately 2:26 p.m. on the afternoon of 4 December 1995. The tape showed defendant at the Texaco station at the time of the purchase, and according to the testimony of Hauser's supervisor at API, the signature on the receipt was not that of Hauser. This evidence, when considered in the light most beneficial to the State, furnished substantial evidence of each element of the crime of financial transaction card theft. Defendant's motion to dismiss the charge was properly denied.

[2] We turn now to the charge of first-degree kidnapping. Under N.C.G.S. § 14-39, a defendant commits the offense of kidnapping if he: (1) confines, restrains, or removes from one place to another; (2) a person; (3) without the person's consent; (4) for the purpose of facilitating the commission of a felony, doing serious bodily harm to the person, or terrorizing the person. *State v. Parker*, 354 N.C. 268, 282, 553 S.E.2d 885, 896 (2001); *see also* N.C.G.S. § 14-39(a) (1999). If the defendant does not release the victim in a safe place, or if he seriously injures the victim, he is guilty of kidnapping in the first degree. *Parker*, 354 N.C. at 282, 553 S.E.2d at 896; *see also* N.C.G.S. § 14-39(b).

The State's theory in the instant case was that defendant unlawfully restrained Hauser for the purpose of facilitating the commission of a robbery. Defendant contends that the only restraint shown by the State was that inherent in the robbery itself; therefore, the evidence was insufficient to establish the kidnapping offense. We are not persuaded.

In *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981), this Court concluded that "it was not the legislature's intent in enacting G.S. 14-39(a) to make a restraint which was an inherent, inevitable element of another felony, such as armed robbery or rape, a distinct offense of kidnapping thus permitting conviction and punishment for both crimes." *Id.* at 102, 282 S.E.2d at 446.

> The key question . . . is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping "exposed [the victim] to greater danger than that inherent in the armed robbery itself, [or that the victim was] subjected to the kind of danger and abuse the kidnapping statute was designed to prevent."

State v. Pigott, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992) (quoting *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446) (second alteration in original).

Viewed in the light most favorable to the State, the evidence showed that defendant lured Hauser to the Fresh Market near his home under the guise of discussing over lunch his unemployment benefits. Defendant then removed Hauser to his apartment, where he repeatedly struck her in the face, breaking her nose and severely bruising both eyes. Thereafter, he transported Hauser to various ATM locations and coerced her into withdrawing money from her accounts. The evidence further showed that at some point during the course of these events, defendant forced Hauser into the trunk of her car, where he eventually shot and killed her. We hold that the restraint to which defendant subjected Hauser far exceeded that necessary to and inherent in the armed robbery. Beating her and forcing her into the trunk " 'subjected [her] to the kind of danger and abuse the kidnapping statute was designed to prevent.' " *Id.* (quoting *Irwin*, 304 N.C. at 103, 292 S.E.2d at 446). Therefore, the trial court properly denied defendant's motion to dismiss the first-degree kidnapping charge.

[3] With respect to the charge of robbery with a dangerous weapon, the constituent elements are: "(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of the person is endangered or threatened." *Call*, 349 N.C. at 417, 508 S.E.2d at 518; *see also* N.C.G.S. § 14-87(a) (1999); *Frogge*, 351 N.C. at 585, 528 S.E.2d at 899. The intent required for the offense is the intent to permanently deprive the owner of the prop-

erty at the time of the taking. *State v. Richardson*, 308 N.C. 470, 474, 302 S.E.2d 799, 802 (1983). Furthermore,

> [t]o be found guilty of robbery with a dangerous weapon, the defendant's threatened use or use of a dangerous weapon must precede or be concomitant with the taking, or be so joined by time and circumstances with the taking as to be part of one continuous transaction. Where a continuous transaction occurs, the temporal order of the threat or use of a dangerous weapon and the taking is immaterial.

State v. Olson, 330 N.C. 557, 566, 411 S.E.2d 592, 597 (1992) (citation omitted).

In the present case, defendant was charged with armed robbery of Hauser's vehicle, a 1993 Nissan Altima valued at approximately $14,000. He contends that the charge should have been dismissed because there was insufficient evidence to show that he intended to deprive Hauser of the vehicle permanently. Defendant bases this argument on the fact that the vehicle was not sold or destroyed, but was ultimately discovered in a subdivision near the location of Hauser's body. This Court has said that "the intent to permanently deprive an owner of [her] property could be inferred where there was no evidence that the defendant ever intended to return the property, but instead showed a complete lack of concern as to whether the owner ever recovered the property." *State v. Barts*, 316 N.C. 666, 690, 343 S.E.2d 828, 843-44 (1986). Additionally, we said that by abandoning property, the thief "puts it beyond his power to return the property and shows a total indifference as to whether the owner ever recovers it." *Id.* at 690, 343 S.E.2d at 844. Here, the evidence that defendant took and subsequently abandoned the vehicle was sufficient to show his intent to permanently deprive Hauser of her property. Thus, we hold that in denying defendant's motion to dismiss the robbery charge, the trial court did not err.

[4] Lastly, we address defendant's contention that the evidence was insufficient to support the charge of first-degree murder under the theory of felony murder. A murder occurs during the " 'perpetration of a felony for purposes of the felony murder rule where there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is part of a series of incidents which form one continuous transaction.' " *State v. Trull*, 349 N.C. 428, 449, 509 S.E.2d 178, 192 (1998) (quoting *State v. Hutchins*, 303 N.C. 321, 345, 279 S.E.2d 788, 803 (1981)), *cert. denied*, 528 U.S. 835,

145 L. Ed. 2d 80 (1999). To prove felony murder as well as the underlying offense, the State need only demonstrate that the elements of both " 'occur[red] in a time frame that can be perceived as a single transaction.' " *Id.* (quoting *State v. Thomas*, 329 N.C. 423, 434-35, 407 S.E.2d 141, 149 (1991)). Taken in the light most favorable to the State, there was plenary evidence tending to show that defendant kidnapped, robbed, and killed Hauser as part of a single, continuous transaction. Accordingly, we hold that the trial court's decision denying defendant's motion to dismiss the charge of first-degree murder was entirely proper. Defendant's assignments of error are, therefore, overruled.

[5] By further assignment of error, defendant argues that the trial court erred in admitting into evidence, over defendant's objection, a promotional photograph in which he is depicted as rap musician "Doc Terra (Da Mann)." In the photograph, defendant is wearing a hooded parka and is standing on a mound of refuse. Defendant contends that the photograph had no probative value and that the State's sole purpose for introducing it was to establish his character for violence. Defendant argues that in our society, rap musicians have become synonymous with gang membership and criminal activity. Thus, defendant contends, in presenting this photograph, the State impermissibly put before the jury evidence of defendant's alleged bad character in order to show that he acted in conformity therewith. Defendant's argument is well taken.

Under Rule 401 of the North Carolina Rules of Evidence, relevant evidence is that having "any tendency" to establish "the existence of any fact that is of consequence to the determination of the action." N.C.G.S. § 8C-1, Rule 401 (1999). However, as regards character evidence, this Court has said that "[w]here a defendant has neither testified as a witness nor introduced evidence of his good character, the State may not present evidence of his bad character for any purpose." *State v. Sanders*, 295 N.C. 361, 373, 245 S.E.2d 674, 683 (1978). The State argues on appeal that the photograph was relevant for identification purposes in that it showed defendant wearing the same jacket that he was seen wearing in the surveillance videotapes on the day of the murder. At trial, however, the State offered no basis for introducing the photograph, and the transcripts of the trial suggest that defendant's identity as the person depicted in the surveillance videotapes was not at issue. In addition, the trial court admitted the photograph into evidence without explanation; therefore, the basis of the court's ruling is unclear. Nonetheless, we conclude that the trial court

erred, inasmuch as the photograph did not tend to prove the existence of any fact of consequence to the determination of defendant's guilt. This error notwithstanding, to establish prejudice, defendant must persuade this Court that had the trial court not admitted the photograph, a different outcome likely would have been reached. *See* N.C.G.S. § 15A-1443(a) (1999). Given the overwhelming evidence of defendant's guilt, we are not so persuaded. Therefore, we overrule this assignment of error.

[6] By additional assignment of error, defendant contends that the trial court erred in submitting to the jury an acting-in-concert instruction with respect to the charge of first-degree murder. Defendant argues that the State failed to present substantial evidence that he acted with another person in perpetrating the offense. We cannot agree.

The doctrine of acting in concert, as reaffirmed by this Court 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), is summarized 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, 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)) (alterations in original), *quoted in Barnes*, 345 N.C. at 233, 481 S.E.2d at 71. For purposes of the doctrine, "[a] person is constructively present during the commission of a crime if he or she is close enough to be able to render assistance if needed and to encourage the actual perpetration of the crime." *State v. Willis*, 332 N.C. 151, 175, 420 S.E.2d 158, 169 (1992).

As we have previously held, a reasonable juror could have found that the robbery, kidnapping, and murder of Hauser were part of a single, continuous transaction. We further conclude that there was sufficient evidence that defendant and his wife acted in concert to perpetrate this chain of offenses against Hauser. The evidence placed both of them at their apartment at or near the time Hauser was

beaten and held against her will. Additionally, a witness testified that shortly after 11:00 p.m. on the night of Hauser's murder, he saw two cars parked within five feet of each other in the middle of the wet bridge at Falls Lake. The witness described the first car as a light-colored mid-sized vehicle, which resembled Hauser's beige Nissan Altima. The witness stated that as he got closer to the bridge, the cars slowly pulled away, and he saw what appeared to be a large white bag on the walkway near where the cars had been parked. The following day, Hauser's body was discovered in the spillway of the dam on the same side of the bridge as where the two cars had been seen. Hauser's body was wrapped in a light-colored blanket and appeared to have been thrown over the railing of the bridge. Additionally, on the day after the murder, the murder weapon was found in the car defendant's wife had been driving. This evidence, taken together and in the light most favorable to the State, was sufficient to warrant an instruction on the doctrine of acting in concert with respect to the charge of first-degree murder. Defendant's assignment of error, therefore, fails.

By assignments of error, defendant contends that, in violation of his right to a fair trial under the Sixth Amendment to the United States Constitution, the prosecutor engaged in misconduct during the guilt phase closing arguments. For this reason, defendant maintains, he deserves a new trial. Again, we disagree.

"The 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. Accordingly, counsel is entitled to argue the evidence presented and all reasonable inferences that follow. *Id.* Where, as in this case, the defendant failed to object to the allegedly improper remarks at trial, the question for this Court on review is whether the remarks complained of were so grossly improper as to require the trial court's intervention *ex mero motu*. *Trull*, 349 N.C. at 451, 509 S.E.2d at 193. We have said that " '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. 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)), *cert. denied*, —— U.S. ——, 151 L. Ed. 2d 55 (2001). Thus, to warrant a new trial, the prosecutor's remarks must

have perverted or contaminated the trial such that they rendered the proceedings fundamentally unfair. *Call*, 349 N.C. at 420, 508 S.E.2d at 519. In assessing the impropriety of the remarks, this Court must view them "in the context in which they were made and in light of the overall factual circumstances to which they referred." *Id.*

[7] During his summation, the prosecutor stated the following:

> The defendant sits here in court with his lawyers. You can see him. These (indicating) are other pictures of the defendant. This (indicating) one has been described as a promotional photograph. You can infer, if you want to, what that would be used to promote. Doc Terra—De Man.
>
> Is that some sort of musical connotation? Is this some sort of wanta (sic) be rap star? Is it a man who's frustrated because he's in the back of some kind of plant back there, doing as best to make ends meet, and he gets laid-off, and this (indicating) is what he aspires to be? What is between him as he was in that plant and this (indicating)? His ability to promote himself, which requires money. And, if you don't have money, you might find a way to get some.

Defendant contends that in referring to him as a "wanta (sic) be rap star," the prosecutor intended to inflame the passions and prejudices of the jury. He alleges a medley of state and federal constitutional violations occasioned by the remark. However, since defendant neglected to assert any of his constitutional claims at trial, he has failed to preserve them for appellate review. *See* N.C. R. App. P. 10(b)(1); *Call*, 349 N.C. at 419, 508 S.E.2d at 519. Moreover, when "viewed in the context in which they were made and in light of the overall factual circumstances to which they referred," *Call*, 349 N.C. at 420, 508 S.E.2d at 519, the prosecutor's remarks were not, as defendant contends, designed to incite the racial and cultural prejudices of the jurors. The remarks were intended to describe a possible motive for the crimes: defendant's need for financial means to further his musical aspirations. Therefore, we hold that the remarks were not grossly improper and that the trial court did not abuse its discretion in failing to intervene *ex mero motu*.

[8] Defendant next complains that it was error for the prosecutor to argue flight to the jury since the trial court denied the State's request for a flight instruction. The evidence showed that T.C. Jones, an investigator with the Raleigh Police Department, approached defend-

ant on 5 December 1995 and said that he needed to talk to defendant. Defendant responded, "F— you. I'm not stopping for anybody. I'm tired of you guys harassing me." When Officer Jones ordered defendant to stop, defendant began to run, and a foot chase ensued. After running a considerable distance, an officer who had come to assist Jones tackled defendant. Defendant continued to struggle, but the officers managed to handcuff him and take him into custody.

In view of the trial court's conclusion that this evidence was insufficient to warrant an instruction on flight, defendant asserts that the following prosecutorial argument was grossly improper:

> Leroy knows what the deal is. He knows what is going on. . . . He is the only person at that time that knew what had gone on.
>
> So, when he was approached out in North Raleigh, what does he do? He runs, because he knows the jig is up at that point. He has an idea of why they're chasing him. They're chasing him for a credit card that they know about. Why is he really fighting though? You don't fight that much over a credit card case.
>
> The jig is up.

The trial court's decision to refrain from instructing on flight did not preclude the prosecutor from arguing the facts regarding defendant's behavior when approached by law enforcement officers for further questioning. We have said that "a prosecutor in a capital trial may argue all the facts in evidence, the law, and all reasonable inferences drawn therefrom." *Trull*, 349 N.C. at 452, 509 S.E.2d at 194. The prosecutor did not suggest to the jury that an instruction on flight was forthcoming. Nor did he argue that the evidence of defendant's actions alone was sufficient to establish his guilt. Therefore, we find no gross improprieties in the prosecutor's remarks.

[9] Further, defendant contends that the prosecutor inappropriately argued the following:

> Now, when you go back there and you start deliberating, you recall the evidence as you heard it and it was presented. And, you make whatever inferences you care to from there.
>
> . . . You listen to what [defense counsel] has to say. You think about any inferences he might ask you to draw from the evidence.
>
> . . . .

> But, if you need to infer something, you remember that she [Hauser] was just too nice. And, this (indicating) is what happened to her.
>
> . . . .
>
> And, any inference that you draw otherwise into some kind of other activity, is absolutely absurd, distasteful, disgusting to think that—to think that it would be any other way than that when you see [the victim's husband] over there (indicating), and you look at Janet Hauser right there (indicating).

Defendant claims that "[t]he argument denigrates defense counsel for asking the jury to find absurd, distasteful and disgusting inferences from the evidence and is a direct attack on counsel." It is true that counsel "may not make uncomplimentary comments about opposing counsel, and should 'refrain from abusive, vituperative, and opprobrious language, or from indulging in invectives.' " *State v. Sanderson*, 336 N.C. 1, 10, 442 S.E.2d 33, 39 (1994) (quoting *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 346 (1967)). Here, however, the prosecutor did no such thing. This argument was not, as defendant contends, an attack on defense counsel, but an expression of outrage at the suggestion that the victim agreed to meet defendant for some illicit purpose. As such, the comments were well within the bounds of permissible closing argument. This Court's most recent pronouncement on the parameters of acceptable closing argument came in *State v. Jones*, 355 N.C. 117, 558 S.E.2d 97 (2002), where we stated the following:

> The power and effectiveness of a closing argument is a vital part of the adversarial process that forms the basis of our justice system. A well-reasoned, well-articulated closing argument can be a critical part of winning a case. However, such argument, no matter how effective, must: (1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial. Moreover, professional decorum requires that tactics such as name-calling and showmanship must defer to a higher standard.

355 N.C. at 135, 558 S.E.2d at 108-09. Because the arguments about which defendant complains do not breach any of the standards articulated in *Jones*, we reject defendant's assignments of error.

[10] Additionally, defendant contends that the trial court committed plain error by instructing the jury in accordance with *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). In *Enmund*, the United States Supreme Court held that imposition of the death penalty is forbidden under the Eighth and Fourteenth Amendments to the United States Constitution as to a defendant "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." 458 U.S. at 797, 73 L. Ed. 2d at 1151. The Supreme Court revisited the issue in *Tison* and held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." 481 U.S. at 158, 95 L. Ed. 2d at 145. Defendant argues that by finding him guilty of first-degree murder based on the felony murder rule, as opposed to premeditated and deliberate murder, the jury necessarily found that he did not possess the intent to kill. Therefore, defendant contends, the State was barred from relitigating the *Enmund-Tison* culpability issue during the sentencing proceeding, and he should have received a life sentence as a matter of law. Defendant's contention lacks merit.

Initially, we note that defendant failed to object to the trial court's submission of the *Enmund-Tison* instruction at trial and, thus, has sought review of this issue pursuant to the plain error doctrine. To establish plain error, defendant must demonstrate not only that there was error, but also that had the error not occurred, the outcome of the proceeding probably would have been different. *State v. Golphin*, 352 N.C. 364, 472, 533 S.E.2d 168, 238 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Defendant has failed to make such a showing.

This Court has previously acknowledged that "intent to kill is not an essential element of first-degree murder . . . under the felony murder rule." *State v. York*, 347 N.C. 79, 97, 489 S.E.2d 380, 390 (1997). However, neither is the absence of murderous intent. As we explained in *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555 (1989),

> First-degree murder based upon the felony murder rule has only two elements: (1) the defendant knowingly committed or attempted to commit one of the felonies indicated in N.C.G.S. § 14-7, and (2) a related killing. Whether the defendant com-

> mitted the killing himself, intended that the killing take place, or even knew that a killing might occur is irrelevant. More specifically, a killing during the commission or attempt to commit one of the felonies indicated in the statute is murder in the first degree without regard to premeditation, deliberation or *malice*.

Id. at 603, 386 S.E.2d at 567 (citations omitted).

Contrary to defendant's argument, the finding by the jury that defendant was guilty of first-degree murder under the felony murder rule was not equivalent to a finding that he lacked culpable intent. Since the jury did not resolve the *Enmund-Tison* culpability issue upon rendering its guilty verdict, collateral estoppel did not, as defendant contends, preclude submission and resolution of this issue during the capital sentencing proceeding. Accordingly, we hold that the trial court committed no error, much less plain error, in instructing the jury pursuant to the requirements of *Enmund*, 458 U.S. 782, 73 L. Ed. 2d 1140, and *Tison*, 481 U.S. 137, 95 L. Ed. 2d 127. Defendant's assignment of error fails.

[11] By assignment of error, defendant contends that there was insufficient evidence to support the trial court's submission to the jury of the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9) (1999). Defendant contends that the evidence supporting this circumstance was the same evidence necessary to establish the kidnapping offense. We must disagree.

With regard to the (e)(9) aggravating circumstance, this Court has said,

> [I]t is appropriate when the level of brutality involved exceeds that normally found in first-degree murders or when the murder in question is conscienceless, pitiless, or unnecessarily torturous to the victim. It also arises when the killing demonstrates an unusual depravity of mind on the part of the defendant. Among the types of murders that meet the above criteria are those that are physically agonizing or otherwise dehumanizing to the victim and those that are less violent but involve the infliction of psychological torture.

State v. Bates, 343 N.C. 564, 584-85, 473 S.E.2d 269, 280 (1996) (citations omitted), *cert. denied*, 519 U.S. 1131, 136 L. Ed. 2d 873 (1997). An example of psychological torture is when the victim is left "in

[her] last moments aware of but helpless to prevent impending death." *State v. Hamlet*, 312 N.C. 162, 175, 321 S.E.2d 837, 846 (1984).

In the instant case, the State presented ample evidence, independent of that necessary to establish the kidnapping offense, to justify the submission of the especially heinous, atrocious, or cruel aggravating circumstance. The evidence is undisputed that Hauser was alive when defendant forced her into the trunk of her car. David Edington, a crime scene specialist with the City-County Bureau of Identification, testified that a set of Hauser's fingerprints was found on the interior trunk lid of the vehicle. Edington stated that the prints were "at an angle pointing out," which indicated that Hauser left them while trapped inside the trunk. He further testified that someone had torn an opening in the plastic liner that separated the trunk from the rear seat and that the investigators discovered fibers matching Hauser's clothing inside the opening. Additionally, Edington testified that the armrest on the rear seat of Hauser's vehicle folded down to permit access to the interior of the trunk from the passenger area of the car. He stated that fibers consistent with Hauser's clothing were also discovered on the armrest. Presented with this evidence, a juror could have reasonably inferred that Hauser was conscious while trapped inside the trunk and that she tried desperately, but futilely, to free herself as she anticipated the moment when defendant would end her life. Accordingly, we hold that the trial court committed no error in submitting the (e)(9) aggravating circumstance. Defendant's assignment of error is overruled.

[12] Defendant further assigns error to the trial court's submission, as an aggravating circumstance, that the murder was committed during the course of an armed robbery, N.C.G.S. § 15A-2000(e)(5). Defendant contends that because proof of the armed robbery was necessary to establish the offense of kidnapping, the felony underlying his first-degree murder conviction, use of the armed robbery as an aggravating circumstance deprived him of the constitutional protection against double jeopardy. Defendant acknowledges, however, that this Court previously rejected similar reasoning in *State v. Banks*, 295 N.C. 399, 245 S.E.2d 743 (1978), *overruled on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993).

In *Banks*, we reiterated the long-standing principle that a crime alleged to be the *purpose* for which the defendant confines and restrains the victim within the meaning of N.C.G.S. § 14-39 does not constitute an element of the kidnapping offense:

> The charges of crime against nature, assault with intent to commit rape[,] and robbery with a dangerous weapon were alleged in the bill of indictment charging kidnapping as the *purposes* for which the defendant confined and restrained the victim. The charges so alleged were not *elements* of the offense of kidnapping which the State had to prove as is the case of the underlying felony in the felony murder rule. When the State proves the elements of kidnapping and the purpose for which the victim was confined and restrained, conviction of the kidnapping may be sustained. Thus, the crimes of crime against nature, assault with intent to commit rape[,] and robbery with a dangerous weapon are separate and distinct offenses and are punishable as such.

Id. at 406, 245 S.E.2d at 748 (citing *State v. Dammons*, 293 N.C. 263, 237 S.E.2d 834 (1977)). We see no reason to deviate from well-settled precedent in this area of the law; therefore, defendant's assignment of error is overruled.

[13] By additional assignment of error, defendant contends that there was insufficient evidence to warrant submission of the aggravating circumstance that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). Defendant's position is that pecuniary gain could not have served as the motive for the murder because the financial transactions were accomplished long before the murder took place. We must disagree.

"The gravamen of the pecuniary gain aggravating circumstance is that 'the killing was for the purpose of getting money or something of value.' " *State v. Jennings*, 333 N.C. 579, 621, 430 S.E.2d 188, 210 (quoting *State v. Gardner*, 311 N.C. 489, 513, 319 S.E.2d 591, 606 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985)), *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). This aggravating circumstance examines the defendant's motive and is proper for the jury's consideration where there is evidence that "[t]he hope of pecuniary gain provided the impetus for the murder." *State v. Oliver*, 302 N.C. 28, 62, 274 S.E.2d 183, 204 (1981).

In the case *sub judice*, the State's evidence showed that two months prior to the murder, defendant requested a $3,000 loan from his employer, Debra Judd, the owner of API. He explained that he was being evicted from his apartment and that he needed the money to obtain a new residence. Judd denied defendant's loan request. Shortly thereafter, defendant was placed on partial lay-off, which was his work status when he received word on 3 December 1995 that he was

being laid off altogether. The morning following his lay-off notice, defendant called Donna Tabron, an acquaintance who worked at the North Raleigh Hilton, and asked her to lunch. When Tabron refused, defendant called Hauser and asked her to meet him for lunch to discuss his unemployment benefits. Upon her arrival, defendant removed her to his apartment and beat her. Then, he transported her to several ATM locations where he forced her to withdraw money from her accounts. After obtaining the maximum withdrawal amounts from Hauser's accounts, defendant forced her into the trunk of her car, where he ultimately shot and killed her. Viewing this evidence, as we must, in the light most favorable to the State, *see State v. Moore*, 335 N.C. 567, 611, 440 S.E.2d 797, 822, *cert. denied*, 513 U.S. 898, 130 L. Ed. 2d 174 (1994), we conclude that the evidence was sufficient to support a finding that the expectation of pecuniary gain drove defendant to commit the crimes that culminated in Hauser's murder. Therefore, we overrule defendant's assignment of error.

PRESERVATION

Defendant brings forward several additional issues that he concedes this Court has previously decided adverse to his position. These issues are: (1) that the trial court erred in denying defendant's motion to dismiss the indictment for first-degree murder on the grounds that the short-form indictment is fatally defective and, therefore, unconstitutional; (2) that the trial court erred by denying defendant's motion to increase the number of his peremptory challenges; (3) that the trial court erred in denying defendant's motion to prohibit the "death qualification" of the jury; (4) that the trial court committed plain error by instructing the jurors with respect to Issues Three and Four that they "may," rather than "must," consider any relevant mitigating evidence found to exist; and (5) that the trial court erred in submitting the (e)(9) aggravating circumstance on the grounds that it is unconstitutionally vague. In raising these issues, defendant urges this Court to reconsider its prior decisions and preserves his right to argue these issues in the event of further review. Having carefully examined defendant's arguments, we are not persuaded that we should depart from our prior holdings as to these issues, and we decline to do so.

PROPORTIONALITY REVIEW

[14] Having concluded that defendant's capital sentencing hearing was free from error, we must now review and determine (1) whether the record supports the aggravating circumstances found by the jury

and upon which the sentence of death was based; (2) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *See* N.C.G.S. § 15A-2000(d)(2).

In the present case, the jury found defendant guilty of first-degree murder under the theory of felony murder. In addition, the jury found the existence of all three aggravating circumstances submitted: (1) that defendant committed the murder while engaged in the commission of a robbery, N.C.G.S. § 15A-2000(e)(5); (2) that defendant committed the murder for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); and (3) that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). After a meticulous and thorough examination of the record, transcripts, and briefs in this case, we conclude that the evidence fully supports each of the aggravating circumstances submitted to and found by the jury. Moreover, we have found nothing in the record to suggest that the sentence of death in this case was imposed under the influence of passion, prejudice, or any other arbitrary factor. Accordingly, we now turn to our final statutory duty of proportionality review.

In conducting a proportionality review, our objective is to " 'eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury.' " *State v. May*, 354 N.C. 172, 186, 552 S.E.2d 151, 160 (2001) (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)). Thus, we compare the instant case to other cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). To date, there have been only seven such 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 that the present case bears no substantial similarity to any of the cases in which this Court has found the death penalty

disproportionate. In only two of the seven disproportionate cases did the jury find the especially heinous, atrocious, or cruel aggravating circumstance. *Stokes*, 319 N.C. 1, 352 S.E.2d 653; *Bondurant*, 309 N.C. 674, 309 S.E.2d 170. This case is readily distinguishable from both. In *Stokes*, we emphasized that the defendant was seventeen years old at the time of the murder, that he had an IQ of 63, that he acted in concert with four accomplices, and that the record was devoid of evidence that he was the ringleader. 319 N.C. at 21, 352 S.E.2d at 664. We found the death sentence disproportionate because of the defendant's young age and because a much older codefendant who participated in "the same crime in the same manner" received only a life sentence. *Id.* By contrast, defendant in the instant case was twenty-seven years old at the time of the murder, and all evidence suggests that he instigated the chain of criminal activity that ended in Hauser's death. In *Bondurant*, this Court found the death penalty disproportionate because the defendant, after shooting the victim, immediately showed genuine contrition and concern for the victim's life. 309 N.C. at 694, 309 S.E.2d at 182-83. He took the victim to the hospital to obtain medical attention. *Id.* In addition, the defendant voluntarily talked to the police and confessed to shooting the victim. *Id.* Here, defendant exhibited no remorse, and instead of taking responsibility for his crimes, he took extraordinary measures to conceal them. He wrapped Hauser's body in a blanket and threw it into the ravine at Falls Lake. He bleached and painted his walls in order to hide her bloodstains and, with his wife's assistance, rented a carpet-cleaning machine to remove all traces of Hauser's blood from his carpet.

Furthermore, as noted previously, the jury in the present case found three aggravating circumstances to exist. Of the seven disproportionate cases, only two involved multiple aggravating circumstances. *See Young*, 312 N.C. 669, 325 S.E.2d 181; *Bondurant*, 309 N.C. 674, 309 S.E.2d 170. In *Young*, this Court focused on the failure of the jury to find as an aggravating circumstance that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). 312 N.C. at 691, 325 S.E.2d at 194. In this case, however, the jury found the (e)(9) aggravating circumstance, which this Court has held is sufficient, by itself, to support imposition of the death penalty. *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). Additionally, *Bondurant*, as discussed above, is plainly distinguishable. Thus, we can find no significant similarity between this case

and those in which this Court has concluded that the death penalty was disproportionate.

In conducting the proportionality review, it is also appropriate to compare the instant case with those in which this Court has found the death penalty proportionate. *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. However, we need "not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.* Here, it suffices to say that we conclude, based on a judicious review of all the cases in the pool, that this case is more similar to cases in which we have found the death penalty proportionate than to those in which we have found the penalty disproportionate or to those in which juries have consistently recommended sentences of life imprisonment. In particular, we note that this case bears a strong resemblance to *State v. Gainey*, 355 N.C. 73, 558 S.E.2d 463 (2002), wherein this Court upheld the death penalty. In *Gainey*, the defendant and an accomplice lured their victim to a church in order to steal his car. *Id.* at 89-90, 558 S.E.2d at 474. When the victim arrived, the defendant and his cohort forced the victim into the trunk of the car and shot him while he lay helpless and crying for help. *Id.* at 90, 558 S.E.2d at 474-75. They then drove to a wooded area, dragged the victim's body into the woods, and covered it with pine straw. *Id.* at 82, 558 S.E.2d at 470.

Based on the nature of the crime and the characteristics of this defendant, we conclude that the death sentence imposed in this case was neither excessive nor disproportionate. Accordingly, we leave defendant's conviction for first-degree murder and sentence of death undisturbed.

NONCAPITAL SENTENCING

[15] By further assignment of error, defendant contends that the trial court erred in aggravating his sentence for the convictions of robbery with a firearm and financial transaction card theft, which were consolidated for purposes of sentencing. Defendant argues that the record lacked sufficient evidence to support the trial court's finding as an aggravating factor that he took advantage of a position of trust or confidence. N.C.G.S. § 15A-1340.16(d)(15) (1999). We are constrained to agree.

In *State v. Daniel*, 319 N.C. 308, 354 S.E.2d 216 (1987), this Court considered the "trust or confidence" factor in the context of the relationship between a mother and her newborn child. We said that a

finding of this aggravating factor did not require that the victim consciously regard the defendant as one in whom she placed her trust or confidence. *Id.* at 311, 354 S.E.2d at 218. We held that "[s]uch a finding depend[ed] instead upon the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other." *Id.* Our courts have upheld a finding of the "trust or confidence" factor in very limited factual circumstances. *See, e.g., State v. Farlow*, 336 N.C. 534, 444 S.E.2d 913 (1994) (factor properly found where nine-year-old victim spent great deal of time in adult defendant's home and essentially lived with defendant while mother, a long-distance truck driver, was away); *State v. Arnold*, 329 N.C. 128, 404 S.E.2d 822 (1991) (factor properly found where defendant conspired to kill her husband, who came to believe that defendant had a change of heart and ended her extramarital affair with another); *State v. Potts*, 65 N.C. App. 101, 308 S.E.2d 754 (1983) (factor properly found where defendant shot best friend who thought of defendant as a brother), *disc. rev. denied*, 311 N.C. 406, 319 S.E.2d 278 (1984); *State v. Baucom*, 66 N.C. App. 298, 311 S.E.2d 73 (1984) (factor properly found where adult defendant sexually assaulted his ten-year-old brother); *State v. Stanley*, 74 N.C. App. 178, 327 S.E.2d 902 (factor properly found where defendant raped nineteen-year-old mentally retarded female who lived with defendant's family and who testified that she trusted and obeyed defendant as an authority figure), *disc. rev. denied*, 314 N.C. 546, 335 S.E.2d 318 (1985). *But see Erlewine*, 328 N.C. 626, 403 S.E.2d 280 (factor not properly found where defendant shared an especially close relationship with his drug dealer, the murder victim); *State v. Midyette*, 87 N.C. App. 199, 360 S.E.2d 507 (1987) (factor not properly found where defendant and victim had been acquainted for approximately one month before the murder and where victim had once asked defendant to join her and her sister for breakfast at victim's apartment), *aff'd per curiam*, 322 N.C. 108, 366 S.E.2d 440 (1988); *State v. Carroll*, 85 N.C. App. 696, 355 S.E.2d 844 (factor not properly found where defendant and victim had met only one and a half days before the murder and had decided to take a trip together in defendant's car), *disc. rev. denied*, 320 N.C. 514, 358 S.E.2d 523 (1987).

In the case *sub judice*, the State's evidence showed that defendant and Hauser worked at API, a small company with fourteen employees, for approximately one year. According to Albert Tripp, a shift supervisor at API, Hauser showed particular concern for defendant following the lay-offs and asked Tripp how defendant had responded to the news. When defendant called Hauser and asked her

to meet him for lunch to discuss his unemployment benefits, she agreed. Further, the evidence showed that Hauser occasionally drove defendant home from work when he had no transportation.

Viewed in the light most favorable to the State, this evidence, at most, showed that defendant and Hauser enjoyed an amiable working relationship, perhaps even a friendship. The evidence does not, however, demonstrate "the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other." *Daniel*, 319 N.C. at 311, 354 S.E.2d at 218. The trial court, therefore, erred in finding that defendant took advantage of a position of trust or confidence to commit the offenses against Hauser. Accordingly, we vacate defendant's sentence on the robbery and financial transaction convictions and remand for a new sentencing hearing.

NO. 95CRS100098, FIRST-DEGREE MURDER: NO ERROR;

NO. 95CRS100097, ROBBERY WITH A DANGEROUS WEAPON, AND 95CRS99884, CREDIT CARD THEFT: JUDGMENT VACATED AND REMANDED FOR RESENTENCING.

STATE OF NORTH CAROLINA v. TERRY LAMONT ROBINSON

No. 578A00

(Filed 5 April 2002)

1. Venue— motion for change—pretrial publicity—specific prejudice not shown

The trial court did not err in a capital prosecution for first-degree murder by denying defendant's motion for a change of venue based upon pretrial publicity where a great number of jurors had prior knowledge of the murder, defendant exhausted his peremptory challenges, and a juror to whom defendant objected sat on the jury, but all of the seated jurors stated unequivocally that they could put aside pretrial publicity and defendant did not establish specific and identifiable prejudice from five newspaper articles about the murder. N.C.G.S. § 15A-957.

2. Criminal Law— ruling on objection—not summarily

A first-degree murder defendant's contention that the trial court ruled summarily on his motion for individual voir dire without allowing defendant to argue the motion fully was not supported by the record.

3. Jury— peremptory challenges—additional challenges not granted

The trial court did not abuse its discretion in a first-degree murder prosecution by not granting defendant additional peremptory challenges where defendant did not allege that the specific juror whom he contended should have been removed for cause had formed or expressed an opinion on guilt or innocence, and there was nothing in the record to suggest that the jurors could not put aside any pretrial information.

4. Jury— selection—questioning—court's supervision—defendant not hindered

The trial court in a capital first-degree murder prosecution did not improperly limit defendant's questioning and examination of prospective jurors. The court sought to supervise the use of the court's time by preventing repetition, but made an express effort to ensure that defendant was "satisfied," and defendant cited no instances in the record where he was hindered in his examination of a prospective juror.

5. Jury— selection—questions about parole eligibility

The trial court did not err in a capital prosecution for first-degree murder by refusing to allow defendant to conduct voir dire of prospective jurors about parole eligibility on a life sentence. A defendant does not have a constitutional right to so examine prospective jurors and the court instructed the jury that a sentence of life imprisonment means life without parole.

6. Evidence— DNA testimony--witness not qualified as expert—allowed

The trial court did not err in a first-degree murder prosecution by allowing testimony concerning DNA analysis where the witness was never qualified as an expert but defendant made only a general objection, defendant engaged in extensive cross-examination regarding the source of the DNA evidence, and defendant did not demonstrate the basis for the objection or the grounds upon which the testimony should have been excluded.

7. Evidence— photograph—defendant wearing particular shirt—admissible

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by admitting into evidence a photograph of defendant wearing a particular shirt to show that defendant had owned such a shirt and to illustrate testimony.

8. Evidence— examination of witnesses—inconsistencies

The trial court did not err in a capital prosecution for first-degree murder where defendant was not allowed to ask questions in a form which called for a witness to vouch for the veracity of another witness. Defendant was free to ask about inconsistencies, and did so.

9. Evidence— failure of another to identify mug-shots—hearsay

The trial court did not err in a capital first-degree murder prosecution by sustaining the State's objection to a question as to whether someone who didn't testify had identified anyone from mug-shot books. Any response would have been hearsay and defendant did not identify any exception which would have allowed a response.

10. Evidence— testimony about other testimony

The trial court did not err in a capital first-degree murder prosecution by sustaining the State's objection when defendant asked a witness if he had heard another's testimony, the witness replied that he had, and defendant asked, "And, do you recall her stating that. . . ."

11. Homicide— first-degree murder—premeditation and deliberation—sufficiency of evidence

There was substantial circumstantial evidence for the jury to conclude that defendant intentionally killed the victim with premeditation and deliberation where defendant carefully planned a robbery of a restaurant with an accomplice, stashed clothing to change into after the robbery, pointed his weapon at the victim after entering the restaurant, shot the victim in the head after an exchange, told the accomplice that the victim had killed himself by trying to grab him, and told his cousin that the victim had refused to give defendant the money and that defendant had shot him.

12. Robbery— attempted armed—intent—overt act—sufficiency of evidence

There was substantial evidence that defendant had the intent to rob by the use of a dangerous weapon and that he committed an overt act in furtherance of that intent so as to support a charge of attempted armed robbery where defendant pointed a gun at the victim and told him to put the money in the bag.

13. Criminal Law— prosecutor's argument—defendant's impeachment of witness

There was no plain error in a first-degree murder prosecution where the trial court did not intervene ex mero motu during the prosecutor's closing remarks about defendant's impeachment of a witness. The prosecutor's zealous advocacy and hyperbolic statements attempting to mitigate the damage done by defendant's impeachment did not merit the court's intervention.

14. Sentencing— capital—combined mitigating circumstances

There was no error in a capital sentencing proceeding where defendant contended that the court's combination of requested mitigating circumstances excluded some of the submitted circumstances, but a careful review of the record revealed that the court's final list of mitigating circumstances subsumed the proposed circumstances and omitted none.

15. Sentencing— capital—aggravating circumstances—prior robberies—stipulation—inherently violent

The trial court did not err in a capital sentencing proceeding by submitting to the jury three separate statutory aggravating circumstances that defendant had been previously convicted of three separate crimes of common law robbery where defendant stipulated to the judgments and commitments for three prior common law robbery convictions. Although defendant contended that he never stipulated to the existence of the use of violence in those convictions, common law robbery is a crime involving the use or threat of violence.

16. Sentencing— capital—aggravating circumstance—underlying felony—conviction based on felony murder and premeditation

The trial court did not err in a capital sentencing proceeding by submitting the aggravating circumstance that the murder was

committed during an attempted armed robbery. There was sufficient evidence to support the robbery conviction, and the underlying felony may be submitted as an aggravating circumstance when a defendant is convicted of felony murder and murder with premeditation and deliberation.

17. Sentencing— capital—curative instruction not given—not requested

The trial court did not err in a capital sentencing proceeding by not giving a curative instruction after sustaining an objection where defendant did not request a curative instruction or ask that the witness's testimony by stricken.

18. Sentencing— capital—death sentence not arbitrary

There was no evidence that a sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration.

19. Sentencing— capital—death sentence proportionate

A sentence of death was proportionate where defendant was convicted based on premeditation and deliberation and the jury found multiple aggravating circumstances, including the (e)(5) and (e)(3) circumstances, which have been held sufficient to support a sentence of death standing alone. Defendant instituted and carefully planned the robbery of a Pizza Inn with his accomplice, showed no remorse when telling others what had happened, and the crime and its circumstances manifest 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 Brown (Frank R.), J., on 10 April 2000 in Superior Court, Wilson County, upon a jury verdict finding defendant guilty of first-degree murder. On 15 May 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 13 November 2001.

Roy Cooper, Attorney General, by William P. Hart, Special Deputy Attorney General, for the State.

Thomas R. Sallenger for defendant-appellant.

BUTTERFIELD, Justice.

On 7 September 1999, defendant was indicted for first-degree murder and for attempted robbery with a dangerous weapon. Defendant was tried capitally before a jury at the 3 April 2000 Criminal Session of Superior Court, Wilson 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 attempted robbery with a dangerous weapon. Following a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction. On 10 April 2000, the trial court sentenced defendant to death. The trial court also sentenced defendant to a consecutive sentence of 133 to 169 months' imprisonment for the attempted robbery conviction. Defendant appealed his sentence of death for first-degree murder to this Court as of right. On 15 May 2001, this Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of the attempted robbery conviction and judgment.

At trial, the State's evidence tended to show that on 16 May 1999, defendant told Ronald Bullock that he wanted Bullock to help him rob the Pizza Inn in Wilson, North Carolina. Bullock agreed to the plan. The two began preparing for the crime by getting some clothes and weapons to use during the robbery. Defendant and Bullock then went to visit defendant's cousin, Jesse Hill. Hill indicated that he would not participate in the robbery. Nightfall was approaching as defendant and Bullock dropped Hill off at his grandmother's house.

Under cover of darkness, defendant and Bullock parked near the Pizza Inn carrying with them the clothes they planned to change into after the robbery. Defendant was armed with a nine-millimeter Ruger automatic pistol. Bullock was armed with a .380-caliber automatic pistol. At 9:00 p.m., the two entered the Pizza Inn through the take-out entrance.

With their faces covered and their weapons drawn, defendant and Bullock neared the cash register. John Rushton, the victim and manager of the Pizza Inn, approached the cash register from the rear of the restaurant. Defendant pointed his weapon at Rushton and ordered him to put the money in a bag. Rushton said, "What are you going to do if I don't?" Defendant replied, "Do you think I'm playing?" Defendant pointed his weapon at the floor and fired. Defendant then shot Rushton in the head as Rushton moved forward. Defendant and

Bullock fled. According to the medical examiner, Rushton died from a gunshot wound to the head.

As defendant and Bullock fled, they stopped to change clothes. Bullock did not, however, put on shoes. Bullock also dropped his weapon as he ran. The two ran in separate directions through a nearby housing area. Both the shoes and the weapon were recovered by the police.

At approximately 10:00 p.m., defendant appeared at Andre Foster and Crystal Dawn Baker's home approximately five blocks from the Pizza Inn. Defendant appeared sweaty and nervous. Defendant went to the bathroom, washed his hands, and asked for a bandage for a cut on his finger on his left hand. Baker noticed a few drops of blood in the sink after defendant used it.

Around midnight, defendant and Bullock returned to Jesse Hill's house. Defendant told Hill that he had shot a man after he asked the man to give him the money. Defendant also told Hill that he had almost shot his own hand when he shot the victim. Hill did not believe defendant until the next day when he heard the news accounts of the murder. Hill called police to arrange a meeting with them to inform them of what he knew about defendant's and Bullock's involvement with the murder. Additional facts will be presented as needed to discuss specific issues.

PRETRIAL

[1] First, defendant contends that the trial court erred in denying his motion for a change of venue or the selection of a special venire. Defendant alleges that the trial court did not properly consider his motion and that the trial court's denial was summary and an abuse of discretion. We disagree.

The evidence presented to the trial court in support of defendant's motion consisted of five newspaper articles published in the *Wilson Daily Times* from 16 May 1999 through 24 May 1999. Defendant argues that these newspaper articles constituted extraordinary pretrial coverage of the murder and, as such, made it impossible for defendant to receive a fair and impartial trial from a jury drawn from Wilson County. The applicable statutory requirements for a change of venue or special venire are codified in N.C.G.S. § 15A-957, which provides in part:

If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:

(1) Transfer the proceeding to another county in the prosecutorial district as defined in G.S. 7A-60 or to another county in an adjoining prosecutorial district as defined in G.S. 7A-60, or

(2) Order a special venire under the terms of G.S. 15A-958.

This Court has stated that pretrial publicity, in and of itself, does not dictate a change of venue if the publicity consists of factual news accounts regarding the commission of a crime and pretrial proceedings. *State v. Soyars*, 332 N.C. 47, 53, 418 S.E.2d 480, 484 (1992); *State v. Madric*, 328 N.C. 223, 229, 400 S.E.2d 31, 35 (1991). The test adopted by this Court to determine whether a motion for a change of venue should be granted is whether "it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed." *State v. Jerrett*, 309 N.C. 239, 255, 307 S.E.2d 339, 347 (1983).

In *State v. Yelverton*, we stated, "The determination of whether a defendant has carried his burden of showing that pre-trial publicity precluded him from receiving a fair trial rests within the trial court's sound discretion." *State v. Yelverton*, 334 N.C. 532, 540, 434 S.E.2d 183, 187 (1993). "Absent a showing of abuse of discretion, [the trial court's] ruling will not be overturned on appeal." *Madric*, 328 N.C. at 226-27, 400 S.E.2d at 33-34. In order to meet this burden, "defendants must ordinarily establish specific and identifiable prejudice against them as a result of pretrial publicity." *State v. Barnes*, 345 N.C. 184, 204, 481 S.E.2d 44, 54, *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). It is well settled that in meeting his burden a defendant " 'must show *inter alia* that jurors with prior knowledge decided the case, that [defendant] exhausted his peremptory challenges, and that a juror objectionable to [defendant] sat on the jury.' " *State v. Wallace*, 351 N.C. 481, 510, 528 S.E.2d 326, 345 (quoting *State v. Billings*, 348 N.C. 169, 177, 500 S.E.2d 423, 428, *cert. denied*, 525 U.S. 1005, 142 L. Ed. 2d 431 (1998)) (alterations in original), *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000).

Before granting a change of venue or special venire, a trial court must find that "there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial." N.C.G.S. § 15A-957 (1999). Defendant argues that the five newspaper articles satisfy this requirement. A careful review of the record reveals that the newspaper articles reported on the murder, the arrest of Ronald Bullock, the arrest of defendant, an editorial decrying the rise of the use of firearms and calling the murder "senseless," and an article describing a fund-raiser held for the victim's family. Only the two articles concerning the arrests mention defendant's name. We do not believe that this is sufficient to constitute a showing of abuse of discretion on the part of the trial court. While defendant did show that a great number of the jurors had prior knowledge of the murder, that defendant exhausted his peremptory challenges, and that a juror to whom he objected sat on the jury, he has not established specific and identifiable prejudice against him as a result of pretrial publicity. We have carefully reviewed the record and found that all of the jurors seated stated unequivocally that they could put aside any pretrial publicity and decide the case solely on the evidence presented in court. Therefore, this assignment of error is overruled.

JURY SELECTION

[2] Defendant next raises an assignment of error in which he contends that the trial court summarily denied his motion for individual *voir dire* without being afforded an opportunity to argue the motion fully. The record reveals that the trial court entertained the motion and heard argument from defendant's counsel. After defense counsel's brief comments, the trial court denied the motion. There is no suggestion in the record that defense counsel's opportunity to expound on the matter was curtailed. There is also no suggestion in the record that defense counsel asked to be heard further on the matter.

Defendant puts forward many of the same arguments as in the assignment of error above regarding the motion for change of venue. "A defendant does not have a right to examine jurors individually merely because there has been pretrial publicity." *State v. Burke*, 342 N.C. 113, 122, 463 S.E.2d 212, 218 (1995). At the time defense counsel addressed this issue, he said, "I just think it's the best way to proceed in this case, given the facts of this case, and the conditions surrounding this case." Faced with this generalized argument in support

of individual *voir dire*, the trial court denied defendant's motion. Defendant's contention that the trial court ruled summarily without hearing defendant's complete articulation is unsupported by the record. This assignment is without merit.

[3] In a similar assignment of error, defendant next argues that the trial court erred in not granting him additional peremptory challenges. In his argument, defendant restates many of the same arguments that he put forward in his previous assignments of error. Specifically, defendant argues that prospective juror Ada Perkins should have been removed for cause, that the trial court's refusal to remove Perkins was error, and that he required additional peremptory challenges because Perkins could not qualify as a disinterested and impartial juror. While defendant did properly preserve the issue for appeal, he has not shown that the trial court abused its discretion in denying the challenge for cause. Defendant contends that Perkins was one of the thirty-five prospective jurors who had either read, heard, or seen accounts of the circumstances surrounding the murder. However, defendant has not alleged that Perkins had "formed or expressed an opinion as to the guilt or innocence of the defendant." N.C.G.S. § 15A-1212(6) (1999). As with defendant's change of venue argument, there is nothing in the record which indicates that each of the jurors could not put aside any pretrial information and be a fair and impartial juror. The trial court, based on its observation and sound judgment, has the discretion to determine whether a juror can be fair and impartial. *State v. Kennedy*, 320 N.C. 20, 26, 357 S.E.2d 359, 363 (1987). "Where the trial court can reasonably conclude from the *voir dire* . . . that a prospective juror can disregard prior knowledge and impressions, follow the trial court's instructions on the law, and render an impartial, independent decision based on the evidence, excusal is not mandatory." *State v. Green*, 336 N.C. 142, 167, 443 S.E.2d 14, 29, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). As there is no showing that the trial court abused its discretion, we overrule defendant's assignment of error.

[4] In another assignment of error, defendant contends that the trial court improperly limited defendant's questioning and examination of prospective jurors. The trial court stated:

> To the attorneys for the State and the defendant, the Court instructs you not to introduce persons already introduced by the Court, not to pose questions of law or hypothetical questions, not to repeat questions, and not to ask for information already

included on the questionnaire. And, you are directed to pose questions to the entire panel whenever possible.

Based on this instruction, defendant argues that he was precluded from "meaningful questioning of venire members." The record indicates otherwise. Prior to giving the above instruction, the trial court had introduced many people+ in the courtroom who were expected to testify. The trial court asked the prospective jurors if they knew or were acquainted with any of these individuals. Clearly, the trial court sought to supervise the use of the trial court's and prospective jurors' time by preventing repetition.

We observe from the record that defense counsel did have the opportunity to probe prospective jurors' fitness. The record reveals the following colloquy between defense counsel, a prospective juror, and the trial court:

Q. And, I believe you also indicated [on the questionnaire] that you have a family member or a close friend that's been the victim of a crime?

A. Juror Number Eleven: Yes.

Q. And, it was a breaking and entering, I believe, and the intruder was shot but not charged, sort of explain that to me, and the Court?

A. Juror Number Eleven: I don't remember what it was.

Q. You also said somebody was convicted—was charged and convicted?

THE COURT: It says "no conviction" on mine.

Q. No conviction?

A. Juror Number Eleven: Yes (nods).

THE COURT: Isn't that what it says on your's?

[DEFENSE COUNSEL]: I think it says—I could be wrong, Judge, but I think it says, yes on mine. "Was anyone charged, arrested or convicted[?]"

THE COURT: It's written on mine: "He was charged but no conviction."

[DEFENSE COUNSEL]: Okay.

THE COURT: Anyway you can ask him about it if you're not satisfied.

. . . .

Q. But, you don't remember anything about it is what you said?

A. Juror Number Eleven: No, sir.

Q. You think that event in your life would prevent you from giving either side a fair and impartial trial?

A. Juror Number Eleven: No, sir.

The above exchange reveals that the trial court could not have harbored the intent to curtail defendant's "meaningful questioning" of prospective jurors. Instead, the exchange demonstrates that the trial court made an express effort to ensure that defendant was "satisfied." Furthermore, defendant cites to no portion of the record where he was hindered in his examination of a prospective juror. Defendant attempts to support his contention with a slightly modified restatement of his change of venue and peremptory challenge arguments. His attempt, as such, is insufficient to call the trial court's *voir dire* into question. This assignment of error is without merit.

[5] Defendant also assigns error to the trial court's refusal to let him "conduct *voir dire* . . . of [prospective] jurors regarding their misconceptions about parole eligibility on a life sentence." Defendant premises his argument on the notion that it is "common knowledge" that jurors believe that defendants who receive life sentences without parole are subject to release. This argument must fail. This Court has examined this issue on numerous occasions and has consistently held that neither this Court nor the United States Supreme Court has ever held that a defendant has a constitutional right to so examine prospective jurors. *State v. Neal*, 346 N.C. 608, 617, 487 S.E.2d 734, 739-40 (1997), *cert. denied*, 522 U.S. 1125, 140 L. Ed. 2d 131 (1998). Furthermore, the trial court fully complied with N.C.G.S. § 15A-2002 by instructing the jury "in words substantially equivalent to those of this section, that a sentence of life imprisonment means a sentence of life without parole." N.C.G.S. § 15A-2000 (1999). This assignment of error is overruled.

GUILT-INNOCENCE

Defendant asks this Court to consider his argument that the trial court committed plain error in the instructions given on the two the-

ories of first-degree murder applied in the case *sub judice* in that they confused the jury. As defendant recognizes, defense counsel did not preserve this issue for appeal as required by North Carolina Rule of Appellate Procedure 10(b)(2). Also, defendant did not preserve the issue for appellate review as plain error under Appellate Rule 10(c)(4) in that no plain error was alleged in the assignment of error upon which defendant seeks to rely. Defendant has not properly preserved this issue for our review. Therefore, we overrule this assignment of error.

[6] Next, defendant assigns error to the trial court's overruling his objection to testimony of Special Agent Boodeè of the State Bureau of Investigation. Agent Boodeè testified that he had examined a cutting from a camouflage neck hood and had determined that it contained DNA bands "consistent with a mixture originating from multiple donors, of which the victim and two suspects may be included." Defendant contends that the testimony was prejudicial to him. Defendant also contends that the witness was never qualified as an expert for any purpose in this case. Defendant does not argue plain error.

Although defendant argues that the witness was never qualified as an expert, he contends that the evidence was speculative and did not assist the trier of fact in understanding the evidence or in determining a fact in issue and that it was, therefore, prejudicial. This argument is unpersuasive. If the witness is not to be considered an expert, as defendant contends, then the standards of expert testimony under North Carolina Rule of Evidence 702 upon which defendant relies are inapplicable. We examine the testimony as nonexpert testimony. Defendant did not need to demonstrate that the evidence did not assist the trier of fact. Instead, defendant's burden was to show that the testimony should have been excluded on some other grounds. This, he has not done.

Defense counsel offered only a general objection to the witness' statement concerning the DNA found on the hood and did not ask to be heard on the objection. After the trial court overruled defendant's objection, the witness continued to testify without objection. Defense counsel then engaged in extensive cross-examination of the witness regarding the source of the DNA evidence about which the witness testified. Defendant has failed to demonstrate the basis for the objection or upon what appropriate grounds the testimony should have been excluded. This assignment of error is overruled.

[7] By two further assignments of error, defendant contends that the trial court erred by admitting into evidence a photograph of defendant's "Mecca" tee shirt and a photograph of defendant wearing a "Mecca" tee shirt and by publishing these photographs to the jury. Defendant has chosen to argue these two assignments of error together. We, however, must examine each piece of evidence separately. There appears to be some misunderstanding in the State's brief to this Court of exactly which pieces of evidence introduced at trial are the subjects of these assignments of error. The State's argument focuses on a tee shirt with the word "Mecca" on it that was found in the woods near the murder scene. The State argues that the introduction of this tee shirt was proper because it was identified by defendant's accomplice, Ronald Bullock, as the shirt defendant was wearing when they committed the attempted robbery at the Pizza Inn. One of defendant's assignments of error refers to the admission of "defendant's Mecca t-shirt." This and defendant's combined argument may have led to the confusion appearing in the State's brief. After careful review, it is apparent that defendant is not challenging the introduction of the tee shirt itself. From the transcript references in his assignments of error, defendant cites only to that portion of the trial where a photograph of defendant wearing a tee shirt with the word "Mecca" on it and a photograph of the tee shirt with the word "Mecca" on it that was found in the woods near the murder scene and that was previously introduced into evidence were at issue. The trial court conducted a *voir dire* out of the presence of the jury prior to the introduction of these photographs. These photographs are the subject of our review.

The photograph of defendant wearing a "Mecca" tee shirt was taken on 29 April 1999 by the witness, David Jones, who testified during the introduction of these photographs. The witness stated that he had taken the photograph on 29 April 1999 and that he had also taken a photograph, in the morning of the day he testified, of the "Mecca" tee shirt that had previously been introduced. Defendant argues that the photographs were not relevant and, even if relevant, should have been excluded under North Carolina Rule of Evidence 403 as more prejudicial than probative. Defendant's argument is unpersuasive.

The introduction of the photograph of defendant wearing a "Mecca" tee shirt seventeen days prior to the murder was relevant to show that defendant had at one time been in the possession of such a shirt. Under North Carolina Rule of Evidence 401, 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. R. Evid. 401. Just as the testimony of defendant's accomplice tended to show that defendant was wearing a shirt similar to the one found in the woods behind the murder scene, the photograph tended to show that defendant had worn a similar shirt seventeen days prior to the murder. Likewise, the photograph of the tee shirt already admitted into evidence was helpful in illustrating the witness' testimony. " 'Photographs are usually competent to be used by a witness to explain or illustrate anything that 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)). The decision of whether to exclude relevant evidence under Rule 403 rests in the discretion of the trial court. *State v. Murillo*, 349 N.C. 573, 601, 509 S.E.2d 752, 768 (1998), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999); *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990). Defendant argues that the photographs were highly prejudicial under Rule 403. We find no abuse of discretion and overrule defendant's assignments of error.

[8] In two additional assignments of error, defendant contends that he was prohibited from impeaching one witness and from "hearing the answer to a highly relevant and material question" from another. Defendant questioned witness Crystal Baker concerning statements she made in court and statements she made to a detective, who also testified. Defense counsel asked witness Baker, "But, if he [the detective] testified that you told him that, he would be telling the truth, wouldn't he, Ms. Baker?" The trial court sustained the State's objection. Defendant also sought to elicit testimony from witness Ronald Bullock. Defense counsel asked witness Bullock, "And, if Jesse Hill testified that he saw you at 6:00 on Monday afternoon, he would be mistaken then?" The trial court sustained the State's objection.

In both instances, defendant sought to have the witnesses vouch for the veracity of another witness. This form of questioning is not proper. A lay witness' testimony is limited to "those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. R. Evid. 701. Defendant was free to, and did, question the detective about statements made by witness Baker and was then free to argue, which he did, any inconsistencies between Baker's statements. Defendant was also free to argue any inconsistencies between the testimony of witnesses Bullock and

Hill. Even if witness Bullock could have rationally perceived that witness Hill was mistaken, the question called for an opinion that would not have been helpful to the jury. In neither instance was it proper for defendant to ask the questions in the above form, which called for the witness to vouch for the veracity of another witness. These assignments of error are overruled.

[9] Defendant raises an assignment of error in which he contends that the trial court erred in sustaining the State's objection when defendant sought to elicit information from witness Steven Gardner as to whether Jennifer Aycock had identified anyone when shown mug-shot books. Defense counsel asked witness Gardner, "Ms. Aycock didn't identify anyone, did she?" Ms. Aycock did not testify at trial. Defendant's question called for a hearsay response.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. R. Evid. 801(c). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." N.C. R. Evid. 801(a). An act, such as a gesture, can be a statement that is subject to the rules of evidence regarding hearsay. *State v. Satterfield*, 316 N.C. 55, 58, 340 S.E.2d 52, 54 (1986). Clearly, any statement by Ms. Aycock would have been hearsay if allowed. Defendant did not identify any hearsay exception that would have allowed a response from the witness. This assignment of error is without merit.

[10] In the second assignment of error, defendant contends that the trial court erred by sustaining the State's objection to his question of whether a witness recalled a portion of another witness' testimony. Defendant argues specifically that by sustaining the objection, the trial court prevented him from hearing the answer to a "highly relevant and material question." The record reveals otherwise. Defendant asked witness Steven Gardner if he had heard witness Crystal Baker's testimony. Gardner responded that he did hear her testimony. Defendant then asked, "And, do you recall her stating that—." The trial court sustained the State's objection. Immediately thereafter, defendant resumed his examination of the witness that he had started before asking the above question. Defendant asked the witness what Baker had told him when he interviewed her. The record does not reveal any suggestion that defendant was prohibited from fully examining what Baker told Gardner. The trial court properly sustained the State's objection when defendant tried to refer to Baker's testimony

rather than the more relevant and material issue of what Baker had or had not told Gardner. *See* N.C. R. Evid. 403 (1999). This assignment of error is overruled.

[11] Defendant next assigns error to the trial court's denying his motions to dismiss the charges of first-degree murder and attempted robbery with a dangerous weapon. Defendant argues that the evidence was insufficient to satisfy a rational fact finder of the existence of the elements beyond a reasonable doubt for each offense charged.

> 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.*

State v. Parker, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001).

Defendant contends that the State's evidence was insufficient to prove that defendant intentionally killed the victim with premeditation and deliberation. Defendant also contends that there was insufficient evidence of an overt act in furtherance of an intent to commit robbery with a dangerous weapon to support the charge of attempted robbery with a dangerous weapon. Attempted robbery with a dangerous weapon was the underlying felony for the felony murder conviction.

We stated in *State v. Laws* as follows:

> "A killing is 'premeditated' if the defendant contemplated killing for some period of time, however short, before he acted." *State v. Williams*, 334 N.C. 440, 447, 434 S.E.2d 588, 592 (1993), *judgment vacated on other grounds*, 511 U.S. 1001, 128 L. Ed. 2d

42 (1994). A killing is "deliberate" if the defendant formed an intent to kill and carried out that intent in a cool state of blood, "free from any 'violent passion suddenly aroused by some lawful or just cause or legal provocation.' " *Id.* (quoting *State v. Fields*, 315 N.C. 191, 200, 337 S.E.2d 518, 524 (1985)). Premeditation and deliberation are mental processes and ordinarily are not susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence. *State v. Brown*, 315 N.C. 40, 59, 337 S.E.2d 808, 822-23 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). Circumstances from which premeditation and deliberation may be inferred include:

> "(1) lack of provocation on the part of the deceased, (2) the conduct and statements of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds."

State v. Keel, 337 N.C. 469, 489, 447 S.E.2d 748, 759 (1994) (*quoting State v. Gladden*, 315 N.C. 398, 430-31, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986)), *cert. denied*, 513 U.S. 1198, 131 L. Ed. 2d 147 (1995).

State v. Laws, 345 N.C. 585, 593-94, 481 S.E.2d 641, 645 (1997). Here, there was substantial circumstantial evidence for the jury to conclude that defendant intentionally killed the victim with premeditation and deliberation.

Defendant carefully planned the robbery with his accomplice, Ronald Bullock. The two stashed clothing in the woods to change into after the robbery to aid their getaway. After entering the Pizza Inn, defendant pointed his weapon at the victim and ordered him to "[p]ut the money in the f—-ing bag." The victim hesitated and asked, "What are you going to do if I don't?" Defendant replied, "Do you think I'm playing?" Defendant pointed his weapon at the floor and fired. Defendant then shot the victim in the head as the victim moved forward. When asked by Bullock why defendant had killed the victim, defendant responded that the victim had killed himself by trying to

grab him. Defendant also told his cousin, Jesse Hill, that the victim had refused to give him the money and that he had shot him. When viewed in the light most favorable to the State, there existed substantial evidence for the jury to conclude beyond a reasonable doubt that defendant killed the victim with premeditation and deliberation.

[12] Defendant contends, in these same assignments, that there was insufficient evidence of an overt act to support the charge of attempted robbery with a dangerous weapon and, therefore, no underlying felony for the application of the first-degree felony murder rule. "The two elements of an attempt to commit a crime are: first, the intent to commit the substantive offense; and, second, an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense." *State v. Smith*, 300 N.C. 71, 79, 265 S.E.2d 164, 169-70 (1980). Defendant contends that the testimony of Ronald Bullock—that defendant pointed a nine-millimeter Ruger at the victim and told him to "[p]ut the money in the f—ing bag"—is "suspect at best." This argument goes to the weight and credibility of the witness' testimony. As stated earlier from *Lucas*, the trial court does not weigh the evidence or determine any witness' credibility. There was substantial evidence that defendant had the intent to rob by use of a dangerous weapon and that he committed an overt act or acts in furtherance of that intent. These assignments of error are meritless and are, therefore, overruled.

[13] Defendant asks this Court to find plain error in the trial court's failure to intervene *ex mero motu* during the prosecutor's closing argument remarks about defendant's impeachment of witness Jesse Hill. The prosecutor said:

> Now, Jesse Hill. If you wondered why people don't want to come forward and testify in cases when they witness things, or they know things in a crime? If you ever wondered why? Because this man gets up there and he is trying to tell you the truth. And, all the defense can do is malign him to go and try to trip him up on times, which don't matter, because he said it was light or dark or whatever, and then act like:
>
> "You've got worthless check convictions?"
>
> As if that would somehow equate with what happened in Boulder, Colorado when the Ramsey girl disappeared. Or, maybe a Bosnian war criminal.

> "You have worthless check [sic]? You have eight worthless check convictions? You've been charged with carrying a concealed weapon?"

It is clear from the transcript that the prosecutor was attempting to mitigate any damage done by defendant's impeachment of witness Hill. At no time did the prosecutor suggest that defendant's actions were linked to the events in Colorado or Bosnia. We stated in *State v. Johnson*:

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

State v. Johnson, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979). We do not believe that the prosecutor's zealous advocacy and hyperbolic statements merited the trial court's intervention and that the trial court did not abuse its discretion in allowing the argument. This assignment of error is overruled.

SENTENCING

Defendant asks this Court to consider his three arguments that the trial court committed plain error in (1) giving peremptory instructions on nonstatutory mitigating circumstances that were not consistent with North Carolina law, did not constitute a true peremptory instruction, and deprived defendant of his federal and state constitutional rights; (2) failing to give a peremptory instruction for the (f)(2), (f)(6), and (f)(7) statutory mitigating circumstances; and (3) failing to give a peremptory instruction for each nonstatutory mitigating circumstance. As defendant recognizes, trial counsel did not preserve these issues for appeal as required by North Carolina Rule of Appellate Procedure 10(b)(2). Also, the issues were not preserved for review as plain error under Appellate Rule 10(c)(4) in that no plain error was alleged in the assignments of error upon which defendant seeks to rely. Defendant has not properly preserved these issues for our review. Therefore, these assignments of error are overruled.

[14] Defendant submitted forty-two mitigating circumstances at the charge conference. The final list included fourteen nonstatutory mitigating circumstances and five statutory mitigating circumstances,

which included the N.C.G.S. § 15A-2000(f)(9) catchall 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. 1022, 108 L. Ed. 2d 603 (1990))(second, third, and fourth alterations in original), *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 omitted proposed mitigating circumstances, a corresponding mitigating circumstance that subsumed the proposed one was submitted to the jury. Also, the jury could have availed itself of the opportunity to consider any evidence of mitigating value under the (f)(9) catchall mitigating circumstance. 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.

[15] In his next assignment of error, defendant alleges that the trial court erred in submitting to the jury for its consideration three separate statutory aggravating circumstances that defendant had been previously convicted of three separate prior convictions for common law robbery. Defendant contends that he never stipulated to the existence of the use or threat of violence in any of the convictions. However, common law robbery is inherently a crime involving the use or threatened use of violence. *State v. Jones*, 339 N.C. 114, 163-64, 451 S.E.2d 826, 854 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995). The record reveals that defendant did stipulate to the exhibits introduced through the Clerk of Superior Court, Wilson County, which were the judgments and commitments for each of the common law robbery convictions. This assignment of error is overruled.

[16] Defendant assigns error to the trial court's submission of the (e)(5) aggravating circumstance that the murder was committed during the commission of an attempt to commit robbery with a dangerous weapon. A person commits the felony offense of attempted robbery with a dangerous weapon if that 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).

Where a jury convicts a defendant of first-degree murder under the theory of premeditation and deliberation and under the felony murder rule, and both theories are supported by the evidence, the underlying felony may be submitted to the jury by the trial court as an (e)(5) aggravating circumstance. *State v. Davis*, 340 N.C. 1, 27, 455 S.E.2d 627, 641, *cert. denied*, 516 U.S. 846, 133 L. Ed. 2d 83 (1995). Here, defendant was convicted under both theories of first-degree murder. Defendant was also convicted of attempted robbery with a dangerous weapon.

As we stated earlier when discussing defendant's motion to dismiss the charge of attempted robbery with a dangerous weapon, there was substantial evidence to support the charge and the conviction. Defendant's argument that there was no overt act because defendant never touched any money or the cash register is not meritorious. The evidence presented that defendant pointed his weapon at the victim, demanded money, and then fired his weapon clearly supported the submission of the (e)(5) aggravating circumstance. This assignment of error is without merit.

[17] In another assignment of error, defendant contends that the trial court abused its discretion in not intervening *ex mero motu* and issuing a curative instruction after it sustained defendant's objection to a question from the prosecutor during the sentencing proceeding. Defendant introduced a photograph of defendant when he was approximately six or seven years old. The prosecutor asked defendant's mother on cross-examination if she was aware that the victim had children about that same age. The trial court sustained defendant's objection. Defendant did not ask that the comment be stricken or that a curative instruction be given.

This Court has held that where the trial court sustains defendant's objection, he has no grounds to except, and there is no prejudice. *State v. Trull*, 349 N.C. 428, 446, 509 S.E.2d 178, 190 (1998), *cert.*

denied, 528 U.S. 835, 145 L. Ed. 2d 80 (1999); *State v. Quick*, 329 N.C. 1, 29, 405 S.E.2d 179, 196 (1991). This Court has also held that a defendant cannot complain that no curative instruction was given where he did not request one. *State v. Williamson*, 333 N.C. 128, 139, 423 S.E.2d 766, 772 (1992). Therefore, defendant's assignment of error is without merit.

PRESERVATION

Defendant raises several 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: the short-form indictment was insufficient to charge defendant with first-degree murder in that it failed to allege all of the elements of first-degree murder; the trial court erred in instructing the jury regarding the definition of mitigation; the trial court erred in instructing the jury that defendant had the burden of proving mitigating circumstances by a preponderance of the evidence; the trial court erred in instructing that each juror was allowed, rather than required, to consider any mitigating circumstances the juror determined to exist when deciding sentencing Issues Three and Four; the North Carolina death penalty statute is unconstitutionally vague and overbroad, results in unconstitutional verdicts, and is imposed in a discretionary and discriminatory manner; the trial court committed reversible error in its instructions that the jury had a "duty" to recommend death; the trial court erred in instructing the jury on Issues Three and Four that it "may" consider mitigating circumstances that it found to exist in Issue Two; 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; the trial court erred by instructing the jury concerning the unanimity requirement in various jury decisions; the trial court erred in its instructions that the answers to Issues One, Three, and Four must be unanimous; and the trial court committed reversible error in its instructions that permitted jurors to reject a submitted mitigating circumstance because it had no mitigating value. 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

[18] 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). 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 arbitrary consideration. Thus, we turn to our final statutory duty of proportionality review.

[19] 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 existence of the four aggravating circumstances submitted for its consideration: three separate aggravating circumstances that defendant had been previously convicted of a felony involving the use or threat of violence, N.C.G.S. § 15A-2000(e)(3), and that the murder was committed while defendant was engaged in the commission of robbery with a firearm, N.C.G.S. § 15A-2000(e)(5).

Five statutory mitigating circumstances, including the catchall, were submitted for the jury's consideration: defendant has no significant history of prior criminal activity N.C.G.S. § 15A-2000(f)(1); defendant committed the murder while under the influence of a mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); defendant's capacity to appreciate the criminality of the conduct or to conform his conduct to the requirements of 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, N.C.G.S. § 15A-2000(f)(9). Of these, the jury found the existence of only the (f)(2) mitigator. Of the fourteen nonstatutory mitigating circumstances submitted by the trial court, one or more jurors found the following four to have mitigating value: that defendant had no male guidance or father figure in his formative years; that defendant witnessed family violence and the death of two cousins; that defendant was neglected by his mother and was exposed to alcohol use by others beginning at an early age; and that defendant has not had a strong, continued, affirmative guidance and support system.

The purpose of proportionality review is to "eliminate the possibility that a person will be sentenced to die by the action of an aber-

rant 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; *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)(3) aggravating circumstance, as the jury did here. The (e)(5) aggravating circumstance found by the jury here was also found in *Young*. However, 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 had one accomplice who fled the scene before defendant and never fired his weapon. In *Bondurant*, this Court weighed the fact that the defendant expressed concern for the vic-

tim'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 shot the victim in the head and immediately fled the scene.

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." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. 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, on the (e)(3) and (e)(5) statutory aggravating circumstances. *Davis*, 340 N.C. 1, 455 S.E.2d 627. Further, there are four statutory aggravating circumstances that, standing alone, this Court has held sufficient to support a sentence of death. *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). Both the (e)(3) and (e)(5) statutory circumstances, which the jury found here, are 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 instituted and carefully planned the robbery of the Pizza Inn with his accomplice. Defendant showed no remorse when telling his accomplice and others what happened after having shot and killed the victim. 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.

PATTERSON v. SWEATT

[355 N.C. 346 (2002)]

WILLIAM J. PATTERSON, LISA K. PATTERSON v. PHILIP SWEATT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, PHILLIP RAINWATER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, WENDELL SESSOMS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, DALE FURR, SHERIFF OF RICHMOND COUNTY, AND WESTERN SURETY COMPANY, AS SURETY

No. 588A01

(Filed 5 April 2002)

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. 351, 553 S.E.2d 404 (2001), affirming an order entered 9 February 2000 by Spainhour, J., in Superior Court, Richmond County. Heard in the Supreme Court 12 March 2002.

Henry T. Drake for plaintiff-appellants.

Stott, Hollowell, Palmer & Windham, L.L.P., by Martha Raymond Thompson, for defendant-appellees Philip Sweatt, Phillip Rainwater, Wendell Sessoms, and Dale Furr.

Kitchin, Neal, Webb, Webb & Futrell, P.A., by Stephan R. Futrell, for defendant-appellee Western Surety Company.

PER CURIAM.

AFFIRMED.

STATE v. HOLT

[355 N.C. 347 (2002)]

STATE OF NORTH CAROLINA v. LAUREEN MILLAR HOLT

No. 336PA01

(Filed 5 April 2002)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 144 N.C. App. 112, 547 S.E.2d 148 (2001), affirming in part and vacating and remanding in part a judgment entered by Johnson (E. Lynn), J., on 13 September 1999, and corrected on 17 September 1999 and 15 November 1999, in Superior Court, Cumberland County. Heard in the Supreme Court 12 March 2002.

Roy Cooper, Attorney General, by Christopher W. Brooks, Assistant Attorney General, for the State-appellant.

James R. Parish for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

ANDERSON v. ASSIMOS

No. 621A01

Case below: 146 N.C. App. 339

Notice of appeal by defendants pursuant to G.S. 7A-30 (substantial constitutional question) retained 6 March 2002.

COUCH v. PRIVATE DIAGNOSTIC CLINIC

No. 661P01

Case below: 146 N.C. App. 658

Motion by appellee (Trial Court) to dismiss the appeal for lack of substantial constitutional question allowed 4 April 2002. Petition by appellant (Maria Sperando) for discretionary review pursuant to G.S. 7A-31 denied 4 April 2002. Conditional petition by appellee (Trial Court) for discretionary review pursuant to G.S. 7A-31 dismissed as moot 4 April 2002.

DOYLE v. ASHEVILLE ORTHOPAEDIC ASSOCS.

No. 62P02

Case below: 148 N.C. App. 173

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 April 2002.

GASTON CTY. EX REL. WEST v. SANDERS

No. 31P02

Case below: 147 N.C. App. 785

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 April 2002.

GOODWIN v. SCHNEIDER NAT'L, INC.

No. 181P99

Case below: 132 N.C. App. 585
353 N.C. 523

Petition by plaintiff to reconsider denial of petition for discretionary review dismissed 12 March 2002.

HARRELL v. HAWLEY

No. 104PA02

Case below: 148 N.C. App. 214

Petition by defendant/third party plaintiff (Ayers) for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 4 April 2002. Notice of appeal by defendant/third party plaintiff (Ayers) pursuant to G.S. 7A-30 (based upon a dissent) dismissed ex mero motu 4 April 2002. Motion by defendant/third party plaintiff (Ayers) for relief under Rule 2 dismissed 4 April 2002.

IN RE MITCHELL

No. 127A02

Case below: 148 N.C. App. 483

Motion by petitioner (Guardian ad Litem) for temporary stay allowed 12 March 2002.

MINTZ v. FOWLER

No. 457P01

Case below: 145 N.C. App. 204

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 4 April 2002.

PARRIS v. LIGHT

No. 640P01

Case below: 146 N.C. App. 515

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 April 2002.

RHODES v. MARCUS CABLE ASSOCS., L.L.C.

No. 678P01

Case below: 147 N.C. App. 313

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 April 2002.

R.J. REYNOLDS TOBACCO CO. v. N.C. DEP'T OF ENV'T & NATURAL RES.

No. 144P02

Case below: 149 N.C. App. 610

Motion by respondent for temporary stay denied 20 March 2002.

SCHOOLCRAFT ENTERS. INC. v. BRIGHT LIFE, L.L.C.

No. 97P02

Case below: 148 N.C. App. 215

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 April 2002.

STATE v. BEANE

No. 599A01

Case below: 146 N.C. App. 220

Motion by the Attorney general to dismiss the appeal for lack of substantial constitutional question allowed 4 April 2002.

STATE v. BYRD

No. 666P01

Case below: 146 N.C. App. 752

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 April 2002.

STATE v. CHAMBERS

No. 35A02

Case below: Rowan County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Rowan County, denied 4 April 2002.

STATE v. GOODE

No. 103P02

Case below: 148 N.C. App. 407

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 April 2002.

STATE v. GUITON

No. 622P01

Case below: 146 N.C. App. 447

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 April 2002.

STATE v. HARGETT

No. 119PA02

Case below: 148 N.C. App. 688

Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 4 April 2002. Petition by the Attorney General for writ of supersedeas allowed 4 April 2002.

STATE v. JOHNSON

No. 99P02

Case below: 148 N.C. App. 407

Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 4 April 2002. Motion by defendant pro se for DNA testing, deoxyribonucleic acid denied 4 April 2002.

STATE v. JONES

No. 39P02

Case below: 147 N.C. App. 527

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 4 April 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 April 2002.

STATE v. McNEILL

No. 105A02

Case below: 148 N.C. App. 407

Notice of appeal by defendant pro se pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 4 April 2002.

STATE v. MOSELEY

No. 385A92-4

Case below: Forsyth County Superior Court

Petition by defendant for writ of certiorari to review the orders of the Superior Court, Forsyth County, denied 4 April 2002.

STATE v. PARKER

No. 594P01

Case below: 138 N.C. App. 555

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals dismissed 4 April 2002.

STATE v. SAMS

No. 60P02

Case below: 148 N.C. App. 141

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 4 April 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 April 2002.

STATE v. SPENCER

No. 683A01

Case below: 147 N.C. App. 314

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 4 April 2002.

STATE v. THOMAS

No. 435A96-2

Case below: Guilford County Superior Court

Petition by defendant pro se for writ of habeas corpus denied 6 March 2002. Petition by defendant pro se for rehearing on application for writ of habeas corpus dismissed 18 March 2002.

STEPHENS v. DORTCH

No. 113P02

Case below: 148 N.C. App. 509

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 4 April 2002.

STEPHENSON v. BARTLETT

[355 N.C. 354 (2002)]

ASHLEY STEPHENSON, INDIVIDUALLY, AND AS A RESIDENT AND REGISTERED VOTER OF BEAUFORT COUNTY, NORTH CAROLINA; LEO DAUGHTRY, INDIVIDUALLY, AND AS REPRESENTATIVE FOR THE 95TH DISTRICT, NORTH CAROLINA HOUSE OF REPRESENTATIVES; PATRICK BALLANTINE, INDIVIDUALLY, AND AS SENATOR FOR THE 4TH DISTRICT, NORTH CAROLINA SENATE; ART POPE, INDIVIDUALLY, AND AS REPRESENTATIVE FOR THE 61ST DISTRICT, NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND BILL COBEY, INDIVIDUALLY, AND AS CHAIRMAN OF THE NORTH CAROLINA REPUBLICAN PARTY AND ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED v. GARY BARTLETT, AS EXECUTIVE DIRECTOR OF THE STATE BOARD OF ELECTIONS; LARRY LEAKE, ROBERT B. CORDLE, GENEVIEVE C. SIMS, LORRAINE G. SHINN, AND CHARLES WINFREE, AS MEMBERS OF THE STATE BOARD OF ELECTIONS; JAMES B. BLACK, AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; MARC BASNIGHT, AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; MICHAEL EASLEY, AS GOVERNOR OF THE STATE OF NORTH CAROLINA; AND ROY COOPER, AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA

No. 94PA02

(Filed 30 April 2002)

1. Elections— North Carolina—2001 legislative redistricting plans—constitutionality

The trial court did not err by granting summary judgment in favor of plaintiffs on the claim that the General Assembly enacted its 2001 legislative redistricting plans in violation of the whole county provision (WCP) under Article II, Sections 3(3) and 5(3) of the North Carolina Constitution when the 2001 Senate redistricting plan divided 51 of 100 counties into different Senate districts and the 2001 House redistricting plan divided 70 out of 100 counties into different House districts, because the use of both single-member and multi-member districts within the same redistricting plan violates the Equal Protection Clause of the State Constitution unless it is established that inclusion of multi-member districts advances a compelling state interest, and the trial court is directed to conduct a hearing, on an expedited basis, on: (1) the question of the feasibility of allowing the General Assembly the first opportunity to develop new redistricting plans consistent with the legal requirements set forth by the North Carolina Supreme Court if so doing will not disrupt the timing of the 2002 general election; and (2) in the event defendants are unable to develop new redistricting plans in accordance with the timetable established by the trial court, the trial court is authorized and directed to seek proposed remedial plans, review and adopt temporary or interim remedial plans for the North Carolina Senate and North Carolina House of

Representatives, and seek preclearance thereof, for use in the 2002 election cycle.

2. Elections— North Carolina—2001 legislative redistricting plans—instructions on remand

The trial court, during the remedial stage of the instant proceeding seeking to correct the General Assembly's unconstitutional enactment of its 2001 legislative redistricting plans in violation of the whole county provisions (WCP) under Article II, Sections 3(3) and 5(3) of the North Carolina Constitution, is instructed on remand to comply with the following requirements including: (1) to ensure full compliance with federal law, legislative districts required by the Voting Rights Act of 1965 (VRA) shall be formed prior to creation of non-VRA districts; (2) VRA districts must be formed consistent with federal law and in a manner having no retrogressive effect upon minority voters; and (3) to the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP herein established for all redistricting plans and districts throughout the State.

3. Elections— North Carolina—legislative redistricting plans—general rules

The following general rules shall be used for all redistricting plans and districts throughout North Carolina, including: (1) in forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal "one-person, one-vote" requirements; (2) in counties having a 2000 census population sufficient to support the formation of one non-Voting Rights Act of 1965 (VRA) legislative district falling at or within plus or minus five percent deviation from the ideal population consistent with "one-person, one-vote" requirements, the whole county provision (WCP) requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county; (3) when two or more non-VRA legislative districts may be created within a single county, which districts fall at or within plus or minor five percent deviation from the ideal population consistent with "one-person, one-vote" requirements, single member non-VRA districts shall be formed within said county, and such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county; (4) in counties having a non-VRA

population pool which cannot support at least one legislative district at or within plus or minus five percent of the ideal population for a legislative district or, alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the at or within plus or minus five percent "one-person, one-vote" standard, the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard; (5) within any such contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping; provided, however, that the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard; (6) intent underlying the WCP must be enforced to the maximum extent possible; thus, only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard shall be combined, and communities of interest should be considered in the formation of compact and contiguous electoral districts; and (7) any new redistricting plans, including any proposed on remand in this case, shall depart from strict compliance with the legal requirements set forth herein only to the extent necessary to comply with federal law.

Justice ORR concurring in part and dissenting in part.

Justice PARKER dissenting.

Justice BUTTERFIELD dissenting.

On appeal pursuant to N.C.G.S. § 7A-31(b) prior to determination by the Court of Appeals from an order allowing summary judgment for plaintiffs and an order for declaratory judgment and injunctive relief holding that the 2001 State legislative redistricting plans violate the North Carolina Constitution, both orders entered 20 February 2002 by Jenkins, J., in Superior Court, Johnston County. Heard in Special Session in the Supreme Court 4 April 2002.

Maupin Taylor & Ellis, P.A., by Thomas A. Farr and James C. Dever, III, for plaintiff-appellees.

Roy Cooper, Attorney General, by Edwin M. Speas, Jr., Chief Deputy Attorney General, and Tiare B. Smiley, Norma S. Harrell, Alexander McC. Peters, and Susan K. Nichols, Special Deputy Attorneys General, for defendant-appellants; and Jenner & Block, LLC, by Donald B. Verrilli, Jr., pro hac vice, co-counsel for defendant-appellants Marc Basnight and James B. Black.

Patterson, Harkavy & Lawrence, L.L.P., by Burton Craige; and Neill S. Fuleihan, on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

Ferguson Stein Chambers Wallas Adkins Gresham & Sumter PA, by Adam Stein and Julius L. Chambers, on behalf of the North Carolina State Conference of Branches of the National Association for the Advancement of Colored People, amicus curiae.

Smith Moore LLP, by James G. Exum, Jr., and Julia F. Youngman, on behalf of Wilbur Gulley, individually and as Senator for the 13th District, N.C. Senate; Luther Jordan, individually and as Senator for the 7th District, N.C. Senate, and as Chairman of the Legislative Black Caucus; David Weinstein, individually and as Senator for the 30th District, N.C. Senate, and as Co-Chairman of the Senate Rural Development Committee; Edd Nye, individually and as Representative for the 96th District, N.C. House of Representatives; and Victor Farah, individually and as resident and registered voter of Wake County, and as candidate for the N.C. House of Representatives, and on behalf of themselves, their constituents, and all other persons similarly situated, amici curiae.

Everett and Everett, by Robinson O. Everett and Seth A. Neyhart, on behalf of Americans for the Defense of Constitutional Rights, Inc., amicus curiae.

Hunter, Elam, Benjamin & Tomlin, PLLC, by Robert N. Hunter, Jr., on behalf of Lee McLean Foreman, Marcus D. Kindley, William W. Peaslee, Kenneth Ray Moore, Robert Brewington, William Franklin Mitchell, Kellon D. McMillian, Cecelia Ferguson Taylor, Gilbert Parker, and Henry McKoy, amici curiae.

Collier Shannon Scott, PLLC, by Scott A. Sinder, pro hac vice; and Coats & Bennett, PLLC, by Anthony Biller, on behalf of the DKT Liberty Project and the Center for Voting and Democracy, amici curiae.

Pender County, by Carl W. Thurman III, Pender County Attorney, amicus curiae.

LAKE, Chief Justice.

The instant action presents a state law question of first impression for this Court. The case arises from a challenge to the state legislative redistricting plans adopted by the General Assembly in November 2001, upon the basis that these plans violate provisions of the North Carolina Constitution (the State Constitution).[1]

Plaintiffs, citizens and registered voters in North Carolina, filed suit on 13 November 2001 contending that, under Article II, Sections 3(3) and 5(3) of the State Constitution, collectively referred to as the "Whole-County Provisions" (the WCP), the General Assembly may not divide counties in creating Senate and House of Representative districts except to the extent necessary to comply with federal law.

On 19 November 2001, defendants removed this case to the United States District Court for the Eastern District of North Carolina. On 20 December 2001, the District Court remanded the case. *Stephenson v. Bartlett*, 180 F. Supp. 2d 779 (E.D.N.C. 2001). In its order of remand, the District Court stated, among other things, that the redistricting process was a matter primarily within the province of the states, that plaintiffs had challenged the 2001 legislative redistricting plans solely on the basis of state constitutional provisions, that the complaint "only raises issues of state law," and that defendants' removal of this suit from state court was therefore inappropriate. *Id.* at 782-83, 786. Defendants subsequently filed a notice of appeal from the District Court's order with the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit denied defendants' motion to stay the District Court's order of remand.

On 20 February 2002, the trial court granted plaintiffs' motion for summary judgment on the ground that the 2001 legislative redistrict-

1. The Senate redistricting plan, known as Senate Plan 1C, was ratified on 13 November 2001. The House redistricting plan, known as the Sutton House Plan 3, was also ratified on 13 November 2001. We hereinafter refer to the redistricting plans collectively as the "2001 legislative redistricting plans."

ing plans violate the State Constitution. That same day, the trial court entered a remedial order granting both declaratory and injunctive relief pursuant to Rules 57 and 65 of the North Carolina Rules of Civil Procedure. The order of the trial court provided in pertinent part:

> 1. Article I, Section 3 of the North Carolina Constitution provides that every right under North Carolina law "should be exercised in pursuance of laws and consistently with the Constitution of the United States." Article I, Section 5 provides that "no law or ordinance of the State in contravention or subversion" of the United States Constitution "can have any lasting force and effect." . . . [T]he Court concludes that Article I, Sections 2, 3, and 5, require that the North Carolina Constitution should be harmonized with any applicable provisions of federal law, so as to avoid any conflict between the North Carolina Constitution and federal law.
>
> 2. Under a harmonized interpretation of Article I, Sections 2, 3, and 5 and Article II, Sections 3(3) and 5(3), the North Carolina Constitution prohibits the General Assembly from dividing counties into separate Senate and House districts, except to the extent that counties must be divided to comply with federal law. Thus, the General Assembly must preserve county lines to the maximum extent possible, except to the extent counties must be divided to comply with Section 5 of the Voting Rights Act, to comply with Section 2 of the Voting Rights Act, and to comply with the U.S. Constitution, including the federal one-person one-vote requirements . . . .
>
> 3. The [2001 legislative redistricting plans] divide counties more than are necessary to comply with the Voting Rights Act or the federal one-person one-vote requirements, and therefore violate the North Carolina Constitution.

The trial court permanently enjoined defendants "from conducting any primary or general election under the 1992 Senate and House Plans, the [2001 legislative redistricting plans], or any other plans that divide counties for any reason other than: (a) the creation of districts needed to obtain preclearance under Section 5 of the Voting Rights Act; (b) the creation of districts needed to avoid liability under Section 2 of the Voting Rights Act; (c) maintaining the population deviation range between districts within the limits approved [by the United States Supreme Court] for jurisdictions that prohibit the division of counties into separate legislative districts; and (d) any other

divisions that are necessary to comply with the United State[s] Constitution and applicable federal law." Finally, the trial court stayed its order and provided that, in fairness to all parties, the voters, and the taxpayers, the present constitutional issues and the outcome of plaintiffs' request for injunctive relief for the 2002 election cycle should be decided by this Court.

On 26 February 2002, this Court allowed plaintiffs' "Emergency Petition for Suspension of the North Carolina Rules of Appellate Procedure," thus setting the stage for expedited direct review by this Court. Thereafter, defendants filed notice of appeal in this Court. By unanimous order dated 7 March 2002, this Court enjoined defendants from conducting primary elections on 7 May 2002 for the office of Senator in the North Carolina Senate and the office of Representative in the North Carolina House of Representatives, pending determination of the constitutional issue by this Court.

On 21 March 2000, the United States Census Bureau released the 2000 population data for the State of North Carolina. From 1990 to 2000, the state's population increased by 21.4 percent, to 8,049,313. Pursuant to its constitutional mandate to redistrict and reapportion legislative districts after each decennial census, N.C. Const. art. II, §§ 3, 5, on 13 November 2001, the General Assembly enacted redistricting and reapportionment plans for the Senate and the House of Representatives, Acts of Nov. 13, 2001, chs. 458, 459, 2001 N.C. Sess. Laws ——, ——. The 2001 Senate Plan divides 51 of 100 counties into different districts (2001 Senate map, Attachment A). Ch. 458, 2001 N.C. Sess. Laws ——. The 2001 House Plan divides 70 of 100 counties into different districts (2001 House map, Attachment B). Ch. 459, 2001 N.C. Sess. Laws ——. Under the 2001 Senate Plan, a number of counties are divided into as many as four to six districts, and under the 2001 House Plan, a number of counties are divided into as many as four to thirteen districts. Chs. 458, 459, 2001 N.C. Sess. Laws ——, ——.

For instance, Pender County has a 2000 census population of 41,082, a number far below the ideal population for a single-member House seat of 67,078. In its *amicus curiae* brief, Pender County states that it "has no interest in which political party controls the North Carolina General Assembly or the re-election prospects of a particular legislator." Rather, "Pender County simply wants its citizens to have the opportunity to present a cohesive voice to address the particular needs it faces as a low wealth, rapid growth county." Under the 2001 legislative redistricting plans, the citizens of Pender

County are distributed among eight legislative districts incorporating fourteen different counties. Chs. 458, 459, 2001 N.C. Sess. Laws ——, ——. As a result, Pender County maintains that the 2001 legislative redistricting plans have "balkanized" the county and muted the voices of its citizens seeking to choose "a" legislator who will be sensitive and responsive to their unique needs.

In the trial court below, plaintiffs presented a forecast of their evidence on the issue of protecting the citizenry's equal right to vote and ensuring the continued vitality of the State's democratic processes. In this regard, plaintiffs submitted deposition testimony of John N. Davis, Executive Director of NCFREE, a nonpartisan organization within this State, who has been forecasting election results in North Carolina since 1992. In 2000, Davis correctly projected 193 out of 200 North Carolina elections. According to Davis, the number of Senate seats competitive for both major political parties has dropped from 14 out of 50 under the 1992 Senate Plan to only 6 out of 50 under the 2001 Senate Plan. Similarly, Davis asserts that the number of competitive House seats has dropped from 32 out of 120 under the 1992 House Plan to only 14 out of 120 under the 2001 House Plan.

The original filing period for legislative offices for the November 2002 elections closed on 1 March 2002. The registration of those who filed for legislative offices for these elections reflects that in the Senate, under the 2001 legislative redistricting plans, 30 out of 50, or sixty percent, of the seats will be uncontested in the November 2002 general election. In the House, 71 out of 120 House seats, or fifty-nine percent, will be uncontested in the November 2002 general election. Overall, out of 170 seats in the General Assembly, 101 members, or fifty-nine percent, will not face opposition in the 2002 general election. Stated differently, voters within districts represented by these 101 members will apparently have no meaningful electoral choices in the 2002 election cycle under the 2001 legislative redistricting plans.

STATE CONSTITUTIONAL ANALYSIS

[1] The primary question for our review is whether the General Assembly, in enacting the 2001 legislative redistricting plans, violated the WCP of the State Constitution. Defendants contend that the constitutional provisions mandating that counties not be divided are wholly unenforceable because of the requirements of the Voting Rights Act. Plaintiffs, on the other hand, assert that the State Constitution requires that counties not be divided when creating

state legislative apportionment plans except to the extent required by federal law.

The State Role in Legislative Redistricting

The apportionment of legislative districts is a matter primarily reserved to the respective states. *Growe v. Emison*, 507 U.S. 25, 34, 122 L. Ed. 2d 388, 400 (1993) (stating that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts"); *see also Chapman v. Meier*, 420 U.S. 1, 27, 42 L. Ed. 2d 766, 785 (1975); *Reynolds v. Sims*, 377 U.S. 533, 586, 12 L. Ed. 2d 506, 541 (1964). Moreover, "issues concerning the proper construction and application of . . . the Constitution of North Carolina can . . . be answered with finality [only] by this Court." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989); *see also PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81, 64 L. Ed. 2d 741, 752 (1980); *Murdock v. Mayor of Memphis*, 87 U.S. 590, 626, 22 L. Ed. 429, 441 (1874); *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984). Although there is a strong presumption that acts of the General Assembly are constitutional, it is nevertheless the duty of this Court, in some instances, to declare such acts unconstitutional. *Preston*, 325 N.C. at 448-49, 385 S.E.2d at 478; *see also Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60, 73 (1803) (stating that "[i]t is emphatically the province and duty of the judicial department to say what the law is"); *Bayard v. Singleton*, 1 N.C. 5, 6-7 (1787). Indeed, within the context of state redistricting and reapportionment disputes, it is well within the "power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan." *Scott v. Germano*, 381 U.S. 407, 409, 14 L. Ed. 2d 477, 478 (1965) (per curiam).

The State Constitution provides that "[t]he General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the senate districts and the apportionment of Senators among those districts" and "shall revise the representative districts and the apportionment of Representatives among those districts." N.C. Const. art. II, §§ 3, 5. The State Constitution specifically enumerates four limitations upon the redistricting and reapportionment authority of the General Assembly, summarized as follows:

> (1) Each Senator and Representative shall represent, as nearly as possible, an equal number of inhabitants.

(2) Each senate and representative district shall at all times consist of contiguous territory.

(3) No county shall be divided in the formation of a senate or representative district.

(4) Once established, the senate and representative districts and the apportionment of Senators and Representatives shall remain unaltered until the next decennial census of population taken by order of Congress.

See N.C. Const. art. II, §§ 3, 5. The WCP, the third limitation above, provides that "[n]o county shall be divided in the formation of a senate district," N.C. Const. art. II, § 3(3), and that "[n]o county shall be divided in the formation of a representative district," N.C. Const. art. II, § 5(3).

The Federal Role in Legislative Redistricting

Although the respective state legislatures maintain primary responsibility for redistricting and reapportionment of legislative districts, such procedures must comport with federal law. Interpretation of the federal limitations upon the redistricting process is unnecessary to the resolution of the instant case. Nonetheless, as these requirements necessarily serve as limitations upon the state legislative redistricting process, we find it helpful to describe, at least briefly, the federal law in this area. The applicable provisions include (1) "one-person, one-vote" principles requiring some measure of population equality between state legislative districts as articulated in *Baker v. Carr*, 369 U.S. 186, 7 L. Ed. 2d 663 (1962), and *Reynolds v. Sims*, 377 U.S. 533, 12 L. Ed. 2d 506, and their progeny; and (2) the Voting Rights Act of 1965 (the VRA), as amended, to protect against voting discrimination, as proscribed under the Fifteenth Amendment, 42 U.S.C. §§ 1973-1973p (1994); *Lopez v. Monterey Cty.*, 525 U.S. 266, 269, 142 L. Ed. 2d 728, 734 (1999).

Section 2 of the VRA generally provides that states or their political subdivisions may not impose any voting qualification or prerequisite that impairs or dilutes, on account of race or color, a citizen's opportunity to participate in the political process and to elect representatives of his or her choice. 42 U.S.C. §§ 1973a, 1973b; *Thornburg v. Gingles*, 478 U.S. 30, 43, 92 L. Ed. 2d 25, 42 (1986). The primary purpose underlying section 5 of the VRA is to avoid retrogression, i.e., a change in voting procedures which would place the members of a racial or language minority group in a less favorable position than

they had occupied before the change with respect to the opportunity to vote effectively. 28 C.F.R. § 51.54(a) (2001); *see also Beer v. United States*, 425 U.S. 130, 140-42, 47 L. Ed. 2d 629, 638-40 (1976). To effectuate its remedial objectives, the VRA requires jurisdictions "covered" by section 5 that seek to enact or administer any change in a voting standard, practice, or procedure to submit the proposed change to the United States Department of Justice (USDOJ) for preclearance or, alternatively, to obtain a declaratory ruling from the United States District Court for the District of Columbia. 42 U.S.C. § 1973c; *see also Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 323, 145 L. Ed. 2d 845, 853 (2000).

The State of North Carolina is not a covered jurisdiction for section 5 purposes. *See Lopez*, 525 U.S. at 280, 142 L. Ed. 2d at 741 (noting that "seven states . . . are currently partially covered: California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota"). Forty of this State's one hundred counties, however, are covered jurisdictions and are subject to section 5 requirements. *See* 42 U.S.C. § 1973c; 28 C.F.R. § 51.4(c) & app. to pt. 51, at 96-98 (2001); *Shaw v. Reno*, 509 U.S. 630, 634, 125 L. Ed. 2d 511, 520 (1993). When the State enacts voting changes that affect these counties, the changes must be precleared before they are administered. *See Lopez*, 525 U.S. at 280, 142 L. Ed. 2d at 740-41 (stating that *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 51 L. Ed. 2d 229 (1977), and *Shaw v. Hunt*, 517 U.S. 899, 135 L. Ed. 2d 207 (1996), "reveal a clear assumption by this Court that [section] 5 preclearance is required where a noncovered State effects voting changes in covered counties"). The VRA does not command a state to adopt any particular legislative reapportionment plan, but rather prevents the enforcement of redistricting plans having the purpose or effect of diluting the voting strength of legally protected minority groups.

The Historical Role of Counties in Legislative Redistricting

Before we begin our analysis, we briefly review the importance of counties as political subdivisions of the State of North Carolina. Counties are creatures of the General Assembly and serve as agents and instrumentalities of State government. *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 654, 142 S.E.2d 697, 701 (1965); *DeLoatch v. Beamon*, 252 N.C. 754, 757, 114 S.E.2d 711, 714 (1960). Counties are subject to almost unlimited legislative control, except to the extent set out in the State Constitution. *Martin v. Board of Comm'rs of Wake Cty.*, 208 N.C. 354, 365, 180 S.E. 777, 783 (1935). "[T]he powers

and functions of a county bear reference to the general policy of the State, and are in fact an integral portion of the general administration of State policy." *O'Berry v. Mecklenburg Cty.*, 198 N.C. 357, 360, 151 S.E. 880, 882 (1930), *quoted in Martin*, 208 N.C. at 365, 180 S.E. at 783.

Counties serve as the State's agents in administering statewide programs, while also functioning as local governments that devise rules and provide essential services to their citizens. This Court has long recognized the importance of the county to our system of government:

> The counties of this state . . . are . . . organized for political and civil purposes. . . . The leading and principal purpose in establishing them is[] to effectuate the political organization and civil administration of the state, in respect to its general purposes and policy which require local direction, supervision and control, such as matters of local finance, education, provisions for the poor, . . . and in large measure, the administration of public justice. It is through them, mainly, that the powers of government reach and operate directly upon the people, and the people direct and control the government. They are indeed a necessary part and parcel of the subordinate instrumentalities employed in carrying out the general policy of the state in the administration of government. They constitute a distinguishing feature in our free system of government. It is through them, in large degree, that the people enjoy the benefits arising from local self-government, and foster and perpetuate that spirit of independence and love of liberty that withers and dies under the baneful influence of centralized systems of government.

White v. Commissioners of Chowan Cty., 90 N.C. 437, 438 (1884); *see also Southern Ry. Co. v. Mecklenburg Cty.*, 231 N.C. 148, 150-51, 56 S.E.2d 438, 439-40 (1949).

Counties play a vital role in many areas touching the everyday lives of North Carolinians. For example, each county effects the administration of justice within its borders, and each has a jail and a courthouse where cases arising in the county are usually tried. A. Fleming Bell, II, & Warren Jake Wicker, *County Government in North Carolina* 938-39, 943 (4th ed. 1998). Each county elects a sheriff. *Id.* at 930. Soil and water conservation districts oversee watershed programs and drainage issues in almost every county. *Id.* at 682-83. Each county is responsible for administering the public schools by

way of a county board of education. *Id.* at 823-29. Not surprisingly, people identify themselves as residents of their counties and customarily interact most frequently with their government at the county level. *See generally id.* at vii-xi. Based on the clear identity and common interests that counties provide, the impetus for the preservation of county lines, as reflected within the WCP, is easily understood within the redistricting context.

There is a long-standing tradition of respecting county lines during the redistricting process in this State. Indeed, this custom and practice arose hundreds of years before federal limitations were placed upon state redistricting and reapportionment procedures during the 1960s. North Carolina's initial state constitution, enacted in 1776, provided that representation in both the Senate and the House of Commons was based on "counties." *See* John V. Orth, *The North Carolina State Constitution: A Reference Guide* 81 (1993) [hereinafter Orth, *State Constitution*]. In the enactment of amendments in 1835, the General Assembly provided that "counties" were not to be divided between two or more senate districts and that each "county" was to be guaranteed at least one representative. *See id.* The 1868 Constitution provided that "no County shall be divided in the formation of a Senate District," unless entitled to two or more Senators, and further provided the House of Representatives shall be composed of 120 members "to be elected by the Counties respectively, according to their population," with each county to have at least one Representative. N.C. Const. of 1868, art. II, §§ 5, 6 (amended 1968).

The Development of a Modern Redistricting Jurisprudence

In *Drum v. Seawell*, 249 F. Supp. 877 (M.D.N.C. 1965), *aff'd per curiam*, 383 U.S. 831, 16 L. Ed. 2d 298 (1966), a three-judge panel on the United States District Court for the Middle District of North Carolina ruled that the General Assembly's legislative redistricting plans violated the "one-person, one-vote" requirement of the United States Constitution and were therefore void. The District Court enjoined the State from using the unconstitutional plans in the 1966 election cycle. *Id.* at 881. The General Assembly thereafter enacted revised redistricting plans in compliance with the District Court's mandate but did not divide counties into separate legislative districts. On 18 February 1966, the District Court found the revised plans to be constitutional. *Drum v. Seawell*, 250 F. Supp. 922, 924 n.2 (M.D.N.C. 1966). The revised legislative districts were thereafter used in the 1966, 1968, and 1970 elections.

Following the *Drum* decisions, the General Assembly proposed constitutional amendments in 1967 to the State Constitution's redistricting and reapportionment provisions. *See* Act of May 31, 1967, ch. 640, 1967 N.C. Sess. Laws 704. The proposed amendments for the Senate and House of Representatives reincorporated a prohibition against the division of counties. *Id.* Subsequently, the North Carolina State Constitution Study Commission completed a comprehensive review and revision of the State Constitution. *See* Orth, *State Constitution* at 20. In November 1968, the voters of North Carolina approved the amendments to the redistricting and reapportionment provisions in the 1868 State Constitution. *See* John L. Sanders & John F. Lomax, Jr., *Amendments to the Constitution of North Carolina: 1776-1996*, at 15 (Inst. of Gov't, Univ. of N.C. at Chapel Hill, 1997). These 1968 amendments based representation in both the Senate and House of Representatives upon the requirement of "one-person, one-vote." *See* Orth, *State Constitution* at 81. These amendments also required the preservation of county lines when forming districts. *See id.* In 1969, the General Assembly reviewed and approved the proposed revisions of the State Constitution, Act of July 2, 1969, ch. 1258, 1969 N.C. Sess. Laws 1461, and in November 1970, North Carolina voters ratified a revised and amended state constitution known as the 1971 Constitution, *see* John L. Sanders, *Our Constitutions: An Historical Perspective*, *in* Elaine F. Marshall, N.C. Dep't of Sec'y of State, *North Carolina Manual 1999-2000*, 125, at 134. As University of North Carolina Law Professor John Orth, a highly respected state constitutional scholar, noted, "The 1971 Constitution, the state's third, was not . . . a product of haste and social turmoil. It was instead a good government-measure, long matured and carefully crafted by the state's lawyers and politicians, designed to consolidate and conserve the best features of the past, not to break with it." Orth, *State Constitution* at 20. The 1971 Constitution included grammatical changes to the 1968 amendments to the Constitution with respect to redistricting and reapportionment, but preserved the language prohibiting the division of counties. N.C. Const. art. II, §§ 3, 5.

Consistent with the 1971 Constitution, the General Assembly enacted a redistricting plan in 1971 that did not divide counties into separate legislative districts. Act of June 1, 1971, ch. 483, 1971 N.C. Sess. Laws 412; Act of July 21, 1971, ch. 1177, 1971 N.C. Sess. Laws 1743. The USDOJ precleared the 1971 legislative reapportionment plans, and those plans were used in the 1972 through 1980 elections.

In 1981, the General Assembly again enacted redistricting plans for the Senate and House of Representatives which did not divide counties. Act of July 3, 1981, ch. 821, 1981 N.C. Sess. Laws 1191; Act of October 30, 1981, ch. 1130, 1981 N.C. Sess. Laws 1657. The USDOJ refused to preclear the 1981 legislative redistricting plans, however, because they contained no majority-minority single-member districts and submerged cognizable minority populations within large multi-member districts. For these reasons, the USDOJ interposed an objection to the use of a "whole-county" criterion by North Carolina, as applied within the plan as then submitted, insofar as it affected the forty counties in North Carolina covered by section 5 of the VRA. The USDOJ made clear, however, that its response to the plans submitted by North Carolina at that time did *not* preclude the State from preserving county lines whenever feasible in formulating its new districts.

In response to the USDOJ's administrative determination, the General Assembly convened in April 1982 and enacted a revised redistricting plan for the House, creating four African-American single-member districts and one African-American two-member district. The House Plan divided twenty-four counties. Act of February 11, 1982, ch. 4, 1981 N.C. Sess. Laws (1st Extra Sess. 1982) 6; Act of April 27, 1982, ch. 1, 1981 N.C. Sess. Laws (2d Extra Sess. 1982) 15. On 30 April 1982, the USDOJ precleared the House redistricting plan. Similarly, the General Assembly enacted a revised redistricting plan for the Senate, which the USDOJ also precleared, that divided eight counties and created two African-American single-member districts. Act of April 27, 1982, ch. 2, 1981 N.C. Sess. Laws (2d Extra Sess. 1982) 15.

In *Cavanagh v. Brock*, 577 F. Supp. 176 (E.D.N.C. 1983), a case originally filed in state court, the defendants removed the case to federal court and affirmatively advocated the invalidation of the WCP. The District Court in *Cavanagh*, purporting to apply a state law severability analysis, determined that the USDOJ's objection to enforcement of the WCP as to the forty covered North Carolina counties also precluded its enforcement in the sixty noncovered counties.[2] *Id.* at 181.

2. The District Court in *Cavanagh* recognized that only a state challenge was asserted and struggled to determine whether abstention would be "most suitably effectuated by allowing defendants to seek a declaratory judgment in state court on that narrow issue." 577 F. Supp. at 180-81 n.4. The Court, however, ultimately concluded that abstention was inappropriate "in view of the substantial public interest in early resolution of challenges affecting the fundamental electoral processes involved" and

The WCP and the 2001 Legislative Redistricting Plans

The expanded question before this Court, in light of the VRA, is whether the WCP is now entirely unenforceable, as defendants contend, or, alternatively, whether the WCP remains enforceable throughout the State to the extent not preempted or otherwise superseded by federal law.

When federal law preempts state law under the Supremacy Clause, it renders the state law invalid and without effect. U.S. Const. art. VI, cl. 2 ("This constitution, and the laws of the United States which shall be made in pursuance thereof, . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."); *see also Pearson v. C.P. Buckner Steel Erection Co.*, 348 N.C. 239, 244, 498 S.E.2d 818, 821 (1998).

The primary inquiry in determining whether a state provision is preempted by federal law is to ascertain the intent of Congress. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280, 93 L. Ed. 2d 613, 623 (1987) (noting that "federal law may supersede state law in several different ways"). Congress may state an intention to preempt state law in express terms, *id.*, or congressional intent to preempt may be inferred where a comprehensive federal scheme is imposed on an area occupied by state law, leaving state law "no room" in which to continue operating, *id.* at 281, 93 L. Ed. 2d at 623. As a third alternative, "in those areas where Congress has not completely displaced state regulation, federal law may nonetheless preempt state law to the extent it actually conflicts with federal law." *Id.* (emphasis added). "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field . . . ." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 10 L. Ed. 2d 248, 256-57 (1963) (noting that where federal and state law both operate, a "coexistence" is formed). Because Congress has not preempted the entire field of state legislative redistricting and reapportionment, state provisions in this area of law not otherwise superseded by federal law must be accorded full force and effect. *See Growe*, 507 U.S. at 34, 122 L. Ed. 2d at 400; *see also Chapman*, 420 U.S. at 27, 42 L. Ed. 2d at 785; *Reynolds*, 377 U.S. at 586, 12 L. Ed. 2d at 541.

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the apparent perception that its application of state law was "not sufficiently uncertain." *Id.*

The State Constitution similarly delineates the interplay between federal and state law: "The people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, . . . but every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States." N.C. Const. art. I, § 3. "[N]o law or ordinance of the State in contravention or subversion [of the United States Constitution and government of the United States] can have any binding force." N.C. Const. art. I, § 5.

The people of North Carolina chose to place several explicit limitations upon the General Assembly's execution of the legislative reapportionment process. None of these express limitations, including the WCP, are facially inconsistent with the VRA or other federal law. Thus, the State retains significant discretion when formulating legislative districts, so long as the "effect" of districts created pursuant to a "whole-county" criterion or other constitutional requirement does not dilute minority voting strength in violation of federal law.

"Issues concerning the proper construction of the Constitution of North Carolina 'are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments.' " *Preston*, 325 N.C. at 449, 385 S.E.2d at 478 (quoting *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953)). In *Sessions v. Columbus Cty.*, 214 N.C. 634, 638, 200 S.E. 418, 420 (1939), this Court stated that "[r]econciliation is a postulate of constitutional as well as of statutory construction." Thus, reconciliation is a fundamental goal, be it in constitutional or statutory interpretation, and North Carolina courts should make every effort to determine whether State provisions, as interpreted under State law, are inconsistent with controlling federal law before applying a severability analysis to strike State provisions as wholly unenforceable.

As part of our constitutional interpretation, it is fundamental "to give effect to the intent of the framers of the organic law and of the people adopting it." *Perry*, 237 N.C. at 444, 75 S.E.2d at 514. More importance is to be placed upon the intent and purpose of a provision than upon the actual language used. *Id.* "[I]n arriving at the intent, we are not required to accord the language used an unnecessarily literal meaning. Greater regard is to be given to the dominant purpose than to the use of any particular words . . . ." *Id.* This Court will consider the "history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought

to be accomplished by its promulgation" when interpreting the State Constitution in light of federal requirements. *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 613, 264 S.E.2d 106, 110 (1980); *see also Perry*, 237 N.C. at 444, 75 S.E.2d at 514.

We observe that the State Constitution's limitations upon redistricting and apportionment uphold what the United States Supreme Court has termed "traditional districting principles." *See Shaw*, 509 U.S. at 647, 125 L. Ed. 2d at 528. These principles include factors such as "compactness, contiguity, and *respect for political subdivisions*." *Id.* (emphasis added). The United States Supreme Court has "emphasize[d] that these criteria are important not because they are constitutionally required—they are not—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Id.* at 647, 125 L. Ed. 2d at 528-29 (citation omitted). We recognize that, like the application or exercise of most constitutional rights, the right of the people of this State to legislative districts which do not divide counties is not absolute. *See, e.g.*, Laurence H. Tribe, *American Constitutional Law* § 12-2 (2d ed. 1988); John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 16.7 (5th ed. 1995) (noting that although the provisions of the First Amendment appear absolute, they are subject to a balancing of interests). In reality, an inflexible application of the WCP is no longer attainable because of the operation of the provisions of the VRA and the federal "one-person, one-vote" standard, as incorporated within the State Constitution. This does not mean, however, that the WCP is rendered a legal nullity if its beneficial purposes can be preserved consistent with federal law and reconciled with other state constitutional guarantees.

The 2001 legislative redistricting plans violate the WCP for reasons unrelated to compliance with federal law. Although the WCP demonstrates a clear intent to keep county boundaries intact *whenever possible* during the legislative redistricting process, the 2001 Senate redistricting plan divides 51 of 100 counties into different Senate districts. The 2001 House redistricting plan divides 70 out of 100 counties into different House districts. The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, *see Gaffney v. Cummings*, 412 U.S. 735, 37 L. Ed. 2d 298 (1973), but it must do so in conformity with the State Constitution. To hold otherwise would abrogate the constitutional limitations or "objective constraints" that the people of North Carolina have imposed on legislative redistricting

and reapportionment in the State Constitution. Accordingly, the WCP remains valid and binding upon the General Assembly during the redistricting and reapportionment process, as more fully explained below, except to the extent superseded by federal law.[3]

Effect of 1981 USDOJ Objection to Redistricting Plan and Decision of Federal District Court in *Cavanagh v. Brock*

Focusing on correspondence received from the USDOJ during 1981 and 1982, defendants assert that the USDOJ's objection to the 1981 State legislative redistricting plans now renders the WCP unenforceable. They also contend that *Cavanagh v. Brock*, 577 F. Supp. 176, controls the resolution of this issue. Finally, they assert that plaintiffs' interpretation of the State constitutional provisions, when coupled with the effect of the VRA, will result in a rewrite of the State Constitution and a mechanical interpretation of the same.

With regard to the USDOJ's objection to the 1981 proposed legislative redistricting plans—plans that failed to include *any* majority-minority VRA districts—the USDOJ indicated that it was unable to conclude that North Carolina's application of the WCP at that time did not have a discriminatory purpose or effect in the forty covered counties. In a letter dated 30 November 1981, the USDOJ pointed out that its analysis "show[ed] that the prohibition against dividing the forty covered counties in the formation of Senate and House districts predictably require[d], and ha[d] led to the use of large, multi-member districts." Letter from William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Alex Brock, Executive Secretary-Director, N.C. State Board of Elections (Nov. 30, 1981) [hereinafter 1981 USDOJ letter]. Thus, in reviewing the 1968 constitutional amendments, the USDOJ analyzed these amendments in the context of redistricting plans that included large, multi-member districts. The USDOJ further stated in this letter: "This determination with respect to the jurisdictions covered by Section 5 of the Voting Rights Act should in no way be regarded as precluding the State from following a policy of preserving county lines whenever feasible in formulating its new districts. Indeed, this is the policy in many states, subject only to the preclearance require-

3. We note that other states have faced similar issues under their respective state constitutions and, where possible, have concluded that county lines should be maintained. *See In re Reapportionment of Colo. Gen. Assembly*, 45 P.3d 1237, 1248-49, (2002); *Hellar v. Cenarrusa*, 106 Idaho 571, 574-75, 682 P.2d 524, 527-28 (1984); *Fischer v. State Bd. of Elections*, 879 S.W.2d 475, 479 (Ky. 1994); *State ex rel. Lockert v. Crowell*, 631 S.W.2d 702, 714-15 (Tenn. 1982).

ments of Section 5, where applicable." *Id.* In a subsequent letter dated 20 January 1982, the USDOJ specifically concluded that "the use of large, multi-member districts effectively submerge[d] sizable concentrations of black population[s] into a majority white electorate." Letter from William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Alex Brock, Executive Secretary-Director, N.C. State Board of Elections (Jan. 20, 1982) [hereinafter 1982 USDOJ letter]. On *this* basis, the 1981 plans were not precleared.

It is apparent from the full context of these letters that the USDOJ concluded that the plans, as then submitted, would result in large multi-member districts having a retrogressive effect on minority voters. Nowhere in these letters is there a statement that the amendments themselves are considered either unconstitutional or unenforceable in conjunction with an acceptable redistricting plan having no retrogressive effect, and defendants have offered no authority supporting such a proposition.

Our opinion that the 1981 and 1982 USDOJ letters do not abrogate the WCP is buttressed by the USDOJ's issuance of its administrative guidance for states concerning redistricting under the VRA. These guidelines provide: "[C]ompliance with Section 5 of the Voting Rights Act may require the jurisdiction to depart from strict adherence to certain of its redistricting criteria. For example, criteria which require the jurisdiction to . . . follow county, city, or precinct boundaries . . . *may need to give way to some degree* to avoid retrogression." Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, 66 Fed. Reg. 5413 (Jan. 18, 2001) (emphasis added). The USDOJ Civil Rights Division clearly considers following political boundaries, including county lines, to be an acceptable criterion but one that "may" have to give way "to some degree" in order to avoid retrogression. Significantly, both the USDOJ's letters to the State of North Carolina and its *own* administrative guidelines reflect that states need only modify, not necessarily abrogate, the application of whole-county redistricting limitations.

Thus, our review of the USDOJ's position on the WCP, as represented by its response to North Carolina's submission in 1981 and its administrative regulations concerning use of "whole-county" requirements, leads us to conclude that the WCP is not facially illegal or unenforceable relative to federal law. We believe our interpretation naturally flows from the language of the USDOJ's representation that

its policy "should in no way be regarded as precluding the State [of North Carolina] from following a policy of preserving county lines whenever feasible in formulating new districts." The 1981 USDOJ letter, by its own terms, merely disallows a redistricting plan that adheres strictly to a "whole-county" criterion without complying with the VRA.

Defendants further argue that *Cavanagh*, 577 F. Supp. 176, voided the WCP. For the reasons set forth below, we respectfully disagree with the District Court's interpretation of the State Constitution. *See Union Pac. R.R. Co. v. Board of Comm'rs of Weld Cty.*, 247 U.S. 282, 287, 62 L. Ed. 1110, 1117 (1918); *see also Harter v. Vernon*, 101 F.3d 334, 342 (4th Cir. 1996) ("Our holdings on questions of state law do not bind state courts"), *cert. denied*, 521 U.S. 1120, 138 L. Ed. 2d 1014 (1997); *Preston*, 325 N.C. at 449-50, 385 S.E.2d at 479; *White v. Pate*, 308 N.C. 759, 766, 304 S.E.2d 199, 203 (1983).

As previously noted, North Carolina courts should first determine whether provisions of the State Constitution, as interpreted under state law, are inconsistent with federal law before applying a severability analysis. Where, as here, the primary purpose of the WCP can be effected to a large degree without conflict with federal law, it should be adhered to by the General Assembly to the maximum extent possible.[4] Also, in addressing the intent of the General Assembly, the District Court in *Cavanagh* apparently failed to consider the history of North Carolina's use of whole-county districts for nearly 200 years prior to 1964. The Court in *Cavanagh* cited no authority to support its conclusion that the General Assembly in 1968 would not have intended or desired to adopt the WCP if that provision could not be fully applicable in all counties. Furthermore, the Court's ruling in *Cavanagh* was not a necessary conclusion based on the 1981 USDOJ letter concerning whole-county districts. As discussed above, the USDOJ's objection to the 1981 redistricting plans does not stand for the proposition that the constitutional "whole-county" provisions are *per se* unenforceable. For all these reasons, we reject defendants' contention that the District Court's holding in *Cavanagh* should be followed in our interpretation of the North Carolina Constitution.

We also reject defendants' assertion that enforcement of the WCP in some way rewrites the State Constitution. Defendants contend,

4. Although no federal law has preempted this Court's authority to interpret the WCP as it applies statewide, we acknowledge that complete compliance with federal law is the first priority before enforcing the WCP.

among other things, that allowing the WCP to retain some measure of enforceability tacitly adds new words to these provisions, i.e., counties may not be split "except to the extent required by federal law." Defendants overlook the fact, however, that compliance with federal law is not an implied, but rather an express condition to the enforceability of *every* provision in the State Constitution. Moreover, our holding accords the fullest effect possible to the stated intentions of the people through their duly adopted State Constitution, the subject provisions of which have remained in place without amendment since 1971. Defendants' "all-or-nothing" interpretation is inordinately mechanical in its application, leaving no room to carry out the spirit or intent of the State Constitution in contravention of time-honored principles of federalism. *See Printz v. United States*, 521 U.S. 898, 921, 138 L. Ed. 2d 914, 935-36 (1997). This construction needlessly burdens millions of citizens with unnecessarily complicated and confusing district lines.

Since *Cavanagh*, many North Carolina legislative districts have been increasingly gerrymandered to a degree inviting widespread contempt and ridicule. *See, e.g.*, "Red-Light District: It's time to draw the line on gerrymandering," John Fund's Political Diary, WSJ.com Opinion Journal from the Wall Street Journal Editorial Page, *at* http://www.opinionjournal.com/diary/?id=105001756 (Mar. 13, 2002) ("[e]lections in many semifree Third World nations routinely offer more choices than many North Carolina residents will have" under the 2001 legislative redistricting plans); *How to Rig an Election*, The Economist, Apr. 27, 2002, at 29, 30 ("In a normal democracy, voters choose their representatives. In America, it is rapidly becoming the other way around" and asserting that "North Carolina [has been] long notorious for outrageous reapportionment.")

We thus hold that because the General Assembly enacted its 2001 legislative redistricting plans in violation of the WCP, N.C. Const. art. II, §§ 3(3), 5(3), these plans are unconstitutional and are therefore void. Accordingly, the trial court properly granted summary judgment in favor of plaintiffs on this claim.

REMEDIAL ANALYSIS

Having determined that defendants violated the WCP in enacting the 2001 legislative redistricting plans, we must next consider the practical consequences of our holding and address any required remedial measures. The United States Supreme Court has recognized the "power of the judiciary of a State to require valid reapportion-

ment or to formulate a valid redistricting plan." *Scott*, 381 U.S. at 409, 14 L. Ed. 2d at 478. Indeed, both "[r]eason and experience argue that courts empowered to invalidate an apportionment statute which transgresses constitutional mandates cannot be left without the means to order appropriate relief." *Terrazas v. Ramirez*, 829 S.W.2d 712, 718 (Tex. 1991); *see also Brooks v. Hobbie*, 631 So. 2d 883, 887-90 (Ala. 1993).

Plaintiffs contend that remedial compliance with the WCP requires the formation of multi-member legislative districts in which all legislators would be elected "at-large." For instance, plaintiffs' suggested five percent whole-county plan for the North Carolina House would require, within Mecklenburg and Gaston Counties, the creation of a single multi-member House district having a contingent of ten Representatives along with the creation of three "submerged" single-member VRA districts. For the following reasons, we reject plaintiffs' proposed remedy.

It is clear, as a practical matter in view of federal law, that application of the WCP in a strictly mechanical fashion would be inconsistent with other provisions of federal law and the State Constitution. Specifically, the WCP cannot be applied in isolation or in a manner that fails to comport with other requirements of the State Constitution. Consequently, as we reject plaintiffs' proposed remedy in the instant case, we recognize we cannot abdicate our duty of redressing the demonstrated constitutional violation which occurred in the present case. *See generally Scott*, 381 U.S. at 409, 14 L. Ed. 2d at 478.

Although the United States Supreme Court has held that multi-member districts are not *per se* invalid under the federal Equal Protection Clause, *Whitcomb v. Chavis*, 403 U.S. 124, 142, 29 L. Ed. 2d 363, 375 (1971), the Court has nonetheless instructed federal district courts to avoid the creation of multi-member districts in the remedial stage of an apportionment dispute, *Connor v. Johnson*, 402 U.S. 690, 692, 29 L. Ed. 2d 268, 270-71 (1971). The Court has observed that ballots containing multi-member districts "tend to become unwieldy, confusing, and too lengthy to allow thoughtful consideration."[5] *Chapman*, 420 U.S. at 15, 42 L. Ed. 2d at 778. The Court has also recognized that multi-member districts may well "operate to minimize or cancel out the voting strength of racial or political ele-

5. Federal law expressly requires that states use single-member districts in reapportioning their congressional representation. *See* 2 U.S.C. § 2c (2000); *Whitcomb*, 403 U.S. at 158-59 n.39, 29 L. Ed. 2d at 385 n.39.

ments of the voting population." *Fortson v. Dorsey*, 379 U.S. 433, 439, 13 L. Ed. 2d 401, 405 (1965), *quoted in Gingles*, 478 U.S. at 47, 92 L. Ed. 2d at 44.

Amicus asserts that the voting strength of minority voters will be unlawfully diluted by application of the WCP in a manner which permits the creation of multi-member legislative districts containing predominately nonminority voters adjacent to single-member VRA districts. At a minimum, by asserting this argument, amicus challenges the legal propriety of multi-member districts within North Carolina legislative redistricting plans. Accordingly, we turn to address the constitutional propriety of such districts, in the public interest, in order to effect a comprehensive remedy to the constitutional violation which occurred in the instant case.

Article I, Section 19 of the State Constitution provides, in pertinent part, that "[n]o person shall be denied the equal protection of the laws." We observe, as amicus alleges, that voters in single-member legislative districts, surrounded by multi-member districts, suffer electoral disadvantage because, at a minimum, they are not permitted to vote for the same number of legislators and may not enjoy the same representational influence or "clout" as voters represented by a slate of legislators within a multi-member district. Conversely, voters in multi-member districts invariably suffer the adverse consequences described by the United States Supreme Court: unwieldy, confusing, and unreasonably lengthy ballots; and minimization of minority voting strength. *Gingles*, 478 U.S. at 47, 92 L. Ed. 2d at 44; *Chapman*, 420 U.S. at 15, 42 L. Ed. 2d at 778; *see also Fortson*, 379 U.S. at 439, 13 L. Ed. 2d at 405.

The Equal Protection Clause of Article I, Section 19 of the State Constitution prohibits the State from denying any person the equal protection of the laws. Before embarking upon an equal protection analysis, we must first determine the level of scrutiny to apply. *Department of Transp. v. Rowe*, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001), *cert. denied*, —— U.S. ——, 151 L. Ed. 2d 972 (2002). Strict scrutiny, this Court's highest tier of review, applies "when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *White*, 308 N.C. at 766, 304 S.E.2d at 204; *see also Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980). Under strict scrutiny, a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest. *Northampton Cty.*

Drainage Dist. No. One v. Bailey, 326 N.C. 742, 746, 392 S.E.2d 352, 355 (1990).

It is well settled in this State that "the right to vote on equal terms is a fundamental right." *Id.* at 747, 392 S.E.2d at 356; *see also Preston*, 325 N.C. at 454, 385 S.E.2d at 481; *Texfi Indus., Inc.*, 301 N.C. at 12, 269 S.E.2d at 149. The classification of voters into both single-member and multi-member districts within plaintiffs' proposed remedial plans necessarily implicates the fundamental right to vote on equal terms, and thus strict scrutiny is the applicable standard.

In applying such standard, we note, for instance, that under plaintiffs' proposed five percent House Plan, voters in multi-member District 36 (Buncombe, McDowell, and Burke Counties) may vote for a contingent of five Representatives, while voters in neighboring District 38 (Haywood and Swain Counties) elect only one Representative. Likewise, in plaintiffs' proposed five percent Senate Plan, multi-member District 13 (Caswell, Rockingham, Guilford, Randolph, Davidson, and Forsyth Counties) voters elect a contingent of five Senators, while in neighboring District 19 (Rowan and Davie Counties), voters elect only one Senator. These classifications, as used within plaintiffs' proposed remedial plans, create an impermissible distinction among similarly situated citizens based upon the population density of the area in which they reside.

In this context, we examine the provisions of Article II, Sections 3(1) and 5(1) of the State Constitution to determine whether the use of both single-member and multi-member districts within the same redistricting plan violates the Equal Protection Clause of the State Constitution. *See* N.C. Const. art. I, § 19. We recognize that a constitution cannot be in violation of itself, *Leandro v. State*, 346 N.C. 336, 352, 488 S.E.2d 249, 258 (1997), and that all constitutional provisions must be read *in pari materia*, *In re Peoples*, 296 N.C. 109, 159, 250 S.E.2d 890, 919 (1978) (citing *Williamson v. City of High Point*, 213 N.C. 96, 103, 195 S.E. 90, 94 (1938), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979), and *Parvin v. Board of Comm'rs of Beaufort Cty.*, 177 N.C. 508, 511, 99 S.E. 432, 434 (1919)). These rules of construction require us to construe Article II, Sections 3(1) and 5(1) in conjunction with Article I, Section 19 in such a manner as to avoid internal textual conflict.

Article II, Sections 3(1) and 5(1) begin by stating that "[e]ach Senator [or Representative] shall represent, as nearly as may be, an equal number of inhabitants." These words embody the principle of

"one-person, one-vote." The proviso that follows in each section adds "the number of inhabitants that each Senator [or Representative] represents being determined for this purpose by dividing the population of the district that he [or she] represents by the number of Senators [or Representatives] apportioned to that district." These provisos arguably contemplate multi-member districts by stating that, for apportionment purposes, each member of the General Assembly from such a district represents a fraction of the voters in that district. The principle of "one-person, one-vote" is preserved because the number of voters in each member's fraction of the multi-member district is the same as the number of voters in a single-member district.

However, in practice, these theoretical divisions within such districts do not work because every Representative or Senator from such a district represents and is supported by every resident in the district, not just those voters making up the fraction of the district comprising the theoretical constituency. Members do not "divide the population of the district that he [or she] represents" to determine their "true" constituency. As a consequence, those living in such districts may call upon a contingent of responsive Senators and Representatives to press their interests, while those in a single-member district may rely upon only one Senator or Representative. Thus, although the people have mandated in their Constitution that all North Carolinians enjoy substantially equal voting power, *Northampton Cty. Drainage Dist. No. One*, 326 N.C. at 746, 392 S.E.2d at 355, the same Constitution contains language which appears to deny voters in single-member districts their right to substantially equal legislative representation. Accordingly, and consistent with the analysis found elsewhere in this opinion, we hold that the language quoted above purporting to allow multi-member districts is effective only within a limited context. We conclude that, while instructive as to how multi-member districts may be used compatibly with "one-person, one-vote" principles, Article II, Sections 3(1) and 5(1) are not affirmative constitutional mandates and do not authorize use of both single-member and multi-member districts in a manner violative of the fundamental right of each North Carolinian to substantially equal voting power.

The proposition that use of both single-member and multi-member districts within the same redistricting plan violates equal protection principles is not novel. In *Kruidenier v. McCulloch*, 258 Iowa 1121, 142 N.W.2d 355, *cert. denied*, 385 U.S. 851, 17 L. Ed. 2d 80

(1966), the Iowa Supreme Court concluded that legislative redistricting schemes, in which there were multi-member districts and single-member districts in the same house plan, unconstitutionally impaired the rights of residents within single-member districts. The Court observed the following example from the apportionment scheme at issue there: "The resident of Warren County can vote for 1/61 of the senate and 1/124 of the house. The resident of Polk County can vote for 1/12 of the senate and 1/11 of the house." *Id.* at 1147, 142 N.W.2d at 370. The Court concluded that the "mere statement of this example disclose[d] the basic unfairness, inequality and lack of uniformity inherent in such a scheme of legislative apportionment" and stated:

> *Equal voting power for all citizens is the goal.* Proposed legislation requires a majority vote of the members of each house to become a law. It is a political reality that legislators are much more inclined to listen to and support a constituent than an outsider with the same problem. It is equally basic that much legislative work is done by committees and there is a distinct advantage in having one's own representative sitting as a member of a committee considering legislation in which one has an interest. . . . Particularly in personal interest legislation the resident of [the multi-member district] has an unfair and unequal advantage over the resident of . . . any other single-member district. He has a much greater opportunity to find legislators to espouse his cause and a much greater chance that one or more of his representatives will be on the committee to which his legislation is assigned. His voting power is much greater.

Id. at 1147-48, 142 N.W.2d at 370-71 (emphasis added).

The Iowa Supreme Court concluded that any legislative apportionment scheme containing both multi-member and single-member legislative districts unlawfully impaired the right of a resident within a single-member district under both the Iowa Constitution and the Constitution of the United States. *Id.* at 1148, 1156, 142 N.W.2d at 371, 375. The Iowa Supreme Court qualified its holding by stating that, to the extent a rational plan of apportionment could not be achieved by using all single-member districts, the possibility existed that use of some multi-member districts could be constitutionally permissible. *Id.*

In our view, use of *both* single-member and multi-member districts within the same redistricting plan violates the Equal Protection

Clause of the State Constitution[6] unless it is established that inclusion of multi-member districts advances a compelling state interest. Therefore, the trial court is directed on remand to afford the opportunity to establish, at an evidentiary hearing, that the use of such districts advances a compelling state interest within the context of a specific, proposed remedial plan.[7]

With respect to redistricting plans, undoubtedly, federal law impacts the functional application of the WCP but does not, as suggested by defendants, totally void it. To accept defendants' logic would necessarily imply that any time Congress enacted a law which even superficially touched upon an area of primary state responsibility, all related state provisions within the challenged area of state jurisprudence would be immediately and entirely nullified. Such a presumption reflects a misunderstanding of federal preemption analysis.

As noted by the United States Supreme Court in *Shaw v. Reno* and by the USDOJ in its previous correspondence and administrative regulations, operation of federal law does not preclude states from recognizing traditional political subdivisions when drawing their legislative districts. *Shaw*, 509 U.S. at 647, 125 L. Ed. 2d at 528; *see also* 66 Fed. Reg. 5413; *Growe*, 507 U.S. at 34, 122 L. Ed. 2d at 400; 1981 USDOJ letter. Although we discern no congressional intent, either express or implied, to preempt the WCP through the operation of the VRA, we also recognize that the WCP may not be interpreted literally because of the VRA and "one-person, one-vote" principles. *See Guerra*, 479 U.S. at 280-81, 93 L. Ed. 2d at 623; 1981 USDOJ letter. Federal law, therefore, preempts the State Constitution only to the extent that the WCP actually conflicts with the VRA and other federal requirements relating to state legislative redistricting and reapportionment. *See Guerra*, 479 U.S. at 281, 93 L. Ed. 2d at 623. It remains possible, therefore, to comply with both the VRA and the WCP as reconciled with other provisions of state law. *See Florida Lime*, 373 U.S. at 142, 10 L. Ed. 2d at 256-57. Our interpretation of the WCP does

6. It is beyond dispute that this Court "ha[s] the authority to construe [the State Constitution] differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision." *State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988).

7. In the event such a hearing is requested on remand, the trial court is authorized to take all necessary remedial actions to ensure that the primary elections for legislative offices are conducted in a timely and expeditious manner and consistent with the general election scheduled for 5 November 2002.

not create a conflict with the VRA, nor does it frustrate the objectives and purposes of federal law. *See id.* Accordingly, the contention that the WCP is wholly unenforceable as a matter of federal preemption analysis is untenable.

In addition to our obligation to ensure that the WCP complies with federal law, it must also be reconciled with other legal requirements of the State Constitution. In this respect, an application of the WCP that abrogates the equal right to vote, a *fundamental* right under the State Constitution, must be avoided in order to uphold the principles of substantially equal voting power and substantially equal legislative representation arising from that same Constitution.

Without question, the intent of the WCP is to limit the General Assembly's ability to draw legislative districts without according county lines a reasonable measure of respect. Prior to the imposition of "one-person, one-vote" and VRA requirements, implementation of the provision was simple and straightforward. However, despite the advent of the VRA and "one-person, one-vote" principles, we are not permitted to construe the WCP mandate as now being in some fashion unmanageable, or to limit its application to only a handful of counties. Any attempt to do so would be an abrogation of the Court's duty to follow a reasonable, workable, and effective interpretation that maintains the people's express wishes to contain legislative district boundaries within county lines whenever possible. As we stated in *State ex rel Martin v. Preston*, "Progress demands that government should be further refined in order to best respond to changing conditions. Several provisions of our Constitution provide the elasticity which ensures the responsive operation of government." *Preston*, 325 N.C. at 458, 385 S.E.2d at 484.

To accomplish this task, we accept the obvious: that in the absence of large multi-member districts, the ability to substantially preserve external county boundaries while complying with the VRA, "one-person, one-vote," and State equal protection requirements, would be impossible without the ability to draw single-member districts within counties or aggregated groups of counties. As a result, the WCP is interpreted consistent with federal law and reconciled with equal protection requirements under the State Constitution by requiring the formation of single-member districts in North Carolina legislative redistricting plans. The boundaries of such single-member districts, however, may not cross county lines except as outlined below.

[2] Consistent with the legal analysis set forth above, we direct the trial court, during the remedial stage of the instant proceeding, to ensure that redistricting plans for the North Carolina Senate and North Carolina House of Representatives comply with the following requirements.

On remand, to ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts. The USDOJ precleared the 2001 legislative redistricting plans, and the VRA districts contained therein, on 11 February 2002. This administrative determination signified that, in the opinion of the USDOJ, the 2001 legislative redistricting plans had no retrogressive effect upon minority voters. In the formation of VRA districts within the revised redistricting plans on remand, we likewise direct the trial court to ensure that VRA districts are formed consistent with federal law and in a manner having no retrogressive effect upon minority voters. To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP, as herein established for all redistricting plans and districts throughout the State.

[3] In forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal "one-person, one-vote" requirements.

In counties having a 2000 census population sufficient to support the formation of one non-VRA legislative district falling at or within plus or minus five percent deviation from the ideal population consistent with "one-person, one-vote" requirements, the WCP requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county.

When two or more non-VRA legislative districts may be created within a single county, which districts fall at or within plus or minus five percent deviation from the ideal population consistent with "one-person, one-vote" requirements, single-member non-VRA districts shall be formed within said county. Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county.

In counties having a non-VRA population pool which cannot support at least one legislative district at or within plus or minus five percent of the ideal population for a legislative district or, alternatively,

counties having a non-VRA population pool which, if divided into districts, would not comply with the at or within plus or minus five percent "one-person, one-vote" standard, the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard. Within any such contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping; provided, however, that the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard. The intent underlying the WCP must be enforced to the maximum extent possible; thus, only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard shall be combined, and communities of interest should be considered in the formation of compact and contiguous electoral districts.

Because multi-member legislative districts, at least when used in conjunction with single-member legislative districts in the same redistricting plan, are subject to strict scrutiny under the Equal Protection Clause of the State Constitution, multi-member districts shall not be used in the formation of legislative districts unless it is established that such districts are necessary to advance a compelling governmental interest.

Finally, we direct that any new redistricting plans, including any proposed on remand in this case, shall depart from strict compliance with the legal requirements set forth herein only to the extent necessary to comply with federal law.

This Court has verified independently that the above requirements of the State Constitution, including the WCP and the Equal Protection Clause, can in fact be reconciled and applied in a manner consistent therewith, as well as with federal requirements, including the VRA and "one-person, one-vote" principles. This verification was achieved through use of a software program which is used by the General Assembly during the redistricting process and which the General Assembly makes generally available to members of the public.

The General Assembly optimally should be afforded the first opportunity to enact new redistricting plans for the North Carolina Senate and North Carolina House of Representatives based on the 2000 census and the constitutional requirements which we have upheld in this opinion. Defendants have represented, however, that there is insufficient time for the General Assembly to enact new plans for use in the 2002 election cycle. Accordingly, we direct the trial court to conduct a hearing, on an expedited basis, on the question of the feasibility of allowing the General Assembly the first opportunity to develop new redistricting plans. The General Assembly should be accorded the first opportunity to draw the new plans if so doing will not disrupt the timing of the 2002 general election. In the event defendants are unable to demonstrate that the General Assembly is able to develop new redistricting plans in accordance with the timetable established by the trial court, the trial court is authorized and directed to seek proposed remedial plans,[8] review and adopt temporary or interim remedial plans for the North Carolina Senate and North Carolina House of Representatives, and seek preclearance thereof, for use in the 2002 election cycle.[9]

Based upon our thorough review of the extensive materials filed in this Court in this case, we believe that the people's insertion of a whole-county requirement within their Constitution was not an historical accident. Rather, we believe that this provision was inserted by the people of North Carolina as an objective limitation upon the authority of incumbent legislators to redistrict and reapportion in a manner inconsistent with the importance that North Carolinians traditionally have placed upon their respective county units in terms of their relationship to State government. Enforcement of the WCP will, in all likelihood, foster improved voter morale, voter turnout, and public respect for State government, and specifically, the General Assembly as an institution; will assist election officials in conducting elections at lower cost to the taxpayers of this State; and will instill a renewed sense of community and regional cooperation within the respective countywide or regionally formed legislative delegations mandated by the WCP. For instance, there will again be countywide delegations and, in rural areas, contiguous multi-county delegations

8. The trial court should consider whether a court-appointed expert would be of assistance in ensuring compliance with federal law and state constitutional requirements. *See* N.C.G.S. § 8C-1, Rule 706 (1999).

9. In this event, the General Assembly shall be accorded the opportunity to enact new redistricting plans, consistent with the constitutional requirements set forth herein, during its 2003 session.

in the General Assembly, which, in working with legislative delegations from other regions of the State, can more effectively work together in a positive manner on matters of mutual concern to citizens of our State.

Accordingly, the orders of the trial court below are affirmed as modified,[10] the stay issued by this Court is lifted, and the trial court is authorized to enter such further orders as necessary to implement our holdings in this opinion.

AFFIRMED AS MODIFIED.

Pursuant to Rule 32 of the North Carolina Rules of Appellate Procedure, the mandate of this opinion is expedited and shall issue at 12:00 o'clock noon on 3 May 2002.

10. We have reviewed and considered all other issues and assignments of error presented by the parties and conclude that they do not need to be addressed in order to effect a full and proper resolution of this case.


Attachment A
2001 Senate Plan


Attachment B
2001 House Plan

Justice ORR concurring in part and dissenting in part.

While I agree with the ultimate conclusion of the majority—that the trial court correctly ruled the redistricting plans at issue unconstitutional—I do so for different reasons. As to the remedial portion of the majority decision, I disagree with the majority's utilization of a State Equal Protection argument to conclude that "multi-member" districts are unconstitutional and with the majority's imposition of a plus-or-minus-five percent standard for drawing new districts. Therefore, I am compelled to write separately and to concur in part and dissent in part to the majority's opinion.

I.

The second issue advanced by the defendants is that "the trial court impermissibly enforced ineffective constitutional amendments when it struck down the enacted redistricting plans." The basis for this argument is that the state constitutional provisions at issue are unenforceable under section 5 of the Voting Rights Act (VRA). Defendants argue that "because the constitutional amendments were never precleared, they have no force and effect and cannot be relied upon in redrawing the State's legislative districts." As to the portion of the majority opinion addressing defendants' contentions, under the heading of "Effect of 1981 USDOJ Objection to Redistricting Plan and Decision of Federal District Court in *Cavanagh v. Brock*," 577 F. Supp. 176 (E.D.N.C., 1983), I concur in both the reasoning and result.

The constitutional amendments at issue were properly passed by the General Assembly and adopted by the voters of this State. *See* Act of May 31, 1967, ch. 640, 1967 N.C. Sess. Laws 704; John L. Sanders & John F. Lomax, Jr., *Amendments to the Constitution of North Carolina: 1776-1996*, at 15 (Inst. of Gov't, Univ. of N.C. at Chapel Hill, 1997). These amendments were further carried forward in the revision and updating of the North Carolina Constitution submitted to the people in 1970 and duly enacted. Thus, on their face, these amendments are valid and binding provisions of our State Constitution. As a result, any constitutional problems with regard to these amendments could arise only if the application of the provisions conflicted with the United States Constitution or federal legislation amid a redistricting plan's submission. The view that the so-called "whole-county provisions" (WCP) can be challenged only in the context of a specific redistricting plan is further buttressed by the very language of the constitutional provisions at issue. "No county

shall be divided in *the formation of* a [legislative] district." N.C. Const. art II, §§ 3(3), 5(3) (emphasis added (hereinafter collectively referred to as the "WCP" for purposes of reference to either or both the Senate provision, section 3(3), and the House of Representative provision, section 5(3)). The WCP, therefore, by its own terms, means absolutely nothing except when it is utilized to form a district. Thus, as the majority correctly concludes, defendants' argument—in sum, that the provision has somehow been rendered inapplicable—must fail because the provision is mandatory and binding unless *the plan utilizing it* is shown to be in violation of federal law.

II.

Having determined that the WCP is a valid and binding state constitutional provision, the next fundamental issue is whether the redistricting plans submitted by the State violate the WCP. The majority, having earlier in its opinion noted the inordinate number of divided counties in the submitted plans, holds in one sentence that such plans violate the WCP and are therefore void. The majority then proceeds immediately to the remedial portion of the opinion. While ultimately reaching a similar conclusion, I find it necessary and appropriate to address defendants' core argument that county lines must be divided because of the federal mandatory requirements of "one person, one vote" and the Voting Rights Act's restrictions and defendants' contention that the trial court erred in its order by establishing criteria under which new redistricting plans are to be drawn.

In large part, defendants' argument questions the necessity of large multi-member districts—either single-county or multi-county—and the inherent failings of any criteria allowing such districts. Plaintiffs' counter-argument and proposed remedial plan relies in large part on the use of multi-member districts, many of which incorporate multiple counties, ostensibly in order to comply with the WCP.

It is necessary to examine the contentions of the parties in the context of the application and interpretation of the WCP, as well as in the context of the WCP's interrelationship with other constitutional provisions—i.e., those that govern the General Assembly's constitutional duty to draw legislative districts. Our examination of the constitutional provisions at issue is guided by the following interpretation principles articulated by then Justice Joseph Branch (later Chief Justice) some twenty-five years ago:

> The North Carolina Constitution expresses the will of the people of this State and is, therefore, the supreme law of the land. Thus, it is a fundamental principle of constitutional construction that effect must be given to the intent of the people adopting the Constitution, or an amendment thereto, and that constitutional provisions should be construed in consonance with the objectives and purposes sought to be accomplished, giving due consideration to the conditions then existing. It is well established that, in construing either the federal or State Constitution, what is implied is as much a part of the instrument as what is expressly stated. Further, amendments are to be construed harmoniously with antecedent provisions, insofar as possible.

In re Martin, 295 N.C. 291, 299, 245 S.E.2d 766, 771 (1978) (citations omitted).

With these guideposts of constitutional interpretation before us, I now turn to a review of the constitutional provisions applicable to this case, as expressed in Article II, Section 3 and its subsections, controlling Senate districts and apportionment, and Article II, Section 5 and its subsections, controlling districts and apportionment of the House of Representatives. These provisions, adopted in large part by the 1968 amendments to our then-existing Constitution and readopted as part of the 1971 Constitution, govern and control the process of reapportionment and district-drawing by the General Assembly.

I note at the outset that our State Constitution is not a grant of power but serves instead as a limitation of power, that all power which is not expressly limited by the people in our Constitution remains with the people, and that an act of the people through their representatives in the legislature is valid unless prohibited by that constitution. *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961). Thus, the power of the people, through their elected representatives in the General Assembly, is constrained by the specific limitations imposed by duly adopted constitutional provisions. In this regard, the people of our State, by adopting the 1968 amendments and readopting them in 1970, have affirmatively placed upon the General Assembly certain limitations in the apportionment and redistricting process. It is these limitations that I am called upon to interpret and apply in the context of the issues raised in the instant case.

The first applicable limitation, as expressed in the North Carolina Constitution, Article II, Sections 3(1) and 5(1), provides in part that

"[e]ach [legislator] shall represent, as nearly as may be, an equal number of inhabitants," and stands as our State's embodiment of the "one-person, one vote" edict imposed by the United States Supreme Court in, among other cases, *Gray v. Sanders*, 372 U.S. 368, 379-81, 9 L. Ed. 2d 821, 830-31 (1963) (holding that "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications," and "[t]he idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions," and ultimately concluding that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote"). Thus, Sections 3(1) and 5(1), as constitutional mandates, "express[] the will of the people of this State and [are], therefore, the supreme law of the land." *In re Martin*, 295 N.C. at 299, 245 S.E.2d at 771.

Next, we must consider the aforementioned portion of the provision's limitation in light of its remainder, which provides that "the number of inhabitants that each [legislator] represents [is] determined for this purpose by dividing the population of the district that he represents by the number of [legislators] apportioned to that district." N.C. Const. art. II, §§ 3(1), 5(1). The language of this clause is not particularly clear, nor does it plainly evidence either its intended effect or the intent of the people who voted to adopt it. However, a straightforward reading of the clause leads me to conclude that the General Assembly is required to draw districts, and apportion legislators to those districts, in such numbers as it shall determine. Historically, the practical effect and practice of the General Assembly has been to create at least some multi-member districts. In other words, a large urban county like Wake would have more than one legislator apportioned to it, and in a similar vein, smaller counties would be joined together to form a district also with more than one legislator apportioned to it. However, what this clause does not provide for is a device or method that allows multiple members apportioned to such a district to be elected in at-large fashion. Actually, the clause makes no statement at all about the manner of election; in fact, any imposition of an at-large voting methodology would directly conflict with the primary purpose of the provision, which is to embody the "one-person, one-vote" principle by requiring that each legislator represent an equal number of inhabitants.

I acknowledge that past practice has been to allow at-large elections in any district that has been apportioned multiple members. Support for such an at-large scheme has largely rested on the premise that, for example, a district of 134,000 inhabitants is somehow represented by two Representatives, *each of whom represents 67,000 inhabitants*. However, the premise proves illusory, as shown by the following. First, each Representative elected from such a district is in actuality elected by 134,000 inhabitants; second, each Representative represents each and all of those 134,000 inhabitants; third, each inhabitant of such a district has two elected Representatives, not one. As a result, the at-large election scheme deviates, *and significantly so*, from the "one-person, one-vote" principle by providing greater practical representation for inhabitants in multi-member districts with at-large elections than to those in single-member districts.

As a result of the foregoing analysis, I conclude that Article II, Sections 3(1) and 5(1) of our Constitution prohibit at-large elections within multi-member districts. And while the General Assembly may create multi-member districts (in part to comply with the WCP, as discussed below, and/or in part to comply with "one-person, one-vote" requirements or VRA requirements), those members apportioned to such districts must be elected *from a specified area* that sets off a proportional number of inhabitants based upon the ideal population for House and Senate districts (1/120th of the State's overall population, or approximately 67,000 persons for purposes of the instant case, for House districts, and 1/50th of the state's overall population, or approximately 161,000 persons for purposes of the instant case, for Senate districts).

Since I conclude that the first limitation placed upon the General Assembly by the 1968 amendments—namely, that "[e]ach [legislator] shall represent, as nearly as may be, an equal number of inhabitants," N.C. Const. art. II, §§ 3(1), 5(1)—requires that Representatives and Senators be elected from single-member districts, the fiction of at-large voting and divided representation cannot survive and be faithful to the restrictions of "one person, one vote." It is important to note that this "one-person, one-vote" limitation is no longer just a mandate of constitutional interpretation imposed by the United States Supreme Court on our State. Instead, it is a duly adopted limitation on legislative redistricting, expressly memorialized in our State Constitution, and as such reflects "the will of the people of this State and, is, therefore, the supreme law of the land." *In re Martin*, 295 N.C. at 299, 245 S.E.2d at 771.

The remedial portion of the majority opinion declares that in single counties with two or more non-VRA districts, single-member districts *must* be formed within the county; further, the majority asserts that in "contiguous multi-county groupings, interior county lines within such groupings may be crossed or traversed" in the creation of the required single-member districts. However, what the majority fails to articulate is why those circumstances do *not* violate the WCP requirement to not divide a county in the formation of a legislative district. While I concur with the result of the bare implied assertion that such division does not violate the WCP, I feel compelled to offer a legal rationale for such a conclusion.

The WCP provides that "[n]o county shall be divided in the formation of a [legislative] district." The provision, requiring that counties not be divided in drawing districts, was enacted contemporaneously with the "one-person, one-vote" provisions in Article II, Sections 3(1) and 5(1). While not facially inconsistent, the practical implementation of the two subsections is complicated by their seemingly contrasting effects. Simple geography suggests that strict adherence to the WCP may prove untenable in light of "one-person, one-vote" and VRA requirements, which may force divisions between residents of the same county. Nevertheless, this Court must reconcile and harmonize the two provisions, guided by the mandate of the people, who imposed upon the General Assembly the specific limitations that: (1) one legislator be elected from a predetermined number of designated constituents based upon "one-person, one vote" principles; and (2) counties not be divided in the formation of legislative districts.

"In order to ascertain the meaning of [an] amendment to the Constitution, it is appropriate to consider it *in pari materia* with the other sections of our Constitution which it was intended to supplement." *In re Peoples*, 296 N.C. 109, 159, 250 S.E.2d 890, 919 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). "Where possible[,] amendments to the Constitution should be given a practical interpretation which will carry out the plainly manifested purpose of those who created them." *Id.* at 162, 250 S.E.2d at 920. In honoring these principles of constitutional interpretation, as set forth by then Chief Justice Susie Sharp in *In re Peoples*, we must view the "whole-county provision" in a practical light and attempt to interpret it in such a way as to carry out its manifest purpose (as expressed by the people). As noted by the majority, the intent of the provision is to limit the General Assembly's ability to draw legislative districts without regard

to county lines (a practice the current plans do extensively), and prior to the imposition of "one-person, one-vote" requirements and the VRA, implementation of the provision was simple and straightforward. In addition, the natural advent of complications arising from the implementation of the VRA and "one-person, one vote" principles does not permit me to construe the WCP mandate as if it had been rendered unmanageable by the federal mandates, or even to limit its application to but a handful of counties. In my view, any attempt to do so would be an abrogation of the Court's duty: (1) to find a practical interpretation of the provision consistent with "one-person, one-vote" principles; and (2) to maintain the people's express wishes to contain district boundaries to county lines.

Without at-large elections in multi-member districts, the ability to purely follow external county boundaries in order to comply with VRA requirements and with "one-person, one-vote" limitations would be impossible without the ability to draw single-member districts within the confines of: (1) any multi-member district composed of a single county, and/or; (2) any multi-member district composed of multiple counties. Therefore, in order to honor the will of the people, I would conclude that single-member districts that traverse county lines within the confines of a multi-county district do not violate the WCP of our State Constitution. Similarly, I would also conclude that single-member districts that dissect a single, highly populated county do not do so either. *See Kruidenier v. McCulloch*, 258 Iowa 1121, 142 N.W.2d 355 (holding that there is no "division" of a county as long as a district is entirely within a specific county), *cert. denied*, 385 U.S. 851, 17 L. Ed. 2d 80 (1966).

To construe the WCP in a more literal fashion, as argued by the parties, would be to ultimately invalidate this provision as a practical matter.

> "A constitution should not receive a technical construction as if it were an ordinary instrument or statute. It should be interpreted so as to carry out the general principles of the government, and not defeat them." The opinion quotes the following: "When we construe a constitution by implication of such rigor and inflexibility as to defeat the legislative regulations, we not only violate accepted principles of interpretation, but we destroy the rights which the Constitution intended to guard."

Stedman v. City of Winston-Salem, 204 N.C. 203, 206, 167 S.E. 813, 815 (1933) (quoting *Jenkins v. State Bd. of Elections*, 180 N.C. 169, 175, 104 S.E. 346, 348 (1920)).

As to the ultimate question before us, the record is uncontroverted that the provisions of our State Constitution limiting the General Assembly's power in redistricting have been violated by defendants' redistricting plans as submitted. Thus, such plans were properly ruled to be invalid and unconstitutional by the trial court.

III.

As to other sections of the remedial portion of the majority's opinion, I am compelled to dissent on the grounds stated below.

While a remedy may be "merely the means of carrying into effect a substantive principle or policy," Dan B. Dobbs, *Handbook on the Law of Remedies: Damages—Equity—Restitution* § 1.2, at 3 (1973), the context of legislative redistricting—which is a duty specifically assigned to the General Assembly under our State Constitution—requires a reviewing court to impose remedial actions as narrowly as possible. Thus, having found the redistricting plans at issue unconstitutional and invalid, the majority, in my view, appears to go beyond that which is necessary to remedy the constitutional violations and command compliance. This Court should not attempt to micromanage the legislative function of drawing new districts. Regrettably, I therefore conclude that the majority has exceeded the necessary scope of its remedy function, and I must dissent from that portion of its opinion.

First, the majority imposes a new limitation on the General Assembly in creating legislative districts by mandating that "any deviation from the ideal population for a legislative district *shall* be at or within plus or minus five percent for purposes of compliance with federal 'one-person, one-vote' requirements." (Emphasis added.) While this deviation in a plan has been declared presumptively constitutional by the United States Supreme Court, *see, e.g.*, *Brown v. Thomson*, 462 U.S. 835, 842-43, 77 L. Ed. 2d 214, 221-22 (1983), it has *never* been imposed as an absolute limit. For example, as noted by plaintiffs in their brief, the Supreme Court, in *Mahan v. Howell*, 410 U.S. 315, 328, 35 L. Ed. 2d 320, 332 (1973), held that a state *may* go to a higher range of deviation in creating legislative districts if its reason for doing so is based upon some rational neutral criteria. *See, e.g.*, *Brown*, 462 U.S. at 842-43, 77 L. Ed. 2d at 221-22.

In complying with "one-person, one-vote" principles, the United States Supreme Court has stated that the burden is on the State to prove that population deviations among its various congressional districts are constitutionally acceptable. *See, e.g., Karcher v. Daggett*, 462 U.S. 725, 740, 77 L. Ed. 2d 133, 147 (1983). And while the State may not rely on general assertions, "[t]he showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely." *Id.* at 741, 77 L. Ed. 2d at 147. The United States Supreme Court has also acknowledged that since congressional redistricting plans will be in effect for a minimum of ten years (as are North Carolina's legislative plans), "[s]ituations may arise where substantial population shifts over such a period can be anticipated." *Kirkpatrick v. Preisler*, 394 U.S. 526, 535, 22 L. Ed. 2d 519, 527 (1969). And "[w]here these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them," *id.*, so long as "[f]indings as to [such] population trends [are] thoroughly documented and applied throughout the State in a systematic, not an ad hoc, manner," *id.*; *see also White v. Weiser*, 412 U.S. 783, 37 L. Ed. 2d 335 (1973). Therefore, in applying these principles to redistricting plans for the North Carolina Senate and House of Representatives, districts could be drawn with higher or lower populations than is required under strict "one-person, one-vote" guidelines—as exemplified by the plus-or-minus-five-percent threshold now mandated by the majority—if criteria demonstrates that the projected population shifts can be predicted with a high degree of accuracy.

A recent newspaper article stated that Wake County was among county leaders in population growth rates. The county gained 27,796 residents in just fifteen months, while the State grew by 109,000 people. Ned Glascock, *Wake Leads Rapid Growth*, The News and Observer (Raleigh), Apr. 29, 2002, at B1. The article went on to state that several counties exceeded Wake's growth rate, with Union County experiencing the greatest growth rate (7.3%) of any county between 1 April 2000 and 1 July 2001. *Id.* Thus, should the General Assembly choose to consider growth patterns and to draw districts reflecting them, the majority opinion's plus-or-minus five percent mandate may well serve to preclude it from doing so. In my view, even the prospect of such a limitation is neither a necessary nor appropriate judicial imposition on the General Assembly, which in

practice is faced with the difficult task of drawing districts in compliance with a range of existing legal requirements.

Second, the majority, in the remedial portion of its opinion, also mandates that in "counties having a 2000 census population sufficient to support the formation of one non-VRA legislative district falling within plus or minus five percent deviation from the ideal population consistent with 'one-person, one-vote' requirements, the WCP requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county." The practical effect of this edict is to require the General Assembly to create a single-county, single-member district under the described circumstances. While that might be desirable, I conclude that mandating that the General Assembly do so likewise is neither necessary nor appropriate in the context of this case.

Third, again as part of the remedial section of its opinion, the majority uses a state equal protection argument based upon Article I, Section 19, to, in effect, hold portions of Article II, Sections 3(1) and 5(1) in violation of the State Constitution. While not precisely saying so, the majority holds that future use of multi-member districts is effectively struck down as unconstitutional. In concluding that the "use of *both* single-member and multi-member districts within the same redistricting plan violates the Equal Protection Clause of the State Constitution" (emphasis added), the majority plows new and unsettling ground. First, such a holding appears to hold one clause of the State Constitution as overruling another, in violation of a long-standing tenet of constitutional interpretation. *See Leandro v. State*, 346 N.C. 336, 352, 488 S.E.2d 249, 258 (1997) ("It is axiomatic that the terms or requirements of a constitution cannot be in violation of the same constitution—a constitution cannot violate itself."). Moreover, by stating that use of *both* single-member and multi-member districts is not constitutional, the majority at least implies that a plan using all multi-member districts could prove to be constitutional, a proposition that I question and one that the majority's own conclusion would appear to contradict.

Fourth, the use of our State Constitution's Equal Protection Clause to arguably strike down multi-member districts—when the United States Supreme Court has held to the contrary under the United States Constitution—marks one of those rare occasions where greater protection has been afforded under our State Constitution than under its federal counterpart. While acceptable to

do so, *see, e.g., State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988), I question whether this is the appropriate circumstance in which to do so.

Fifth, the majority places a caveat in its holding by stating that multi-member districts may be permitted if they are shown to advance "a compelling state interest." By then remanding the case to the trial court in order to allow evidence on whether a compelling state interest exists for *any* multi-member district, the majority potentially postpones a final resolution of this matter, which may well result in a protracted period of litigation.

Sixth, I question whether utilizing a State Constitution Equal Protection Clause argument in the remedial section is appropriate at all. No party raised such an issue at trial, nor did anyone argue such an issue to this Court. Likewise, no questions were propounded by this Court at oral argument contemplating such an issue. In this vein, I still agree with former Chief Justice Burley Mitchell, with whom I joined in a separate concurrence in *Nelson v. Freeland*: "I think it inadvisable to render an opinion of the magnitude of that entered by the majority in the case when, as here, . . . this Court has not had the benefit of briefs and arguments on the issued decided by the majority." 349 N.C. 615, 634, 507 S.E.2d 882, 893 (1998).

Seventh, and finally, in my view, the only remedial requirements that are compelled by this case are as follows:

(I) The General Assembly must first comply with the following mandatory criteria in drawing districts:

(1) United States constitutional requirements for "one person, one vote," with population variations within the districts being controlled by applicable federal case law;

(2) Voting Rights Act requirements;

(3) State constitutional requirements to the extent possible and not inconsistent with mandatory criteria specified in (1) and (2), above; such state requirements include:

(a) legislators shall be elected from single-member districts;

(b) counties shall not be divided in the formation of districts, except boundaries of areas within counties from which individual members are elected may divide a single county internally or

cross a county line within a multi-county district to the minimal extent necessary.

(II) The General Assembly may also utilize nonmandatory criteria acknowledged by the federal courts as acceptable—i.e., community of interest, incumbent protection, and partisan considerations—so long as such use does not result in a violation of the mandatory criteria.

IV.

As to all other issues presented, including the justiciability issue raised by defendants, I would further take exception with footnote 10 of the majority opinion, which says that such other issues "do not need to be addressed in order to effect a full and proper resolution of this case." However, having reviewed those issues, I would conclude that they have no merit.

Thus, for the reasons set forth above, I concur in part with, and dissent in part from, the majority opinion.

Justice PARKER dissenting.

The sole issue before this Court is whether the trial court erred in ruling that the redistricting plans duly enacted by the General Assembly on 13 November 2001 and precleared by the United States Department of Justice on 11 February 2002 violate Article II, Sections 3(3) and 5(3) of the North Carolina Constitution ("State Constitution"). Defendants contend the trial court did err; I agree and vote to reverse.

Section 5 of the Voting Rights Act of 1965, as amended, prohibits "covered" jurisdictions from implementing or enforcing any changes to a "standard, practice, or procedure with respect to voting" unless those provisions have first been "precleared." 42 U.S.C. § 1973c (1994). Forty of North Carolina's one hundred counties are "covered" for purposes of section 5 preclearance requirements.

In 1966, North Carolina's legislative districts for the State House and Senate and the state constitutional provisions then governing the drawing of State House districts were held unconstitutional based on federal one-person, one-vote requirements. *Drum v. Seawell*, 249 F. Supp. 877 (M.D.N.C. 1965), *aff'd per curiam*, 383 U.S. 831, 16 L. Ed. 2d 298 (1966). In response the 1967 General Assembly enacted proposed constitutional amendments to redefine the manner

in which the General Assembly should proceed each decade to draw new legislative districts based on the decennial census. Those proposed amendments provided that "[n]o county shall be divided in the formation of a" House or Senate district. Act of May 31, 1967, ch. 640, secs. 1, 3, 1967 N.C. Sess. Laws 704, 704-05.[11] These amendments were submitted to the voters in 1968 on a ballot reading as follows: "FOR constitutional amendments continuing present system of representation in the General Assembly," and "AGAINST constitutional amendments continuing present system of representation in the General Assembly." *Id.* at secs. 7, 8, 1967 N.C. Sess. Laws at 706. At that time the State Constitution provided that each county would elect at least one member to the House of Representatives, N.C. Const. of 1868, art. II, § 5 (1962) (amended 1968), and mandated a ratio system to apportion the remaining Representatives, N.C. Const. of 1868, art. II, § 6 (1876) (amended 1968). With respect to the Senate the Constitution provided that the Senate would consist of fifty Senators, N.C. Const. of 1868, art. II, § 3, and that no county would be divided unless the county was equitably entitled to two or more Senators, N.C. Const. of 1868, art. II, § 4 (1876) (amended 1968). The amendments submitted to the people in 1968 also contained the provisions now found in Sections 3(1) and 5(1) of the 1971 State Constitution providing for one-person, one-vote and delineating the formula for determining how many Senators or Representatives a district would have. Ch. 640, secs. 1, 3, 1967 N.C. Sess. Laws at 704-05. These amendments were ratified by the voters and were carried over without substantive changes into the 1971 Constitution. *See* N.C. Const. art. II, §§ 3(1), 5(1).

The 1968 constitutional amendments were not initially submitted to the Department of Justice for preclearance under section 5 of the Voting Rights Act, nor were they precleared by virtue of litigation in the United States District Court for the District of Columbia. However, the 1971 Constitution was promptly submitted to, and precleared by, the United States Department of Justice after its ratification by the voters.

The prohibitions on dividing counties were followed in the 1971 and 1981 redrawing of state legislative districts. Late in 1981 an action was filed against state officials in their official capacity chal-

11. These amendments are embodied in two separate substantively identical provisions of our State Constitution. *See* N.C. Const. art. II, §§ 3(3), 5(3). However, for the sake of clarity, this dissent refers to these two provisions in the singular ("the provision").

lenging the legislative districts on the basis that the State had failed to obtain preclearance of the 1968 amendments precluding division of counties in the drawing of legislative districts. *Gingles v. Edmisten*, 590 F. Supp. 345, 350 (E.D.N.C. 1984) (three-judge court), *aff'd in part and reversed in part on other grounds*, 478 U.S. 30, 92 L. Ed. 2d 25 (1986). With this litigation pending, the State submitted the 1968 amendments seeking their preclearance from the Department of Justice. The General Assembly also amended the State House of Representatives plan while the preclearance request was pending and did not divide counties in the creation of the House districts. In submitting the 1968 amendments, the State presented the argument that the amendments did not constitute a change from the long-standing practice of drawing legislative districts without dividing counties.

Notwithstanding this argument the Department of Justice objected to the language against dividing counties and refused to give preclearance to the 1968 amendments or to redistricting plans enacted in reliance on those amendments, thereby forcing the General Assembly to redraw the legislative districts. The objection highlighted the Department's concern that application of the 1968 amendments would result in large, multi-member districts, which necessarily submerge minority voters into larger white voter districts. Pursuant to the Department of Justice's objection, the General Assembly drew new legislative plans that were precleared. However, these plans were still the subject of litigation under section 2 of the Voting Rights Act. *Gingles*, 590 F. Supp. at 351.

Once the General Assembly enacted new plans in 1982, State officials in their official capacity were the subject of a civil action brought by residents of Forsyth County to challenge the division of Forsyth County in the newly drawn legislative districts. Specifically, the plaintiffs claimed that the General Assembly could not divide Forsyth County because the county was not among the forty "covered" counties for purposes of section 5 preclearance. Hence, the constitutional provision still applied to the remaining noncovered counties. This claim was rejected by a three-judge United States District Court in *Cavanagh v. Brock*, 577 F. Supp. 176, 182 (E.D.N.C. 1983). The court in *Cavanagh* held that the denial of preclearance to the 1968 constitutional amendments meant that the amendments were not effective at all insofar as they prohibited the division of counties in the drawing of legislative districts. *Id.* at 181-82.

The 1982 legislative redistricting plans were used until the United States Supreme Court in *Gingles* required the General Assembly to modify them in order to carve out separate, majority-minority districts in certain counties of the State to comply with section 2 of the Voting Rights Act, which applies irrespective of whether a jurisdiction is covered under section 5. Section 2 compels states to create majority-minority districts when a minority population is sufficiently compact to form a majority in a single-member district and votes cohesively, but is generally unable to elect candidates of its choice because of the racial bloc voting of the majority, often in conjunction with other factors such as historical discriminatory practices that have affected the minority's ability to participate in the political process. *Gingles*, 478 U.S. at 50-51, 92 L. Ed. 2d at 46-47. The counties for which North Carolina was required to create section 2 districts under *Gingles* included Wake, Forsyth, and Mecklenburg, which are not "covered" counties under section 5, along with some section 5 counties. *Gingles*, 590 F. Supp. at 376, 384.

Thus, the plans used in the 1980s split a number of counties as did the plans enacted and used in the 1990s. The General Assembly proceeded on the basis that the only court decision that had ever considered the question of whether counties could be divided was binding on the General Assembly and that the 1968 constitutional amendments prohibiting the division of counties were of no force or effect. Against this background of litigation implementing the Voting Rights Act, the 2001 General Assembly enacted the Senate and House redistricting plans that are the subject of this civil action.

The following provisions of our State Constitution are determinative of this appeal.

Article II, Section 3 provides as follows:

> The Senators shall be elected from districts. The General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the senate districts and the apportionment of Senators among those districts, subject to the following requirements:
>
> (1) Each Senator shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each

Senator represents being determined for this purpose by dividing the population of the district that he represents by the number of Senators apportioned to that district;

(2) Each senate district shall at all times consist of contiguous territory;

(3) No county shall be divided in the formation of a senate district;

(4) When established, the senate districts and the apportionment of Senators shall remain unaltered until the return of another decennial census of population taken by order of Congress.

N.C. Const. art. II, § 3.

Article II, Section 5 is identical except that it provides for "Representatives" rather than "Senators."

Article I, Section 3 provides as follows:

The people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness; but every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States.

N.C. Const. art. I, § 3.

Article I, Section 5 provides as follows:

Every citizen of this State owes paramount allegiance to the Constitution and government of the United States, and no law or ordinance of the State in contravention or subversion thereof can have any binding force.

N.C. Const. art. I, § 5.

In interpreting the State Constitution, we are guided by certain fundamental principles. The proper construction of our Constitution is generally controlled by the same principles that control in discerning the meaning of all written documents. *Perry v. Stancil*, 237 N.C.

442, 444, 75 S.E.2d 512, 514 (1953).[12] In searching for the will and intent of the people as expressed in the Constitution,

> all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purposes of the instrument. The best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected.

State v. Emery, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944) (citations omitted). Further, where the meaning is clear from the words used in the Constitution, we will not search for meaning elsewhere; if the meaning is doubtful, the intention of the people must be sought. *Elliott v. State Bd. of Equalization*, 203 N.C. 749, 753, 166 S.E. 918, 921 (1932). Moreover, if given the choice of two possible interpretations of a state constitutional provision, one of which would violate the United States Constitution or federal law and one of which would not, this Court must interpret the provision consistently with federal law rather than invalidate the constitutional provision. *In re Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977) (noting with respect to statutory interpretation that "[w]here one of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question should be adopted"). Finally, if it is not possible to interpret a state constitutional provision in a manner compliant with federal law, the state constitutional provision is void under the Supremacy Clause. *Constantian v. Anson Cty.*, 244 N.C. 221, 229, 93 S.E.2d 163, 168 (1956) (holding that "any provision of the Constitution or statutes of North Carolina in conflict [with federal law] must be deemed invalid").

In the present case the language in Article II, Sections 3(3) and 5(3) that "[n]o county shall be divided" is clear and unambiguous and is not subject to two reasonable interpretations. This language has been determined to be unenforceable under section 5 of the Voting Rights Act as to the forty counties covered by that section; hence, this provision is in conflict with federal law and, under the Supremacy Clause of the United States Constitution and the Supremacy Clause of the North Carolina Constitution, cannot be given force and effect in drafting legislative redistricting plans affecting those forty counties.

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12. The constitutional provision in question in *Perry* has since been abrogated. *See Forsyth Mem'l Hosp., Inc. v. Chisholm*, 342 N.C. 616, 620, 467 S.E.2d 88, 90 (1996).

While this case does not fit the traditional application of the doctrine of severability, the concept of that doctrine does have an analogous application to this case. The doctrine provides that if a portion of a statute is invalid as violative of a constitutional provision or a federal law, the invalid portion may be stricken and the remaining portion given effect if it is whole and complete in itself and the intent of the legislature was such that the statute would have been enacted even without the stricken portion. *State ex rel. Andrews v. Chateau X, Inc.*, 296 N.C. 251, 259-60, 250 S.E.2d 603, 608 (1979), *judgment vacated on other grounds*, 445 U.S. 947, 63 L. Ed. 2d 782 (1980). In *Constantian* this Court stated:

> "A statute may be valid in part and invalid in part. If the parts are independent, or separable, but not otherwise, the invalid part may be rejected and the valid part may stand, provided it is complete in itself and capable of enforcement." 82 C.J.S., Statutes sec. 92. Our decisions are in accord. This well established rule applies equally when a portion of a state constitution or any provision thereof is invalid as violative of the Constitution of the United States.

Constantian, 244 N.C. at 228, 93 S.E.2d at 168 (citations omitted).

In this case, words of the State Constitution have not been determined to be invalid under federal law; rather, the constitutional provision has been rendered unenforceable in forty of the State's one hundred counties. Thus, by analogy, unless the provision can stand as a whole when applied in the remaining counties and this Court can determine that the intent of the people in ratifying the amendment was for the provision to have effect even if enforceable in less than all one hundred counties, the provision must fail.

The record in this case is devoid of any evidence suggesting that the amendments would have garnered the requisite three-fifths majority for a constitutional amendment in the legislature, N.C. Const. art. XIII, § 4, had the members of the General Assembly anticipated that the "no county shall be divided" provision would be applicable in less than all one hundred counties; nor does any evidence before the Court suggest that the people would have ratified the amendments with this limitation. Any conclusion to the contrary based on this record is pure speculation. As the three-judge United States District Court consisting of Judges J. Dickson Phillips; Franklin T. Dupree, Jr.; and W. Earl Britt noted, without preclearance the constitutional provision regarding division of counties is

> not "effective as law" in the forty covered counties. With the [provision's] effect thus territorially circumscribed by federal authority, under North Carolina law [it] would be effective in the sixty non-covered counties only if there were manifest a legislative, and popular, intent that the [provision] should be applied differentially across the state if for any reason—including a failure of section 5 preclearance—[it] should be held of no effect in respect of some portions of the state. We find no evidence of such an intent in any legislative source. The illogic, indeed the questionable legality, of such a consequence is manifest. We therefore conclude that the [provision was] necessarily intended by the legislature and the populace voting by referendum upon the legislatively proposed [provision] to rise or fall as a whole.

Cavanagh, 577 F. Supp. at 181-82.

Even if it is assumed that the intent of the people was as the majority espouses, the narrower question is whether, given the covered counties limitation, the "no county shall be divided" provision of the State Constitution can be reconciled as written with other provisions of the State Constitution. The majority opinion leaves no doubt that this provision cannot be so reconciled.

The majority acknowledges that reconciliation is a fundamental goal of constitutional and statutory interpretation. However, the majority appears to read the language from *Sessions* that "[r]econciliation is a postulate of constitutional as well as of statutory construction," *Sessions v. Columbus Cty.*, 214 N.C. 634, 638, 200 S.E. 418, 420 (1939), to mean that if one provision of the State Constitution cannot, consistent with federal law, be reconciled with another provision, then this Court is at liberty to rewrite one of the provisions or give the provision no effect. For example, the majority repeatedly qualifies the application of the "no county shall be divided" provision with words such as "whenever possible" or "to a large degree." The opinion states:

> We recognize that . . . the right of the people of this State to legislative districts which do not divide counties is not absolute. In reality, an inflexible application of the WCP [whole-county provision] is no longer attainable because of the operation of the provisions of the [Voting Rights Act] and the federal "one-person, one-vote" standard, as incorporated within the State Constitution.

(Citations omitted). Yet, the majority declares, "Where, as here, the primary purpose of the WCP can be effected to a large degree without conflict with federal law, it should be adhered to by the General Assembly to the maximum extent possible." This interpretation ignores the plain language of the "no county shall be divided" provision, which is clear and unambiguous. The majority cites no authority for this maximization theory, which, if applied as the majority mandates, is inconsistent with Article I, Section 3 of our State Constitution, providing that "[t]he people of this State have the inherent, sole, and exclusive right . . . of altering or abolishing their constitution." N.C. Const. art. I, § 3. While the majority notes that the Department of Justice's administrative guidelines "reflect that states need only modify, not necessarily abrogate, the application of whole-county redistricting limitations," the majority apparently fails to accept that, under the State Constitution, this Court has no authority to "modify" this provision.

The majority states that, "[w]ithout question, the intent of the WCP is to limit the General Assembly's ability to draw legislative districts without according county lines a reasonable measure of respect." However, the clear and unambiguous language of the "no county shall be divided" provision manifests that the intent is not "a reasonable measure of respect" for county lines; rather, the intent of this absolute mandate is that counties not be divided at all. Notwithstanding the majority's conclusory claims, the provision cannot be reasonably interpreted as evincing "the people's express wishes to contain legislative district boundaries within county lines whenever possible."

In rejecting defendants' argument that this construction "rewrites" the constitutional provision to read that "no county shall be divided except to the extent required by federal law," the majority states that "[d]efendants overlook the fact . . . that compliance with federal law is not an implied, but rather an express condition to the enforceability of *every* provision in the State Constitution." However, by proper operation of the Supremacy Clause, laws and provisions in conflict with federal law are rendered void. U.S. Const. art. VI, cl.2; *Constantian*, 244 N.C. at 229, 93 S.E.2d at 168. The Supremacy Clause does not merely modify the offending provision. While the majority is correct in noting that " '[s]everal provisions of our Constitution provide the elasticity which ensures the responsive operation of government' " (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 458, 385 S.E.2d 473, 484 (1989)), the provision in question is clearly not one of the "several provisions" providing "elasticity."

Nowhere is the disregard for the plain language of the "no county shall be divided" provision more obvious than in its tortured application in the majority's remedial analysis. Under the guise of reconciling provisions of our State Constitution, the majority amends and rewords the "no county shall be divided" provision to permit division of counties so long as they are part of a multi-county grouping whose exterior boundaries are not crossed or traversed. How this approach is consistent with the language that "no county shall be divided" is not readily discernable. While this revision may be good policy and necessary to comply with the principle of one-person, one-vote while still maintaining a community of interest, this decision is one for the legislature or the people of this State, not for this Court.

Moreover, the majority's purported reconciliation of the State Equal Protection Clause with the language regarding multi-member districts misses the mark. Our State Equal Protection Clause states that "[n]o person shall be denied the equal protection of the laws." N.C. Const. art. I, § 19. Article II, Sections 3(1) and 5(1) state that

> Each [Senator or Representative] shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each [Senator or Representative] represents being determined for this purpose by dividing the population of the district that he represents by the number of [Senators or Representatives] apportioned to that district[.]

N.C. Const. art. II, § 3(1), 5(1). These provisions envision multi-member districts as valid in this State. Nevertheless, the majority purports to reconcile the multi-member district language with the Equal Protection Clause by holding that the language on multi-member districts is "effective only within a limited context" and that, "while instructive as to how multi-member districts may be used compatibly with 'one-person, one-vote' principles, Article II, Sections 3(1) and 5(1) are not affirmative constitutional mandates."

The majority's "reconciliation" thus treats portions of Article II, Sections 3(1) and 5(1) as having no real effect, ignoring our long-standing rule of construction that a statute must be "construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage." *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981). This rule of statutory construction is equally applicable to constitutional construction. *See Perry*,

237 N.C. at 444, 75 S.E.2d at 514. Ignoring this rule of construction, the majority has determined that this language in our Constitution has no effect, but is merely instructive and is, therefore, surplusage that need not be followed. By refusing to give effect to this provision of our Constitution, the majority attempts to avoid the fundamental principle that one section of the North Carolina Constitution cannot violate another. *Leandro v. State*, 346 N.C. 336, 352, 488 S.E.2d 249, 258 (1997) ("It is axiomatic that the terms or requirements of a constitution cannot be in violation of the same constitution—a constitution cannot violate itself.").

A true reconciliation would necessarily treat multi-member districts as not violative of our State Equal Protection Clause, as those two clauses are co-equal. Such a construction gives effect to both provisions while respecting the rule that a state constitutional provision cannot violate the State Constitution. Rather than truly reconciling these provisions, the majority is forced by its determined preservation of the "no county shall be divided" provision to further amend the Constitution by making multi-member districts unconstitutional unless the General Assembly can show a compelling state interest in having multi-member districts. What exactly that compelling state interest might be is left for future litigation. The plain fact is that Article II, Sections 3(1) and 5(1) and Article II, Sections 3(3) and 5(3) cannot be reconciled with each other, consistent with federal law, without the use of multi-member districts or amendment of the "no county shall be divided" provision to allow multi-county groupings. Although limiting multi-member districts and allowing multi-county groupings may well be sound policy decisions, under the language of our State Constitution, this decision is again for the legislature or the people, not for this Court.

Finally, the redistricting scheme announced by the majority today creates four classes of citizens: (i) those who reside in covered counties and, therefore, may not enjoy the benefit of the "no county shall be divided" provision; (ii) those who reside in counties that do not receive the benefit of the provision in order to comply with section 2 of the Voting Rights Act; (iii) those who reside in noncovered counties and may or may not have the benefit of the provision, depending on whether their county needs to be divided to enable the forty covered counties to obtain preclearance; and (iv) those who reside in counties that receive the benefit of the provision and are kept whole (whether truly whole or whole as part of the new "multi-county groupings" allowed via the majority's amendment to the Constitu-

tion). Clearly, this disparate treatment of the citizenry was not the intention of the people who were accustomed to electing one Representative from each county when they declared that "[n]o county shall be divided in the formation of a senate or representative district." No other provision of the North Carolina Constitution that is by its terms applicable statewide has ever been interpreted by this or any other court as applying only in certain regions of the State. No proposition is more fundamental than that our State Constitution applies equally to all our people and applies uniformly throughout all one hundred counties.

Today, the majority amends our State Constitution to read:

> No county shall be divided in the formation of legislative districts unless:
>
> 1. The county is covered by section 5 of the Voting Rights Act;
> 2. The county must be divided to comply with section 2 of the Voting Rights Act;
> 3. The county must be divided to enable a covered county to achieve preclearance; or
> 4. The county is part of a "multi-county grouping."

Sadly, in arriving at this proposal, the majority has lost sight of two cardinal principles of state constitutional construction. The first principle is:

> "It is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—*but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.*"

Preston, 325 N.C. at 449, 385 S.E.2d at 478 (quoting *Glenn v. Board of Educ. of Mitchell Cty.*, 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936)) (emphasis added).

The second principle is:

> If the provisions of [an Article of the State Constitution] are obsolete or ill-adapted to existing conditions, this Court is without power to devise a remedy. However liberally we may be inclined

> to interpret the fundamental law, we should offend every canon of construction and transgress the limitations of our jurisdiction to review decisions upon matters of law or legal inference if we undertook to extend the function of the Court to a judicial amendment of the Constitution.

Elliott, 203 N.C. at 756, 166 S.E. at 922.

For the foregoing reasons, in my opinion Article II, Sections 3(3) and 5(3) are void and unenforceable. The guidelines mandated by the majority may provide a sound and wise basis for redistricting; however, this Court has, in my view, exceeded its constitutional authority by amending the State Constitution. Although I agree that the 2001 legislative plans duly enacted by the General Assembly are far from perfect, and are certainly not aesthetically appealing, the only question before this Court is whether those plans violate Article II, Sections 3(3) and 5(3) of our State Constitution. Accordingly, in adherence to the State Constitution, I must respectfully dissent.

Justice BUTTERFIELD dissenting.

I agree with Justice Parker's conclusion that the whole-county provisions of our state Constitution are void and unenforceable. I write separately to explain my view concerning the unenforceability of the whole-county provisions and to emphasize the important role of the Voting Rights Act in guaranteeing racial fairness in the political process.

The Fifteenth Amendment to the United States Constitution provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude," U.S. Const. amend. XV, § 1, and Congress has the power to enforce the Fifteenth Amendment by appropriate legislation, U.S. Const. amend. XV, § 2. In 1965, Congress, under the enforcement arm of the Fifteenth Amendment, enacted the Voting Rights Act, a landmark piece of civil rights legislation. The Voting Rights Act is designed to address legacies of racially polarized voting and discriminatory voting practices that have not vanished.

Section 2 of the Voting Rights Act covers all states and all political subdivisions within the states. It provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a

manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a) (1994). In the simplest terms, section 2 concerns the vote dilution of a protected class. Section 5 of the Voting Rights Act, which covers some states in their entirety and covers selected jurisdictions in other states, such as in North Carolina, applies when a covered jurisdiction "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure."[13] 42 U.S.C. § 1973c (1994). Also stated simply, section 5 seeks to prevent "retrogression" of minority voting strength.

In 1982, United States Senator Patrick Leahy observed the following during a Senate hearing on amending the Voting Rights Act:

> If section 5 is the engine that drives the act and renders it enforceable as a practical matter, section 2 is still the basic protection against discriminatory practices. Preclearance does not cover all areas and may not resolve every threatened violation where it does apply. Preclearance is designed to stop voting discrimination before it can start in covered jurisdictions, and section 2 is calculated to end it whenever and wherever it is found.

2 *Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong. 45 (1982) (statement of Sen. Leahy, Member, Senate Comm. on the Judiciary).

In 1967, the North Carolina General Assembly sought to amend the Constitution of North Carolina. The amendments included provisions prohibiting the dividing of counties in the redistricting process. The proposed constitutional amendments were placed on the ballot in 1968 and passed by an ample margin. The proposition on the ballot stated simply, "FOR constitutional amendments continuing present system of representation in the General Assembly," and "AGAINST constitutional amendments continuing present system of representation in the General Assembly." Act of May 31, 1967, ch. 640, sec. 8,

13. North Carolina has forty covered jurisdictions: Anson, Beaufort, Bertie, Bladen, Camden, Caswell, Chowan, Cleveland, Craven, Cumberland, Edgecombe, Franklin, Gaston, Gates, Granville, Greene, Guilford, Halifax, Harnett, Hertford, Hoke, Jackson, Lee, Lenoir, Martin, Nash, Northampton, Onslow, Pasquotank, Perquimans, Person, Pitt, Robeson, Rockingham, Scotland, Union, Vance, Washington, Wayne, and Wilson Counties.

1967 N.C. Sess. Laws 704, 706. The proposition did not expressly indicate that whole-county provisions were being adopted.

Upon adoption of the amendments by the voters in 1968, the State of North Carolina did not submit the constitutional amendments to the District of Columbia District Court or to the United States Department of Justice as required by section 5 of the Voting Rights Act. When the amendments were subsequently included in the 1971 Constitution, the State sought preclearance of the entire Constitution through the Attorney General but did not specifically identify the provisions relating to voting as required by section 5 administrative guidelines.

The nonprecleared whole-county provisions were enforced in the 1971 redistricting process with no divided counties. In 1981, the State again attempted to enforce the whole-county provisions. However, the United States Attorney General objected to the submitted plans and discovered the nonprecleared 1968 amendments. Upon discovery, the amendments were submitted for preclearance. The Attorney General refused to preclear the amendments and, under power vested to him by section 5 of the Voting Rights Act, interposed an objection to the use of the 1968 amendments in the forty covered counties. The effect of the Attorney General's objection was to give the General Assembly the discretion to divide those forty counties covered by section 5 of the Voting Rights Act.

Following the objection in 1982, the General Assembly concluded that the Attorney General's refusal to preclear the amendments rendered the whole-county provisions completely unenforceable, thereby granting the General Assembly the discretion to divide counties statewide. The General Assembly thereafter exercised this discretion and divided counties outside the forty covered jurisdictions.

The 1982 redistricting plans were challenged in 1982 on the basis of an alleged violation of the whole-county provisions. The case was removed to federal court, and the State's position that the whole-county provisions were unenforceable was upheld by three federal judges from North Carolina, Judges J. Dickson Phillips; Franklin T. Dupree, Jr.; and W. Earl Britt. *Cavanagh v. Brock*, 577 F. Supp. 176 (E.D.N.C. 1983). The United States Supreme Court subsequently struck down the 1982 plans as violative of section 2. *Thornburg v. Gingles*, 478 U.S. 30, 92 L. Ed. 2d 25 (1986). All redistricting plans

since *Gingles* have divided counties outside of the forty covered counties.

In administrative preclearance proceedings, the United States Attorney General is a surrogate for the District of Columbia District Court. No new voting practice is enforceable unless the covered jurisdiction has succeeded in obtaining preclearance. 42 U.S.C. § 1973c. Voting changes to which the United States Attorney General has interposed an objection are legally unenforceable.

Unquestionably, the United States Attorney General's objection rendered the whole-county provisions void and unenforceable in the forty covered counties. The Supremacy Clauses of the United States and North Carolina Constitutions prohibit the enforcement of the whole-county provisions in the forty covered counties. U.S. Const. art. VI, cl. 2; N.C. Const. art. I, § 3. The question then becomes whether the provisions are invalidated as to all counties or are capable of partial enforcement in the remaining noncovered counties.

"One of the first rules in construing constitutions, and it applies to all written instruments, is to ascertain the intention of the people in adopting it." *Reade v. City of Durham*, 173 N.C. 668, 677, 92 S.E. 712, 715 (1917). "Constitutional provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption. To ascertain the intent of those by whom the language was used, we must consider the conditions as they then existed and the purpose sought to be accomplished." *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953).

The majority states that its holding "accords the fullest effect possible to the stated intentions of the people." The majority offers no insight as to how it divined the intent of the people. My view of the people's intent does not include the sacred nostalgia for whole counties that the majority seems to embrace.

It is important to mention that voting discrimination in 1968 was especially significant and that African-American citizens were subjected to practices and procedures that affected their right to register to vote and to be able to elect legislators of their choice. Accordingly, there were no African-American members in the General Assembly when the amendments were adopted. The electorate in 1968 failed to include many African-American citizens who were eligible to register to vote but were not registered because of reasons attributable to their race. In other words, voting discrimination, which the Voting

Rights Act seeks to eliminate, was present in the enactment and adoption of the amendments under review. Therefore, I am unable to conclude that the amendments represented the will of *all* of the people when the General Assembly passed them and the voters adopted them.

A historical evaluation sheds some light on the purpose of the 1968 amendments. The majority sets out the basic path of how the whole-county provisions came to be incorporated into the Constitution of North Carolina. There are several points that I believe the majority omits in its discussion that are relevant to my reasoning. First, until the 1968 amendments that put in place the whole-county provisions, there was no express prohibition in the Constitution against the division of counties in the creation of House districts. Rather, the constitutional mandate requiring at least one Representative for each county meant that no county was, in practice, ever divided. This is a subtle but important distinction.

Prior to *Drum v. Seawell,* 249 F. Supp. 877 (M.D.N.C. 1965), *aff'd per curiam,* 383 U.S. 831, 16 L. Ed. 2d 298 (1966), under the constitutional requirement that each county have at least one Representative, House districts were never divided. *See* John L. Sanders, *Maps of North Carolina Congressional Districts, 1789-1960, and of State Senatorial Districts and Apportionment of State Representatives, 1776-1960* (Inst. of Gov't, Univ. of N.C. at Chapel Hill, 1961); John L. Sanders, *Materials on Representation in the General Assembly of North Carolina* (Inst. of Gov't, Univ. of N.C. at Chapel Hill, 1965). After *Drum* and the adoption of the 1968 amendments, no county was divided in the creation of a House or Senate district, until 1982, as a result of the constitutional prohibitions against dividing counties. *See* Act of Jan. 13, 1966, ch. 1, 1965 N.C. Sess. Laws (Extra Sess. 1966) 13; Act of Jan. 14, 1966, ch. 5, 1965 N.C. Sess. Laws (Extra Sess. 1966) 17; Act of June 1, 1971, ch. 483, 1971 N.C. Sess. Laws 412; Act of July 21, 1971, ch. 1177, 1971 N.C. Sess. Laws 1743. It is true that there was a prohibition in the 1868 Constitution on the division of counties for some Senate districts. That provision prohibited the division of counties in the creation of a Senate district unless that district was entitled to two or more Senators. Therefore, the express prohibition against dividing counties for Senate districts never affected all of the counties simultaneously in its application.

The majority states, "The proposed amendments for the Senate and House of Representatives reincorporated a prohibition against

the division of counties." The only prohibition that was "reincorporated" in the amendments was for the Senate. After the adoption of the 1968 amendments, Article II, Section 5(3) of the Constitution of North Carolina created a prohibition that did not previously exist against the division of counties in the creation of House districts. The requirement that every county have at least one Representative was stricken from the Constitution when the 1968 amendments were adopted. The Constitution of 1971 made no changes to the whole-county provisions, and those provisions remain in the form adopted in 1968.

The majority acknowledges that *Drum* was the catalyst for the 1968 amendments. The majority states that *Drum* held that the "legislative redistricting plans violated the 'one-person, one-vote' requirement of the United States Constitution and were therefore void." In order to divine the intent of the people, one must understand what was at issue in *Drum* and the effect of the *Drum* decision on the Constitution.

A full understanding of *Drum* cannot be achieved without understanding the distinction between redistricting and reapportionment. Each of these terms has a precise meaning that invokes different aspects of law. In modern parlance, the two terms have tended to be used haphazardly and, sometimes, interchangeably. Reapportionment is the reallocation of legislators among existing political subdivisions. Redistricting is the actual redrawing of existing district lines. *See Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 142 L. Ed. 2d 797 (1999) (discussing role of decennial census in both reapportionment and redistricting).

When *Drum* was written, the House had 120 members and the Senate had 50, just as they do today. The one hundred counties accounted for one hundred Representatives. The remaining twenty Representatives were allotted to the more populous counties. The questions before the General Assembly were the same then as now: How many districts would there be?, How many members would be in each district?, and Where would the boundaries of those districts be located? *Drum* was instituted to challenge the manner in which the General Assembly apportioned House members to districts. The court in *Drum* held that the manner of apportionment violated the federal requirements established in *Reynolds v. Sims*, 377 U.S. 533, 12 L. Ed. 2d 506 (1964) (establishing the principle of "one-person, one-vote"). Under the federal standards, the General Assembly could no longer legally comply with the constitutional requirement that

every county have at least one Representative. The constitutional requirement was unenforceable after *Drum*. The lawsuit in *Drum* was brought because of the manner of reapportionment, not because of redistricting. This bears directly on the 1968 amendments.

If one operates from the presumption that the 1968 amendments were in response to *Drum*, then such a presumption would seem to weaken, rather than support, the majority's argument concerning intent. Contemporary reports by those involved in complying with *Drum* bolster this presumption. Then Governor Daniel K. Moore addressed a special legislative session convened after the November 1965 decision in *Drum* as follows:

> Ladies and gentlemen, the hour of decision has arrived. The General Assembly of North Carolina must meet head on the mandate of the Supreme Court of the United States and reapportion both houses and congressional districts in accordance with the "one man, one vote" decision enunciated by the Supreme Court. The General Assembly must make these decisions in compliance with the specific orders of the United States District Court for the Middle District of North Carolina issued on November 30, 1965.

Message to the Extra Session of the General Assembly (Jan. 10, 1966), *in Messages, Addresses, and Public Papers of Daniel Killian Moore, Governor of North Carolina, 1965-1969*, 65, at 69 (Memory F. Mitchell ed. 1971). In *Reynolds*, the United States Supreme Court established the requirement of substantially equal representation for all citizens in a state. The Court stated, "With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live." *Reynolds*, 377 U.S. at 565, 12 L. Ed. 2d at 529. If there was an absolute necessity for amending the Constitution, I believe it arose from the problems created by the constitutional requirement to have at least one Representative per county.

This Court has previously examined the effect of federal court decisions on the Constitution of North Carolina. The severance analysis applicable to statutes, determining whether one portion of the statute can survive after another portion of the statute has been stricken, is equally applicable to constitutional provisions. *Constantian v. Anson Cty.*, 244 N.C. 221, 228, 93 S.E.2d 163, 168 (1956). The two-part severability test was set out in *State ex rel. Andrews v. Chateau X, Inc.*, 296 N.C. 251, 259, 250 S.E.2d 603, 608

(1979), *judgment vacated on other grounds*, 445 U.S. 947, 63 L. Ed. 2d 782 (1980), as follows:

> To determine whether the portions [of a statute] are in fact divisible, the courts first see if the portions remaining are capable of being enforced on their own. They also look to legislative intent, particularly to determine whether that body would have enacted the valid provisions if the invalid ones were omitted.

Applying this statutory analysis to the whole-county provisions, I believe that if Article II, Sections 3(3) and 5(3) are severed from the remaining clauses of the 1968 constitutional amendments, then the remaining clauses—concerning equal representation, contiguity, and unaltered districts and apportionment between congressional censuses—are capable of being enforced on their own. As previously expressed, I believe that the principal legislative intent of the 1968 amendments was to comply with *Drum* and the federal "one-person, one-vote" requirement. I believe that the 1967 General Assembly would have voted to submit amendments to the voters without the whole-county provisions in order to comply with *Drum* and that the whole-county provisions were not vital to the paramount intent of the amendments.

The whole-county provisions were, as the court in *Cavanagh* stated, "to rise or fall as a whole." *Cavanagh*, 577 F. Supp. at 182. We are faced with the combination of the impediments placed on the reapportionment and redistricting processes by the supremacy of section 5 of the Voting Rights Act, the requirements under section 2 that must be applied across the entire state, and the "one-person, one-vote" requirement.

When taken in the aggregate, I believe these requirements overwhelm the whole-county provisions to the extent that they are functionally unworkable in any manner that would give them purposeful effect, considering *Drum* and the demographics of the 1968 electorate, and that they are, therefore, unenforceable. My determination that the whole-county provisions are unenforceable logically makes moot further examination of our state Constitution on the issue of the constitutional propriety of multi-member and single-member districts that the majority undertook in fashioning its remedy.

While I feel very strongly that the whole-county provisions of the state Constitution are void and unenforceable, I am compelled to

comment upon the majority's remedy. The majority has crafted a remedy that it believes gives maximum enforcement to the whole-county provisions. In my view, the majority has assumed to act in a legislative, rather than a judicial, capacity in its approach to a remedy. This Court has stated:

> When called upon to exercise its inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right, . . . the judiciary must recognize two critical limitations. First, it must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power. *In re Alamance County Court Facilities*, 329 N.C. 84, 100-01, 405 S.E.2d 125, 133 (1991) (discussing and applying inherent powers of the judiciary). Second, in exercising that power, the judiciary must minimize the encroachment upon other branches of government—in appearance and in fact—by seeking the least intrusive remedy available and necessary to right the wrong. *Id.*

Corum v. University of N.C., 330 N.C. 761, 784, 413 S.E.2d 276, 291, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992).

The criteria directed by the majority, while similar to criteria utilized by the judiciary in court-ordered remedies, are an encroachment upon the discretion of the Legislative Branch of government. Our General Assembly is fully capable of interpreting the decision of this Court without having its discretionary legislative authority bound by the Judicial Branch of government. I believe that the majority's approach to the remedy is excessive in its reach.

In sum, I believe that the whole-county provisions of our state Constitution are void and completely unenforceable, and I believe that the General Assembly was correct in determining that the whole-county provisions were unenforceable statewide. Accordingly, I would vote to uphold the 2001 redistricting plans enacted by the General Assembly. Therefore, I must respectfully dissent.

STATE OF NORTH CAROLINA v. LIONEL LEWIS ROGERS

No. 373A00

(Filed 10 May 2002)

1. Venue— motion to change—pretrial publicity

The trial court did not abuse its discretion in a first-degree murder, first-degree burglary, and first-degree sexual offense prosecution by denying defendant's motion to change venue under N.C.G.S. § 15A-957 based on pretrial publicity including several newspaper articles and a broadcast television report about the murder, because defendant's general allegations that the attention devoted by local media tainted the jury pool in this case failed to establish the particularized prejudice necessary to support a change of venue.

2. Jury— motion for individual selection of jurors—improper comments

The trial court did not err in a first-degree murder, first-degree burglary, and first-degree sexual offense prosecution by denying defendant's motion for individual selection of jurors even though defendant contends several prospective jurors tainted the pool by allegedly expressing improper opinions as to defendant's guilt or the outcome of the trial while other prospective jurors were listening, because: (1) the trial court maintained control over the jury selection process, intervening to ask questions as necessary and clarifying matters to the prospective jurors as appropriate; (2) the trial court interrupted on at least one occasion when a prospective juror appeared to be on the verge of making an improper comment and allowed challenges for cause as to jurors who were unable to follow the law; (3) the trial court instructed the prospective jurors to disregard improper comments; and (4) a judge who observes the prospective juror's demeanor as he responds to questions and efforts at rehabilitation is best able to determine whether the juror should be excused for cause.

3. Identification of Defendants— photographic lineup—motion to suppress

The trial court did not err in a first-degree murder, first-degree burglary, and first-degree sexual offense prosecution by denying defendant's motion to suppress a witness's identification

of defendant in a photographic lineup, because: (1) defendant was not impermissibly photographed since he came to the police station voluntarily and was not under arrest or in custody when photographed; (2) the photographic identification process was not suggestive since the witness was shown an array of six photographs, including the photograph taken of defendant that day, and the witness quickly selected defendant's photograph; (3) the witness identified defendant in court as the man she saw at the victim's home; and (4) although defendant is the only one in the photo array not standing before a grid of horizontal lines, a photographic lineup is not impermissibly suggestive merely based on the fact that defendant has a distinctive appearance, and none of the men in the photo array appears particularly distinctive in comparison with any of the others.

4. Identification of Defendants— in-court—motion to suppress

The trial court did not err in a first-degree murder, first-degree burglary, and first-degree sexual offense prosecution by denying defendant's motion to suppress a witness's in-court identification of defendant as the perpetrator of the crime, because: (1) the witness had the opportunity to view the perpetrator of the crime from a distance of approximately forty feet for several seconds on two occasions; (2) although it was night, lighting was adequate to allow the witness to see the man's face and the witness's eyesight was good; (3) the witness was paying close attention and shortly thereafter provided a detailed description to the investigators; and (4) at the suppression hearing, the witness was careful to ask to see defendant without his hat before committing herself and then was confident of her identification.

5. Jury— challenges for cause—familiarity with defendant—opposition to death penalty

The trial court did not abuse its discretion in a first-degree murder, first-degree burglary, and first-degree sexual offense prosecution by excusing two prospective jurors for cause after voir dire, because: (1) one of the prospective jurors stated unambiguously and without prodding by the court that she would be unable to return a verdict of guilty, and the trial court also learned that the prospective juror knew defendant personally, was a friend of defendant's mother, had misgivings about serving on the jury, and left the court with the definite impression that this prospective juror would be unable to faithfully and impar-

tially apply the law; and (2) the second prospective juror revealed his inability to serve on a capital jury.

6. Jury— peremptory challenges—racially neutral reasons

The trial court did not abuse its discretion in a first-degree murder, first-degree burglary, and first-degree sexual offense prosecution by overruling defendant's objections to the prosecutor's peremptory challenges of several African-American jurors based on alleged racial discrimination, because the prosecutor gave racially neutral reasons including that: (1) one prospective juror was dismissed because the juror knew defendant's mother and was ambivalent about sitting in judgment; (2) another prospective juror's spouse had worked for one of defendant's counsel; (3) another prospective juror had a history of problems with the law and may have been mentally challenged; (4) another prospective juror seemed uncomfortable with the law and unwilling to participate in the trial; (5) another prospective juror had a prior DWI and seemed to the prosecutor to be weak on the death penalty; and (6) another prospective juror also appeared to be mentally challenged and had a family history of encounters with the law.

7. Jury— excusal—age

The trial court did not abuse its discretion in a first-degree murder, first-degree burglary, and first-degree sexual offense prosecution by excusing two prospective jurors over the age of sixty-five based on their age, because: (1) both prospective jurors asked to be excused, and N.C.G.S. § 9-6.1 allows a person over sixty-five years of age to be excused if they ask to be excused; (2) citizens over the age of sixty-five do not make up a distinctive group for the purposes of determining whether defendant was denied his right to have a jury selected from a cross-section of the community as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 26 of the North Carolina Constitution; and (3) the rational basis of the General Assembly's decision to allow trial judges to excuse jurors on the basis of advanced age is readily apparent when the adverse affects of growing old do not strike all equally or at the same time.

8. Constitutional Law— effective assistance of counsel—failure to object

A defendant in a first-degree murder, first-degree burglary, and first-degree sexual offense prosecution did not receive inef-

fective assistance of counsel based on defense counsel's failure to object when the trial court excused two prospective jurors over sixty-five based on their age, because: (1) the trial court acted properly by excusing the jurors; and (2) there is no evidence in the record suggesting that the two jurors who were excused would have led the other jurors to a different verdict if they had been selected to sit on this case in light of the strong evidence of defendant's guilt.

9. Criminal Law— defendant's pro se motion—failure to conduct a hearing

The trial court did not err in a first-degree murder, first-degree burglary, and first-degree sexual offense prosecution by failing to conduct a hearing on defendant's pro se motion during trial, because: (1) most of the allegations in defendant's filing involved conclusory claims that are best addressed during a trial and by cross-examination, including that defendant was discriminated against based on his race, that witnesses lied, that the investigators paid witnesses to perjure themselves, and that defendant was innocent; (2) the issues raised by defendant such as the admissibility of his statements to investigators were handled in pretrial proceedings; and (3) although defendant's filing was extraordinary and did not require any action by the court, the trial judge conscientiously allowed defendant to present his case before a neutral and detached magistrate.

10. Criminal Law— prosecutor's argument—defendant's exercise of his right not to testify or produce evidence—failure to rebut the State's evidence

The trial court did not err by failing to intervene ex mero motu in a first-degree murder, first-degree burglary, and first-degree sexual offense prosecution during the prosecutor's closing argument allegedly commenting on defendant's exercise of his right not to testify or produce evidence, because: (1) the prosecutor was addressing defendant's failure to refute the State's theory of the case while acknowledging that some questions remained unanswered; (2) there is no error in an argument that the State's evidence was uncontradicted, and a prosecutor's argument pointing out a defendant's failure to answer the State's evidence is not a comment on defendant's failure to testify; and (3) it is assumed that the jurors followed the court's admonition to disregard any comments relating to a polygraph and that the stricken testimony played no part in the jurors' evaluation of the

portions of the prosecutor's argument relating to defendant's failure to rebut the State's evidence.

11. Criminal Law— prosecutor's argument—vouching for witnesses

The trial court did not err by failing to intervene ex mero motu in a first-degree murder, first-degree burglary, and first-degree sexual offense prosecution during the prosecutor's closing argument where the prosecutor allegedly vouched for his own witnesses by stating the State's witnesses had no axe to grind and came to tell the truth, because: (1) counsel is allowed to give the jurors reasons why they should believe the State's evidence; and (2) the prosecutor did not personally vouch for the witnesses or place the State's imprimatur on their testimony, but only argued that logic compelled the conclusion that the witnesses were credible.

12. Criminal Law— prosecutor's argument—community revulsion

The trial court did not err by failing to intervene ex mero motu in a first-degree murder, first-degree burglary, and first-degree sexual offense prosecution during the prosecutor's closing argument allegedly asking the jury to convict on the basis of community revulsion to the crime, because: (1) the prosecutor did not argue that the jury should be swayed by local sentiment, but instead pointed out that the jurors had the responsibility of deciding the case; (2) arguments characterizing the jury as the conscience of the community have been upheld; and (3) the prosecutor in fact instructed the jurors not to be swayed by community sentiment.

13. Sentencing— capital—prosecutor's argument—expert's untruthful testimony in exchange for pay

The trial court did not err by failing to intervene during the prosecutor's closing argument in the capital sentencing phase stating that defendant's expert should not be believed based on the fact that he would give untruthful or inaccurate testimony in exchange for pay. While an argument imputing perjury to a witness on the basis of evidence no more substantial than the mere fact the witness was compensated is improper, it was not so grossly improper as to require the trial court to intervene ex mero motu.

14. Sentencing— capital—psychiatric expert—prosecutor's cross-examination and argument—cumulative effect

Defendant is entitled to a new capital sentencing proceeding because of the cumulative effect of improprieties in the prosecutor's cross-examination of defendant's psychiatric expert and the prosecutor's closing argument pertaining to the expert where the prosecutor went beyond ascribing the basest of motives to defendant's expert that the expert would perjure himself for pay, but he also indulged in *ad hominem* attacks, disparaged the witness's area of expertise, and distorted the expert's testimony.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Haigwood, J., on 14 April 2000 in Superior Court, Halifax County, upon a jury verdict finding defendant guilty of first-degree murder. On 21 June 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 13 February 2002.

Roy Cooper, Attorney General, by Valérie B. Spalding, Special Deputy Attorney General, for the State.

Staples Hughes, Appellate Defender, and Janet Moore, Assistant Appellate Defender, for defendant-appellant.

EDMUNDS, Justice.

On 25 August 1997, defendant Lionel Lewis Rogers was indicted for first-degree murder, first-degree burglary, and first-degree sexual offense. He was tried capitally before a jury at the 20 March 2000 session of Superior Court, Halifax County. On 10 April 2000, the jury found defendant guilty of all charges. The first-degree murder conviction was based on theories both of premeditation and deliberation and of felony murder. At defendant's capital sentencing proceeding, the jury found the existence of five aggravating circumstances, two statutory mitigating circumstances, and fourteen nonstatutory mitigating circumstances, and recommended the death penalty. On 14 April 2000, the trial court sentenced defendant to death for the first-degree murder conviction. The trial court also imposed consecutive sentences of 146 to 185 months' imprisonment for the first-degree burglary conviction and 480 to 585 months' imprisonment for the first-degree sexual offense conviction. Defendant appeals his conviction for first-degree murder and his sentence of death to this Court as

a matter of right. On 21 June 2001, we allowed defendant's motion to bypass the Court of Appeals as to his burglary and sexual offense convictions. For the reasons that follow, we conclude that defendant's trial was free from prejudicial error; however, we hold that defendant is entitled to a new capital sentencing proceeding.

At trial, the State presented evidence that Hazel Sechler, the eighty-eight-year-old victim in this case, lived alone in Weldon, North Carolina. At approximately 9:25 p.m. on 11 May 1997, her neighbor Irma Johnson telephoned the victim. During their conversation, the line went dead. When Johnson's attempts to call the victim back were unsuccessful, she took a flashlight onto her porch and looked toward the victim's house, which was about forty feet away. The lights in the victim's home provided adequate illumination, and Johnson saw a man on the victim's porch. She noticed the man's appearance, complexion, hair style, and clothing. When she saw the man enter the victim's home, she called the police.

As Johnson continued to watch, she saw the man emerge from the victim's house carrying in his left hand an implement that appeared to be a knife. She called the police again, and shortly thereafter, Lieutenant Eugene Harris of the Weldon Police Department responded. He met Johnson, then observed that the telephone wires leading to the victim's house appeared to have been cut. Upon entering the victim's home, he noticed that a door leading upstairs had been forced open, then saw a cane and a shoe in the hall and what appeared to be a spot of blood on the wall.

Lieutenant Harris found the victim lying on her bed, bleeding from injuries to her throat and hands. Her neck had been sliced so deeply that she was breathing through the wound in her trachea. Her nightgown had been ripped away from her chest and abdomen. Her panties were around her ankles, and the responding paramedics observed blood around her vaginal area. The victim was conscious but unable to speak because her larynx had been cut.

The victim was transported to a local hospital, then immediately airlifted to Duke University Medical Center. While receiving treatment the next day, the victim suffered a fatal heart attack. John Butts, chief medical examiner for the State of North Carolina, was accepted by the court as an expert in the field of forensic pathology. He conducted the autopsy of the victim and described the injuries to her neck. He stated that she had a "large gaping wound" in her throat and "two deeper cutting injuries" in the same area, "indicating that it

[took] more than one stroke or movement to produce the cut." He also found defensive wounds on both of the victim's hands and evidence of injury to the victim's genitalia. Dr. Butts' opinion was that the victim's death was caused by the injuries to her neck.

After the victim was taken to the hospital on 11 May 1997, police interviewed Johnson. She described the individual she saw as a black male with dreadlocks who was wearing a blue-green T-shirt. On 12 May 1997, police found a T-shirt matching Johnson's description 131 feet from defendant's home. Individuals who saw defendant at different times on 11 May 1997 identified the T-shirt as being the one he had been wearing that day. Also on 12 May 1997, police observed defendant walk slowly past the victim's home, then later twice drive past it.

Defendant voluntarily went to the police station on 13 May 1997, where he provided blood, hair, and clothing samples. He also was photographed, and that same day, police showed Johnson a photographic lineup. She promptly identified defendant as the individual she had seen enter the victim's home and also identified the T-shirt found by the police as matching the shirt worn by the intruder.

Subsequent testing of the DNA in two hairs found on the T-shirt excluded defendant as the source of the hairs, but the victim was in 8.5% of the Caucasian population that could have contributed the strands. DNA testing of the blood found on the shirt revealed that there was only one chance in many millions that the blood did not come from the victim. Additional DNA testing of fabric around the T-shirt's collar indicated that while there had been more than one wearer, the profile of the major contributor nevertheless could be determined. That profile matched the DNA obtained from defendant's blood sample. The odds against an unrelated individual also matching the major contributor's genetic profile were one in 4,800 for the African-American population, one in 230,000 for the Caucasian population, one in 130,000 for the southeastern Hispanic population, and one in 68,000 for the southwestern Hispanic population.

One of defendant's neighbors testified that after the assault on the victim, she visited defendant at his home and saw him carrying a bag containing a knife that appeared to be bloody. As she watched, defendant cleaned the knife. Defendant told her he had dropped it in some blood on the way home and to keep the knife a secret.

On 6 August 1997, defendant was arrested. He was transported to the police station and given *Miranda* warnings. Defendant appeared unconcerned and told investigators that they had nothing on him. However, when investigators showed defendant a photograph of the victim and advised him that she could not have identified him because she had been legally blind, defendant grew quiet and remarked, "She didn't have to die." The next day, police searched a mini-storage bin rented by defendant and recovered several knives of a style similar to those found in defendant's home.

Defendant presented no evidence during the guilt-innocence phase of his trial.

PRETRIAL ISSUES

[1] First, defendant contends that the trial court erred in denying his motion to change venue. In this motion, originally filed on 15 September 1997, defendant cited several newspaper articles about the murder. When this motion was heard on 19 April 1999, defendant submitted to the court seven articles from the local newspaper. The court reviewed these articles and observed that some of them described the events of the crime and the nature of the victim without naming defendant. Defendant responded by pointing out that other articles focused on defendant and argued that even where he was not mentioned, the articles had a natural tendency to inflame the readers. After considering defendant's arguments, the trial court noted that the most recent article was more than a year and a half old and that additional time would pass before the case would be called for trial. Because of this extended interval, the court concluded

> that there's no reasonable likelihood that members of the public would be able to recall in any specific detail the reports of the media concerning this event or of the defendant, nor is it likely that they would have preconceived impressions that they would continue to have about this matter based upon such pretrial publicity.
>
> . . . The defendant has failed to show that there's a reasonable likelihood that prejudicial pretrial publicity will prevent a fair trial in this case.

Accordingly, the court denied defendant's motion without prejudice to defendant to raise the issue again at the time of trial.

When the case was called for trial on 20 March 2000, defendant renewed his motion, citing a recently broadcast television report. The court viewed the segment, considered arguments of counsel, and denied defendant's motion; however, the court allowed defendant to address pretrial publicity during jury *voir dire*. Of the sixty-nine prospective jurors considered for service, forty-one had some knowledge of the case, and of the fifteen jurors actually selected, nine had such knowledge.

A motion to change venue is controlled by N.C.G.S. § 15A-957, and a trial court's denial of such a motion will not be reversed absent an abuse of discretion. *State v. Golphin*, 352 N.C. 364, 391-92, 533 S.E.2d 168, 190 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Similarly, a motion for individualized jury selection is also addressed to the trial court's discretion. *State v. Anderson*, 355 N.C. 136, 147, 558 S.E.2d 87, 95 (2002). Our review of the record and the particular incidents cited by defendant satisfy us that the trial court did not abuse its discretion here. To obtain a change of venue, a defendant must show a specific and identifiable prejudice against him as a result of pretrial publicity. *State v. Barnes*, 345 N.C. 184, 204, 481 S.E.2d 44, 54, *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). Defendant's general allegations that the attention devoted by local media to this case tainted the jury pool fail to establish the particularized prejudice necessary to support a change of venue. Accordingly, the trial court did not abuse its discretion by denying defendant's motion for change of venue.

[2] Defendant also moved for individual selection of jurors. The court denied his motion, holding that, in its discretion, it would follow the procedures set out in the statutes. *See* N.C.G.S. ch. 15A, art. 72 (2001) (entitled "Selecting and Impaneling the Jury"). Defendant now argues that several prospective jurors tainted the pool by expressing improper opinions as to defendant's guilt or the outcome of the trial while other prospective jurors were listening. Defendant further contends that he was compelled to expend peremptory challenges to remove several prospective jurors who were prejudiced against him. However, our review of the record reveals that the trial court maintained control over the jury selection process, intervening to ask questions as necessary and clarifying matters to the prospective jurors as appropriate. The trial court interrupted on at least one occasion when a prospective juror appeared to be on the verge of making an improper comment and allowed challenges for cause as to

jurors who were unable to follow the law. The court also instructed the prospective jurors to disregard improper comments. The trial court's actions, consistent with the statutory scheme, ensured that *voir dire* was conducted properly.

Defendant specifically claims that he was compelled to accept one objectionable juror after he had expended all his peremptory challenges. This juror, who was initially called as an alternate, first stated that she was familiar with the case and, while she had no opinion as to whether defendant was guilty or innocent, would favor the death penalty if defendant were convicted. The court then took over the questioning of this juror, and following some inquiries and explanations of the law from the bench, the juror stated that she now understood the sentencing process and affirmed that she could set aside her personal beliefs and follow the law. This juror was accepted as an alternate and later became a regular juror during the trial.

Defendant asks us to revisit our doctrine that holds that even after a prospective juror initially voices sentiments that would normally make him or her vulnerable to a challenge for cause, that prospective juror may nevertheless serve if the prospective juror later confirms that he or she will put aside prior knowledge and impressions, consider the evidence presented with an open mind, and follow the law applicable to the case. *See, e.g., State v. Wallace*, 351 N.C. 481, 521, 528 S.E.2d 326, 351, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). It appears to be defendant's position that such a juror cannot be rehabilitated and that allowing such a juror to serve constitutes structural error. We disagree. A judge who observes the prospective juror's demeanor as he or she responds to questions and efforts at rehabilitation is best able to determine whether the juror should be excused for cause. In the case at bar, we discern no abuse of discretion in the trial court's decision not to allow a challenge for cause of this prospective juror. Similarly, we see no abuse of discretion in the trial court's denial of defendant's motion for individualized jury selection.

These assignments of error are overruled.

[3] Next, defendant argues that the trial court erred in denying his motions to suppress Johnson's identification of him in a photographic lineup. Defendant filed two such motions to suppress. In the first, filed 12 April 1999, defendant claimed that he was impermissibly photographed on 13 May 1997 because he was then in custody at the Weldon Police Department. Defendant also contended in this motion

that the identification procedure was "highly suggestive and prejudicial." In his second motion to suppress, filed 23 August 1999, defendant made a more detailed argument that the identification procedure was suggestive.

The trial court conducted a hearing on 13 September 1999 at which Johnson and Chief Karl Clark of the Weldon Police Department testified. The prosecution presented evidence through Chief Clark that defendant came to the police station voluntarily and was not under arrest or in custody when photographed. As to the photographic identification procedure, Chief Clark testified that on 13 May 1997, officers showed Johnson an array of six photographs, including the photograph taken of defendant that day, and that she quickly selected defendant's photograph. The array was admitted into evidence.

Johnson testified that she was satisfied that the individual she identified in the photographic lineup was the man she saw at the victim's home the night of the murder. She added that some time after making this identification, she saw two photographs of defendant in a newspaper when he was arrested. When asked if the man she saw at the victim's home was then in courtroom, she identified defendant.

After the prosecution completed its presentation of evidence, defendant argued that the array was defective for two reasons: (1) defendant's photograph was the only one that did not have a background of horizontal lines, suggesting that his was the only photograph that was not a mug shot; and (2) those in the array were all "distinctively different" in coloration, hairstyle, and so forth. The court viewed the array, considered additional arguments of counsel, then orally denied defendant's motions.

The court entered its written order on 23 September 1999. In addition to reciting the evidence, the court noted that it had examined the array and found as a fact

> that the photographs of the persons depicted therein are of the same type and contain similarities and consistencies of appearance, and said photographic lineup was not so unnecessarily suggestive or conducive so as to lead to any chance of mistaken identification to the extent that the Defendant would be denied due process of law.

Based on its findings of fact, the court concluded as a matter of law that defendant's photograph was legally obtained, that the photo-

graphic lineup was not so unnecessarily suggestive as to lead to a chance of mistaken identification to the extent that defendant would be denied due process of law, and that Johnson's identification of defendant in court was of independent origin and based on what she had seen at the time of the offense. Accordingly, the trial court denied defendant's motions to suppress. Defendant has not appealed the court's finding that he was not in custody when photographed. However, defendant vigorously contends that the identification procedures followed here were improper.

Whether an identification procedure is unduly suggestive depends on the totality of the circumstances. *State v. Pigott*, 320 N.C. 96, 99, 357 S.E.2d 631, 633 (1987). A due process analysis requires a two-part inquiry. *State v. Fowler*, 353 N.C. 599, 617, 548 S.E.2d 684, 698 (2001), *cert. denied*, —— U.S. ——, 152 L. Ed. 2d 230 (2002). "First, the Court must determine whether the identification procedures were impermissibly suggestive." *Id.* If so, "the Court must then determine whether the [suggestive] procedures created a substantial likelihood of irreparable misidentification." *Id.* In determining whether identification procedures are impermissibly suggestive, courts have considered such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty shown by the witness, and the time between the offense and the identification. *Manson v. Brathwaite*, 432 U.S. 98, 114, 53 L. Ed. 2d 140, 154 (1977). Where a witness identifies a defendant in a photographic lineup, this Court has considered pertinent aspects of the array, such as similarity of appearance of those in the array and any attribute of the array tending to focus the witness' attention on any particular person therein, as factors in determining whether the identification procedures are impermissibly suggestive. *See, e.g.*, *State v. Freeman*, 313 N.C. 539, 545, 330 S.E.2d 465, 471 (1985) (affirming that photographic lineup was lawful despite the defendant's contention that he was the heaviest individual in the array and also affirming the trial court's denial of the defendant's motion to suppress the in-court identification testimony of three witnesses who had also identified the defendant in the photographic lineup); *State v. Gaines*, 283 N.C. 33, 40, 194 S.E.2d 839, 844 (1973) (affirming that photographic lineup was lawful despite the defendant's contention that he was the youngest and lightest man in the array); *State v. Roberts*, 135 N.C. App. 690, 694, 522 S.E.2d 130, 132-33 (1999) (affirming that photographic lineup was lawful despite

the defendant's contention that he was the only one with freckles in the array), *disc. rev. denied*, 351 N.C. 367, 543 S.E.2d 142 (2000). In addition, we have held that "[a] photographic lineup is not impermissibly suggestive merely because defendant has a distinctive appearance." *State v. Freeman*, 313 N.C. at 545, 330 S.E.2d at 471. Indeed, "[i]f such were the rule, no lineup would be valid because no two men are alike." *State v. Gaines*, 283 N.C. at 40, 194 S.E.2d at 844. "The trial court's findings of fact are binding on appeal when supported by competent evidence." *State v. Fowler*, 353 N.C. at 618, 548 S.E.2d at 698.

On appeal, defendant has refined his argument that the photographic array is improper by adding that the color of his shirt matches the outline of tape that frames and holds together the array, therefore drawing a viewer's eye to defendant. This Court has viewed the array. It depicts six African-American males of similar complexion and age. Only the top of the shoulders show in the photographs, so that clothing is not particularly significant; nevertheless, we note that two men are wearing gold or orange, one is wearing gray, one is wearing green, one is wearing white, and defendant is wearing red. All are bearded. Four of the men have dreadlocks or otherwise braided hair, one has short hair, and one has an Afro. The red tape that borders the array is closer to two others than to defendant. Although defendant is the only one in the array not standing before a grid of horizontal lines, all the photographs have a light background. None of the men appears particularly distinctive in comparison with any of the others. Accordingly, we agree with the trial court that the photographic array was not improperly suggestive, and therefore we need not consider whether the procedure created a substantial likelihood of irreparable misidentification. *Id.* at 619, 548 S.E.2d at 698.

[4] Defendant also challenges Johnson's in-court identification.

> [T]he viewing of a defendant in the courtroom during the various stages of a criminal proceeding by witnesses who are offered to testify as to identification of the defendant is not, of itself, such a confrontation as will taint an in-court identification unless other circumstances are shown which are so "unnecessarily suggestive and conducive to irreparable mistaken identification" as would deprive defendant of his due process rights.

State v. Covington, 290 N.C. 313, 324, 226 S.E.2d 629, 638 (1976) (quoting *Stovall v. Denno*, 388 U.S. 293, 302, 18 L. Ed. 2d 1199, 1206

(1967)). The record reveals that Johnson had the opportunity to view the perpetrator from a distance of approximately forty feet for several seconds on two occasions. Although it was night, lighting was adequate to allow her to see the man's face. Her eyesight is good. She was paying close attention and shortly thereafter provided a detailed description to the investigators. At the suppression hearing, she was careful to ask to see defendant without his hat before committing herself, then was confident of her identification.

We hold that her in-court identification was made independently of the photographic identification procedure and was properly admitted. This assignment of error is overruled.

JURY SELECTION

[5] Defendant raises three issues pertaining to jury selection. First, defendant argues that the trial court improperly excused two prospective jurors for cause without conducting adequate *voir dire*. This Court recently discussed the law applicable to challenges for cause in *State v. Reed*, 355 N.C. 150, 155-56, 558 S.E.2d 167, 171-72 (2002). Grounds for allowing a challenge for cause include that the juror "[a]s a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina," N.C.G.S. § 15A-1212(8), or "[f]or any other cause is unable to render a fair and impartial verdict," N.C.G.S. § 15A-1212(9). Moreover, "[t]he judge may excuse a juror without challenge by any party if he determines that grounds for challenge for cause are present." N.C.G.S. § 15A-1211(d). To determine whether a prospective juror is capable of rendering a fair and impartial verdict, the trial court must " 'reasonably conclude from the *voir dire* examination that a prospective juror can disregard prior knowledge and impressions, follow the trial court's instructions on the law, and render an impartial, independent decision based on the evidence.' " *State v. Jaynes*, 342 N.C. 249, 270, 464 S.E.2d 448, 461 (1995) (quoting *State v. Green*, 336 N.C. 142, 167, 443 S.E.2d 14, 28, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994)), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996).

A trial court's excusal of a prospective juror for cause is reviewed for abuse of discretion. *State v. Smith*, 352 N.C. 531, 543, 532 S.E.2d 773, 782 (2000), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360 (2001). Such abuse of discretion occurs where the trial court's determination is " 'manifestly unsupported by reason' " and " 'so arbitrary that it could not have been the result of a reasoned decision.' " *State v.*

T.D.R., 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). An appellate court will affirm a trial court's discretionary ruling if the trial court's findings are fairly supported by the record. *Wainwright v. Witt*, 469 U.S. 412, 434, 83 L. Ed. 2d 841, 858 (1985).

The attorneys and the court conducted the following pertinent *voir dire* of Lucy Williams, the first prospective juror who defendant claims was improperly challenged for cause:

THE COURT: Do you know the defendant in this matter, Lionel Lewis Rogers?

MS. WILLIAMS: Yes, I do.

THE COURT: Okay. Do you know members of his family?

MS. WILLIAMS: I knew his mother for years, his adopted mother, I [knew] her for years.

THE COURT: All right. Have you visited in their home or they visited in your home?

MS. WILLIAMS: She has.

THE COURT: Do you know the defendant through his mother?

MS. WILLIAMS: Through his mother.

THE COURT: That's how you know him?

MS. WILLIAMS: Yes. Yes.

THE COURT: Would you consider—is he a casual acquaintance or is he someone that you . . .

MS. WILLIAMS: (Interjected) I would just say casual because I didn't see him that much, but I have talked with him a couple of hours at the store and, you know, things like that.

THE COURT: You know his mother much better.

MS. WILLIAMS: Yes.

THE COURT: She's more than a casual acquaintance?

MS. WILLIAMS: Yes, she is.

THE COURT: The fact that you know him in the manner that you described and know his mother in the way you have told us, would that prevent you—would that be something that you

would carry into this case and would prevent you from being able to be impartial?

MS. WILLIAMS: I don't know. I really couldn't say because like I said, she's a very good friend, she's a very good friend of my mother's and I've known her for years.

THE COURT: Okay. And only you would know, but what I'm asking you is, the fact that you know her in the way that you've described, do you believe that would be something that you would take—if you were selected as a juror, that would be something that you would take with you into the jury room and would affect how you would decide issues . . .

MS. WILLIAMS: (Interjected) It might.

THE COURT: . . . of guilt or innocence?

MS. WILLIAMS: I think so because I just care a lot about her.

THE COURT: Care a lot about her?

MS. WILLIAMS: About his mother; yes.

THE COURT: Would you be able to set that aside?

MS. WILLIAMS: I really couldn't say.

THE COURT: I mean there's no right or wrong answers, I want you to understand that, nobody is trying to . . .

MS. WILLIAMS: (Interjected) Yeah, I understand what you're saying and I'm trying to understand it myself. I wouldn't want, I wouldn't know if it would [—] you understand what I'm saying? I wouldn't know if it would come up because I've never been through this before.

THE COURT: Yes, ma'am. Well, because we don't—I would say to you as I would to the other members of the jury panel, this case, both the State and the defendant are entitled to a trial and a jury's decision . . .

MS. WILLIAMS: (Interjected) I know.

THE COURT: . . . based upon the evidence that comes out here in the courtroom . . .

MS. WILLIAMS: (Interjected) Yeah, what happened.

THE COURT: . . . in accordance with the law and not based upon personal acquaintances . . .

MS. WILLIAMS: (Interjected) I know, I know.

THE COURT: . . . in the community or maybe even what people are saying in the community but based upon what happens here, the evidence and the law.

MS. WILLIAMS: (Interjected) Yeah, what's right and what's wrong.

THE COURT: And would you be able—what I'm asking you is whether you would be able if you were selected as a juror to base your verdict upon the evidence and the law that comes out during the trial or whether you feel like that your personal acquaintance with the defendant and his family, or his mother, would—that would be something that you would not be able to set aside[,] that it would play a part in your verdict?

MS. WILLIAMS: I think it would hinder it.

THE COURT: Okay. You believe it would cause you a problem?

MS. WILLIAMS: I think it would.

THE COURT: Cause you a problem?

MS. WILLIAMS: Yes, it would.

THE COURT: And you would—and your verdict, if you were to arrive at a verdict in this case it would be effected [sic] by . . .

MS. WILLIAMS: (Interjected) The way I feel about her.

THE COURT: . . . not wanting to—about how you care for his mother?

MS. WILLIAMS: That's right.

THE COURT: All right. And then that would—if the evidence, well, let me move right on then, if the evidence and the law in this case satisfied you beyond a reasonable doubt that the defendant was guilty of murder in the first degree or first degree burglary or first degree sex offense or any lesser included offenses, would you be able to return such a verdict or would your personal acquaintance and friendship with his mother prevent you or impair you from being able to do that?

MS. WILLIAMS: I would have to do the right thing now. I would have to do that. If this happened I would have to do the right thing.

THE COURT: Okay.

MS. WILLIAMS: I know what bothers me with his mother, I know that's true, but I mean right is right.

THE COURT: So you would, even though it would cause you—would concern you . . .

MS. WILLIAMS: (Interjected) Yes, it would be very much concerning me.

THE COURT: . . . you would be able then to set it aside?

MS. WILLIAMS: Uh huh . . .

THE COURT: Now, ma'am, you need to listen to me.

MS. WILLIAMS: I know what you're saying and . . .

THE COURT: I just want to be sure I understand what you're saying.

MS. WILLIAMS: [Y]eah.

THE COURT: If you can't set it aside just, you know . . .

MS. WILLIAMS: (Interjected) I don't think so.

THE COURT: You could not set it aside?

MS. WILLIAMS: No, I don't think so. I really don't.

THE COURT: So it would prevent you from being able to return a verdict . . .

MS. WILLIAMS: (Interjected) Yes, I think so.

THE COURT: . . . of guilty . . .

MS. WILLIAMS: (Interjected) Uh huh, it would.

THE COURT: . . . because of your friendship with his mother?

MS. WILLIAMS: Uh huh.

THE COURT: And now you're sure of that, ma'am?

MS. WILLIAMS: I'm sure, yes.

THE COURT: I'm not putting words in your mouth.

MS. WILLIAMS: I know you're not. No, I'm sure of it.

THE COURT: Do I clearly understand what you're saying now?

MS. WILLIAMS: Yes, uh huh, yes.

THE COURT: The State have a motion?

[PROSECUTOR]: For cause, Your Honor.

THE COURT: State's challenge for cause is allowed.

[DEFENSE COUNSEL]: We would object.

THE COURT: Defendant's objection to the Court allowing the State's challenge for cause is overruled and denied.

[DEFENSE COUNSEL]: Request an opportunity to rehabilitate.

THE COURT: Your request to get her to seek to change her mind is denied.

Defendant argues that whenever this prospective juror gave responses indicating a willingness to consider the evidence with an open mind, the court steered her toward answers that would make her open to a challenge for cause. However, the record, as quoted above, demonstrates that the judge learned that the juror knew defendant personally, was a friend of defendant's mother, and had misgivings about serving on the jury. Alerted by these potential sources of conflict, the court did not direct the prospective juror's answers in any direction. Instead, the court cautioned the prospective juror to listen to his questions, apparently in response to her tendency to interrupt. This record leaves no doubt that the experienced trial judge was " 'left with the definite impression that [this] prospective juror would be unable to faithfully and impartially apply the law.' " *State v. Smith*, 352 N.C. at 543, 532 S.E.2d at 782 (quoting *Wainwright v. Witt*, 469 U.S. at 426, 83 L. Ed. 2d at 852). Moreover,

> [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.

State v. Oliver, 302 N.C. 28, 40, 274 S.E.2d 183, 191 (1981). Here, the prospective juror had unambiguously, and without prodding by the court, stated that she would be unable to return a verdict of guilty. The court did not abuse its discretion in denying defendant's motion to rehabilitate this prospective juror.

As to Robert Hudson, the second prospective juror who defendant contends was improperly dismissed, the following pertinent *voir dire* took place:

> [PROSECUTOR]: You understand that anybody who sits on this jury must be able upon hearing the evidence and the law must be able upon finding this defendant guilty of first degree murder, they must be able to recommend the death penalty, they must be able to recommend life imprisonment without parole. You understand?
>
> MR. HUDSON: (Nods his head.)
>
> [PROSECUTOR]: Are you saying that that's something that you . . .
>
> MR. HUDSON: (Interjected) I can probably recommend him life in prison [sic].
>
> [PROSECUTOR]: But insofar as recommending the death penalty, you feel that's something you just couldn't do?
>
> MR. HUDSON: Right now in this point in my life I can't say death penalty because of stuff that's been going on with my life so I can't say.
>
> [PROSECUTOR]: Is that coming from a religious conviction that you have or a personal conviction that you have, or moral conviction that you have?
>
> MR. HUDSON: It's both, personal and religious.
>
> [PROSECUTOR]: Okay. Is this a conviction that you've had for some time or, and if so, can you tell us how long it's been?
>
> MR. HUDSON: Over about three years and then when I started school they motivated us like during different times of the class and stuff and they changed like my thoughts and my thinking and so I can't say.
>
> [PROSECUTOR]: But would it be fair and honest to say that as a matter of conscience that regardless of what the facts are in

this case or any other case that recommending the death penalty is just something you couldn't do?

. . . .

MR. HUDSON: I think it's something that I could do but I got [sic] to hear the evidence and get down into it before I can say if I can say that he should be put to death or if he was found guilty he should be put to death, so I can't say. I can't say. I can't say.

[PROSECUTOR]: So as you sit there right now this morning would it be fair and honest to say that upon hearing the evidence and the law that you could say right now that you could vote that he receive life imprisonment without parole, could you do that?

. . . .

MR. HUDSON: That by hearing the evidence that if found guilty I recommended life in prison?

[PROSECUTOR]: Yes.

MR. HUDSON: Depends on if he can get like some type of psychology and you know check out his head and brain and all that I might—I don't know.

. . . .

THE COURT: Let me ask you sir, first, based on your religious and personal views can you conceive of some set of facts or circumstances in your mind, not asking you what they are, but just asking if you can conceive of some set of facts and circumstances in your mind where you if you were selected as a juror could vote to recommend a sentence of death?

MR. HUDSON: No.

THE COURT: You cannot?

MR. HUDSON: (Shakes his head.)

THE COURT: Then if you were selected as a juror in this case—well, let me first ask you one further question, is that—and is that because of—the reason you can't conceive of any set of facts or circumstances is that because of your religious and moral and personal beliefs?

MR. HUDSON: About the death penalty?

THE COURT: Yes, sir.

MR. HUDSON: Yes, sir, but . . .

THE COURT: (Interjected) All right, now, if you were selected as a juror in this case and the jury that you were a part of had found the defendant guilty of first degree murder, and you had heard evidence as it relates to aggravating and mitigating circumstances and at that point you were satisfied from the evidence and beyond a reasonable doubt of the existence of one or more aggravating circumstances; secondly, you were satisfied that if there were mitigating circumstances that they were insufficient to outweigh the aggravating circumstances beyond a reasonable doubt; and third, you were satisfied from the evidence and beyond a reasonable doubt that one or more of those aggravating circumstances was sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstances, would you be able or unable to recommend a sentence of death?

MR. HUDSON: Not able.

THE COURT: You would not be able?

MR. HUDSON: Unable.

THE COURT: And that would be no matter what the facts are, no matter what the circumstances might reveal? Is that correct or not?

MR. HUDSON: That's correct.

THE COURT: Any question in your mind about that sir?

MR. HUDSON: (Shakes his head.)

THE COURT: Anything I can explain to you any further to help you understand the process by which a jury would go about reaching that decision?

MR. HUDSON: No, sir.

THE COURT: You're satisfied with your answers?

MR. HUDSON: (Nods his head.)

THE COURT: You would then always recommend a sentence of life imprisonment without parole, correct?

MR. HUDSON: Yes, yes, sir.

THE COURT: And never recommend a sentence of death, correct?

MR. HUDSON: Yes, yes, sir, it's hard to say, it's really hard to say, hard to say.

THE COURT: Wait a minute now, tell me—a minute ago I thought you had said you would always recommend a sentence of life imprisonment.

MR. HUDSON: See, I'm like the lady that just left, I mean it's still—that's two deaths, you know, that's like religious, the Bible says "Thou shalt not kill," that [H]e'll take care of your enemies or whatever.

THE COURT: Yes, sir. So that would prevent you then from being able to recommend a sentence of death?

MR. HUDSON: Yes, sir. If you would have called me three years back maybe.

THE COURT: Three years ago you might have been able . . .

MR. HUDSON: (Interjected) I might have, yeah, I might have.

THE COURT: But now you can't?

MR. HUDSON: I can't since I been [sic] reading the Bible and stuff, you know.

THE COURT: Thank you. [Mr. Prosecutor], do you have a motion?

[PROSECUTOR]: For cause, Your Honor.

THE COURT: The State's challenge for cause is allowed.

[DEFENSE COUNSEL]: Defendant would object.

[DEFENSE COUNSEL]: Defendant objects; request an opportunity to rehabilitate.

THE COURT: Thank you. That request is denied. State's challenge for cause is allowed. Court denies the request to rehabilitate in the Court's discretion. And in exercise of my discretion I'm satisfied based on the juror's answers that his position is an unequivocal position, one based upon strong religious and personal views that he's held for over three years and, therefore, this

juror is excused for reasons as a matter of conscience, regardless of the facts or circumstances he would be unable to render a verdict with respect to the charge in accordance with the laws of North Carolina.

This record reveals that the trial court made searching and impartial inquiry of the prospective juror, whose answers revealed his inability to serve on a capital jury. The trial court correctly allowed the prosecutor's motion to challenge the juror for cause and did not abuse its discretion in denying defendant's motion to attempt to rehabilitate the juror.

These assignments of error are overruled.

[6] Defendant next argues that the trial court erred in overruling his objections to the prosecutor's peremptory challenges of several jurors. Defendant contends that these strikes were racially discriminatory and a violation of his rights under the United States and North Carolina Constitutions, as set out in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986).

Defendant is African-American, and the victim was Caucasian. The race of a defendant and of a victim may be a relevant factor in determining whether a defendant has raised an inference of purposeful discrimination. *State v. Locklear*, 349 N.C. 118, 140, 505 S.E.2d 277, 290 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999). During jury selection, the prosecution exercised two peremptory strikes against African-American prospective jurors. Defendant raised a *Batson* objection. Finding that defendant had failed to make a *prima facie* showing of discrimination, the court overruled the objection. The prosecutor then peremptorily struck two more African-American prospective jurors, and defendant renewed his *Batson* challenge. In again overruling defendant's objection, the trial court noted that during the first selection round the prosecution had passed six African-American jurors and six Caucasian jurors, and during the second selection round had passed two African-Americans and six Caucasians.

However, when the prosecutor peremptorily struck a fifth African-American prospective juror, the court required the prosecutor to set his reasons on the record. The prosecutor complied, giving his explanation for challenging both Caucasian and African-American prospective jurors. One prospective juror knew defendant's mother and was ambivalent about sitting in judgment, another's spouse had

worked for one of defendant's counsel, another had a history of problems with the law and may have been mentally challenged, another seemed uncomfortable with the law and unwilling to participate in the trial, another had a prior DWI and seemed to the prosecutor to be "weak" on the death penalty, and another also appeared to be mentally challenged and had a family history of encounters with the law. When the prosecutor completed his recitation, defendant declined the court's offer to present rebuttal evidence. The court then noted that it had been observing the selection process from the beginning and accepted the prosecution's proffered reasons for his peremptory challenges as race-neutral.

The trial court thus followed the three-step inquiry set out in *Batson*. When the court determined that defendant had established a *prima facie* case of discrimination, it required the prosecution to offer race-neutral explanations for its peremptory challenges. After those explanations were provided, the court determined that defendant had not established purposeful racial discrimination. *See Batson v. Kentucky*, 476 U.S. at 96-97, 90 L. Ed. 2d at 87-88. The burden of persuasion was on defendant in making this motion, *see Purkett v. Elem*, 514 U.S. 765, 767, 131 L. Ed. 2d 834, 839 (1995); *State v. Locklear*, 349 N.C. at 140, 505 S.E.2d at 290, and on appeal, we give deference to the trial court's ruling, *see State v. Smith*, 328 N.C. 99, 127, 400 S.E.2d 712, 727-28 (1991) ("The ability of the trial judge to observe firsthand the reactions, hesitations, emotions, candor, and honesty of the lawyers and veniremen during voir dire questioning is crucial to the ultimate determination whether the district attorney has discriminated."). A trial court's ruling on a *Batson* challenge is reviewed for clear error. *State v. Kandies*, 342 N.C. 419, 434-35, 467 S.E.2d 67, 75, *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996).

The jury that sat in this case consisted of ten African-Americans and two Caucasians, with two Caucasian and one Hispanic alternates.[1] Although we have held that the "excusal of even a single juror for a racially discriminatory reason is impermissible," *State v. Locklear*, 349 N.C. at 141, 505 S.E.2d at 290, we also have held that "the trial court may consider the acceptance rate of minority jurors by the State as evidence bearing on alleged discriminatory intent," *id.* at 141, 505 S.E.2d at 291. The reasons given by the prosecutor and accepted by the trial court were both race-neutral and plausible. Although defendant argues that the prosecution passed other jurors

1. One Caucasian juror who was originally seated was replaced with the Hispanic alternate while the trial was under way.

who showed the same or similar characteristics as those challenged for cause, we have rejected this mechanical type of analysis.

> [A]lleged disparate treatment of prospective jurors would not be dispositive necessarily. Choosing jurors, more art than science, involves a complex weighing of factors. Rarely will a single factor control the decision-making process. . . . "A characteristic deemed to be unfavorable in one prospective juror, and hence grounds for a peremptory challenge, may, in a second prospective juror, be outweighed by other, favorable characteristics."

State v. Porter, 326 N.C. 489, 501, 391 S.E.2d 144, 152-53 (1990) (quoting *People v. Mack*, 128 Ill. 2d 231, 239, 538 N.E.2d 1107, 1111 (1989), *cert. denied*, 493 U.S. 1093, 107 L. Ed. 2d 1072 (1990)).

Defendant also argues that the prosecution's contentions that it was neutral on the matter of race was belied by its later "reverse *Batson*" objection based upon defendant's exercise of peremptory strikes, allegedly made against Caucasian prospective jurors to increase the number of minorities on the jury. However, we note that the record shows that the trial judge observed defendant's pattern of peremptory strikes and gently reminded defense counsel that both sides had constitutional responsibilities during jury selection. The *Batson* motions made by trial counsel do not reveal a racially discriminatory intent on the part of either the prosecution or defendant.

Based upon the record in this case, we hold that the trial court did not commit clear error in denying defendant's *Batson* motion. These assignments of error are overruled.

[7] Finally, defendant contends that the trial court erred in excusing two prospective jurors solely on account of their age. The record reveals that the first such prospective juror, Barbara Whitehead, asked to address the court during *voir dire*:

> THE COURT: Okay. Tell me what . . .
>
> MS. WHITEHEAD: Well, on Monday I did not understand the nature of this case and I'm sixty-eight years old and I do not think I can work, you know.
>
> THE COURT: Are you asking because of your age if you can be excused?
>
> MS. WHITEHEAD: Yes and the fact that I could not be impartial . . .

THE COURT: (Interjected) Well I'm not able to get into that at this point but as far as your age, ma'am, if you're over sixty-five years of age the law allows me to allow you to be excused if you ask to be excused.

MS. WHITEHEAD: I'm sixty-eight and I ask to be excused.

THE COURT: Yes, ma'am. I can excuse you for that reason.

The second prospective juror, Warren Braswell, also asked to address the court:

THE COURT: Good morning, Mr. Braswell.

MR. BRASWELL: Sir, due to my age I would like to be dismissed if possible.

THE COURT: And how old are you Mr. Braswell?

MR. BRASWELL: Sixty-nine.

THE COURT: Yes, sir. Counsel, Mr. Braswell is a member of Group C. Mr. Braswell in light of your age you're entitled to that, to be released and I will release you.

Defendant did not object to the court's excusing of either juror. He now contends that the court's action violated the applicable statutes and was unconstitutional. In the alternative, he argues that trial counsel was ineffective in not objecting to the court's action. The State responds that defendant waived the issue by failing to object and that defendant cannot raise a constitutional issue on appeal without preserving it below. Although we acknowledge the validity of the State's position, we will address defendant's arguments because similar issues related to jury selection periodically come before this Court.

By statute, citizens over the age of sixty-five are qualified to serve on juries. N.C.G.S. § 9-3 (2001). However, a prospective juror over that age may, when summoned, request an exemption. N.C.G.S. § 9-6.1 (2001). The judge has the option of allowing or denying the request. *Id.* Once the venire is in the courtroom, any juror, though qualified, nevertheless may ask to be excused. The General Assembly has

> declare[d] the public policy of this State to be that jury service is the solemn obligation of all qualified citizens, and that excuses from the discharge of this responsibility should be granted only

> for reasons of compelling personal hardship or because requiring service would be contrary to the public welfare, health, or safety.

N.C.G.S. § 9-6(a) (2001). This language gives trial courts considerable latitude to deal with the particular problems that appear with every trial, and we have recognized that the decision to excuse a prospective juror lies in the trial court's discretion. *State v. Neal*, 346 N.C. 608, 619, 487 S.E.2d 734, 741 (1997), *cert. denied*, 522 U.S. 1125, 140 L. Ed. 2d 131 (1998). We have stated that a juror may properly be excused on the basis of age. *State v. Nobles*, 350 N.C. 483, 494, 515 S.E.2d 885, 892 (1999) ("The transcript shows that [the prospective juror] was properly excused '[b]ecause he was over sixty-five.' "); *State v. Sanders*, 276 N.C. 598, 606, 174 S.E.2d 487, 493 (1970) ("court in its discretion properly excused the juror who was 84 years of age"), *death sentence vacated on other grounds*, 403 U.S. 948, 29 L. Ed. 2d 860 (1971). Accordingly, we discern no abuse of discretion in the trial court's decision to grant the jurors' requests to be excused. Nevertheless, in light of the statutory admonition contained in N.C.G.S. § 9-6(a), we remind the trial courts that excusing prospective jurors present in the courtroom who are over the age of sixty-five must reflect a genuine exercise of judicial discretion. Defendant correctly points out that such jurors often bring to the jury pool both a wealth of experience and a willingness to serve.

Defendant also raises two constitutional objections to the excusing of these jurors. First, he states that the statutes permitting the removal of jurors on the basis of age "violate the fair cross-section requirement of the Sixth Amendment [to the United States Constitution] by allowing the arbitrary removal of jurors on a discriminatory basis unrelated to their ability to serve." Defendant also cites Article I, Section 26 of the North Carolina Constitution. To establish his claim, however, defendant must show that there has been a systematic exclusion of a distinctive group in the community. *Lockhart v. McCree*, 476 U.S. 162, 174, 90 L. Ed. 2d 137, 149 (1986). To be "distinctive," a group must: (1) show a quality or attribute that defines or limits membership in the group; (2) possess a cohesiveness of ideas, attitudes, or experiences that distinguishes the purported group from the rest of society; and (3) share a community of interest that may not be represented in other segments of the population. *State v. Price*, 301 N.C. 437, 445-46, 272 S.E.2d 103, 109 (1980). We have held that individuals between the ages of eighteen and twenty-nine do not constitute a distinctive group because there

is no evidence that "the values and attitudes of this purported group are substantially different from those of other segments of the community" or that "the values and attitudes of the members of the purported group are cohesive and consistent." *Id.* at 446, 272 S.E.2d at 110. In the case at bar, defendant presented no evidence to support his claim that citizens over sixty-five make up a "distinctive group." For the reasons articulated in *Price*, we now hold that citizens over the age of sixty-five do not make up a "distinctive group" for the purposes of determining whether defendant was denied his right to have a jury selected from a fair cross-section of the community as guaranteed by the Sixth Amendment to the United States Constitution and pursuant to Article I, Section 26 of the North Carolina Constitution.

Defendant's second constitutional claim is that the statutes "impermissibly discriminate on the basis of age, in violation of the equal protection clauses of the Fourteenth Amendment [to the United States Constitution] and Article I, § 19 of the North Carolina Constitution." However, because age has never been determined to be a suspect class, *Phelps v. Phelps*, 337 N.C. 344, 352, 446 S.E.2d 17, 22 (1994), classifications based on age are subject to a "rational basis" review, *State v. Elam*, 302 N.C. 157, 162, 273 S.E.2d 661, 665 (1981). The rational basis of the General Assembly's decision to allow trial judges to excuse jurors on the basis of advanced age is readily apparent. The adverse effects of growing old do not strike all equally or at the same time, and it is only sensible to allow trial judges to consider the individual when a prospective juror seeks to be excused because of his or her age. Accordingly, we find no constitutional infirmity in the statutory scheme as it relates to jurors over the age of sixty-five.

[8] Finally, defendant argues that his trial counsel provided ineffective assistance by failing to object when the court excused these jurors. Because the trial court acted properly in excusing the jurors, defense counsel's acquiescence was also proper. Moreover, even if there had been any question as to the propriety of the court's actions, we see no dereliction by trial counsel. Pursuant to *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984), a defendant making a claim of ineffective assistance of counsel must establish both that "counsel's performance was so deficient as to deprive him of his right to be represented and that absent the deficient performance by defense counsel, there would have been a different result at trial." *State v. Strickland*, 346 N.C. 443, 455, 488 S.E.2d 194, 201 (1997), *cert.*

denied, 522 U.S. 1078, 139 L. Ed. 2d 757 (1998). However, if we can "determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985). Here, the evidence of defendant's guilt was strong. There is no evidence in the record suggesting that the two jurors who were excused would have led the other jurors to a different verdict if they had been selected to sit on this case.

Accordingly, we do not see any possibility that the outcome of the trial would have been different if defense counsel had objected to the actions of the trial court. This assignment of error is overruled.

GUILT-INNOCENCE PHASE

[9] Defendant argues that the trial court erred in failing to conduct a hearing on a *pro se* motion that he filed during trial. This motion consisted of several handwritten letters and printed forms, collectively titled "Notice of Motion and Motion of Complaint for Investigation, Declaration; Points & Authorities." In his motion, defendant claimed that he was innocent; that he was the victim of bias; and that the prosecutor and police had presented perjured testimony, obstructed justice, and coerced and bribed witnesses, along with a host of other wrongs. Defendant sought the court's assistance in investigating these claims.

The record shows that as the court prepared to adjourn at the end of one day of trial, defendant sought to file this *pro se* motion. When the trial court made inquiry, defendant stated that he had initially presented the material to another judge during the pretrial portion of his case but had later withdrawn it. The court asked both of defendant's trial counsel if they cared to be heard as to the filing, but neither did. The court allowed the documents to be filed, then asked defendant if he had anything else to add. Defendant responded in the negative.

Defendant's motions came before the court again the next afternoon. After the jury was excused, defense counsel inquired of the court whether it had considered or ruled on defendant's motion. When invited to address the motion by the court, defense counsel responded that "the motions speak for themselves and would ask the Court to make the appropriate ruling." Following further consultation

with defense counsel, the court observed that the only prayer for relief in defendant's filing was a request that the court investigate his allegations and allow him to bring criminal charges against those named in his complaint. When defense counsel concurred in the court's understanding, the court ordered that a magistrate be made available to defendant so that he could seek a warrant. The court then recessed for the day.

Defendant's filing was discussed again the following day after the prosecutor concluded his closing argument in the guilt-innocence phase of the trial. Defendant advised the court that he had spoken with a magistrate, who had turned his complaints over to the district attorney. Because many of his complaints contained allegations against the prosecutors, defendant contended that the referral was futile. He again claimed that there was bias against him, that the prosecutors showed him disrespect, and that lies were being told about him. Defendant became increasingly disruptive during this colloquy, and the court warned defendant that he was at risk of being held in contempt. It does not appear that defendant's filing again came to the court's attention.

Defendant now contends that the trial court should have conducted a hearing on his allegations. However, our review of the record indicates that the court handled this matter properly. Many, even most, of the allegations in defendant's filing were mere conclusory claims that he was discriminated against because of his race, that witnesses lied, that the investigators paid witnesses to perjure themselves, and that he was innocent. Such claims are best addressed in the crucible of trial and cross-examination. Other issues raised by defendant, such as the admissibility of his statements to investigators, were handled in pretrial proceedings. Defendant was represented by two capable attorneys who, despite difficulties with their client obvious from a review of the transcript, took pains to preserve all his rights while mounting his defense. The record reveals that defendant's attorneys were understandably uncertain how best to handle this filing. Although they did not endorse it, they were careful to ensure that defendant's *pro se* claims were brought to the attention of the trial court. Defendant was sometimes obstreperous during the trial, to the point that he was shackled after threatening one of the prosecutors. Nevertheless, the judge presided over the proceedings with commendable restraint and forbearance. Although our review of the record reveals that defendant's filing was extraordinary and did not require any action by the court, the trial judge conscien-

tiously allowed defendant to present his case before a neutral and detached magistrate. More than that he cannot ask. The court's handling of defendant's *pro se* filing was appropriate in all respects. This assignment of error is overruled.

[10] Defendant next argues that the prosecutor's closing arguments to the jury during the guilt-innocence phase of his trial were improper. Defendant focuses on three prosecutorial themes. First, defendant states that the prosecutor improperly commented on the exercise of his right not to testify or produce evidence. The prosecutor argued that "[o]nly the defendant" knew whether a knife admitted into evidence (apparently, a knife retrieved from defendant's storage bin) was from a set of knives found at defendant's home and that "[o]nly the defendant can tell you" his intent when he attacked the victim. The prosecutor also argued that not one person had come forward for defendant, and "[t]hat's [defendant's] choice." Because defendant did not object to this argument, we must consider whether the argument was so grossly improper that the trial court erred by failing to intervene *ex mero motu*. *See State v. Lloyd*, 354 N.C. 76, 116, 552 S.E.2d 596, 624 (2001).

Our review of the pertinent portions of the prosecutor's argument reveals that the prosecutor was addressing defendant's failure to refute the State's theory of the case while acknowledging that some questions remained unanswered. In addition to the comments quoted above, the prosecutor argued that "every witness that has come forward and testified before you under oath has pointed to this defendant's guilt. Every piece of evidence does the same thing. It's unrefuted. It's uncontradicted." Defendant contends that such arguments amount to a comment upon his failure to take the stand. However, we have found no error in an argument that the State's evidence was uncontradicted. *State v. Smith*, 290 N.C. 148, 168, 226 S.E.2d 10, 22, *cert. denied*, 429 U.S. 932, 50 L. Ed. 2d 301 (1976). A prosecutor's argument pointing out a defendant's failure to answer the State's evidence "is not a comment on the defendant's failure to testify." *State v. Barrett*, 343 N.C. 164, 179, 469 S.E.2d 888, 897, *cert. denied*, 519 U.S. 953, 136 L. Ed. 2d 259 (1996).

Defendant seeks to buttress his contention by pointing out that the jury became aware that he had taken a polygraph examination. Existence of this examination inadvertently came to light during cross-examination of a State's witness. The court denied the prosecutor's motion for a mistrial and, with the approval of defense counsel, gave the jurors a cautionary instruction to disregard all tes-

timony about a polygraph. Although defendant now argues that "[u]nanswered questions" about the polygraph undoubtedly fueled juror speculation as to why defendant had not testified, jurors are presumed to heed a trial judge's instructions. *State v. Nicholson*, 355 N.C. 1, 60, 558 S.E.2d 109, 148 (2002). Accordingly, we assume that the jurors followed the court's admonition to disregard any comments relating to a polygraph and that the stricken testimony played no part in the jurors' evaluation of the portions of the prosecutor's argument relating to defendant's failure to rebut the State's evidence.

[11] Second, defendant argues that the prosecutor improperly vouched for his own witnesses. The prosecutor argued that the State's witnesses had "no axe to grind whatsoever except to come in here and tell you the truth. That's it. There's nothing in it for them. Come in here and tell you the truth." Although defendant claims such an argument is improper, we have consistently held that counsel may give the jurors reasons why they should believe the State's evidence. *State v. Burrus*, 344 N.C. 79, 94, 472 S.E.2d 867, 877 (1996) (prosecutor's argument that if State's cooperating codefendant witnesses were lying, they would have told better lies and minimized their roles gave jury reason to believe those witnesses); *State v. Worthy*, 341 N.C. 707, 711-12, 462 S.E.2d 482, 484-85 (1995) (when the defendant attacked credibility of State's witness, prosecutor entitled to argue in response "that in deciding a witness' credibility, it is important to consider why a witness might be motivated to testify in a certain way"); *State v. Bunning*, 338 N.C. 483, 489, 450 S.E.2d 462, 464 (1994) (same where prosecutor argued that professional law enforcement officers would not make up testimony and risk reputation merely to convict the defendant). The prosecutor here did not personally vouch for the witnesses or place the State's imprimatur on their testimony; he argued only that logic compelled the conclusion that the witnesses were credible. There was no impropriety in this appeal to reason.

[12] Finally, defendant argues that the prosecutor improperly asked the jury to convict on the basis of community revulsion to the crime. The pertinent portion of the prosecutor's argument was as follows:

> [A]s your District Attorney, ladies and gentlemen, I'm asking you on behalf of the State of North Carolina to return those guilty verdicts, not out of malice or ill will or hard feelings toward anybody, but because the facts and the law lead you there.

> It would be improper, ladies and gentlemen, and I will not do it, to try to tell you what this community is sick and tired of. We're sick and tired of crime, sick and tired of this. And do you know why that's improper? Because you, you fourteen people, you fourteen people, citizens and residents of Halifax County, do you know that you are not the ear of Halifax County? You're not the ear of this county. You're not to sit here and listen what this county is sick and tired of. You are not to set the standards for this county by listening with your ears. You are, you are today, you are Halifax County. You are the conscience of Halifax County and you are the voice, you're the voice of Halifax County. So don't let anybody tell you what folks are sick and tired of. You tell us. You tell us through your verdicts, ladies and gentlemen, you tell us that we can have folks roaming our streets who cut and hack and slash and murder and abuse and sexually assault eighty-eight year old citizens of this county. If you feel that way turn him loose, find him not guilty and let's give him his T-shirt back and his row of knives back, and then we'll know where we stand in Halifax County.
>
> So you tell us, ladies and gentlemen, you're the voice; you're the conscience. Just do what the very word [“]verdicts[”] means. You know what the word verdict means. . . . It means to speak the truth.

The prosecutor did not argue that the jury should be swayed by local sentiment; instead, he pointed out that the jurors had the responsibility of deciding the case. We have upheld arguments characterizing the jury as the conscience of the community. *State v. Nicholson*, 355 N.C. at 43, 558 S.E.2d at 138. Moreover, in his argument, the prosecutor instructed the jurors not to be swayed by community sentiment. *See State v. Golphin*, 352 N.C. at 471, 533 S.E.2d at 237 (“[t]he State cannot encourage the jury to lend an ear to the community”). We discern no impropriety in this portion of the prosecutor's argument.

Our review of the prosecutor's closing argument satisfies us that the trial court did not err in failing to intervene *ex mero motu*. These assignments of error are overruled. Accordingly, we find no error in the guilt-innocence phase of defendant's first-degree murder trial or in his convictions of first-degree sexual offense and first-degree burglary.

[13] During the sentencing proceeding, defendant presented the testimony of Dr. Nathan Strahl, who, after being qualified, was tendered and accepted as an expert in psychiatry. During his direct examination, Dr. Strahl presented opinion testimony to support a number of mitigating circumstances, such as his opinion that defendant was under the influence of a mental or emotional disturbance at the time of the offense and that defendant did not have a meaningful relationship with his father. Dr. Strahl testified that in his opinion defendant suffered from a narcissistic personality disorder, demonstrated schizoid and antisocial traits, and also suffered from a general anxiety disorder with alcohol and marijuana dependence. In addition, Dr. Strahl was of the opinion that defendant's intelligence level fell in the dull-normal range, and he believed that defendant's personality, as diagnosed, resulted in part from defendant's genetic makeup and in part from his peer group and socialization. During this testimony, Dr. Strahl opined that defendant's condition was treatable and that he would benefit from prison's structured environment. At no point during his mitigation testimony did Dr. Strahl indicate that defendant was not guilty of or culpable for the offenses of conviction.

When the direct examination of Dr. Strahl was completed, he was cross-examined by the prosecutor. Much of the cross-examination consisted of the sparring between knowledgeable adversaries that makes this procedure "the 'greatest legal engine ever invented for the discovery of truth.' " *California v. Green*, 399 U.S. 149, 158, 26 L. Ed. 2d 489, 497 (1970) (quoting 5 John H. Wigmore, *Evidence* § 1367 (3d ed. 1940)). However, in a number of instances, the prosecutor's inquiries were, at best, problematic. The prosecutor's questions as to the amount of time Dr. Strahl spent working with criminal cases and the number of cases in which he had testified for the State and for a defendant were entirely appropriate. However, the prosecutor then asked how much Dr. Strahl was paid per hour and, upon receiving an answer, suggested that he was paid by defendant instead of the State:

> Q. How long have you been employed by the defendant in this case?
>
> A. Employed by the defendant? I think I'm employed by the State of North Carolina through the Office of Courts [sic] but I've been working on this case for over a year.

Despite Dr. Strahl's correction, the prosecutor's subsequent questions relating to the amount Dr. Strahl expected to be compensated for his work on the case continued to imply that he might be paid by defendant:

> Q. Did you bill the defendant or the State of North Carolina for the first six months of your employment?
>
> A. I've not billed anybody for anything at this point.
>
> Q. Well, are you planning on doing it?
>
> A. Yes, I am.
>
> Q. For what?
>
> A. I don't follow you, sir. For the same thing you're doing right here. You're working to do your job. I'm doing my job up here. I don't understand the difference.
>
> Q. How long have you been notified, contacted, involved in this case?
>
> A. Okay. I first saw [defendant] on June 14th of 1999 and I would estimate that I was contacted in May of 1999 to work on the case. I'm not sure there's anything else to state than that.
>
> Q. So your billing started in May, you first saw [defendant] in June?
>
> A. My billing will start for the contact time I spent on the case whether it's in a group of hours like it is today or it's nothing for two, three months. I'll only bill for the time that I spent on the case.
>
> Q. And how many hours did you say so far?
>
> A. Well, I think you remember. I said between twenty and thirty.
>
> Q. Which is it?
>
> A. I don't have the exact figure, sir. I don't tally that up. I'll tally it up when we're all done here. I'm estimating between twenty and thirty hours for this case. It's been one of the more rigorous cases to deal with and I've spent more time on it than most other cases I've had to deal with.
>
> Q. So what you will bill somebody will be between $3000 and $4500 so far?

A. Somewhere in that range I would guess if that's how it works out mathematically. That's correct.

Q. For your work in this case?

A. That is correct.

Q. And do you understand, Dr. Strahl, that almost everybody in this room has spent more time with this defendant than you have?

A. I don't know that for a fact. If you say so. You're making something evil out of my charging for my expertise.

It is difficult to imagine that any prosecutor with even minimal experience would not know that experts testifying for indigent defendants are paid through the Administrative Office of the Courts. No apparent reason existed for the prosecutor to suggest otherwise except, perhaps, to confuse the jury.

When the prosecutor turned to Dr. Strahl's testimony that defendant had been affected by his chaotic early life and lack of contact with his natural father, the following exchange took place:

Q. . . . You were asked by [defense counsel] what affect this defendant's being born to an unwed mother had on him, isn't that correct?

A. That is correct.

Q. Did you grow up in a home with both your parents?

[DEFENSE COUNSEL]: Objection, Judge.

[THE COURT]: Overruled.

A. I did.

Q. So you're probably ill equipped in your personal life to testify as to how being born to an unwed mother might affect someone personally. Wouldn't you agree?

Dr. Strahl's childhood had little if anything to do with his professional ability to assess the impact on defendant of an absent parent. These questions were not a probe of Dr. Strahl's methodology; instead, they were an improper attempt to discredit or subvert his expert opinion by raising an irrelevant aspect of Dr. Strahl's personal life. Perhaps pertinently, the jury failed to find two submitted mitigating circumstances relating to defendant's relationships with his natural parents.

A similar attack occurred when the prosecutor questioned Dr. Strahl as to his opinion that defendant suffered from a narcissistic personality disorder.

> Q. Now, Dr. Strahl, you have testified in giving your Curriculum Vitae that you are licensed to practice medicine in Virginia as well as North Carolina?
>
> A. I have a license in Virginia as well. I would need to reactivate that because it's on kind of like a hold pattern since I don't work in Virginia directly and I don't have to pay certain fees but I can reactivate it any time. I'm in good standing with the State of Virginia.
>
> Q. So you are not currently licensed to practice medicine in Virginia as you previously testified?
>
> A. I think I am currently licensed to practice in the State of Virginia. I only need to send a letter indicating that I do want to do so. In my license I have a registration certificate from the State of Virginia that I receive every year or two that I pay for every year or two.
>
> Q. Well, regardless of that, you're certainly familiar with the Violent Offender Profile that is prepared as offenders go into the Virginia Correction System, are you not?
>
> A. I am not. I've never seen such a document before.
>
> Q. How long have you been practicing medicine in Virginia?
>
> A. I have never practiced medicine in Virginia. I think that's what I'm trying to tell you. I'm allowed to, I am able to, I'm registered to but I never have.
>
> Q. What was the purpose of telling this jury then that you're licensed to practice in Virginia, if your license is not current and you've never done it?
>
> A. Not doing it is different. My license is current. I pay a current fee and I have a number on my license that is active. I can practice anytime I want to practice in the State of Virginia. I do not choose to practice in the State of Virginia. I was asked where I am licensed and I'm licensed actively in two states, North Carolina and Virginia. Those remain true statements.
>
> Q. You can practice anytime you want to in the State of Virginia?

A. That is correct.

Q. Would you define narcissistic for this jury one more time?

A. Narcissistic is a statement that results in an excessive level of entitlement over and above what is deserved.

The prosecutor returned to the unsavory implications of this line of questions in his closing argument, as discussed below. We also cannot fail to observe that, throughout this exchange, the prosecutor twisted Dr. Strahl's answers.

Finally, the prosecutor asked a question wholly irrelevant to Dr. Strahl's professional role in the case but designed to inflame the jury and diminish the impact of Dr. Strahl's testimony:

Q. Do you have any idea how many homes this defendant has invaded, how much space of other people, weak and defenseless people he's invaded. Do you have any idea?

A. Not exactly, sir. But you're asking me to condone his behavior and I'm not.

[DEFENSE COUNSEL]: Objection.

THE COURT: Please just answer the question, sir.

Before Dr. Strahl could respond to the court's instruction, the prosecutor asked an unrelated question. "The prosecutor's questions were not designed to elicit competent evidence. More in the nature of rhetorical assertions, their likely effect was unfairly to prejudice the jury against this witness." *State v. Sanderson*, 336 N.C. 1, 13, 442 S.E.2d 33, 40 (1994).

During his closing argument in the sentencing proceeding, the prosecutor returned to the themes addressed during his cross-examination of Dr. Strahl. In his preliminary comments to the jury, he distorted Dr. Strahl's testimony to suggest that Dr. Strahl countenanced defendant's conduct:

You're to bring [your recollections of the evidence] with you into this sentencing proceeding. You're to bring as well as your reason and common sense, you're to bring that experience into this proceeding with you. But in addition to that we're past [the] guilt[-innocence proceeding], well some of us are past it, there are two people who are not quite past it and that is the defendant and Nathan Strahl, they still haven't gotten it yet.

The prosecutor later reinforced his contention, unsupported by any evidence, that Dr. Strahl believed defendant was not guilty, then argued that the jury should find that Dr. Strahl padded his bill and lied in order to be paid:

> To him [defendant] is still not guilty. He comes in here yesterday and said that he spent five hours with this defendant. Spent a half an hour yesterday morning as a courtesy call or something, I don't know what, of course, it'll cost the State of North Carolina seventy-five dollars for that half hour, but anyway, wouldn't it have been beneficial for him before he jumped up on the stand and took the oath to tell the truth, wouldn't it have been beneficial to go to this defendant when they had their little chat yesterday morning and say, [defendant], look, the jigs [sic] up son, the jigs [sic] up, this not guilty mess, we're past that, I'm gone [sic] look like a moron if I get up on that stand as an expert and talk about your innocence to the jury that convicted you. [Defendant] come clean with me son, let's talk about your emotional state. Let's talk about your mental disturbance when you went in there and sliced that lady up. And you're supposed to put stock, you're supposed to put credence, you're supposed to put credibility in that kind of expert?
>
> Now, ladies and gentlemen, I don't mean to degrade, deride anybody personally or any profession, but dag-gone-it, when you come into this court and you put your hand on that Bible up there and you talk about your degrees and where you can practice medicine and where you can't practice medicine, you better not be trying to sell a bill of goods, you better not be looking to pick up your three thousand dollar check and stay on that defense witness testimony list and keep picking up that little ten percent. You need to come in here and get up and tell the truth cause that's what you deserve. That's what you deserve, ladies and gentlemen. *And it's a crying shame when education is corrupted for filthy lucre, it's a crying shame when people who've got the education abuse it.* It's up to you to determine whether that happened in this case or not. But it was a far cry on direct examination, everything was consistent, oh, yeah, answered yes to everything. As soon as he gets a little cross examination he wants to say somebody's evil for talking about what money he's making and he gets choked up and has to go to the water jug. *Well what's stuck in his throat? The truth?* It's been said, ladies and gentlemen, that it's a mighty small frog, it's a mighty small frog that can't get a croak

out of his own pond. And you may have heard it, I don't know, but you know what it means. You know what it means. You know that when all you can do in mitigation in a capital murder case is to put up a psychiatrist that has spent less time with this defendant than you have and know less about him, that's a mighty small croak in mitigation. *And saying it doesn't make it so cause you can pay somebody to say anything.*

(Emphases added.)

The prosecutor next belittled Dr. Strahl's profession:

When you get, you know, any discipline, psychiatry, psychology, whatever, plumbing, whatever, when you get to the point that you can make a call like that, you don't need to be running around testifying for any three thousand dollars. Play the lottery. Play the lottery if you're that good. Get on the Psychic Friends Network. Get to reading minds. And I don't say that again to deride the good doctor or to deride his profession, I say that because there's no evidence to back up what he spouts[.] . . .

. . . .

. . . Of course, Dr. Strahl was to work from various [tracts] and treatises because you remember he grew up in a two-parent home, didn't he? He grew up in a two-parent home. So when he wants to stand up or sit up and spout his expert opinion to you about this defendant's mitigation being from born to an unwed mother, he's not quite talking from experience, is he? He's talking about experience about like he is when he talks about this defendant's genetic makeup. Mumbo jumbo is basically what it is.

The prosecutor also used closing argument to misstate Dr. Strahl's testimony as to his Virginia license and to mischaracterize Dr. Strahl's diagnosis while suggesting that Dr. Strahl was himself mentally afflicted:

[C]onsider whether the defendant has been diagnosed as having a Narcissistic Personality Disorder.

Well, the good doctor defined that for us as being having an excessive level of entitlement. And then when I asked if he's licensed to practice in Virginia he said I can treat any patient I want to over there. Of course, he owes them some money, he's not currently licensed, but that's why, you remember he was

> asked, well, define narcissistic for us one more time, Dr. Strahl. Define that for us one more time. Excessive level of entitlement. Everybody has—everybody who thinks something of himself is narcissistic I guess, it's called self-esteem. But thank you Dr. Strahl for making it a personality disorder, thank you for driving that square peg into a round hole and taking self-esteem and making something, as he would call it, making something evil out of it.

Although defendant unsuccessfully objected to some of the prosecutor's cross-examination questions, he did not object to the prosecutor's closing argument.

> It is well settled in North Carolina that counsel is allowed wide latitude in the argument to the jury. Even so, counsel may not place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence. The control of the arguments of counsel must be left largely to the discretion of the trial judge, and the appellate courts ordinarily will not review the exercise of the trial judge's discretion in this regard unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations. In capital cases, however, an appellate court may review the prosecution's argument, even though defendant raised no objection at trial, but the impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.

State v. Johnson, 298 N.C. 355, 368-69, 259 S.E.2d 752, 761 (1979) (citations omitted).

A number of our cases have considered arguments where an attorney has directly or indirectly challenged the veracity of a party or witness. Although we have found grossly improper the practice of flatly calling a witness or opposing counsel a liar when there has been no evidence to support the allegation, *Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 100, 515 S.E.2d 30, 36, *aff'd per curiam*, 351 N.C. 92, 520 S.E.2d 785 (1999); *see also State v. Locklear*, 294 N.C. 210, 217-18, 241 S.E.2d 65, 70 (1978), we have also held that it is proper for a party to point out potential bias resulting from payment that a witness received or would receive for his or her services, *State*

v. Lawrence, 352 N.C. 1, 22, 530 S.E.2d 807, 820 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001). However, where an advocate has gone beyond merely pointing out that the witness' compensation may be a source of bias to insinuate that the witness would perjure himself or herself for pay, we have expressed our unease while showing deference to the trial court. For instance, we held that an argument made during the guilt-innocence phase of a capital case where the prosecutor stated in reference to the defendant's expert witness, " 'It is a sad state of our legal system[] that when you need someone to say something, you can find them. You can pay them enough and they'll say it,' " *State v. Murillo*, 349 N.C. 573, 604, 509 S.E.2d 752, 770 (1998), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999), was not so grossly improper as to require the trial court to intervene *ex mero motu*, *id.* at 606, 509 S.E.2d at 771. Similarly, where a prosecutor argued during a capital sentencing proceeding that the defendant's psychiatric expert was " '[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. . . . Nobody's paying someone fifteen hundred dollars a day to [say defendant is sane],' " *State v. May*, 354 N.C. 172, 180, 552 S.E.2d 151, 156 (2001), we again held that the trial court did not err in failing to intervene *ex mero motu*, *id.* at 181, 552 S.E.2d at 157.

Despite this deference, we have advised counsel that such arguments, imputing perjury to a witness on the basis of evidence no more substantial than the mere fact the witness was compensated, are improper. Where the prosecutor argued of the defendant's expert that " 'I submit to you, ladies and gentlemen, she's getting paid three thousand dollars to work on this case, she'll say anything he wants her to say,' " *State v. Spruill*, 338 N.C. 612, 651, 452 S.E.2d 279, 300 (1994), *cert. denied*, 516 U.S. 834, 133 L. Ed. 2d 63 (1995), we assumed *arguendo* that the statement was improper, *id.* at 652, 452 S.E.2d at 300. More recently, where a prosecutor argued that the defendant's mitigating circumstances " 'were developed skillfully by the defense experts who go around this State testifying for defendants in capital cases, selling their services and opinions at rates from $75 to $125 an hour,' " *State v. Hill*, 347 N.C. 275, 299, 493 S.E.2d 264, 278 (1997), *cert. denied*, 523 U.S. 1142, 140 L. Ed. 2d 1099 (1998), we again assumed the argument was improper but not so grossly improper as to entitle the defendant to a new sentencing hearing, *id.* at 300, 493 S.E.2d at 278. We went on to disapprove of "one of the statements

made by the prosecutor," presumably the one quoted above.[2] *Id.* Although it might be possible to differentiate the particular words in the instant argument from those used in the cases cited above, we would have to slice the salami pretty thin. Accordingly, consistent with our holdings in *Murillo* and *May*, we conclude that while the prosecutor's argument that the expert should not be believed because he would give untruthful or inaccurate testimony in exchange for pay was improper, it was not so grossly improper as to require the trial court to intervene *ex mero motu*.

Nevertheless, we are disturbed that some counsel have failed to heed our repeated warnings that such arguments are improper, even if not always grossly so. *State v. Smith*, 351 N.C. 251, 270, 524 S.E.2d 28, 42, *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100 (2000). One measure of the professionalism that we expect from litigants in North Carolina courts is the avoidance of all known improprieties. *State v. Jones*, 355 N.C. 117, 127-28, 558 S.E.2d 97, 104 (2002). Our prior holdings, where the conviction was not reversed on the basis of a prosecutor's improper argument only because of the demanding standard of review, should not be construed as an invitation to trial counsel to try the same thing again. We admonish counsel to refrain from arguing that a witness is lying solely on the basis that the witness has been or will be compensated for his or her services. We also instruct trial judges to be prepared to intervene *ex mero motu* if such arguments continue to be made. *Id.* at 128, 558 S.E.2d at 104.

[14] Our inquiry does not end here, however. In the case at bar, the prosecutor went beyond ascribing the basest of motives to defendant's expert. As detailed above, he also indulged in *ad hominem* attacks, disparaged the witness' area of expertise, and distorted the expert's testimony. We have observed that "maligning the expert's profession rather than arguing the law, the evidence, and its inferences is not the proper function of closing argument." *State v. Smith*, 352 N.C. at 561, 532 S.E.2d at 792. "When vigor in unearthing bias becomes personal insult, all bounds of civility, if not of propriety, have been exceeded." *Id.* Particularly in capital cases, we believe it appropriate to require that practitioners conduct themselves with a probity and dignity consistent with the gravity of the proceedings.

That a prosecutor refrain from improper conduct is especially important in the context of a capital sentencing hearing,

2. We make this assumption because the comment is the only one quoted in that portion of our opinion in *Hill*.

where the issue before the jury is whether a human being should live or die and where this decision involves the exercise of the jury's judgment as to how certain aggravating and mitigating circumstances should be weighed against each other.

State v. Sanderson, 336 N.C. at 8, 442 S.E.2d at 38. In light of the cumulative effect of the improprieties in the prosecutor's cross-examination of defendant's expert and the prosecutor's closing argument, we are unable to conclude that defendant was not unfairly prejudiced. *Id.* at 15, 442 S.E.2d at 40.

Accordingly, we hold that defendant is entitled to a new capital sentencing proceeding. Because we reach this result, we need not address other issues raised by defendant relating to his sentencing proceeding that are unlikely to recur.

NO. 97CRS6891, FIRST-DEGREE MURDER: NO ERROR IN THE TRIAL; DEATH SENTENCE VACATED AND CASE REMANDED FOR NEW CAPITAL SENTENCING PROCEEDING.

NO. 97CRS6892, FIRST-DEGREE BURGLARY: NO ERROR.

NO. 97CRS6893, FIRST-DEGREE SEXUAL OFFENSE: NO ERROR.

JAMES L. MARTISHIUS AND CINDY K. MARTISHIUS v. CAROLCO STUDIOS, INC.

No. 175A01

(Filed 10 May 2002)

1. Premises Liability— injury from contact with power line— directed verdict—judgment notwithstanding the verdict

The trial court did not err by denying defendant motion-picture studio owner's motions for directed verdict and judgment notwithstanding the verdict on the issue of defendant's negligence in a case where plaintiff carpenter came into contact with uninsulated energized power lines while working on defendant's premises to build a film set, because: (1) defendant's retention of substantial authority over the use of its property, taken together

with its active involvement in the film production company's daily routines, placed upon defendant a concomitant duty to exercise reasonable care to ensure that the production company's employees including plaintiff were not injured by coming into contact with uninsulated power lines running over the back lot; (2) defendant had a duty to exercise such reasonable care as a landowning proprietor, running a motion-picture studio while maintaining a significant degree of control over the daily operations of its licensees, would exercise under the circumstances; (3) given the evidence to the jury concerning the nature and use of the property, the knowledge of defendant through its facility manager of the set conditions, and the available alternatives, there was sufficient evidence to submit to the jury the question of whether defendant was negligent in causing plaintiff's injuries; (4) defendant has not been held to a strict-liability standard since defendant's liability was based upon the particular facts of the case, including defendant's awareness that the film production employees would be working within the power-line easement and defendant's failure to take reasonable steps to protect plaintiff; and (5) it was not unforeseeable as a matter of law that the type of injury plaintiff sustained would result from defendant's alleged negligence.

2. Premises Liability— contributory negligence—injury from contact with power line—directed verdict—judgment notwithstanding the verdict

The trial court did not err by denying defendant motion-picture studio owner's motions for directed verdict and judgment notwithstanding the verdict on the issue of plaintiff carpenter's contributory negligence in a case where plaintiff came into contact with uninsulated energized power lines while working on defendant's premises to build a film set, because: (1) while the general rule is that a person has a legal duty to avoid open and obvious dangers including contact with an electrical wire he knows to be dangerous, that does not mean that a person is guilty of contributory negligence as a matter of law if he contacts a known electrical wire regardless of the circumstances and regardless of any precautions he may have taken to avoid the mishap; and (2) the jury properly considered and resolved the conflicting evidence to reach a verdict as to contributory negligence.

MARTISHIUS v. CAROLCO STUDIOS, INC.

[355 N.C. 465 (2002)]

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. 216, 542 S.E.2d 303 (2001), finding no error in a judgment entered 23 July 1999 and subsequent oral orders denying defendant's motion for judgment notwithstanding the verdict and for new trial entered by Cobb, J., in Superior Court, New Hanover County. Heard in the Supreme Court 12 September 2001.

Kirby & Holt, L.L.P., by David F. Kirby and Isaac L. Thorp, for plaintiff-appellees.

Law Offices of William F. Maready, by William F. Maready; and Smith Helms Mulliss & Moore, L.L.P., by James G. Exum, Jr., for defendant-appellant.

EDMUNDS, Justice.

Plaintiffs James L. Martishius (plaintiff) and Cindy K. Martishius initiated this negligence action against Carolco Studios, Inc. (defendant) for injuries sustained on 1 February 1993 when plaintiff came into contact with uninsulated energized power lines while working on defendant's premises. Now before this Court are the issues of whether the Court of Appeals erred in affirming the trial court's denial of defendant's motions for directed verdict and for judgment notwithstanding the verdict regarding negligence and contributory negligence. For the reasons set forth below, we affirm the holding of the Court of Appeals.

An understanding of the issues presented in this appeal requires an explication of the relationships between the parties. In 1984, Dino DeLaurentis and the North Carolina Film Corporation (Film Corporation) acquired and built a motion picture studio on a thirty-two-acre site in Wilmington, North Carolina. Over time, the studio, which began as a single building, expanded to include several stages, and a back lot was constructed for outdoor filming. During 1984, Film Corporation hired engineer Gerald Waller to assist in construction of the facilities and to design an electrical distribution system for the premises. Waller presented to Film Corporation various options for the provision of electricity to the back lot, including overhead lines and buried lines. Factors affecting the decision as to which option to select included the costs of burying lines (which Carolina Power & Light (CP&L), the electricity supplier, would pass on to Film Corporation), the aesthetic considerations of having exposed lines, safety, and the requirements of any future expansion. Film

Corporation elected to have CP&L install uninsulated overhead power lines to the back lot.

The original separation between the back lot and the newly installed power lines was seventy-five feet from the rear of the lot and twenty-five feet from the side. However, as the studio continued operation and new films were produced, the separation between the power lines and the back lot diminished. This shrinkage did not end when defendant became the owner of the studio in 1989. That same year, defendant promoted Waller to the position of facility manager. Jeffrey Schlatter, construction coordinator for Crowvision, Inc., an independent production company involved in this case, testified that from 1984 through 1993, the back-lot set expanded toward the power lines with each subsequent production. On one occasion, Waller requested that some of the back lot's power lines be relocated because of their dangerous proximity to the back lot during the filming of "Aunt Julia, the Script Writer." On another occasion, Waller agreed with a production coordinator of the movie "Teenage Mutant Ninja Turtles" to de-energize a portion of the back lot when construction was to take place approximately fifteen feet from power lines.

Waller aptly described the back lot as a constantly changing construction zone. Production company employees working on the back lot frequently attached large facades to telephone poles that were thirty to forty feet high to create a particular set. A number of these poles had been left from prior productions; in fact, plaintiff presented at trial an aerial photo of the back lot taken in February 1992, almost one year before the instant accident, showing such poles standing within ten to twelve and a half feet of the power lines. A set facade would appear in the film as if it were a building or other part of a scene. As one witness testified, the facade "would be very real, and it is composed of, this street here, of telephone poles. You imagine the city of Wilmington, a facade, pieces of plywood with fake bricks put on and windows cut in them, . . . with telephone poles behind it holding it up, instead of buildings back there."

In order to attach facades to poles at heights exceeding thirty feet, production company workers frequently used mobile boom lift machines. The lifts used in the instant case were manufactured by JLG Industries, and the parties consistently referred to the lifts as "JLGs" (JLG). A JLG resembles a "cherry picker" and was described by one of plaintiff's witnesses as "a piece of equipment that has tires and can move from spot to spot, rotates around with an extending

boom, work platform, so that it will get to high places, things that you can't get with a ladder or scaffolding." The operator of a JLG usually stands in a basket at the end of the extendable boom. In addition to attaching and dismantling facades, JLGs were used in a variety of ways on a movie set. Construction foreman Ralph Woolaston testified that based on his experience working in the film industry since 1978, JLGs are also used for construction and dressing of sets, setting and holding backdrops, and filming. Plaintiff produced substantial testimony at trial from film industry workers that JLGs routinely and customarily were used on both the front and back of the poles to attach and take down facades. One of the workers testified: "We were constantly working the back of the facade. There was all kinds of movement, all kinds of machinery."

A construction access road, used for moving materials and prebuilt pieces, ran directly underneath the power lines serving the back lot. This road separated the back lot from an area known as the "bone yard," where sets from previous movies were stored. Although the bone yard belonged to defendant, movie production companies could, with permission from defendant, reuse some of the pieces kept there. Workers using motorized equipment such as JLGs to gather material from the bone yard or to travel to the rear lot by means of this access road therefore drove beneath the power lines. The JLG operated by plaintiff was on this access road at the time of his 1 February 1993 accident.

As noted above, defendant became the owner of the studio in 1984. Defendant made one film of its own, then elected to rent the facilities to independent production companies. Crowvision was thereafter formed to produce the movie "The Crow," and Crowvision and defendant entered into an agreement on 29 December 1992. Under this agreement, defendant gave Crowvision a license to use a portion of defendant's facilities, equipment, and personnel "for the purpose of producing [a] motion picture[]." The agreement further required Crowvision to obtain approval from defendant before making any alterations to the studio property. Defendant warranted "that the licensed premises and facilities hereunder are satisfactory and in a safe condition."

Before production began on "The Crow," Waller, defendant's facility manager, toured the facilities and back lot with Schlatter, Crowvision's construction coordinator. Waller stated that the purpose of the "walk-through" was to "discuss the work environment, the conditions of the backlot [sic], to discuss what their needs were,

and again, to make them aware of the environment." Schlatter's and Waller's inspection included the overhead power lines that then were in the vicinity of the back lot. These lines consisted of three parallel lines five feet apart. The two outside lines were energized and were 27.8 feet above ground. Waller explained to Schlatter that CP&L had a thirty-foot easement around the lines and that Crowvision would have to keep at least ten feet away from the outer lines.

In November 1992, Schlatter hired plaintiff to work for Crowvision as a carpenter. One of plaintiff's witnesses testified that movie-set carpenters "build the sets for the, for the movie to be shot on. . . . [A]nything you could imagine, we build, I mean, everything, anything." Plaintiff, who arrived with experience gained working on other movies, initially came to Wilmington to work on the film "Mario Brothers." While working on the set of that movie, plaintiff first began using lift equipment. Although he never received formal training, plaintiff became so proficient that he was described by his foreman as one of the best JLG operators.

In the weeks leading up to the accident, the back lot was the scene of considerable activity. Plaintiff's evidence indicated that Waller was present on the studio grounds every day, touring the back lot. In January 1993, Crowvision began work on a church and cemetery facade for "The Crow." As early as a year before the accident, the portion of the back lot where Crowvision employees worked was within ten to twelve and a half feet of energized power lines. Some of the poles on which facades would be hung "[had] been there for several years. There [had been] a set there built . . . in exactly the same location." In addition, ten or eleven new poles had been installed for "The Crow." Before the new poles were installed, Schlatter and others from Crowvision discussed with Waller the exact locations where the poles would be positioned. Plaintiff presented evidence at trial that Waller thereafter approved their installation. Although Waller later testified that he did not realize that Crowvision had encroached on CP&L's power-line easement, plaintiff's evidence established that Waller knew where the power lines were located in relation to the poles. Schlatter additionally testified that whenever Crowvision sought to make alterations to the set, he was required to meet with Waller because "[t]hat's how it was." Construction foreman Woolaston described the interaction between Crowvision and Waller regarding the placement of the new poles: "The poles were marked in their exact spots to where they were going to be, and at that point, the whole situation was gone over with myself, [Schlatter], [Waller]

and [two other Crowvision employees]." Woolaston added that some of the poles were within one to two feet of the power lines. The remaining poles were within five to ten feet of the lines.

Crowvision employees anticipated working between these poles and the power lines, using JLGs and other lifting equipment. One witness testified that

> [t]he power lines . . . are fairly close to the, to the back side of the set. In many places, you will find yourself inbetween [sic] the set and the power lines. With the entire machine, you could be inbetween [sic] the set and the power lines . . . . The power lines are constant. Anything else out there is pretty much a movable object.

Another worker testified that

> a couple of days before the accident . . . we were putting up these walls here, and we had the JLG between this power line and the back of this wall line, and we were actually—I was at eye level. . . . And I had articulated the JLG, myself and two other people, in between the power lines and the back of the facade to get the back framing up.

Carpenter Chris Crowder explained that the reason the workers had to come close to the power lines was "because that was where the work was." Plaintiff acknowledged at trial that he was aware that the power lines were dangerous.

On 1 February 1993, Paul Saunders instructed plaintiff to assist construction foreman Woolaston on the church set. Using the access road that ran beneath the power lines, plaintiff drove a JLG along the back of the church facade. Woolaston instructed plaintiff to pick up a large, heavy door and place it into the church facade. Plaintiff accordingly drove the JLG back down the same access road to an opening in the rear of the facade, then raised the JLG boom over the facade to pick up the door. Plaintiff was in the basket at the end of the boom. Crowder, who was working near the opening in the church facade, described what happened next:

> Well, [plaintiff] boomed the lift over. He was going to pick up a door section from here, and he came over me, and I came back over to work. And I told him when he came by, I didn't think he was going to be able to reach the door from where he was. He came on through. So then I came, I came over to here, so I had

> my back to him. I guess he started back out, and that's when he made contact with the power lines. I had walked over to here and had my back to him when I heard the spark and explosion, and at that point, you know, we went to him.

Although the exact details are unclear because plaintiff has no memory of the event and there were no other eyewitnesses, the basket of the JLG came into contact with a power line as plaintiff maneuvered to move the door.

After hearing the explosion, Crowder saw that plaintiff was slumped over the controls and on fire. As other workers rushed to the scene, Woolaston ran to the JLG and lowered the boom. Plaintiff had collapsed in the basket. Woolaston and the others removed plaintiff from the basket and, seeing that his clothes were still burning, undressed plaintiff and wrapped him in blankets. Immediately after the accident, Waller approached the scene and told Schlatter that he had "been after Martha[1] and Dino [DeLaurentis] for years to do something about these lines."

Plaintiff was burned over forty to forty-five percent of his body. He was blinded in his right eye and suffers from a residual neurological problem of poor balance. Plaintiff's burns caused severe facial and bodily disfigurement, requiring reconstructive surgeries.

On 8 April 1994, plaintiff and his wife, Cindy, filed a complaint alleging negligence and loss of consortium against defendant, CP&L, Edward R. Pressman Film Corporation, Crowvision, and Hertz Equipment Rental Corporation. The claims against CP&L, Pressman, Crowvision, and Hertz were either settled or dismissed, and the matter proceeded to trial solely against defendant. Defendant unsuccessfully moved for a directed verdict both at the close of plaintiff's evidence and at the close of all evidence. On 16 July 1999, the jury found that plaintiff was injured by the negligence of defendant and that plaintiff was not contributorily negligent; the jury additionally found that defendant was not responsible to plaintiff's wife for loss of consortium. The jury awarded plaintiff $2,500,000. On 23 July 1999, the trial court denied defendant's motion for judgment notwithstanding the verdict or new trial and entered judgment against defendant.

Defendant appealed to the North Carolina Court of Appeals, and on 20 February 2001, a divided panel affirmed the trial court's

1. "Martha" is Martha Schumaker (later Martha DeLaurentis), president of Film Corporation at the time the decision was made to run CP&L's power lines overhead to the back lot.

ruling. *Martishius v. Carolco Studios, Inc.*, 142 N.C. App. 216, 542 S.E.2d 303 (2001). Defendant appeals to this Court on the basis of the dissent.

The test for determining whether a motion for directed verdict is supported by the evidence is identical to that applied when ruling on a motion for judgment notwithstanding the verdict. *Smith v. Price*, 315 N.C. 523, 340 S.E.2d 408 (1986). "In ruling on the motion, the trial court must consider the evidence in the light most favorable to the nonmoving party, giving him the benefit of all reasonable inferences to be drawn therefrom and resolving all conflicts in the evidence in his favor." *Taylor v. Walker*, 320 N.C. 729, 733-34, 360 S.E.2d 796, 799 (1987). "The party moving for judgment notwithstanding the verdict, like the party seeking a directed verdict, bears a heavy burden under North Carolina law." *Id.* at 733, 360 S.E.2d at 799.

NEGLIGENCE

[1] We first address whether the Court of Appeals erred in affirming the trial court's denial of defendant's motions for directed verdict and judgment notwithstanding the verdict on the issue of defendant's negligence. To prevail in a common law negligence action, a plaintiff must establish that the defendant owed the plaintiff a legal duty, that the defendant breached that duty, and that the plaintiff's injury was proximately caused by the breach. *Hunt v. N.C. Dep't. of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998). Actionable negligence occurs when a defendant owing a duty fails to exercise the degree of care that a reasonable and prudent person would exercise under similar conditions, *Hart v. Ivey*, 332 N.C. 299, 420 S.E.2d 174 (1992), or where such a defendant of ordinary prudence would have foreseen that the plaintiff's injury was probable under the circumstances, *Pittman v. Frost*, 261 N.C. 349, 134 S.E.2d 687 (1964).

This Court in *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998), eliminated the distinction between invitees and licensees and established that the standard of care a landowner owes to persons entering upon his or her land is to "exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Id.* at 632, 507 S.E.2d at 892. Adoption of a "true negligence" standard allows the jury to concentrate "upon the pertinent issue of whether the landowner acted as a reasonable person would *under the circumstances*." *Id.* (emphasis added). In addition, this Court has stated:

> [T]he proprietor must use the care a reasonable man similarly situated would use to keep his premises in a condition safe for the foreseeable use by his invitee—but the standard varies from one type of establishment to another because different types of businesses and different types of activities involve different risks to the invitee and require different conditions and surroundings for their normal and proper conduct.

Hedrick v. Tigniere, 267 N.C. 62, 67, 147 S.E.2d 550, 554 (1966). Although *Hedrick* uses now-superseded language describing the status of the individual using the land, the principle recognizing the importance of the underlying facts in a case remains valid. As we went on to hold in *Hedrick*, in order to determine whether appropriate care has been exercised, " 'it is proper to consider the nature of the property, the uses and purposes for which the property in question is primarily intended, and the particular circumstances of the case.' " *Id.* (quoting 65 C.J.S. *Negligence* § 45(b), at 531-32 (1950)). Upon application of those factors in this case, and viewing the evidence in the light most favorable to plaintiff, we hold that plaintiff produced sufficient evidence to warrant submission of the negligence claim to the jury.

The instant case is in a somewhat atypical posture because defendant is the landowner, whereas reported cases dealing with injuries resulting from contact with a power line usually involve the supplier of electricity as the defendant. We have long held that owners of land are not insurers of their premises, *Nelson v. Freeland*, 349 N.C. at 632, 507 S.E.2d at 892; *Jones v. Southern Ry. Co.*, 199 N.C. 1, 3, 153 S.E. 637, 638 (1930), and we do not today retreat from this general rule, applicable to those such as homeowners or business proprietors who are little more than passive consumers of electric power provided by a supplier. However, in the case at bar, the evidence established that defendant was an active and knowledgeable participant with Crowvision in the planning and use of the perpetual construction site that was defendant's back lot. Defendant required in the licensing agreement that Crowvision obtain approval from defendant before making any alterations to the studio property, thereby retaining veto power over a number of Crowvision's decisions. It warranted to Crowvision that the premises were safe. Through Waller, it worked with and advised Crowvision employees on a daily basis on such routine matters as the placement of poles. Schlatter testified that production companies would have to ask Waller if they could reuse items stored in the bone yard because "they were part of the [s]tudio prop-

erty." This evidence establishes that defendant was far more than a mere landlord to Crowvision. Defendant's retention of substantial authority over the use of its property, taken together with its active involvement in Crowvision's daily routines, placed upon defendant a concomitant duty to exercise reasonable care to ensure that Crowvision's employees were not injured by coming into contact with uninsulated power lines running over the back lot.

> [O]ne who maintains a high voltage electric line at places where people may be reasonably expected to go for work, business or pleasure has the duty to guard against contact by insulating the wires or removing them to a place where human beings will not likely come in contact with them.

Partin v. Carolina Power & Light Co., 40 N.C. App. 630, 632, 253 S.E.2d 605, 608, *disc. rev. denied*, 297 N.C. 611, 257 S.E.2d 219 (1979). Under the standards articulated in *Nelson* and *Hedrick*, the reasonableness of a defendant's actions depends upon the circumstances of the case, including the nature of the property involved and the intended uses of that property. Accordingly, defendant landowner had a duty to exercise such reasonable care as a landowning proprietor, running a motion-picture studio while maintaining a significant degree of control over the daily operations of its licensees, would exercise under the circumstances.

Having determined that the evidence was sufficient to hold that defendant landowner could be liable for negligence, we now turn to the question whether this and other evidence, taken in the light most favorable to plaintiff, was also sufficient to submit plaintiff's negligence claim to the jury. Evidence was presented that defendant was aware that the uninsulated power lines presented a hazard to film crews on the back lot and that workers would have to confront such a hazard to accomplish their assigned duties. Despite defendant's knowledge of the danger, it allowed near-permanent fixtures on the back lot to encroach on CP&L's easement. Although the evidence shows that the power lines were originally seventy-five feet from the place in which plaintiff was injured, defendant allowed the back lot to move closer to the lines to such a degree that various production company workers had to navigate between the back of the set and the energized lines. As described above, some portions of the set and access road became located directly under the lines.

Plaintiff presented testimony that, while a different production company was using the back lot, defendant de-energized the lines

when work reached within fifteen feet of the lines because of the hazard it presented to the crew. Additionally, defendant authorized the building of sets for "The Crow" up to the edge of the ten-foot easement, even though it knew that Crowvision employees would need to work behind the set, using lift equipment, inside the ten-foot zone. Defendant's expert witness, Raymond P. Boylston, agreed that JLGs would be used in outdoor construction settings and that workers would have to work on both sides of the set in order to attach the facades.

As noted previously, an aerial photograph of the back lot established that one year before the accident, poles extending thirty to forty feet in the air were within ten to twelve and a half feet of the power lines. Based on evidence that a JLG basket is three feet deep by five feet wide, the jury could find that even if no additional poles were installed on the set, Crowvision employees working in JLGs on the edge of the easement could be as close as five to eight feet from the lines. Moreover, through Waller, its facility manager, defendant oversaw and approved the installation of ten to eleven additional poles, including some that were located only five to ten feet from the lines and where work could be undertaken using JLGs.

Plaintiff presented expert testimony regarding both the existing condition of defendant's studio back lot and various alternatives that were available to defendant. David MacCullum was accepted as an expert in safety engineering. MacCullum's multipart opinion was that "[defendant] had a hazardous workplace because the power lines were present. No. 2 is that the power lines could have been easily removed, and third is that [plaintiff], the operator, was following the basic instructions from the JLG." MacCullum further testified that he was familiar with the customs and practices in the industry as to separation of power lines from construction activity and observed that "[t]he most reliable industry practice is to separate or remove the power lines from the workplace before the lift equipment is introduced into the work environment, so that it is now physically impossible to strike the power lines with lift equipment." He also testified:

> Q: And when you say "remove the power lines," do you have an opinion as to how the power lines could have been removed from the work site?
>
> A: Well, there [are] a number of solutions. The easiest is to bury them. The second is to barricade the area off to restrict entry into

the area. And the third: In some instances, you can provide insulation on the power lines.

The jury also heard expert testimony from Dr. Harvey Snyder that "those lines were located dangerously close to the structures which these men were working on, dangerously close when it was known that lifting-type or raising-type equipment . . . could be used in that environment." Like MacCullum, Snyder suggested de-energizing the lines, moving or burying the lines, or guarding the lines as alternatives to the current condition.

In addition, the jury was informed that defendant's property extended one hundred feet beyond the back lot. Given the evidence presented to the jury concerning the nature and use of the property, the knowledge of defendant through its facility manager of the set conditions, and the available alternatives, there was sufficient evidence to submit to the jury the question of whether defendant was negligent in causing plaintiff's injuries. The Court of Appeals did not err in affirming the trial court's denial of defendant's motions for directed verdict and judgment notwithstanding the verdict.

Defendant contends that the Court of Appeals' opinion holds it strictly liable for any injury to plaintiff caused by power lines. We have held that the mere maintenance of uninsulated power lines is not wrongful. *Mintz v. Town of Murphy*, 235 N.C. 304, 314, 69 S.E.2d 849, 857 (1952). However, liability in the case at bar is not based on the mere presence of power lines at defendant's studio. "[I]n order to hold the owner negligent, where an injury occurs, he must be shown to have omitted some precaution which he should have taken." *Philyaw v. City of Kinston*, 246 N.C. 534, 537, 98 S.E.2d 791, 794 (1957). Our holdings in *Nelson* and *Hedrick* demonstrate that a jury may consider whether, under the circumstances, defendant exercised reasonable care in the maintenance of its premises. We agree with plaintiff that there was sufficient evidence for a jury to find that the intended purpose of the property was for film-making and that film production companies utilized JLGs to lift equipment from the front and back of facades, reaching heights above the existing power lines. A jury could further find that given the nature and use of the property, as observed and authorized by defendant, workers were required to operate JLGs in close proximity to or directly under uninsulated power lines. Defendant not only knowingly allowed construction of sets up to the edge of the easement, it participated in the decision where to place poles and other parts of the set. Defendant's liability was based upon the particular facts of the case, including defendant's

awareness that Crowvision employees would be working within the power-line easement and defendant's failure to take reasonable steps to protect plaintiff. Accordingly, defendant has not been held to a strict-liability standard.

Defendant also argues that this case is controlled by our holding in *Floyd v. Nash*, 268 N.C. 547, 151 S.E.2d 1 (1966) (per curiam). In that case, a worker was preparing to discharge the contents of a feed truck into a storage tank on the defendant landowner's property. The blower pipe that the worker was using to transfer the feed contacted an uninsulated power line, and the worker was electrocuted. The decedent's estate brought suit, alleging that the defendant landowner was negligent in building the feed tank directly beneath uninsulated power lines. We determined that the evidence did not support a negligence case against the defendant landowner when "[t]he evidence show[ed] that the defendant [landowner] did not construct, determine the location of, own, control or use the feed tank." *Id.* at 551, 151 S.E.2d at 4. We further stated that the evidence supported the inference that the decedent was contributorily negligent. *Id.*

We believe *Floyd* is distinguishable. Defendant here not only knew of Crowvision's activities on its property, but also maintained a significant degree of control over Crowvision's use of the facilities under the licensing agreement. In addition, Crowvision employees testified that they had to seek approval from Waller before using props from the bone yard or erecting additional poles for facades. There was evidence that Waller was present on the studio grounds, including the back lot, every day. In light of defendant's exercise of such control over the property, the particular use to which the property was put, and defendant's knowledge of the potential dangers facing Crowvision employees from uninsulated power lines, we believe that defendant's duty of reasonable care to plaintiff included a duty to protect plaintiff from contact with an energized power line. By contrast, although the defendant landowner in *Floyd* was an electrician and had once before the accident discussed the power line with the victim, he was a mere recipient of power. The defendant landowner had no part in siting or building the feed tank, nor did he give the deceased any instructions as to how to carry out his responsibilities. Accordingly, he had no duty to the decedent regarding the uninsulated power line.

Finally, defendant alleges that there was insufficient evidence to submit to a jury that a person of ordinary prudence would have fore-

seen that plaintiff's injury was probable under the circumstances. We disagree. Our definitions of probable cause have included the requirement that the cause be "one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed." *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984). This Court has held that "[t]he test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of the defendant." *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 403, 250 S.E.2d 255, 258 (1979); *see also Davis v. Carolina Power & Light Co.*, 238 N.C. 106, 76 S.E.2d 378 (1953). Plaintiff alleged that in the ordinary course of his job on the movie set he was required to operate the JLG in close proximity to uninsulated power lines. Crowvision employees testified that it was not uncommon to have to maneuver JLG lifts between the back of the set facade and the power lines. Evidence was presented that defendant knew of these conditions. Accordingly, we hold that it was not unforeseeable as a matter of law that the type of injury plaintiff sustained would result from defendant's alleged negligence.

CONTRIBUTORY NEGLIGENCE

[2] We next address whether the Court of Appeals erred in affirming the trial court's denial of defendant's motions for directed verdict and judgment notwithstanding the verdict on the issue of contributory negligence.

Defendant first argues that because plaintiff knew of the electrical lines, he was contributorily negligent in bringing his JLG into contact with power lines. The burden of proving contributory negligence is on defendant. *Nicholson v. American Safety Util. Corp.*, 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997). The existence of contributory negligence is ordinarily a question for the jury; such an issue is rarely appropriate for summary judgment, and only where the evidence establishes a plaintiff's negligence so clearly that no other reasonable conclusion may be reached. *Id.* While we acknowledge the general rule that a person has a legal duty to avoid open and obvious dangers, *Gibbs v. Carolina Power & Light Co.*, 268 N.C. 186, 150 S.E.2d 207 (1966), including contact with an electrical wire he or she knows to be dangerous, *Alford v. Washington*, 244 N.C. 132, 92 S.E.2d 788 (1956), "[t]hat does not mean . . . that a person is guilty of contributory negligence as a matter of law if he contacts a known electrical

wire regardless of the circumstances and regardless of any precautions he may have taken to avoid the mishap," *Williams v. Carolina Power & Light Co.*, 296 N.C. at 404, 250 S.E.2d at 258.

At trial, evidence was presented that while plaintiff was a capable JLG operator, on the day of the accident, he was operating a JLG model that used an electronic control system rather than the hydraulic system to which plaintiff was more accustomed. Kenneth Thomas Fisher, Jr., a representative from the company that rented the JLG to Crowvision, testified that the controls of this particular model of JLG were sensitive and "jerky" and stated that while operating this JLG, "[i]f you were in close proximity to an object you didn't want to strike, then yeah, you would definitely have a greater risk."

In addition, another JLG operator testified that, under some circumstances, the operator could experience difficulties seeing power lines. "Everything gets lost in the, your perspective, you know. . . . Sometimes you are closer; sometimes you are further away than you actually think you are." Woolaston described the perception as being "like if you were on a high diving board and jumping in the water, you don't know where the water is until you hit it." Woolaston further testified:

> I would have a very hard time distinguishing those power lines if they were right in here. And especially on a lift, you wouldn't see them at all. And your only vantage point, usually, looking up at them is your best view, because you are looking up against pretty much a solid sky. You get those lines while you are up on a lift, like I said, cluttered in this, in trees, or even right on the edge of that tree line where a tree line meets the sky. They look invisible. You've got to look for them. You've got to really look for them. If the sun is in your eyes, you are not going to see them at all . . . .

Plaintiff's expert MacCullum similarly testified that "[t]he power lines may be camouflaged because they blend in with the background, and it's very difficult for people to estimate accurate distances, particularly when they have multiple visual tasks to do." Although no one knew where plaintiff was looking at the time of the accident, testimony as to the relative position of the sun suggested that glare could have been a factor. Taken together, this evidence adequately raised a question sufficient to submit to the jury as to whether plaintiff was contributorily negligent.

Defendant additionally contends that plaintiff was contributorily negligent in that he chose a knowingly dangerous option when he attempted to raise the door over a facade rather than taking a different path around the side of the facade. However, evidence was presented that plaintiff had no choice but to travel down the access road underneath the lines. Schlatter, Crowvision's construction coordinator, testified that while there were other access roads on the back lot, parked vehicles and other impediments would have prevented the JLG from reaching the door by any route other than the one plaintiff took. Although defendant suggested that a forklift could have been used to move the door, plaintiff's foreman testified that the JLG was the preferable piece of equipment for the job, given the tight confines of the area and the possibility that a forklift might overturn in the uneven terrain. Finally, the jury heard the testimony of plaintiff's expert MacCullum that in his opinion plaintiff followed the basic instructions for operating the JLG.

Based on this evidence, we hold that defendant has failed to carry its burden of proving as a matter of law that plaintiff was contributorily negligent. " 'Contradictions or discrepancies in the evidence . . . must be resolved by the jury rather than the trial judge.' " *Rappaport v. Days Inn of Am., Inc.*, 296 N.C. 382, 384, 250 S.E.2d 245, 247 (1979) (quoting *Clark v. Bodycombe*, 289 N.C. 246, 251, 221 S.E.2d 506, 510 (1976)). In the case at bar, the jury properly considered and resolved the conflicting evidence to reach a verdict as to contributory negligence. Accordingly, the Court of Appeals did not err in affirming the trial court's denial of defendant's motions for directed verdict and judgment notwithstanding the verdict regarding contributory negligence.

AFFIRMED.

KENNETH L. MARAMAN, SR. AND MILDRED MARAMAN, ADMINISTRATORS OF THE ESTATE OF KENNETH L. MARAMAN, JR. v. COOPER STEEL FABRICATORS AND JAMES N. GRAY COMPANY

No. 662A01

(Filed 10 May 2002)

1. **Workers' Compensation— *Woodson* claims—insufficient evidence**

Plaintiffs' evidence was insufficient to support *Woodson* claims against a general contractor and a subcontractor-employer for the death of a steel erector who was performing steel construction work.

2. **Appeal and Error— Court of Appeals opinion—inappropriate format**

A Court of Appeals opinion was confusing and inappropriate where a portion of the majority opinion was erroneously designated a dissent and a portion of the dissent was found in what purported to be the majority opinion.

Appeal by plaintiffs and defendant Cooper Steel Fabricators 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. 613, 555 S.E.2d 309 (2001), finding no error in part and ordering a new trial in part on orders for directed verdict entered in open court by Lanning, J., on 27 October 1999 in Superior Court, Mecklenburg County; these orders were subsequently reduced to writing and entered on 22 and 23 March 2000. Plaintiffs appeal from the part of the decision finding no error as to directed verdict for defendant James N. Gray. Defendant Cooper Steel Fabricators appeals from the part of the decision holding that the trial court erred in directing a verdict against plaintiffs and ordering a new trial. Heard in the Supreme Court 15 April 2002.

Price, Smith, Hargett, Petho & Anderson, by Wm. Benjamin Smith, for plaintiff-appellants and -appellees.

Jones, Hewson & Woolard, by Lawrence J. Goldman, for defendant-appellant Cooper Steel Fabricators.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Hatcher Kincheloe, Neil P. Andrews, and Shannon P. Herndon, for defendant-appellee James N. Gray Company.

PER CURIAM.

[1] We reverse that portion of the Court of Appeals' opinion that found error in the trial court's entry of directed verdict for defendant Cooper Steel Fabricators.

We affirm that portion of the Court of Appeals' opinion that affirmed the trial court's entry of directed verdict for defendant James N. Gray Company.

[2] The Court of Appeals is once again reminded of its responsibility to issue opinions in which the holding is readily understandable to the bench and bar. *Knight Pub'g Co. v. Chase Manhattan Bank, N.A.*, 131 N.C. App. 257, 506 S.E.2d 728 (1998), *remanded for modification*, 351 N.C. 98, 540 S.E.2d 36 (1999); *Jones v. Asheville Radiological Grp., P.A.*, 129 N.C. App. 449, 500 S.E.2d 740 (1998), *remanded with instructions*, 350 N.C. 654, 517 S.E.2d 380 (1999). The Court of Appeals' opinion in this case, in which a portion of the majority opinion was erroneously designated a dissent, while a portion of the dissent was found in what purported to be the majority opinion, was confusing and inappropriate.

REVERSED IN PART; AFFIRMED IN PART.

BEATRICE WOODY, EMPLOYEE v. THOMASVILLE UPHOLSTERY INCORPORATED, EMPLOYER, SELF-INSURED (HELSMAN-MANAGEMENT SERVICES, INC., SERVICING AGENT)

No. 596A01

(Filed 10 May 2002)

Workers' Compensation— depression and fibromyalgia—not occupational diseases

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 the evidence and the Industrial Commission's findings do not support the Commission's conclusions that plaintiff's employment exposed her to a greater risk of contracting depression and fibromyalgia than the public generally and that her depression and fibromyalgia are compensable occupational diseases.

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. 187, 552 S.E.2d 202 (2001), affirming an opinion and award entered by the Industrial Commission on 13 January 2000. Heard in the Supreme Court 16 April 2002.

Mary F. Pyron for plaintiff-appellee.

Morris York Williams Surles & Barringer, LLP, by Thomas E. Williams and Stephen Kushner; and Orbock Bowden Ruark & Dillard, by Maureen S. Orbock and Devin F. Thomas, for defendant-appellant.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals.

REVERSED.

WILLIAM EDWARD DOLAN v. KAREN A. DOLAN

No. 48A02

(Filed 10 May 2002)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 558 S.E.2d 218 (2002), vacating and remanding an order entered 31 August 2000 by Jarrell, J., in District Court, Guilford County. Heard in the Supreme Court 16 April 2002.

Hatfield & Hatfield, by Kathryn K. Hatfield, for plaintiff-appellant.

Floyd & Jacobs, L.L.P., by Jack W. Floyd, for defendant-appellee.

Wyatt Early Harris & Wheeler, L.L.P., by A. Doyle Early, Jr., on behalf of the North Carolina Chapter of the American Academy of Matrimonial Lawyers, amicus curiae.

PER CURIAM.

AFFIRMED.

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

BRENDA GAIL BRADLEY, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF HARVEY LEE BRADLEY, SR.; AND SONYA ANNETTE BRADLEY v. HIDDEN VALLEY TRANSPORTATION, INC.

No. 29A02

(Filed 10 May 2002)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 148 N.C. App. 163, 557 S.E.2d 610 (2001), affirming an order for summary judgment entered 13 November 2000 by Johnston, J., in Superior Court, Burke County. Heard in the Supreme Court 17 April 2002.

Simpson Kuehnert Vinay & Bellas, P.A., by Daniel A. Kuehnert, for plaintiff-appellants.

Roberts & Stevens, P.A., by Kenneth R. Hunt and Frank P. Graham, for defendant-appellee.

PER CURIAM.

AFFIRMED.

GERALDINE A. BEST v. FORD MOTOR COMPANY, SAM JOHNSON'S LINCOLN MERCURY, INC. AND TRW, INC.

No. 15A02

(Filed 10 May 2002)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 148 N.C. App. ——, 557 S.E.2d 163 (2001), affirming an order for summary judgment entered 23 May 2000 by Patti, J., in Superior Court, Mecklenburg County. Heard in the Supreme Court 17 April 2002.

Wallace & Graham, P.A., by Christopher D. Mauriello, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Kirk G. Warner and Johanna S. Fowler, for defendant-appellee Ford Motor Company.

Golding, Holden, Pope & Baker, L.L.P., by Lawrence M. Baker, for defendant-appellee Sam Johnson's Lincoln Mercury, Inc.

Nelson Mullins Riley & Scarborough, LLP, by Paul J. Osowski; and Lord, Bissell & Brook, by David R. Reed, pro hac vice, for defendant-appellee TRW, Inc.

PER CURIAM.

AFFIRMED.

RALPH LINDSEY, JR. v. BODDIE-NOELL ENTERPRISES, INC., D/B/A HARDEE'S SKAT-THRU

No. 679A01

(Filed 10 May 2002)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 147 N.C. App. 166, 555 S.E.2d 369 (2001), ordering a new trial after appeal from a judgment entered 21 July 1999 and an order signed 22 February 2000 by Klass, J., in Superior Court, Guilford County. Heard in the Supreme Court 15 April 2002.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by L.P. McLendon, Jr.; John W. Ormand III; and Teresa DeLoatch Bryant, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by H. Lee Evans, for defendant-appellant.

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion.

REVERSED.

STATE OF NORTH CAROLINA v. ANTOINNE LAMONT MORRIS

No. 663A01

(Filed 10 May 2002)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 147 N.C. App. 247, 555 S.E.2d 353 (2001), reversing a judgment entered 8 June 2000 by Kincaid, J., in Superior Court, Mecklenburg County. Heard in the Supreme Court 15 April 2002.

Roy Cooper, Attorney General, by Jennie Wilhelm Mau, Assistant Attorney General, for the State-appellant.

Isabel Scott Day, Public Defender, by Julie Ramseur Lewis, Assistant Public Defender, for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. ELBERT LEBRON WOODARD

No. 519PA01

(Filed 10 May 2002)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 146 N.C. App. 75, 552 S.E.2d 650 (2001), ordering a new trial as to defendant's conviction and sentence for first-degree murder and remanding for sentencing on defendant's convictions for assault with a deadly weapon inflicting serious injury and felonious operation of a motor vehicle to elude arrest; judgments were entered for these convictions on 10 December 1999 by Haigwood, J., in Superior Court, Johnston County. On 20 December 2001, the Supreme Court allowed defendant's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court 16 April 2002.

Roy Cooper, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Patricia A. Duffy, Assistant Attorney General, for the State-appellant and -appellee.

Mark Montgomery for defendant-appellant and -appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

BAARS v. CAMPBELL UNIV., INC.

No. 182P02

Case below: 148 N.C. App. 408

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002.

CREECH v. MELNIK

No. 63P02

Case below: 147 N.C. App. 471

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 March 2002.

DAVIS v. TRUS JOIST MACMILLAN

No. 79P02

Case below: 148 N.C. App. 248

Petition by plaintiff (Jose I. Troncony) for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002.

DEADWOOD, INC. v. N.C. DEP'T OF REVENUE

No. 66PA02

Case below: 148 N.C. App. 122

Notice of appeal by defendant-appellant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 9 May 2002. Petition by defendant-appellant for discretionary review pursuant to G.S. 7A-31 allowed 9 May 2002.

DISCIPLINARY HEARING COMM'N OF THE
N.C. STATE BAR v. FRAZIER

No. 72PA01

Case below: 141 N.C. App.

354 N.C. 555

Petition by defendant pro se for writ of mandamus denied 9 May 2002. Petition by defendant pro se for any other extraordinary writs pursuant to N.C. Rules of Appellate Procedure denied 9 May 2002. Motion by defendant pro se for expedited relief pursuant to N.C. Rule of Appellate Procedure 37 denied 9 May 2002. Motion by defendant pro se pursuant to N.C. Rule of Civil Procedure 11(a) sanction of forfeiture of award of attorney's fees pursuant to N.C. Rules denied 9 May 2002.

DOUGLAS v. N.C. DEP'T OF CORR.

No. 186P02

Case below: 149 N.C. App. 667

Petition by plaintiff pro se for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002.

FIRST UNION NAT'L BANK v. BURGESS

No. 37P02

Case below: 147 N.C. App. 785

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 23 April 2002.

GILES v. FIRST VA. CREDIT SERVS., INC.

No. 157P02

Case below: 149 N.C. App. 89

Notice of appeal by plaintiffs pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 9 May 2002. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002.

GOYNIAS v. SPA HEALTH CLUBS, INC.

No. 89A02

Case below: 148 N.C. App. 554

Motion by defendant to dismiss appeal based upon late filing of plaintiff-appellant's new brief denied 9 May 2002.

IN RE APPEAL OF CHAPEL HILL DAY CARE CENTER, INC.

No. 478P01

Case below: 144 N.C. App. 649

Motion by Orange County to dismiss the appeal for lack of substantial constitutional question allowed 9 May 2002. Petition by petitioner (Day Care Center, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002.

IN RE B.A.

No. 193P02

Case below: 149 N.C. App. 667

Motion by Attorney General for temporary stay allowed 19 April 2002 pending determination of the State's petition for discretionary review.

KRAUSS v. PAWLEY (IN RE PAWLEY)

No. 152P02

Case below: 148 N.C. App. 716

Petition by petitioners for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002.

MASON v. TOWN OF FLETCHER

No. 185P02

Case below: 149 N.C. App. 636

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002.

McMILLAN v. N.C. DEP'T OF CORR.

No. 431P01

Case below: 144 N.C. App. 722

Petition by petitioner (Ann McMillan) for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002.

MEDEARIS v. TRUSTEES OF MYERS PARK BAPTIST CHURCH

No. 67P02

Case below: 148 N.C. App. 1

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 18 April 2002.

PRIOR v. PRUETT

No. 367P01

Case below: 143 N.C. App. 612

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002.

REYNOLDS v. REYNOLDS

No. 38A02

Case below: 147 N.C. App. 566

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 9 May 2002.

R.J. REYNOLDS TOBACCO CO. v.
N.C. DEP'T OF ENV'T & NATURAL RES.

No. 144P02

Case below: 148 N.C. App. 610

Petition by respondent for writ of supersedeas denied 9 May 2002. Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002.

RUSSOS v. WHEATON INDUS.

No. 461P01

Case below: 355 N.C. 214

145 N.C. App. 164

Motion by defendants for temporary stay denied 9 May 2002. Petition by defendants for writ of supersedeas denied 9 May 2002. Petition and motion by defendant for rehearing of denial of petition for discretionary review denied 9 May 2002.

STATE v. ARRINGTON

No. 489P01

Case below: 135 N.C. App. 232

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 9 May 2002. Notice of appeal by plaintiff pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 9 May 2002.

STATE v. ARROYO

No. 513P01

Case below: 145 N.C. App. 503

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002.

STATE v. BOND

No. 143A95-2

Case below: Bertie County Superior Court

Petition by defendant pro se for writ of mandamus denied 9 May 2002. Motion by defendant pro se for judicial notice dismissed 9 May 2002.

STATE v. BROWN

No. 151P02

Case below: 148 N.C. App. 683

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 9 May 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002.

STATE v. BRYANT

No. 167P02

Case below: 149 N.C. App. 232

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002.

STATE v. BUCHANAN

No. 190A00-2

Case below: 355 N.C. 264

Motion by Attorney General to reconsider the decision at 355 N.C. 264 denied 9 May 2002.

STATE v. DEMOS

No. 160P02

Case below: 148 N.C. App. 343

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 9 May 2002.

STATE v. ELDERS

No. 184P02

Case below: 149 N.C. App. 668

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002.

STATE v. FEATHERSON

No. 427P01

Case below: 145 N.C. App. 134

Motion by defendant to withdraw petition for discretionary review allowed 9 May 2002.

STATE v. FOSTER

No. 168P02

Case below: 149 N.C. App. 206

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 9 May 2002.

STATE v. GRAY

No. 556A93-2

Case below: Lenoir County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Lenoir County, denied 9 May 2002. Motion by defendant pro se to delay ruling on petition for writ of certiorari dismissed 9 May 2002. Motion by the Attorney General to lift stay of proceedings as a result of the United States Supreme Court's decision in *Mickens v. Taylor*, 2002 U.S. Lexis 2146 (March 27, 2002) allowed 9 May 2002.

STATE v. HATCHER

No. 164P02

Case below: 148 N.C. App. 407

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 9 May 2002.

STATE v. HERNANDEZ

No. 537P01-2

Case below: 143 N.C. App. 717

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 9 May 2002.

STATE v. HOLADIA

No. 162P02

Case below: 149 N.C. App. 248

Motion by Attorney General for temporary stay denied 8 April 2002. Petition by Attorney General for writ of supersedeas denied 8 April 2002. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 8 April 2002.

STATE v. HOLMES

No. 165P02

Case below: 149 N.C. App. 233

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 9 May 2002.

STATE v. HOWELL

No. 197P02

Case below: 149 N.C. App. 668

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002.

STATE v. KORNEGAY

No. 190P02

Case below: 149 N.C. App. 390

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 9 May 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002.

STATE v. LAMBERT

No. 153A02

Case below: 149 N.C. App. 163

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 9 May 2002.

STATE v. LEE

No. 114A02

Case below: 148 N.C. App. 518

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 9 May 2002.

STATE v. LEE

No. 128P02

Case below: 148 N.C. App. 407

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002.

STATE v. LINTON

No. 557P01

Case below: 145 N.C. App. 639

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002.

STATE v. NANCE

No. 226P02

Case below: 149 N.C. App. 734

Motion by Attorney General for temporary stay denied 3 May 2002. Petition by Attorney General for writ of supersedeas denied 3 May 2002. Notice of appeal by Attorney General pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 3 May 2002. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 3 May 2002.

STATE v. PHILLIPS

No. 178A02

Case below: 149 N.C. App. 310

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 9 May 2002.

STATE v. TAYLOR

No. 116P02

Case below: 141 N.C. App. 321

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 9 May 2002.

STATE v. THOMPSON

No. 200P02

Case below: 149 N.C. App. 276

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 9 May 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 9 May 2002.

STATE v. WALL

No. 158P02

Case below: 149 N.C. App. 233

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002.

STATE v. WILSON

No. 172P02

Case below: 149 N.C. App. 233

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002.

STATE v. YOUNG

No. 129P02

Case below: 148 N.C. App. 462

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 9 May 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002.

STEPHENSON v. BARTLETT

No. 94PA02

Case below: Johnston County Superior Court

Motion by plaintiffs to strike affidavits of Gary Bartlett and Ferrel Guillory denied 9 May 2002. Plaintiffs' renewed motions for rulings on plaintiffs' motion for suspension of rules, petition for a writ of supersedeas, and petition for expedited discretionary review dismissed as moot 9 May 2002.

STILWELL v. GUST

No. 72P02

Case below: 148 N.C. App. 128

Petition by defendant/third party plaintiff (Gust) for discretionary review pursuant to G.S. 7A-31 denied 23 April 2002.

TAYLOR v. CITY OF LENOIR

No. 95A01-2

Case below: 148 N.C. App. 269

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 9 May 2002.

WADDELL v. WILLIAMS

No. 199P02

Case below: 149 N.C. App. 671

Motion by defendant for temporary stay denied 23 April 2002.

STATE v. WILLIAMS

[355 N.C. 501 (2002)]

STATE OF NORTH CAROLINA v. JOHN WILLIAMS, JR.

No. 278A99

(Filed 28 June 2002)

1. Joinder— charges—transactional connection

The trial court did not abuse its discretion by granting the State's motion under N.C.G.S. § 15A-926(a) to join the charges against defendant including two counts of first-degree murder, two counts of first-degree rape, first-degree sexual offense, assault with a deadly weapon, two counts of assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree rape, assault with a deadly weapon with intent to kill, and first-degree rape even though the charges involved seven different victims over a fifteen-month span, because a transactional connection was established through numerous factors including a similar modus operandi, similar circumstances with respect to the type of victims, similar location, and a DNA match between defendant and several of the victims.

2. Evidence— possible perpetrators other than defendant—relevancy

The trial court did not err in a first-degree murder and first-degree rape case by ruling that defendant's evidence implicating three other men as possible perpetrators was inadmissible, because: (1) there was no evidence one of the alleged perpetrators had committed the crime except for his proximity to the crime scene; (2) even though defendant sought to call another of the alleged perpetrators as a witness and then impeach him with another witness's testimony, prior inconsistent statements may not be used as substantive evidence; and (3) the evidence defendant sought to elicit about the last alleged perpetrator did not tend to implicate the man, nor was the evidence inconsistent with defendant's guilt.

3. Evidence— cross-examination—failure to make offer of proof

The trial court did not err in a first-degree rape, first-degree sexual offense, and aggravated assault case by sustaining the State's objection to defendant's questions during cross-examination of two of the State's witnesses, because: (1) in

regard to the cross-examination of the police officer witness, defendant failed to make an offer of proof in order to preserve the issue concerning whether the officer had identified an individual who fit the description given to the police by the victim; and (2) in regard to the cross-examination of a witness allegedly interviewed by the police as a suspect in the murder of one of the victims, defendant again failed to make an offer of proof and the mere fact of the witness being interviewed by the police does not raise an issue concerning the credibility or bias of the witness. N.C.G.S. § 8C-1, Rule 103(a)(2).

4. Evidence— hearsay—unavailable declarant

The trial court did not err in a first-degree murder case by excluding hearsay testimony of a detective regarding his interview of an unavailable witness who told the detective that he had seen the victim alive the day before the discovery of her body, because: (1) defendant did not establish that the unavailable witness's testimony possessed equivalent guarantees of trustworthiness; (2) the testimony of an eyewitness was more probative than the unavailable witness's hearsay statement regarding the victim being alive; and (3) the trial court specifically concluded that the general purposes of the rules and the interests of justice would not be best served by the admission of the unavailable witness's statement. N.C.G.S. § 8C-1, Rule 804(b)(5).

5. Evidence— cross-examination—motion to strike testimony on redirect examination

The trial court did not err in a first-degree murder case by sustaining the State's objections to two questions that defendant asked a detective on cross-examination and by overruling defendant's motion to strike certain testimony that the detective gave on redirect examination, because: (1) the answers by the detective were irrelevant under N.C.G.S. § 8C-1, Rule 401 considering all of the evidence against defendant and the fact that defendant's DNA was found on the victim, and defendant failed to carry his burden to show that there was evidence which tends both to implicate another and to be inconsistent with the guilt of defendant; and (2) defendant failed to carry his burden to show prejudice to any alleged error by the trial court with regard to the question and answer during redirect examination, and any alleged prejudice was rendered moot when the detective testified that other people were included in his investigation.

6. Evidence— alternative suspect—failure to show evidence

The trial court did not err in a first-degree rape and assault with a deadly weapon with intent to kill inflicting serious injury case by excluding evidence of an alternative suspect, because defendant has not shown that any evidence implicated the other person, nor has defendant shown any evidence that would be inconsistent with defendant's guilt.

7. Discovery— prosecutor's investigative files—other suspects

The trial court did not err in a first-degree murder, first-degree rape, first-degree sexual offense, assault with a deadly weapon, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree rape, and assault with a deadly weapon with intent to kill case involving seven different victims over a fifteen-month span by denying defendant's written motions for pretrial discovery relating to other suspects and to other offenses with which defendant was not charged, because: (1) no statutory provision or constitutional principle requires the trial court to order the State to make available to a defendant all of its investigative files relating to his case, and defendant has not cited any statute that would give the trial court the authority to grant defendant's motions; (2) defendant is not entitled to the granting of his motion for a fishing expedition; and (3) defendant has not shown any violation of the Due Process Clause when the United States Supreme Court has held that due process does not require the State to make complete disclosure to defendant of all of the investigative work on a case. N.C.G.S. § 15A-904(a).

8. Criminal Law-motion to continue— failure to show prejudice

The trial court did not abuse its discretion in a first-degree murder, first-degree rape, first-degree sexual offense, assault with a deadly weapon, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree rape, assault with a deadly weapon with intent to kill, and first-degree rape case involving seven different victims over a fifteen-month span by denying defendant's motion to continue, because defendant has shown no evidence that the lack of additional time prejudiced his case or that he would have been better prepared had the continuance been granted.

9. Homicide— first-degree murder—short-form indictment—constitutionality

The use of a short-form indictment to charge a defendant with first-degree murder was constitutional even though it did not set forth the aggravating circumstances upon which defendant's death eligibility was based.

10. Discovery— pretrial motion—bill of particulars

The trial court did not abuse its discretion in a prosecution for first-degree murder, first-degree rape, first-degree sexual offense, and other crimes involving seven different victims over a fifteen-month span by denying defendant's pretrial motion under N.C.G.S. § 15A-925(c) for a bill of particulars, because: (1) defendant has not shown that the information requested was necessary to enable defendant to adequately prepare or conduct his defense; (2) all of the information that defendant requested was in the materials he received from the prosecution pursuant to open file discovery; and (3) defendant does not suggest surprise or specify in what manner the denial of his motion affected his trial strategy.

11. Indigent Defendants— motion for funds to hire expert—change of venue

The trial court did not abuse its discretion in a first-degree murder, first-degree rape, first-degree sexual offense, assault with a deadly weapon, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree rape, and assault with a deadly weapon with intent to kill case involving seven different victims over a fifteen-month span by denying defendant's motion for funds in order to hire an expert to prove the necessity for a change of venue based on pretrial publicity, because defendant has not shown any evidence that he was deprived of a fair trial due to the absence of a jury-selection expert or that there was a reasonable likelihood that the expert would have been able to materially assist him in the preparation of his case.

12. Discovery— criminal records of witnesses and victims—oral request for access to Police Information Network

The trial court did not err in a first-degree murder, first-degree rape, first-degree sexual offense, assault with a deadly weapon, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree rape, and assault with a

deadly weapon with intent to kill case involving seven different victims over a fifteen-month span by denying defendant's pretrial motions for disclosure of the criminal records of the witnesses and victims involved in the case against defendant and by denying defendant's oral request for an order allowing his investigator to have access to the Police Information Network from which the criminal records could be obtained, because: (1) no statutory or constitutional principle requires a trial court to order the State to make a general disclosure of criminal records of the State's witnesses; and (2) the prosecution witnesses were cross-examined rigorously and no additional impeaching evidence gleaned from the criminal records of these witnesses would have created a reasonable doubt of defendant's guilt which did not otherwise exist.

13. Jury— selection—understanding about parole eligibility for a life sentence

The trial court did not err in a prosecution for first-degree murder, first-degree rape, first-degree sexual offense and other crimes involving seven different victims over a fifteen-month span by denying defendant's request to question jurors during jury selection on their understanding about parole eligibility for a life sentence, because defendant has failed to establish any compelling reason why our Supreme Court should reconsider its prior holding deciding this issue against defendant.

14. Confessions and Incriminating Statements— Miranda warnings—appointment of counsel—reinitiation of contact by defendant—subsequent statement—waiver of counsel

The trial court did not err in a first-degree murder, first-degree rape, first-degree sexual offense, assault with a deadly weapon, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree rape, and assault with a deadly weapon with intent to kill involving seven different victims over a fifteen-month span by denying defendant's motion to suppress a statement he gave to the Raleigh Police Department after he was arrested, advised of his Miranda rights, declined to make a statement, and had counsel appointed to represent him where (1) defendant reinitiated contact with the police and stated that he had information for them; (2) defendant was advised of his Miranda rights, he signed a waiver of rights form, and defendant indicated that he understood his rights and wished to waive them; (3) defendant was further advised by the officers

that he was still represented by counsel, and defendant waived his right to have his attorney present; (4) although the trial court denied defendant's motion to suppress the entire statement, it granted defendant's motion to suppress that part of the statement occurring after defendant asserted his right to remain silent; and (5) there is no factual basis in the record for defendant's contention that the statement was obtained in violation of the North Carolina Code of Professional Ethics Rule 7.4(1), which is now embodied in Rule 4.2(a).

15. Evidence— motion in limine—statement about electric chair—bias—reference to beating—failure to preserve issue

The trial court did not abuse its discretion in a prosecution for two first-degree murders and other crimes involving seven different victims over a fifteen-month span by denying defendant's pretrial motion in limine to redact that part of his statement from 25 February 1997 which referred to the electric chair, and a reference to defendant allegedly being beaten up by men hired by a girl who knew the defendant, because: (1) the statement involving the electric chair was relevant under N.C.G.S. § 8C-1, Rule 401 in order to show defendant's bias against his former girlfriend whom defendant had accused of participating in one of the murders; and (2) defendant failed to properly preserve his hearsay argument concerning the second statement about the men beating up defendant since defendant did not specify hearsay as a basis for objecting to this part of the statement.

16. Appeal and Error— preservation of issues—identification of defendant—pretrial motion to suppress—failure to object at trial

Although a defendant contends the trial court erred in an assault with a deadly weapon with intent to kill and attempted first-degree rape case by denying defendant's pretrial motion to suppress evidence of the show-up identification of defendant by the victim, defendant did not preserve this issue because: (1) defendant failed to object to the testimony introduced at trial pertaining to the show-up identification; and (2) our Supreme Court has held that a pretrial motion to suppress is not sufficient to preserve for appellate review the issue of admissibility of evidence.

17. Appeal and Error— preservation of issues—identification of defendant—objection lost based on previously admitted evidence

Although a defendant contends the trial court erred in an attempted first-degree rape and assault with a deadly weapon with intent to kill inflicting serious injury case by failing to suppress the identification of defendant by the victim through a photographic lineup even though the prosecution notified defendant that the victim had seen a photograph of defendant prior to the lineup, defendant did not preserve this issue because: (1) defendant lost the benefit of his objection to a detective's testimony concerning the photographic lineup since defendant failed to object to the same testimony given by the victim; and (2) defendant did not request a ruling on his renewed motion pertaining to the photographic lineup as required by N.C. R. App. P. 10(b)(1).

18. Identification of Defendants— photographic lineup—in-court identification

The trial court did not err in a first-degree rape, first-degree sexual offense, and assault with a deadly weapon with intent to kill inflicting serious injury case by denying defendant's motion to suppress a photographic lineup identification and in-court identification by the victim identifying defendant as her attacker, because: (1) defendant failed to refile a more specific motion to suppress after the trial court denied defendant's motion subject to defendant's right to file a more specific motion or motions directed to a particular identification of defendant by a specific victim or other witnesses; and (2) defendant failed to object to the disputed evidence once it was admitted in open court.

19. Jury— panels—motion to dismiss—alleged disproportionate underrepresentation of defendant's race

The trial court did not err in a prosecution for first-degree murder, first-degree rape, first-degree sexual offense and other crimes involving seven different victims over a fifteen-month span by denying defendant's motions to dismiss jury panels based on defendant's African-American race allegedly being disproportionately underrepresented in the composition of the jury panels, because: (1) a difference of 12.13% is insufficient in and of itself to conclude that the representation of African-Americans in this venire was not fair and reasonable in relation to their population in the community; and (2) defendant failed to present evidence showing that the alleged deficiency of African-Americans on the

jury was based on the systematic exclusion of this group in the jury selection process.

20. Jury— selection—peremptory challenges—African-American prospective jurors

The trial court did not violate a defendant's constitutional rights in a prosecution for two first-degree murders and other crimes involving seven different victims by allowing the State to exercise peremptory challenges against two African-American prospective jurors because, taken singly or in combination, the State's excusal of these jurors was based on race-neutral reasons that were clearly supported by the individual jurors' responses during voir dire.

21. Jury— capital—opposition to death penalty

The trial court did not err in a capital first-degree murder prosecution by denying defendant's motion to allow jurors who were opposed to the death penalty to sit as jurors in the guilt-innocence phase of the trial, because: (1) N.C.G.S. § 15A-2000(a)(2) provides that the same jury that determines the guilt of a defendant should recommend the appropriate sentence for the defendant in a capital case; (2) N.C.G.S. § 15A-2000(a)(2) does not provide for the exchange of jurors for the sentencing phase based upon their convictions concerning the death penalty; and (3) our Supreme Court has held that death-qualifying a jury is constitutional under both the federal and state Constitutions.

22. Appeal and Error— preservation of issues—failure to make offer of proof

Although a defendant contends the trial court erred in a prosecution for first-degree rape, first-degree sexual offense, and assault with a deadly weapon with intent to kill inflicting serious injury by sustaining the prosecutor's objection to a question asked by defendant to a detective on cross-examination concerning the identification of the alleged assailant, defendant failed to preserve this issue for appellate review because: (1) defendant did not make an offer of proof developing the detective's testimony as required by N.C.G.S. § 8C-1, Rule 103(a)(2); and (2) even if the substance of the testimony was apparent from the context, the statement still would have been excluded as hearsay since it was being offered for the truth of the matter asserted.

23. Evidence— expert opinion—DNA testing

The trial court did not err in a first-degree rape, first-degree sexual offense, and assault with a deadly weapon with intent to kill inflicting serious injury case by denying defendant's objections and motions to strike the testimony of an expert witness concerning DNA profiles and the expert's conclusions, because: (1) defendant did not specify the reasons for his objections to the expert's testimony with regard to this matter; and (2) contrary to defendant's assertions, the expert's testimony was not based on an inaccurate premise.

24. Evidence— news media material—still photographs of defendant

The trial court did not err in a first-degree murder, first-degree rape, first-degree sexual offense, assault with a deadly weapon, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree rape, and assault with a deadly weapon with intent to kill case involving seven different victims over a fifteen-month span by denying defendant's objection to the State's introduction of still photographs of defendant that were obtained from a videotape made by the news media during a pretrial hearing, because: (1) the State used the photographs to demonstrate the length of defendant's fingernails, and the photographs were cropped in order to show defendant's fingernails and the side of his face; (2) defendant failed to preserve his argument that the introduction of the photographs violated N.C.G.S. § 8C-1, Rules 401 and 403 by failing to present this argument at trial; and (3) even assuming arguendo that the State violated Rule 15(i) of the General Rules of Practice for Superior and District Courts by admitting these photographs, defendant failed to show prejudice as required by N.C.G.S. § 15A-1443(a), and it cannot be concluded that a different result would have been reached at trial absent these photographs.

25. Evidence— records of victims—motion for in camera inspection

The trial court did not err in a first-degree murder, first-degree rape, first-degree sexual offense, assault with a deadly weapon, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree rape, and assault with a deadly weapon with intent to kill case involving seven different victims over a fifteen-month span by denying defendant's broad motion for an in camera inspection of any county or state agency

records relating to the rape/sexual assault victims, because: (1) there was no specific request made for evidence that is obviously relevant, competent, and not privileged; and (2) in regard to defendant's pretrial motion for discovery of medical records, defendant abandoned this issue by asking the trial court to hold the matter open until another motion was heard and defendant thereafter failed to seek a ruling on the motion.

26. Appeal and Error— preservation of issues—failure to make an offer of proof

Although defendant contends the trial court erred in a first-degree rape and assault with a deadly weapon with intent to kill inflicting serious injury case by sustaining the State's objections to certain questions asked in regard to the victim's alleged mental problems, defendant failed to preserve this issue because: (1) defendant failed to make an offer of proof; and (2) assuming arguendo that the substance of the testimony was apparent from the context, the statements would still have been excluded as hearsay since they were being offered for the truth of the matter asserted.

27. Evidence— defendant's frustrations—absence of prejudice

The trial court did not err in a first-degree rape and assault with a deadly weapon with intent to kill inflicting serious injury case by allowing the testimony of defendant's case manager regarding defendant's frustrations, because defendant has failed to show prejudice as required by N.C.G.S. § 15A-1443(a), and it cannot be concluded that a different result would have been reached absent this testimony.

28. Identification of Defendants— failure to show prejudice—acquittal of charges

Although defendant contends the trial court erred in an attempted first-degree rape and assault with a deadly weapon with intent to kill inflicting serious injury case by failing to suppress the victim's identification of defendant, defendant was not prejudiced and has no basis for appeal because: (1) defendant was acquitted of the charges relating to this victim; and (2) defendant failed to make an argument to show that this victim's identification of defendant prejudiced his case against the other victims.

29. Evidence— detective's testimony—victim's knowledge of where defendant ran after attack—what victim told friend about attack

Even assuming arguendo that the trial court erred in an attempted first-degree rape and assault with a deadly weapon with intent to kill inflicting serious injury case by allowing a portion of a detective's testimony to be admitted over defendant's objections regarding the victim's knowledge of where defendant ran after the attack and how a friend acted when the victim told the friend about the incident with defendant, defendant has failed to show prejudice as required by N.C.G.S. § 15A-1443(a) because: (1) in regard to the detective's testimony as to where the victim said defendant ran, the evidence showed that the police were able to capture defendant shortly after the attack, and any prejudice was thus nullified; and (2) it cannot be concluded that a different result would have been reached at trial had the trial court not admitted the testimony about how the friend acted when the victim told him about the incident.

30. Evidence— detective's testimony—use of term "sexual assault"

Even assuming arguendo that the trial court erred in a first-degree murder case by overruling defendant's objection to a detective's testimony using the term "sexual assault" when referring to another of defendant's victims in an assault with a deadly weapon with intent to kill and attempted first-degree rape case, defendant has failed to show prejudice as required by N.C.G.S. § 15A-1443(a) and it cannot be concluded that a different result would have been reached absent this testimony.

31. Evidence— prior crimes or acts—testimony of prior victims

The trial court did not err in a first-degree murder, first-degree rape, first-degree sexual offense, assault with a deadly weapon, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree rape, and assault with a deadly weapon with intent to kill case involving seven different victims over a fifteen-month span by failing to exclude in one of the murder cases the testimony of two witnesses pertaining to certain prior offenses committed against them by defendant in Georgia, because: (1) the evidence of motive, plan, opportunity, intent, and modus operandi of these alleged offenses was so similar to the offenses for which defendant was charged that the

testimony was admissible under N.C.G.S. § 8C-1, Rule 404(b); (2) the trial court ruled the evidence was admissible in all the cases except in relation to that one murder victim; and (3) defendant did not request that a limiting instruction be given to the jury.

32. Evidence— prior crimes or acts—testimony of ex-girlfriend—turbulent relationship

The trial court did not err in a first-degree murder, first-degree rape, first-degree sexual offense, assault with a deadly weapon, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree rape, and assault with a deadly weapon with intent to kill case involving seven different victims over a fifteen-month span by allowing defendant's ex-girlfriend to testify under N.C.G.S. § 8C-1, Rule 404(b) about certain aspects of her turbulent relationship with defendant including choking and knife incidents, attacks on the ex-girlfriend and another man, and an incident in which defendant allegedly forcibly stole his ex-girlfriend's purse, because: (1) the testimony concerning the choking incidents was admissible to show motive, plan, common scheme, and intent since defendant had shown a pattern of choking his victims; (2) the relationship between defendant, his ex-girlfriend, and another man was relevant as evidence of motive since defendant had accused the ex-girlfriend and the other man of murdering one of the victims; (3) the evidence of this relationship and defendant's prior bad acts were intertwined with the principal crime; and (4) contrary to defendant's assertion, the admissibility of this testimony was not dependent on the ruling on another witness's testimony.

33. Evidence— testimony—corroboration

The trial court did not err in a first-degree murder, first-degree rape, first-degree sexual offense, assault with a deadly weapon, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree rape, and assault with a deadly weapon with intent to kill case involving seven different victims over a fifteen-month span by allegedly allowing the jury to decide whether certain testimony from a detective was admissible as corroborative evidence of the testimony of defendant's ex-girlfriend, because: (1) the trial court, and not the jury, decided on the admissibility of this evidence; (2) the trial court gave the jury limiting instructions on the use of corroborative evidence; and (3) defendant failed to preserve his argument that

this evidence was inadmissible under N.C.G.S. § 8C-1, Rule 608 by failing to object at trial on these grounds.

34. Evidence— testimony—corroboration

The trial court did not err by allowing certain testimony of a detective to be admitted as corroborative evidence of a witness's testimony pertaining to one of the first-degree murder charges against defendant, because: (1) the witness's testimony about not seeing defendant and the murder victim together could be construed as the witness not seeing defendant and the murder victim in a sexual manner, and the detective's testimony would thus not contradict the witness's testimony; (2) even assuming arguendo that it was error to allow the detective's testimony that the witness told him defendant usually carried a box cutter, defendant has failed to show prejudice as required by N.C.G.S. § 15A-1443(a) and it cannot be concluded that a different result would have been reached at trial absent this testimony when several of the victims testified that defendant had a box cutter or sharp object when he attacked them; and (3) the testimony regarding the detective describing an event which actually pertained to another case was quickly corrected by the detective once he realized the prosecutor directed the detective to the wrong page of the detective's interview with the witness, and defendant has shown no reason this mistake constituted prejudicial error and that a different result would have been reached.

35. Evidence— testimony—defendant's reaction after being released from jail

The trial court did not err in a first-degree murder case by overruling defendant's objections and motions to strike certain testimony by a witness concerning the witness seeing defendant after defendant had been released from jail for taking his ex-girlfriend's purse, because considering the overwhelming evidence against defendant with regard to this case, defendant has failed to show prejudice as required by N.C.G.S. § 15A-1443(a), and it cannot be concluded that a different result would have been reached at trial absent this testimony.

36. Evidence— testimony—defendant's demeanor towards female detective

The trial court did not err in a first-degree murder, first-degree rape, first-degree sexual offense, assault with a deadly weapon, assault with a deadly weapon with intent to kill inflict-

ing serious injury, attempted first-degree rape, and assault with a deadly weapon with intent to kill case involving seven different victims over a fifteen-month span by allowing the testimony from two detectives concerning defendant's demeanor towards the female detective during their interview of defendant, because: (1) the testimony had no impact on the case considering the overwhelming evidence against defendant; and (2) defendant failed to show prejudice as required by N.C.G.S. § 15A-1443(a), and it cannot be concluded that a different result would have been reached absent this testimony.

37. Evidence— testimony—defendant's reaction upon seeing victim enter courtroom

The trial court did not err in a first-degree murder, first-degree rape, first-degree sexual offense, assault with a deadly weapon, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree rape, and assault with a deadly weapon with intent to kill case involving seven different victims over a fifteen-month span by admitting certain testimony by a detective regarding her observation of defendant's reaction upon his seeing one of the victims enter the courtroom, because: (1) defendant had previously stated to two of the detectives that he did not know this victim, even though other evidence was introduced to the contrary; and (2) the testimony was a reasonable inference that was rationally based on the detective's perception, and it helped to refute defendant's statement that he did not know the victim.

38. Evidence— exhibits—diagram—photographs

The trial court did not err in a first-degree murder case by admitting into evidence two exhibits that were used during the interview of defendant on 25 February 1997 including a diagram and some photographs, because: (1) defendant used the diagram and photographs when giving his statement on that date; and (2) defendant's statement has already been ruled admissible, the exhibits were a part of that statement, and defendant has not given any reason to reconsider this issue.

39. Evidence— demonstration—jury view of crime scene—failure to allow defendant to raise door—changed circumstances

The trial court did not err in a first-degree murder case by failing to permit defendant to raise a bay roll-up door at the Old

Pine State building during the jury view of the crime scene even though defendant contends he witnessed the murder through the window, because: (1) the trial court did not permit defendant to conduct any demonstrations with regard to the roll-up door since the circumstances at the time of the jury view were not the same as at the time of the offense; (2) defendant failed to show the trial court abused its discretion in determining the demonstration was inappropriate based on changed circumstances; and (3) even if there was error, defendant failed to show a different result would have been reached at trial absent this error.

40. Evidence— hearsay—statements defendant made while in jail—admission by party exception

The trial court did not err in a prosecution for two first-degree murders by allowing a witness inmate to testify concerning statements he overheard defendant make while in jail admitting that he killed the victims, because N.C.G.S. § 8C-1, Rule 801(d) allows a statement to be admissible as an exception to the hearsay rule if it is offered against a party and it is his own statement.

41. Evidence— videotapes—photographs—crime scenes and injuries

The trial court did not err in a first-degree murder, first-degree rape, first-degree sexual offense, assault with a deadly weapon, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree rape, and assault with a deadly weapon with intent to kill case involving seven different victims over a fifteen-month span by admitting into evidence videotapes and photographs that showed crime scenes and injuries with respect to five of the victims, because: (1) defendant lost the benefit of an objection to the introduction of exhibits including photographs of one of the victims during a detective's testimony since defendant failed to object to the introduction of these exhibits when they were previously used to illustrate that victim's testimony, and even if defendant had objected, these exhibits were not so cumulative in nature as to constitute undue prejudice; (2) defendant's general objection to exhibits depicting the crime scene relating to another victim was not adequate to preserve the issue for appellate review; (3) defendant failed to object to the admission of crime scene photographs relating to one of the victims; (4) the videotape and photographs relating to one of the victims were not repetitive and defendant failed to

carry his burden of showing a different result would have been reached absent the introduction of this evidence; (5) the photographs of another victim were not too gruesome or repetitive and cumulative as to violate N.C.G.S. § 8C-1, Rule 403; and (6) the photographs and videotape submitted for another victim were not so gruesome and repetitive as to require their inadmissibility.

42. Homicide; Rape— first-degree murder—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charges of first-degree murder and first-degree rape regarding one of defendant's victims, because: (1) DNA testing was conducted on the victim's body and a DNA match was found with defendant; (2) the doctor who performed the autopsy concluded the victim died of strangulation, and scrapes and scratches were found on both sides of the victim's neck as well as on the front of her neck; (3) the N.C.G.S. § 8C-1, Rule 404(b) evidence presented at trial showed that defendant would consistently choke his victims while raping or assaulting them; and (4) defendant's statement overheard by a prison inmate that defendant killed those girls provides further evidence in order to survive a motion to dismiss.

43. Appeal and Error— preservation of issues—failure to object—submission of aggravating circumstances

Although defendant contends the trial court erred in a double first-degree murder prosecution by submitting the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that a capital felony was committed while defendant was engaged in the commission of a rape or sexual offense, defendant failed to properly preserve this issue because defendant failed to object at trial.

44. Homicide— first-degree murder—sufficiency of evidence—perpetrator of crime

The trial court did not err by denying defendant's motion to dismiss one of the first-degree murder charges based on alleged insufficient evidence that defendant was the perpetrator of the crime, because: (1) defendant's shoe prints were found at the scene of the crime; (2) although defendant stated he witnessed the murder through a roll-up door at the building of the crime scene, a detective determined that it was not possible to see the events that defendant described; (3) defendant told the detectives where the murder took place, the nature of the weapon, and

the nature of the blows; (4) defendant lied to a detective and an officer about when he had last seen the victim; (5) the victim had been choked, and the scratches on her neck were consistent with the marks that defendant had left on his other victims; (6) the crime scene was close to several of defendant's other attacks; and (7) a witness inmate overheard defendant say he killed those girls.

45. Homicide— first-degree murder—felony murder—sufficiency of evidence—attempted rape

The trial court did not err by denying defendant's motion to dismiss one of the first-degree murder charges based on the felony murder rule using attempted rape as the underlying felony even though defendant contends there was insufficient evidence that defendant attempted to rape the victim, because: (1) the victim's body was found naked except for her shoes and socks; (2) the victim's bra had been cut apart and a couple of buttons appeared to have been torn from her shirt; (3) N.C.G.S. § 8C-1, Rule 404(b) evidence tended to show that defendant lured his victims to isolated locations where he would assault them in part by choking them while raping or attempting to rape them; and (4) evidence showed the victim was choked, and a reasonable inference could be made that defendant attempted to rape the victim.

46. Appeal and Error— preservation of issues—failure to object—submission of aggravating circumstances

Although defendant again contends the trial court erred in a double first-degree murder prosecution by submitting the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that a capital felony was committed while defendant was engaged in the commission of a rape or sexual offense, defendant failed to properly preserve this issue because defendant failed to object at trial.

47. Criminal Law— jury instruction—alibi

Although defendant contends the trial court erred in a first-degree rape, first-degree sexual offense, and assault with a deadly weapon with intent to kill inflicting serious injury case by failing to give the jury an alibi instruction, defendant failed to properly request the alibi instruction because: (1) defendant did not request the alibi instruction for this case until after the jury charge, and defendant's request was with regard only to a victim of defendant's other crimes; and (2) the evidence in this case was insufficient to support an alibi instruction when the only evi-

dence suggesting alibi was on cross-examination of defendant's ex-girlfriend when she stated that she could not recall when in May 1996 defendant had left for his trip to Georgia.

48. Criminal Law— jury instruction—flight

The trial court did not err in a first-degree murder, first-degree rape, first-degree sexual offense, assault with a deadly weapon, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree rape, and assault with a deadly weapon with intent to kill case involving seven different victims over a fifteen-month span by giving a general flight instruction and a flight instruction with regard to the first-degree murder cases, because: (1) defendant has provided virtually no factual support in his brief that the flight instruction was not supported by the evidence; and (2) even if the flight instruction was improper, defendant failed to show prejudice as required by N.C.G.S. § 15A-1443(a) and it cannot be concluded that a different result would have been reached at trial absent this alleged error.

49. Sentencing— capital—mitigating circumstances—no significant history of prior criminal activity—rebuttal evidence of prior incidents

The trial court did not commit plain error during a capital first-degree murder sentencing proceeding by instructing the jury on the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance of no significant history of prior criminal activity and thereby allowing the State to introduce rebuttal evidence of prior incidents committed by defendant, because: (1) the jury had just found defendant guilty of two counts of first-degree murder, first-degree rape, first-degree sexual offense, two counts of assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree rape, assault with a deadly weapon with intent to kill, and assault with a deadly weapon; and (2) any alleged error by the trial court in allowing the (f)(1) mitigator to be introduced and thereby allowing the State's rebuttal evidence was not so egregious and prejudicial that defendant was not able to receive a fair sentencing proceeding.

50. Sentencing— death penalty—International Covenant on Civil and Political Rights

Although defendant contends his execution for two counts of first-degree murder would violate provisions of the International

Covenant on Civil and Political Rights based on long delays between sentencing and execution and the conditions in which death row inmates are kept, our Supreme Court has previously decided this issue against defendant and defendant has failed to present new arguments to compel reconsideration of this issue.

51. Sentencing— prior record level—noncapital felony convictions

The trial court erred by determining that defendant's prior record level was VI rather than V for sentencing defendant for his noncapital felony convictions, and the case is remanded for resentencing.

52. Sentencing— death penalty—not disproportionate

The trial court did not err by sentencing defendant to the death penalty for two counts of first-degree murder, because: (1) defendant was convicted on the basis of both premeditation and deliberation and under the felony murder rule; (2) our Supreme Court has never found a sentence of death to be disproportionate in a case where the jury found a defendant guilty of murdering more than one victim; (3) the jury found the N.C.G.S. § 15A-2000(e)(3), (e)(5), and (e)(11) aggravating circumstances for both murders, each of which standing alone has been held to be sufficient to support a sentence of death; and (4) the jury found the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance as to one of the victims.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of death entered by Farmer, J., on 4 March 1998 in Superior Court, Wake County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. On 6 October 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 September 2001.

Roy A. Cooper, Attorney General, by William P. Hart, Special Deputy Attorney General, and William B. Crumpler, Assistant Attorney General, for the State.

William F.W. Massengale and Marilyn G. Ozer for defendant-appellant.

ORR, Justice.

Defendant was indicted 24 February 1997 for assault with a deadly weapon with intent to kill Shelly Jackson. On 31 March 1997, defendant was additionally indicted for the first-degree murders of Deborah Jean Elliot and Patricia Ann Ashe, the first-degree rapes of Jacqueline Crump and Audrey Marie Hall, first-degree sexual offense against Audrey Marie Hall, and two counts of assault with a deadly weapon with intent to kill inflicting serious injury on Jacqueline Crump and Audrey Marie Hall. On 4 August 1997, defendant was indicted in superseding indictments for the attempted first-degree rapes of Vicki LaVerne Whitaker and Kimberly Yvonne Warren, assault with a deadly weapon with intent to kill Kimberly Yvonne Warren, and assault with a deadly weapon with intent to kill inflicting serious injury on Vicki LaVerne Whitaker. Finally, on 20 October 1997, defendant was indicted in superseding indictments for an attempt to commit the first-degree rape of Shelly Jackson and for the first-degree rape of Patricia Ann Ashe.

A jury found defendant guilty of first-degree murder of Patricia Ashe and Deborah Elliot on the basis of premeditation and deliberation and under the felony murder rule. The jury also found defendant guilty of two counts of first-degree rape of Jacqueline Crump and Audrey Hall, first-degree sexual offense of Audrey Hall, assault with a deadly weapon of Kimberly Warren, two counts of assault with a deadly weapon with intent to kill inflicting serious injury of Jacqueline Crump and Audrey Hall, attempted first-degree rape of Shelly Jackson, assault with a deadly weapon with intent to kill Shelly Jackson, and first-degree rape of Patricia Ashe.

The jury found defendant not guilty of two counts of attempted first-degree rape of Vicki Whitaker and Kimberly Warren and assault with a deadly weapon with intent to kill inflicting serious injury of Vicki Whitaker.

Following a capital sentencing proceeding, the jury recommended a sentence of death for each of the murders, and the trial court entered judgments accordingly. The trial court also sentenced defendant to the following additional sentences all of which are to be served concurrent to the sentences of death but consecutive to each other: 480 to 585 months' imprisonment for the first-degree rape of Audrey Hall; 480 to 585 months' imprisonment for the first-degree sexual offense of Audrey Hall; 168 to 211 months' imprisonment for assault with a deadly weapon with intent to kill inflicting serious

injury on Audrey Hall; 480 to 585 months' imprisonment for the first-degree rape of Jacqueline Crump; 145 to 183 months' imprisonment for assault with a deadly weapon with intent to kill inflicting serious injury on Jacqueline Crump; 313 to 385 months' imprisonment for attempted first-degree rape of Shelly Jackson; 59 to 80 months' imprisonment for assault with a deadly weapon with intent to kill Shelly Jackson; and 150 days' imprisonment for assault with a deadly weapon of Kimberly Warren.

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 capital convictions or death sentences. We also find no error meriting reversal of defendant's noncapital convictions. However, we remand the case for resentencing on defendant's noncapital felony convictions at a prior record level V.

With regard to all of the offenses described below as to each victim, the evidence at trial tended to show the following.

Offenses Relating to Jacqueline Crump

As to Jacqueline Crump, defendant was charged with and convicted of first-degree rape and assault with a deadly weapon with intent to kill inflicting serious injury.

Crump had been using cocaine off and on for about thirteen years. At times, Crump would exchange sex for crack or money. On 25 October 1995, Crump left her boyfriend's house to buy a pack of cigarettes. As to much of what happened that night Crump could not remember, but she did testify as to some occurrence she could recall. In her testimony, Crump remembered being at a concrete tunnel that goes under Martin Luther King Boulevard and connects Chavis Park on one side to an area of Old Garner Road on the other side. She could recall walking past the tunnel with two men. The two men were talking about sex when one of them suggested that they go into the tunnel. When Crump refused to go, she was then pushed into the tunnel. One man grabbed Crump by the throat and starting choking her while she was backed up against the wall of the tunnel. He got on top of her and started pushing down her pants while still keeping one hand on her throat. At this point, Crump blacked out.

Raleigh Police Officer David German was dispatched to the scene and arrived at 9:13 a.m. on 26 October. Crump had no clothing on the

bottom half of her body except for a white sock on her left foot. There was blood on the wall and on the floor of the tunnel.

Crump suffered a fractured nose and facial bone fractures, and her eyes were swollen shut. She had a couple of gashes on the side of her head and cuts and bruises on her arms and legs. The evidence at the scene appeared to indicate that Crump was beaten with a beer bottle. DNA testing was subsequently conducted, and it was determined that a match was present between defendant and the vaginal swabs taken from Crump.

Offenses Relating to Patricia Ashe

As to Patricia Ashe, defendant was charged with and convicted of first-degree murder based on premeditation and deliberation and first-degree rape.

Ashe was a habitual crack cocaine user and possibly a prostitute. On Sunday, 7 January 1996, Officer G.M. Wright of the Raleigh Police Department was dispatched to the 1500 block of South Blount Street. A black male, Rodney Bass, was waving to get the officer's attention. Bass stated that he had seen a person around the back of the building with no clothes on. It had been snowing and sleeting off and on throughout the day. Officer Wright found Ashe's body covered with snow on a bench. The officer observed a set of footprints near the body. These footprints did not get close enough to the body to indicate that the person who left them could have touched the body.

Bass told another officer that he had been drinking in a nearby vehicle and decided to go for a walk. As he was walking behind the building, he saw Ashe's body. He got within twenty or thirty feet of the body and then decided to call the police.

Ashe's body was on the lower portion of the bench, with her feet and lower body hanging off the edge. Her legs were completely off the end of the bench, slightly spread, and her knees were bent. She had no clothes on except white socks. A thermal long-sleeve T-shirt was folded up under her buttocks, and a pair of jeans was folded under her head. A couple of crack pipes and a lighter were underneath or just to the side of the bench. There was snow and ice on Ashe's body, but no snow and ice was underneath her body.

Dr. John Butts performed an autopsy on Ashe's body, and he formed the opinion that Ashe died as a result of strangulation. She had scrapes and scratches on both sides of her neck as well as

some on the front part of her neck. She also had some linear scrapes on her back, some scratches on her left arm, and a small tear in the skin on the right groin area. Some of the neck scratches were relatively deep with a bit of the skin torn off. The multiple scratches and scrapes on Ashe's neck indicate that she had struggled against the perpetrator.

DNA testing was conducted on the vaginal swabs that Dr. Butts took from Ashe, and a DNA match was found with defendant.

Offenses Relating to Audrey Marie Hall

As to Audrey Hall, defendant was charged with and convicted of first-degree rape, first-degree sexual offense, and assault with a deadly weapon with intent to kill inflicting serious injury.

Audrey Hall had used crack cocaine off and on since 1985 and was actively involved in using crack in May 1996 while living in Raleigh. On various occasions, she exchanged sex for money.

Hall had a friend, Jerry Jones, who lived in southeast Raleigh. Occasionally, when Hall visited Jones at his home, she would use crack. On Saturday, 25 May 1996, Hall went to Jones' house about 5:00 p.m. Hall had been smoking crack that day and got high later that night from smoking crack at Jones' house, where she stayed overnight.

Defendant arrived at Jones' house around 10:00 or 11:00 on Sunday morning and asked if Hall was in the house. Jones woke Hall up to tell her defendant was looking for her. Defendant came into the house and sat down beside Hall. Defendant then asked Hall if she wanted to smoke some cocaine, to which Hall responded affirmatively and proceeded to do so. Eventually, defendant asked Hall if she knew where he could buy some cocaine. Hall agreed to take defendant to a crack house, so they left Jones' house about 3:00 p.m.

Hall intended to take defendant to a crack house that was about two blocks from Jones' house, but defendant said he still had some cocaine and asked if there was some place where they could smoke it. Hall took defendant to a wooded area that is adjacent to South Wilmington Street near some railroad tracks. When they got to the woods, Hall took a "hit" from defendant's cocaine. Defendant motioned for Hall to walk in front of him, and when she did, defendant grabbed her by the throat, squeezed tightly, and threw her on the ground. Defendant began choking Hall and told her to take her

clothes off. Defendant also threatened Hall with a box cutter and made her walk farther into the woods and get on her knees.

Over a relatively short period of time, defendant made Hall put his penis in her mouth as she was on her knees. He told her to do exactly what he said to do if she wanted to get out of those woods alive. Then, defendant pushed Hall on her back, stuffed his penis down her throat and ejaculated. Defendant continued to choke Hall, while holding the box cutter and raping her.

Raleigh Police Officer Kevin Carswell and two other officers were dispatched to the wooded area. The officers found, among other things, some items of clothing, a purse, a watch, and a gold necklace along a path. When the officers eventually found Hall, her arms were stretched over her head, and she was nude except for a dirty white sock on her right foot. Officer Carswell testified that it was apparent that Hall was dragged to the place where she was found. Hall was able to describe her attacker to an officer as a black male with black jeans and a black shirt and carrying a backpack. She also said that defendant was at Jones' house at 203 Bragg Street.

Hall was taken to Wake Medical Center, where she described her assault and her attacker to a nurse. Hall's injuries included cuts on her hand and face and abrasions on her back. She also had some very obvious scratches and bruises on her neck. Vaginal swabs, collected from Hall, and subsequent blood samples from defendant were later subjected to DNA analysis. The analysis by the SBI lab revealed a DNA banding pattern that was consistent with a mixture of the DNA profile for Hall and defendant. Additional DNA testing by another lab revealed that sperm from the vaginal swabbing had genetic characteristics that were consistent with characteristics possessed by defendant. Ultimately, this testing excluded 99.99% of the population from having the same DNA which was found in the sperm taken from the vaginal swabs.

Offenses Relating to Vicki Whitaker

As to Vicki Whitaker, defendant was charged with and found not guilty of attempted first-degree rape and assault with a deadly weapon with intent to kill inflicting serious injury.

Whitaker also had previous experience with crack. According to her testimony, she met defendant at a store on Davie Street around 8:00 p.m. one night in July 1996. Whitaker was walking towards a bar on Hillsborough Street when defendant came up behind her and

started walking with her. Whitaker testified that she told defendant she had to use the bathroom, so defendant took her to a location near a warehouse where a trailer was situated. When Whitaker said that she would not use the bathroom there, defendant grabbed her by the throat. They ended up on the ground, and defendant told Whitaker to take her pants off. Defendant ripped her shirt and got her pants unbuttoned. Defendant put both hands around Whitaker's neck, choked her, and told her that he was going to kill her if she did not take her pants off. She managed to kick defendant in the genitals, and defendant ran away.

Whitaker had many scratches on her neck as a result of this incident. She testified that she did not report the matter to the police until six or seven months later because she was on probation at the time of the incident and was not supposed to be drinking or out at that time of the night.

Offenses Relating to Kimberly Warren

As to Kimberly Warren, defendant was charged with attempted first-degree rape and assault with a deadly weapon with intent to kill inflicting serious injury. The jury found defendant not guilty of attempted rape, but guilty of assault with a deadly weapon, a misdemeanor.

Warren was homeless and unemployed in November 1996. She would stay at the A.S.K., a store that, through a connected business, offered services as a temporary employment agency. Warren would sleep in the van that belonged to the business. William Hargrove, Warren's friend, was responsible for the van and drove people to work in the van. Defendant was one of the persons that Hargrove would drive to different job sites.

Hargrove introduced Warren and defendant in the van. Warren was using crack cocaine daily during this time. When Warren met defendant, he indicated that he wanted oral sex in exchange for some crack. On some occasions, Warren had exchanged sex for drugs, but she told defendant no because she already had some crack.

Two or three weeks later, Warren saw defendant on Harrington Street near the Greyhound Bus Station. Defendant asked her if she wanted to get high or if she wanted some money. Warren responded that she wanted to get high, so defendant told her to wait down the street near the 42nd Street Oyster Bar. Defendant met her there a few minutes later, and they walked to a warehouse on Hargett Street.

They climbed a fence and went towards a parked trailer. Defendant opened the sliding door on the back of the trailer, they climbed inside, and defendant closed the door halfway. Defendant began to unwrap the crack and then said, "Bitch take your clothes off." When Warren refused, defendant put his hands around her neck, lifted her up, and slammed her against the wall of the trailer. He kept one hand around her neck and produced a sharp object in his other hand. She struggled, managed to get his hand away from her throat, and screamed. Once she screamed, defendant ran away.

Warren went back to Harrington Street and told Hargrove what had happened, which he corroborated at trial, but she did not report it to the police. Her neck was scratched as a result of the incident. Three or four months later, Hargrove pointed Warren out to an officer and told the officer that Warren had said defendant had attacked her. Warren subsequently identified defendant as her attacker from a photograph and a photographic lineup.

Offenses Relating to Deborah Jean Elliot

As to Deborah Jean Elliot, defendant was charged with and convicted of first-degree murder on the basis of felony murder as well as premeditation and deliberation.

On 23 December 1996, Elliot spoke with one of her sisters about her plans for Christmas. Elliot was supposed to go to her other sister's house about 1:00 p.m. on 24 December to stay for Christmas, but she never arrived. This sister told the police that Elliot was using crack and was a prostitute. One of the last people to see Elliot alive—and the only person who the State could produce as a witness—was Cleon Gibbs, who was the owner/manager of the Martin Street Mini Mart in Raleigh, near Moore Square. Elliot went into the store on the morning of 24 December 1996 to purchase some items.

On 26 December 1996, Oliver Parrish was working at a building on North West Street near downtown Raleigh. The building was formerly part of Pine State Creamery. Parrish had the responsibility of making sure the doors were locked. In a section of the building where there are three bays, he found the body of Deborah Elliot. She was in the second bay, lying face-down, and she was naked except for shoes and socks.

After defendant was arrested on 4 February 1997 for the assault on Shelly Jackson, Marty Ludas, a latent print examiner who was accepted by the trial court as an expert in the field of footwear iden-

tification, received a pair of tennis shoes that had been taken from defendant. Ludas compared the shoes to a shoe print taken from glass pieces that had been put together at the Elliot crime scene. Ludas formed the opinion that only one shoe could have made that shoe print: defendant's left shoe.

Dr. D.E. Scarborough performed an autopsy on Elliot on 27 December 1996. Elliot had a large laceration over the right side of her forehead, and her underlying skull was fractured. She had hemorrhaging over the surface of her brain, and there was actual tearing of the brain relating to the laceration and fracture in her forehead. There were numerous abrasions and scrapes over her arms and legs and substantial bruising, hemorrhaging, and swelling around both of her eyes. Elliot also had multiple scratches over the front and right side of her neck and a small amount of hemorrhaging on the left side of the larynx in the neck.

Offenses Relating to Shelly Jackson

As to Shelly Jackson, defendant was charged and convicted of assault with a deadly weapon with intent to kill and attempted first-degree rape.

On 4 February 1997, Jackson was at the A.S.K. Store near Moore Square. She had been drinking and using crack during the day. Around 7:00 p.m., Jackson saw defendant leaving William Hargrove's van. Jackson did not know defendant, but they met and talked for awhile. Defendant mentioned that he had some cocaine and said, "Come go with me to my secret place that I go to." Jackson agreed to go with defendant, but she said that she did not want to use any more cocaine for the day. Sex was not discussed in the conversation.

Defendant led Jackson to a fenced-in lot with abandoned vehicles, located off West Hargett Street. Defendant and Jackson climbed into an abandoned truck through a rear roll-up door. As Jackson bent down to put her purse on the floor, defendant stood behind her, grabbed her around the neck, and held her from behind. He had what Jackson thought was a razor in his right hand. Defendant demanded that Jackson take her clothes off, and she refused. As Jackson screamed, defendant said, "Shut up bitch. I got you now. I'm going to kill you." Jackson saw a police car coming down the street, so she managed to break loose, jump out of the truck, and run to the police car.

Sergeant T.C. Earnhart of the Raleigh Police Department was working in the downtown area on 4 February 1997. As he was driving past the back lot of 612 West Hargett Street about 8:00 p.m., he heard a woman's scream and realized there was a possible attack in progress. Earnhart got out of his vehicle and saw a woman, Shelly Jackson, jump out of a truck and run towards his vehicle. Earnhart testified that Jackson was very "frantic" and "hysterical" and said something to the effect that defendant tried to cut her and rape her. Jackson's hand was dripping blood. Jackson testified that defendant was about to cut her throat, so she brought her hand up, which resulted in her hand being cut.

Earnhart saw someone get out of the back of the truck and run away. He radioed for assistance, and within ten minutes, defendant was spotted and apprehended. Defendant was brought back to the crime scene where, Jackson identified him as her attacker. The police found a box cutter in defendant's pants pocket, and one officer observed that defendant's fingernails were particularly long for a male. Defendant had a cut on his right hand and blood on his shirt, and his blood was found inside the truck where the attack on Jackson took place.

Further facts necessary to the discussion of the issues raised by defendant will be presented as needed.

We note at the outset that defendant has presented 244 assignments of error. While defendant has included a constitutional component to almost all of 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 to this Court. "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) (citing *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988)); *see also State v. Anthony*, 354 N.C. 372, 389, 555 S.E.2d 557, 571 (2001), *cert. denied*, — U.S. —, — L. Ed. 2d —, 2002 WL 984307 (June 17, 2002) (No. 01-10030). Furthermore, where defendant includes plain error as an alternative in some of his assignments of error but does not specifically argue or give support in his brief as to why plain error is appropriate, we will not address this aspect of his assignment of error. *See State v. Grooms*, 353 N.C. 50, 66, 540 S.E.2d 713, 723 (2000), *cert. denied*, — U.S. —, 151 L. Ed. 2d 54 (2001); *see also* N.C. R. App. P. 10(c)(4). "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)(6); *see also Lloyd*, 354 N.C. at 87, 552 S.E.2d at 607.

JOINDER ISSUES

[1] In defendant's first question presented before this Court, he contends that the trial court erred when it granted the State's motion to join the charges against defendant for trial. Defendant contends that joinder of these charges violated N.C.G.S. § 15A-926(a) and deprived him of due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 19, 23, 24, and 35 of the North Carolina Constitution. Defendant specifically complains that there were fourteen separate charges involving seven different victims over a fifteen-month span, and the crimes themselves differed significantly. Defendant argues that one of the murders was by strangulation, while the other was by blunt-force head injuries. Also, some of the assaults involved a box cutter, and others did not. All of the crimes occurred in areas of Raleigh infested with drugs and poverty, but some of the crimes occurred indoors and others outdoors. For the reasons stated below, we conclude that joinder was proper in this case.

N.C.G.S. § 15A-926(a) provides:

> Two or more offenses may be joined . . . for trial when the offenses . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.

N.C.G.S. § 15A-926(a) (2001). In considering a motion to join, the trial judge must first determine if the statutory requirement of a transactional connection is met. *State v. Silva*, 304 N.C. 122, 126, 282 S.E.2d 449, 452 (1981). Whether such a connection exists so that the offenses may be joined for trial is a fully reviewable question of law. *State v. Huff*, 325 N.C. 1, 22, 381 S.E.2d 635, 647 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990). Once the trial court determines that the offenses have the requisite transactional connection, the court must determine whether the defendant "can receive a fair hearing on each charge if the charges are tried together." *Id.* at 23, 381 S.E.2d at 647. Furthermore,

> [i]f consolidation hinders or deprives the accused of his ability to present his defense, the charges should not be consolidated. However, the trial judge's decision to consolidate for trial cases having a transactional connection is within the discretion of the

> trial court and, absent a showing of abuse of discretion, will not be disturbed on appeal.

Id. (citations omitted).

If in hindsight the court's ruling adversely affected defendant's defense, the ruling will not be converted into error. *State v. Jackson*, 309 N.C. 26, 32, 305 S.E.2d 703, 709 (1983). Defendant's remedy in this situation would be to make a motion for severance as provided by N.C.G.S. § 15A-927. *Silva*, 304 N.C. at 127-28, 282 S.E.2d at 453.

Under N.C.G.S. § 15A-927(a), a defendant must make a motion for severance of offenses before trial except that he may do so during trial no later than the close of the State's evidence, if the basis for the motion is a ground not previously known. Defendant waives his right to severance "if the motion is not made at the appropriate time." N.C.G.S. § 15A-927(a)(1) (2001). "If a defendant's pretrial motion for severance is overruled, he may renew the motion on the same grounds before or at the close of all the evidence. Any right to severance is waived by failure to renew the motion." N.C.G.S. § 15A-927(a)(2).

N.C.G.S. § 15A-927(b) further provides that the court must grant a defendant's motion for severance of offenses whenever:

> (1) If before trial, it is found necessary to promote a fair determination of the defendant's guilt or innocence of each offense; or
>
> (2) If during trial, upon motion of the defendant or motion of the prosecutor with the consent of the defendant, it is found necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. The court must consider whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

N.C.G.S. § 15A-927(b). Whether offenses should be severed is within the sound discretion of the trial judge, and his ruling will not be overturned unless an abuse of discretion can be shown. *State v. Chandler*, 324 N.C. 172, 188, 376 S.E.2d 728, 738 (1989).

The transactional connection required by N.C.G.S. § 15A-926(a) may be satisfied by considering various factors. Two factors frequently used in establishing the transactional connection are a com-

mon *modus operandi* and the time lapse between offenses. *See, e.g., State v. Chapman*, 342 N.C. 330, 343, 464 S.E.2d 661, 668 (1995), *cert. denied*, 518 U.S. 1023, 135 L. Ed. 2d 1077 (1996); *State v. Effler*, 309 N.C. 742, 752, 309 S.E.2d 203, 209 (1983); *State v. Bracey*, 303 N.C. 112, 118, 277 S.E.2d 390, 394 (1981); *State v. Clark*, 301 N.C. 176, 181, 270 S.E.2d 425, 428 (1980).

In this case, the transactional connection was established through numerous factors. First, all of the victims were either prostitutes or had at some time exchanged sex for drugs or money. Also, the victims were all African-Americans and were drug addicts and/or drug users. Defendant's method of assaulting the victims was by strangulation with his hands that often left distinct scratches from defendant's long fingernails. All of the surviving victims, except for Jacqueline Crump because she could not identify the defendant, stated that defendant was well-mannered prior to the assaults but that he would snap instantly and begin assaulting them. Defendant used a knife or box cutter at some point during the assaults. Furthermore, the police were able to use DNA evidence to link defendant to Crump, Ashe, and Hall. All of the offenses occurred within a one-square-mile area, and the incidents took place in a fifteen- to sixteen-month span, with the longest time between offenses being close to five months. Finally, the similarities in these cases were such that the essential evidence in one case would have been admissible in every other case to prove intent, plan, or design. *See, e.g., Effler*, 309 N.C. at 752, 309 S.E.2d at 209; *State v. Corbett*, 309 N.C. 382, 388, 307 S.E.2d 139, 144 (1983); *State v. Greene*, 294 N.C. 418, 422-23, 241 S.E.2d 662, 665 (1978).

The evidence disclosed a similar *modus operandi*, similar circumstances with respect to the type of victims, similar location, and a DNA match between defendant and several of the victims. This Court has stated that public policy favors consolidation because it

> "expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries, and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once."

State v. Boykin, 307 N.C. 87, 91-92, 296 S.E.2d 258, 261 (1982) (quoting *Parker v. United States*, 404 F.2d 1193, 1196 (9th Cir. 1968), *cert. denied*, 394 U.S. 1004, 22 L. Ed. 2d 782 (1969)). We therefore hold that

the trial court did not abuse its discretion in joining these offenses for trial.

[2] In defendant's next question presented, he contends that the trial court erred when it ruled as inadmissible evidence that defendant sought to introduce implicating three other men as possible perpetrators in the Patricia Ashe case. Defendant argues that from October 1995 through February 1997, the period in which the offenses in this case occurred, similar crimes had also been committed. Defendant contends that he had evidence that Rodney Bass, Tyrone McCullers, and Jerry Young were on the State's suspect list for these other crimes and that they may have committed the crimes with which defendant was charged in this case. However, the trial court entered a written order as follows:

> The Court, *ex mero motu*, hereby orders the Defendant and attorneys for the Defendant not to elicit evidence in front of the jury from any witness relating to other possible suspects they contend may have committed any of the crimes for which the Defendant is on trial without prior approval of the Court. Such evidence is inadmissible unless it points directly to a person's guilt other than the Defendant and is inconsistent with the Defendant's guilt.

The trial judge also entered this order orally in court with the parties present.

" '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 (2001). "The admissibility of evidence of the guilt of one other than the defendant is governed now by the general principle of relevancy." *State v. Cotton*, 318 N.C. 663, 667, 351 S.E.2d 277, 280 (1987).

> Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party. Under Rule 401 such evidence must tend *both* to implicate another *and* [to] be inconsistent with the guilt of the defendant.

Id. at 667, 351 S.E.2d at 279-80 (citations omitted).

Defendant points to three potential suspects in this case. First, defendant contends that the trial court erred by not allowing testi-

mony that Rodney Bass had committed the murder. Bass discovered the body of Patricia Ashe and called the police. Bass was living in an abandoned truck about two hundred yards from the crime scene. There was no evidence to indicate that Bass had committed this crime except for his proximity to the crime scene. This evidence does not meet the standard as set forth in *Cotton.*

Next, with regard to Tyrone McCullers, defendant contends it was error for the trial court to deny him the opportunity to call McCullers as a witness and then impeach him with Keisha Ward's testimony. Contrary to McCullers testimony on *voir dire*, Ward testified on *voir dire* that she and McCullers talked about Ashe's death at the warehouse during the snow. According to Ward, Ashe was supposed to meet McCullers that Friday night at the King's Motel, where McCullers was staying. Ward stated that McCullers had seen Ashe's body, and he described the body, particularly as having scratches on her throat. Ward also testified that McCullers saw Ashe being dropped off by a gray or black pickup truck.

"The credibility of a witness may be attacked by any party, including the party calling him." N.C.G.S. § 8C-1, Rule 607 (2001). However,

> extrinsic evidence of prior inconsistent statements may not be used to impeach a witness where the questions concern matters collateral to the issues. Such collateral matters have been held to include testimony contradicting a witness's denial that he made a prior statement when that testimony purports to reiterate the substance of the statement.

State v. Hunt, 324 N.C. 343, 348, 378 S.E.2d 754, 757 (1989) (citation omitted). Also, it has been established that prior inconsistent statements may not be used as substantive evidence. *Id.* Therefore, the evidence sought to be introduced by defendant was inadmissible and the trial court did not err by excluding it.

With regard to Jerry Young, he testified on *voir dire* that he met a prostitute, had sex with her without a condom, strangled her with a cord, and then left her on Jones Sausage Road. Defendant claims that the trial judge erred by ruling this testimony inadmissible. However, this evidence does not tend to implicate Young, nor is the evidence inconsistent with the guilt of defendant. *See Cotton*, 318 N.C. at 667, 351 S.E.2d at 280. Thus, the trial court did not err in ruling that this evidence was inadmissible.

[3] The next issue defendant brings to the attention of this Court involves the cross-examination of two witnesses for the State in the Audrey Hall case. Defendant contends the trial court erroneously sustained the State's objection to certain questions asked by defendant. First, on cross-examination of Officer Kevin Carswell of the Raleigh Police Department, defendant asked whether Carswell had identified an individual who fit the description given to the police by Hall. The trial court sustained the State's objection to this question.

Defendant did not make an offer of proof to show what Carswell's response to the question would have been. Therefore, defendant has failed to preserve this issue for appellate review under the standard set forth in N.C.G.S. § 8C-1, Rule 103(a)(2). *See State v. Atkins*, 349 N.C. 62, 79, 505 S.E.2d 97, 108 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). The answer to defendant's question was not evident, and "[t]he substance of the excluded testimony was not necessarily apparent from the context within which the question was asked; therefore, an offer of proof was necessary to preserve this issue for appeal." *State v. Braxton*, 352 N.C. 158, 184, 531 S.E.2d 428, 443 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *see also Atkins*, 349 N.C. at 79, 505 S.E.2d at 108; *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).

Also, even if Carswell had answered defendant's question affirmatively, one can only speculate who Carswell would have identified. Thus, the trial court did not err in sustaining the State's objection.

Next, on cross-examination of Jerry Jones, defendant questioned as follows:

> Q. The police interviewed you on January the 6th, 1996, didn't they?
>
> A. They could have.
>
> Q. They interviewed you because you were a suspect in the Pat Ashe murder?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Objection sustained.

The trial judge then excused the jury in order to allow defendant to question Jones on *voir dire*. Defendant argues that this evidence went to the credibility and bias of the witness. However, during *voir*

dire, defendant did not ask Jones whether the police interviewed him because he was a suspect in the Ashe murder. Jones did say that he was interviewed by the police on 6 January 1996, but the question that was objected to was whether Jones was being interviewed because he was a suspect in the case. Thus, defendant did not make an offer of proof on this specific question, and therefore, this assignment of error was not preserved for appeal. Also, the mere fact of Jones being interviewed by the police does not raise an issue concerning the credibility or bias of a witness.

[4] Defendant's next question presented concerns testimony from Detective J.D. Turner with regard to the Deborah Elliot case. Defendant argues that it was error for the trial court to exclude certain hearsay testimony from Turner regarding his interview with Donald Jones. The trial court ruled that Jones was unavailable under N.C. R. Evid. 804(a)(5) and then allowed defendant to make an offer of proof outside the presence of the jury. On *voir dire*, Turner testified that Jones told him that Jones had seen Deborah Elliot alive on Christmas day, the day before the discovery of her body in the Pine State building. Defendant contends that this evidence was crucial because if Elliot was killed on Christmas day, then defendant had an alibi.

North Carolina Rule of Evidence 804(b) provides for certain exceptions to the hearsay rule when the declarant is determined to be unavailable under North Carolina Rule of Evidence 804(a). Rule 804(b)(5) reads, in part, as follows:

> (5) Other Exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

N.C.G.S. § 8C-1, Rule 804(b)(5) (2001). Under this rule, once the trial court finds that the declarant is unavailable under N.C. R. Evid. 804(a), the trial judge must engage in a six-part inquiry to determine the admissibility of the hearsay evidence under this exception. *State v. Triplett*, 316 N.C. 1, 8-9, 340 S.E.2d 736, 741 (1986).

First, defendant did not establish that Jones' testimony possessed equivalent circumstantial guarantees of trustworthiness. At one point during the *voir dire* of Turner, he was asked whether Jones had changed his story about whether he had seen Elliot on Christmas day. Turner testified that Jones had initially stated that he was 100% sure that he had seen Elliot alive on Christmas day, but later stated that he was 85% sure. Also, Ireace Small testified that she saw Elliot on Christmas day. In this case, the testimony of Small, an eyewitness, was more probative than Jones' hearsay statement regarding Elliot being alive on Christmas day. *See* N.C.G.S. § 8C-1, Rule 804(b)(5)(B). Moreover, the trial judge specifically concluded that "the general purposes of these rules and the interests of justice will not be best served by the admission of [Jones'] statement." Thus, defendant has not shown error on this issue.

[5] Defendant next contends that the trial court erred in sustaining the State's objections to two questions that defendant asked Detective J.R. Poplin on cross-examination with respect to the Patricia Ashe case. Defendant also contends the trial court erred by overruling his motion to strike certain testimony that Detective Poplin gave on redirect examination.

First, defendant asked Detective Poplin whether he considered impotence or the use of a condom in his investigation of the Ashe murder. Defendant's objective was allegedly to show that if the perpetrator was impotent or used a condom, then his DNA would not be found in the victim. Defendant then asked Detective Poplin, "In your investigation of Rodney Bass did you consider impotence?" The trial court sustained the State's objection to this question. Also, in referring to another possible perpetrator, defendant asked Detective Poplin if "[o]n January 4th, 1996 a prostitute was found strangled but alive on Jones Sausage Road." Once again, the trial court sustained the State's objection to this question. Subsequent to these two objections being sustained, defendant made an offer of proof. Defendant showed that Detective Poplin did not take into account impotence when attempting to eliminate Rodney Bass as a suspect. Defendant also showed that Detective Poplin investigated and found that Jerry Wayne Young strangled a prostitute on Jones Sausage Road on 4 January 1996.

After hearing defendant's offer of proof as to both questions, the trial court sustained both objections to this evidence, stating that

> [N]either the State [n]or the defendant may present evidence that some other person may have committed the crime that the defendant is charged with, unless the evidence points directly to another person's guilt and is inconsistent with the defendant's guilt. . . . There's no evidence that the court sees that—or the evidence presented does not point to anybody else's guilt of the crime the defendant is charged with.

See also Cotton, 318 N.C. at 667, 351 S.E.2d at 279-80. We agree with the trial court's ruling as to both of the questions defendant asked Detective Poplin. Considering all of the evidence against defendant and the fact that defendant's DNA was found on vaginal swabs taken from Ashe, we hold that defendant has not carried his burden to show that there was "evidence which tends *both* to implicate another *and* [to] be inconsistent with the guilt of the defendant." *Id.* Therefore, we conclude that the answers by Detective Poplin were irrelevant under N.C.G.S. § 8C-1, Rule 401.

Defendant also complains that the trial court erred by overruling his motion to strike certain testimony that Detective Poplin gave on redirect examination, which proceeded as follows:

> Q. And you've been asked a number of questions about different people that you spoke with and different people that you interviewed, and people that may have been a suspect or suspects at different points in this investigation. After the defendant made his statement on February the 25th of 1997, did your investigation become more focused?
>
> A. Yes, it did.
>
> Q. And upon whom did you focus after February the 25th of 1997?
>
> A. On the defendant. All the evidence tended to focus directly to the defendant.
>
> [DEFENSE COUNSEL]: Objection. Move to strike.
>
> THE COURT: Overruled.
>
> Q. As a result of the defendant's statement, did you focus on three possibilities?
>
> A. Yes.
>
> Q. As far as people that were there at the time of the murder?

A. That is correct.

Q. And who did you focus on?

A. The defendant, [Derrick] Jackson, and Cynthia Pulley.

Defendant has not carried his burden to show prejudice to any alleged error by the trial court with regard to the preceding question and answer. *See* N.C.G.S. § 15A-1443(a) (2001). Defendant objects to this testimony on the basis that it was conclusory, and that the testimony related to the Ashe murder. From reading the transcript, we find that the questions and answers refer to the Elliot murder, not the Ashe murder. Furthermore, Poplin also testified that his investigation focused on Jackson and Pulley, not just defendant. The investigation proceeded in this manner because of defendant's statement of 25 February 1997 in which defendant implicated Jackson and Pulley. Thus, any alleged prejudice that may have resulted from Poplin's testimony was rendered moot when Poplin testified that other people were included in his investigation. Thus, this assignment of error is overruled.

[6] Next, defendant contends that the trial court erred by excluding evidence of an alternative suspect in the Jacqueline Crump case. At trial, defense counsel asked Detective Poplin if he had determined whether there was a relationship between Shawn Sanders and the "victim." However, the State argues that defendant has misconstrued the particular transcript page that he has relied upon in support of this assignment of error. More specifically, the State contends that the question, from which the trial court sustained the State's objection, actually pertained to Patricia Ashe, not Jacqueline Crump.

Even assuming that the questioning pertained to Jacqueline Crump, we find no error. As stated previously,

> [e]vidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party. Under Rule 401 such evidence must tend *both* to implicate another *and* [to] be inconsistent with the guilt of the defendant.

Cotton, 318 N.C. at 667, 351 S.E.2d at 279-80 (citations omitted). Defendant has not shown that any evidence implicated Sanders, nor has he shown any evidence that would be inconsistent with the guilt of defendant. Therefore, this assignment of error is overruled as it pertains to this issue.

[7] Defendant next argues that the trial court erred by denying his written motions for pretrial discovery relating to other suspects and to other offenses with which defendant was not charged. Specifically, defendant contends that the trial court erred when it denied his request for the following: (1) police files dealing with any other murders or rapes having a common *modus operandi* with the crimes charged against defendant and the identification of all persons identified as suspects in those crimes; (2) evidence relating to another suspect, John Wesley, in the Jacqueline Crump case; (3) evidence relating to Christopher Barnette as a suspect in the crimes charged against defendant; and (4) evidence relating to other murders and rapes in which defendant was a suspect. Defendant argues that the trial court's denial of his motions violated his due process and confrontation rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 23 and 35 of the North Carolina Constitution. We disagree.

"The United States Supreme Court has held that due process does not require the State to make complete disclosure to defendant of all of the investigative work on a case." *State v. Hunt*, 339 N.C. 622, 657, 457 S.E.2d 276, 296 (1994) (citing *Moore v. Illinois*, 408 U.S. 786, 33 L. Ed. 2d 706 (1972)). " '[N]o statutory provision or constitutional principle requires the trial court to order the State to make available to a defendant all of its investigative files relating to his case . . . .' " *Id.* (quoting *State v. McLaughlin*, 323 N.C. 68, 85, 372 S.E.2d 49, 61 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990)). Furthermore, N.C.G.S. § 15A-904(a) provides:

> (a) Except as provided in G.S. 15A-903(a), (b), (c), and (e), this Article does not require the production of reports, memoranda, or other internal documents made by the prosecutor, law-enforcement officers, or other persons acting on behalf of the State in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State.

N.C.G.S. § 15A-904(a) (2001); *see also State v. Brewer*, 325 N.C. 550, 574, 386 S.E.2d 569, 582 (1989) (stating the general rule that the work product or investigative files of the district attorney, law enforcement agencies, or others assisting in the preparation of the case are not open to discovery), *cert. denied*, 495 U.S. 951, 109 L. Ed. 2d 541 (1990).

Pretrial discovery is governed by statute, and defendant has not cited any statute that would give the trial court the authority to grant defendant's motions. Moreover, "defendant is not entitled to the granting of his motion 'for a fishing expedition.' " *State v. Heatwole*, 344 N.C. 1, 23, 473 S.E.2d 310, 321 (1996) (quoting *State v. Davis*, 282 N.C. 107, 111-12, 191 S.E.2d 664, 667 (1972)), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997). Also, defendant has shown no violation of the Due Process Clause by the trial court denying these motions. Thus, the assignments of error presented by this issue are without merit.

PRETRIAL ISSUES

[8] Defendant next argues that the trial court erred in denying his motion to continue, and he contends that this denial violated his constitutional rights. Defendant argues that he had a mitigation expert who needed additional time to look into possible additional information. Defendant also wanted additional time to investigate similar offenses that had occurred but with which defendant had not been charged. For the following reasons, we conclude that the trial court did not err in denying defendant's motion.

> A motion for a continuance is ordinarily addressed to the sound discretion of the trial court, and the ruling will not be disturbed absent a showing of abuse of discretion. When a motion to continue raises a constitutional issue, however, the trial court's ruling thereon involves a question of law that is fully reviewable on appeal by examination of the particular circumstances presented in the record. Even when the motion raises a constitutional issue, denial of the motion is grounds for a new trial only upon a showing that "the denial was erroneous and also that [defendant] was prejudiced as a result of the error." [*State v.*] *Branch*, 306 N.C. [101,] 104, 291 S.E.2d [653,] 656 [(1982)].

State v. Blakeney, 352 N.C. 287, 301-02, 531 S.E.2d 799, 811 (2000) (citations omitted), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001). Defendant has shown no evidence that the lack of additional time prejudiced his case. "To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense." *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 337 (1993). "To demonstrate that the time allowed was inadequate, the defendant must show 'how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial

of his motion.' " *Id.* (quoting *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986)). Defendant has been unable to show that he was materially prejudiced or that he would have been better prepared had the continuance been granted. Therefore, we conclude that the trial court did not abuse its discretion, and we thus overrule this assignment of error.

[9] Defendant's next contention is that the short-form murder indictment violated his federal constitutional rights on the grounds that it failed to allege all the elements of first-degree murder and that the indictment failed to include any of the aggravating circumstances upon which defendant's death eligibility was based.

First, we have held that " 'the State need not set forth in an indictment the aggravating circumstances upon which it will rely in seeking a sentence of death.' " *State v. Golphin*, 352 N.C. 364, 396, 533 S.E.2d 168, 193 (2000) (quoting *State v. Young*, 312 N.C. 669, 675, 325 S.E.2d 181, 185 (1985)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001); *see also Chapman*, 342 N.C. at 339, 464 S.E.2d at 666. Also, in support of his challenge that the short-form indictment was unconstitutional, defendant cites the United States Supreme Court's decisions in *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000). However, this Court has repeatedly addressed and rejected this argument. *See, e.g., Braxton*, 352 N.C. at 173-75, 531 S.E.2d at 437-38; *State v. Wallace*, 351 N.C. 481, 504-08, 528 S.E.2d 326, 341-43, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). Defendant has presented no compelling reason for this Court to reconsider the issue in the present case. Accordingly, this assignment of error is overruled.

[10] Defendant next complains that the trial court erred by denying defendant's pretrial motion for a bill of particulars, requesting the following information:

> 1. The exact time of day or night of the alleged offense or offenses.
>
> 2. The exact location in the county or city in which the alleged crime and arrest of defendant took place.
>
> 3. The name and address or other identifying information of all persons present during the alleged crime and at the arrest of the defendant.

Defendant contends that the requested information was necessary to clarify the charges against him and to prepare his defense. We disagree.

N.C.G.S. § 15A-925(c), which governs motions for bills of particulars, reads as follows:

> If any or all of the items of information requested are necessary to enable the defendant adequately to prepare or conduct his defense, the court must order the State to file and serve a bill of particulars. Nothing contained in this section authorizes an order for a bill of particulars which requires the State to recite matters of evidence.

N.C.G.S. § 15A-925(c) (2001). "The grant or denial of a bill of particulars is generally within the discretion of the trial court and is not subject to review 'except for palpable and gross abuse thereof.' " *State v. Easterling*, 300 N.C. 594, 601, 268 S.E.2d 800, 805 (1980) (quoting *State v. McLaughlin*, 286 N.C. 597, 603, 213 S.E.2d 238, 242 (1975), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976)). "[A] denial of a defendant's motion for a bill of particulars will be held error only when it clearly appears to the appellate court that the lack of timely access to the requested information significantly impaired defendant's preparation and conduct of his case." *Id.*

In this case, defendant has not shown that the information requested was necessary to enable defendant to adequately prepare or conduct his defense; thus, defendant has not proven palpable and gross abuse of discretion on the part of the trial court. The prosecution provided defendant with open file discovery in this case. Defendant received copies of the victims' statements, and he received copies of every police report that had been prepared in connection with the particular investigations. All of the information that defendant requested was in these materials. Furthermore, "[d]efendant does not suggest surprise or specify in what manner the denial of [his] motion[] for a bill of particulars affected [his] trial strategy." *State v. Moore*, 335 N.C. 567, 588, 440 S.E.2d 797, 809, *cert. denied*, 513 U.S. 898, 130 L. Ed. 2d 174 (1994). Therefore, we hold that the trial court did not err in denying defendant's motion for a bill of particulars.

[11] Next, defendant argues that the trial court erred by denying defendant's motion for funds in order to hire an expert to prove the necessity for a change of venue. Defendant filed a pretrial motion for

change of venue or, alternatively, for a special venire from another county. Also, defendant requested funds for a jury-selection expert in order to establish the degree and extent of pretrial publicity and the impact of such publicity upon the jury and to analyze and determine other possible venues. The trial court denied defendant's motion in its entirety.

> In order to receive state-funded expert assistance, an indigent defendant must make "a particularized showing that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it would materially assist him in the preparation of his case." *State v. Parks*, 331 N.C. 649, 656, 417 S.E.2d 467, 471 (1992). Furthermore, "the State is not required by law to finance a fishing expedition for the defendant in the vain hope that 'something' will turn up." *State v. Alford*, 298 N.C. 465, 469, 259 S.E.2d 242, 245 (1979). "Mere hope or suspicion that such evidence is available will not suffice." *State v. Tatum*, 291 N.C. 73, 82, 229 S.E.2d 562, 568 (1976).

State v. McNeill, 349 N.C. 634, 650, 509 S.E.2d 415, 424 (1998) (citation omitted), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999).

In the present case, defendant has not shown any evidence that he was deprived of a fair trial because of the absence of a jury-selection expert or that there was a reasonable likelihood that the expert would have been able to materially assist him in the preparation of his case. Since defendant has been unable to provide any evidence to support his assignment of error, we conclude that the trial judge did not abuse his discretion in denying defendant's request for funds.

[12] Defendant next contends that the trial court erred by denying his pretrial motions for disclosure of the criminal records of the witnesses and victims involved in the cases against him. Defendant also requested orally for an order allowing his investigator to have access to the Police Information Network (PIN) controlled by the State from which the criminal records could be obtained. The trial court denied defendant's pretrial motions and his oral request.

This Court has held "that no statutory or constitutional principle requires a trial court to order the State to make a general disclosure of criminal records of the State's witnesses." *State v. Gibson*, 342 N.C. 142, 149-50, 463 S.E.2d 193, 198 (1995). Furthermore, "the failure of the court to order the disclosure of the State's witnesses' criminal records is not violative of due process." *State v. Alston*, 307 N.C. 321,

338, 298 S.E.2d 631, 643 (1983); *see also 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). Also, in *State v. Thomas*, this Court upheld a trial court's denial of a defendant's request for access to the PIN. 350 N.C. 315, 340, 514 S.E.2d 486, 501-02, *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999). This Court concluded that defendant had no right to the information sought. *Id.*

As this Court concluded in *Thomas*, we also conclude that "the record in this case discloses that the prosecution witnesses were cross-examined rigorously and extensively by both defense attorneys." *Id.* at 340, 514 S.E.2d at 502. Furthermore, "[t]here was ample evidence presented to the jury for impeachment purposes. We fail to see how any additional impeaching evidence gleaned from the criminal records of these witnesses would have created a reasonable doubt of defendant's guilt which did not otherwise exist." *Id.* Accordingly, these assignments of error are overruled as to this question presented.

[13] Next, defendant argues that the trial court erred by denying his request to question jurors during jury selection on their understanding about parole eligibility for a life sentence. Defendant acknowledges that this Court has previously decided this issue against him, but defendant asks this Court to reexamine its position in light of *Shafer v. South Carolina*, 532 U.S. 36, 149 L. Ed. 2d 178 (2001). We decline to do so.

This Court has held "that a trial court does not err by refusing to allow *voir dire* concerning prospective jurors' conceptions of the parole eligibility of a defendant serving a life sentence." *State v. Smith*, 347 N.C. 453, 460, 496 S.E.2d 357, 361, *cert. denied*, 525 U.S. 845, 142 L. Ed. 2d 91 (1998); *see also State v. Neal*, 346 N.C. 608, 617-18, 487 S.E.2d 734, 739-40 (1997), *cert. denied*, 522 U.S. 1125, 140 L. Ed. 2d 131 (1998); *State v. Chandler*, 342 N.C. 742, 749-50, 467 S.E.2d 636, 640, *cert. denied*, 519 U.S. 875, 136 L. Ed. 2d 133 (1996); *State v. Skipper*, 337 N.C. 1, 24, 446 S.E.2d 252, 264 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995). Defendant has failed to establish any compelling reason why this Court should reconsider its prior holdings on this issue. Therefore, this assignment of error is overruled.

[14] Defendant's next contention involves the trial court's denial of his motion to suppress a statement he gave to the Raleigh Police Department on 25 February 1997. Defendant was arrested on 4

February 1997 and was advised of his *Miranda* rights. He declined at that time to make a statement. On 6 February, counsel was appointed. Prior to giving his statement on 25 February, defendant initiated contact with the police and stated that he had information for them. Subsequently, defendant was transported to the Raleigh Police Department.

The motion was subsequently heard, and an oral motion was entered in open court and subsequently reduced to writing. The trial court found as fact that defendant was again advised of his *Miranda* rights, that he signed a waiver of rights form, and that he indicated that he understood his rights and wished to waive them. The trial court also found that defendant was further advised by the officers that he was still represented by counsel and that defendant waived his right to have his attorney present. The trial court concluded as a matter of law that defendant knowingly, intelligently, and voluntarily waived his right to counsel and his right to have an attorney present on 25 February 1997.

The trial court denied defendant's motion to suppress the entire statement, but granted defendant's motion to suppress that part of the statement occurring after defendant asserted his right to remain silent. Defendant contends that the trial court's failure to suppress the statement violated his Fifth and Sixth Amendment rights. Defendant further contends that the suppression motion raised the issue of whether the statement should be suppressed because it was obtained in violation of North Carolina Code of Professional Ethics Rule 7.4(1), which is now embodied in Rule 4.2(a) of the North Carolina Code of Professional Ethics. We disagree with both contentions.

First, with regard to defendant's Fifth Amendment right to counsel, once a defendant has expressed his desire to have counsel present during custodial interrogation, police questioning must cease. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 68 L. Ed. 2d 378, 386 (1981); *State v. Warren*, 348 N.C. 80, 97, 499 S.E.2d 431, 440, *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998). However, if "the accused himself initiates further communication, exchanges, or conversations with the police," then the defendant may be able to waive his Fifth Amendment right to counsel and the police may be able to proceed with the interrogation. *Id.* Furthermore, a defendant may waive his Sixth Amendment right to counsel in the same manner as he may waive his Fifth Amendment right to counsel. *Patterson v. Illinois*, 487 U.S. 285, 101 L. Ed. 2d 261 (1988).

As previously stated, defendant reinitiated contact with the police in order to provide them with information with regard to the crimes against Shelly Jackson and Deborah Elliot. The detective fully advised defendant of his rights and that he was represented by counsel, and defendant signed a waiver of rights form. Defendant also acknowledged that he understood his rights, that he wished to waive his rights, and that he wished to proceed without counsel. Thus, the trial court properly denied defendant's motion to suppress and determined that defendant waived his right to counsel on 25 February 1997. We also note that the trial court ruled that part of defendant's statement was inadmissible because defendant invoked his right to remain silent during the interrogation.

As previously stated, defendant also contends that the statement should be suppressed because it was obtained in violation of North Carolina Code of Professional Ethics Rule 7.4(1), which is now embodied in Rule 4.2(a). Defendant contends that the district attorney's office was contacted prior to the interrogation of defendant and that the rule prohibits an attorney for one party from contacting a represented party without contacting the adverse attorney. Since there is no factual basis in the record for this contention, we decline to address the issue. Therefore, this assignment of error is overruled.

[15] By another question presented, defendant argues that the trial court erred by denying his pretrial motion *in limine* to redact that part of his statement from 25 February 1997 which referred to the "electric chair" and a reference to defendant allegedly being "beaten up by men hired by a girl who knew the defendant."

With regard to the reference to the electric chair, defendant stated the following to the detectives: "I'll tell you what. You want to know how much I care about Cynthia? Go get me an electric chair and plug it up right there and let me pop the switch on it. If she get time, I would love to be there to see it." Defendant and Cynthia Pulley had broken up as a couple, and defendant had accused Cynthia Pulley of participating in the murder of Elliot. Thus, this statement is relevant under N.C.G.S. § 8C-1, Rule 401 in order to show defendant's bias against Pulley.

With regard to the statement about the men beating up defendant, he now contends that this was hearsay, but defendant did not specify hearsay as a basis for objecting to this part of the statement. Thus, he has not properly preserved this argument for appellate review. *See* N.C. R. App. P. 10(b)(1).

Overall, trial courts have discretion in deciding whether to grant a motion *in limine*, *State v. Hightower*, 340 N.C. 735, 746-47, 459 S.E.2d 739, 745 (1995), and we conclude that the trial court did not abuse its discretion in this situation. Therefore, the assignments of error presented under this issue are overruled.

[16] Defendant next contends that the trial court erred in denying his pretrial motion to suppress evidence of the show-up identification of him by Shelly Jackson in violation of his constitutional rights. However, defendant failed to object to the testimony introduced at trial pertaining to the show-up identification. This Court has held that a pretrial motion to suppress is not sufficient to preserve for appellate review the issue of admissibility of evidence. *Grooms*, 353 N.C. at 65-66, 540 S.E.2d at 723; *Golphin*, 352 N.C. at 405, 533 S.E.2d at 198. Accordingly, this assignment of error is overruled.

[17] Next, defendant contends that the trial court erred by failing to suppress the identification of defendant by Kimberly Warren. Warren was able to pick out defendant at a photographic lineup as the man who attacked her. Defendant filed a pretrial motion to suppress Warren's identification, and the trial court subsequently denied this motion. Subsequent to this denial, the prosecution notified defendant that Warren had seen a photograph of defendant prior to the lineup. Thus, defendant filed a renewed motion to suppress the identification. The trial court reserved ruling on the renewed motion until trial in order to see what the testimony of the witnesses developed.

At trial, Warren testified specifically that she was able to pick defendant out of a photographic lineup shown to her by Detective Turner, but defendant did not object to this testimony. However, when Detective Turner testified about the photographic lineup, defendant objected. Defendant now claims the trial court erred by overruling his objections.

This Court has held that "[w]here evidence is admitted over objection and the same evidence has been previously admitted . . . , the benefit of the objection is lost." *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995). Defendant objected to testimony by Turner that was previously admitted by Warren without objection. Therefore, defendant has lost the benefit of that objection. Furthermore, defendant did not request a ruling on his renewed motion pertaining to the photographic lineup, and therefore, he did not properly preserve these assignments of error. *See* N.C. R. App. P.

10(b)(1). Accordingly, the assignments of error pertaining to this question presented are overruled.

[18] Defendant's next contention is that the trial court erred by denying his motion to suppress a photographic lineup identification and in-court identification by Audrey Hall identifying defendant as her attacker. Defendant filed a general pretrial motion to suppress any pretrial identification or in-court identification of defendant that was impermissibly suggestive. In ruling that the motion was not specific enough, *see* N.C.G.S. § 15A-977 (2001), the trial judge denied defendant's motion "subject to the Defendant's right to file a more specific motion or motions directed to a particular identification of the Defendant by a specific victim or other witness."

Defendant did not file any subsequent motion, although he did conduct a *voir dire* of Hall during trial in which he reiterated his pretrial motion. However, because defendant chose not to exercise his option of refiling a more specific motion, the court again denied defendant's motion to suppress. Furthermore, we note that defendant did not object to Hall's testimony, in which she identified him as her assailant numerous times. Thus, (1) defendant did not refile a more specific motion to suppress, and (2) he failed to object to the disputed evidence once it was admitted in open court. As a consequence, we conclude that the trial court did not err in denying his motions to suppress. Moreover, Detective Poplin testified at trial without objection that Hall had identified defendant as her assailant. Therefore, defendant has also waived any right to raise these objections on appeal. *See Alford*, 339 N.C. at 569-70, 453 S.E.2d at 515-16.

JURY *VOIR DIRE* ISSUES

[19] By another question presented, defendant contends that the trial court erred in denying his motions to dismiss jury panels because defendant's race was disproportionately underrepresented in the composition of the jury panels. We disagree.

"Our state and federal Constitutions protect a criminal defendant's right to be tried by a jury of his peers." *State v. Bowman*, 349 N.C. 459, 467, 509 S.E.2d 428, 434 (1998) (citing U.S. Const. amend. VI; N.C. Const. art. I, §§ 24, 26), *cert. denied*, 527 U.S. 1040, 144 L. Ed. 2d 802 (1999). "This constitutional guarantee assures that members of a defendant's 'own race have not been systematically and arbitrarily excluded from the jury pool which is to decide [his] guilt or innocence.' " *Id.* (quoting *State v. McNeill*, 326 N.C. 712, 718, 392

S.E.2d 78, 81 (1990)). However, the Sixth Amendment does not guarantee a defendant "the right to a jury composed of members of a certain race or gender." *State v. Norwood*, 344 N.C. 511, 527, 476 S.E.2d 349, 355 (1996), *cert. denied*, 520 U.S. 1158, 137 L. Ed. 2d 500 (1997).

In order for defendant to establish a *prima facie* violation for disproportionate representation in a venire, he must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community;
>
> (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
>
> (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364, 58 L. Ed. 2d 579, 586-87 (1979); *see also Blakeney*, 352 N.C. at 297, 531 S.E.2d at 808; *Bowman*, 349 N.C. at 467-68, 509 S.E.2d at 434; *McNeill*, 326 N.C. at 717, 392 S.E.2d at 81; *State v. McCoy*, 320 N.C. 581, 583, 359 S.E.2d 764, 765 (1987). We conclude that defendant has failed to establish the second and third prongs of the *Duren* test.

With regard to the second prong, defendant submitted statistics showing that the African-American population of Wake County was 20.8% in 1997 and that African-Americans made up 8.67% of the jury pool, for a difference of 12.13%. In *Bowman*, this Court held that a difference of 16.17% was insufficient as a matter of law to conclude that the representation of African-Americans was not fair and reasonable in relation to their representation in the community. *Bowman*, 349 N.C. at 468, 509 S.E.2d at 434. Furthermore, in *State v. Price*, this Court held that a 14% difference was insufficient to show that the representation was unfair and unreasonable. 301 N.C. 437, 447-48, 272 S.E.2d 103, 110-11 (1980). Therefore, we conclude that a difference of 12.13% is insufficient, in and of itself, to conclude that the representation of African-Americans in this venire was not fair and reasonable in relation to their population in the community.

With regard to the third prong of the *Duren* test, we note that defendant has presented no evidence showing that the alleged deficiency of African-Americans on the jury was because of the systematic exclusion of this group in the jury-selection process. " '[T]he fact

that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the [Equal Protection] Clause.' " *State v. Avery*, 299 N.C. 126, 130, 261 S.E.2d 803, 806 (1980) (quoting *Washington v. Davis*, 426 U.S. 229, 239, 48 L. Ed. 2d 597, 607 (1976)). Overall, the only evidence defendant offered in support of his contention that his race was disproportionately underrepresented in the composition of the jury panels was statistics. Therefore, based on the foregoing, this assignment of error is overruled.

[20] Defendant's next argument relates to the State's peremptory challenges of prospective jurors Marion Hairston and Henry Smith, who are both African-American. Defendant contends that the trial court violated defendant's constitutional rights by allowing the State to exercise peremptory challenges against these two African-American prospective jurors. Defendant argues that these peremptory challenges were based solely on race, in violation of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). We disagree.

> The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the North Carolina Constitution prohibit a prosecutor from peremptorily excusing a prospective juror solely on the basis of his or her race. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986); *State v. Floyd*, 343 N.C. 101, 106, 468 S.E.2d 46, 50, *cert. denied*, [519] U.S. [896], 136 L. Ed. 2d 170 (1996). A three-step process has been established for evaluating claims of racial discrimination in the prosecution's use of peremptory challenges. *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991). First, defendant must establish a *prima facie* case that the peremptory challenge was exercised on the basis of race. *Id.* Second, if such a showing is made, the burden shifts to the prosecutor to offer a race-neutral explanation to rebut defendant's *prima facie* case. *Id.* Third, the trial court must determine whether the defendant has proven purposeful discrimination. *Id.*

State v. Lemons, 348 N.C. 335, 360-61, 501 S.E.2d 309, 324-25 (1998), *sentence vacated on other grounds*, 527 U.S. 1018, 144 L. Ed. 2d 768 (1999).

In this case, although the trial court ruled that defendant had not made a *prima facie* showing that the peremptory challenges were exercised on the basis of race, the State offered race-neutral explanations anyway in response to defendant's *Batson* challenge. The

trial court accepted the State's explanations as valid reasons for using the peremptory challenges. " 'Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.' " *Id.* at 361, 501 S.E.2d at 325 (quoting *Hernandez*, 500 U.S. at 359, 114 L. Ed. 2d at 405). Therefore, "the only issue for us to determine is whether the trial court correctly concluded that the prosecutor had not intentionally discriminated." *Id.* Since "the trial court is in the best position to assess the prosecutor's credibility, we will not overturn its determination absent clear error." *Id.* (citing *Hernandez*, 500 U.S. at 369, 114 L. Ed. 2d at 412).

With regard to prospective juror Hairston, the prosecutor told the trial court that she excused this juror because Hairston had counseled inmates on death row and others involved in similar crimes, because Hairston started crying when questioned about her counseling, and because Hairston stated concerns that it would be very difficult for her to impose the death penalty.

With respect to prospective juror Smith, the prosecutor informed the trial court that the State would be relying heavily on scientific evidence. The prosecutor was concerned that Smith had only a sixth-grade education and that he had a problem understanding some basic words from the questions asked and from the jury questionnaire.

"Taken singly or in combination, the State's excusal of these jurors was based on race-neutral reasons that were clearly supported by the individual jurors' responses during *voir dire*." *State v. Robinson*, 336 N.C. 78, 99, 443 S.E.2d 306, 315 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995). Thus, the trial court correctly determined that the peremptory challenges of these specific jurors was not based solely upon their race. Therefore, the assignments of error with regard to this issue are overruled.

[21] Next, defendant contends that the trial court violated his constitutional rights by denying his motions to allow jurors who were opposed to the death penalty to sit as jurors in the guilt-innocence phase of the trial. Defendant concedes that this issue has been decided against him, but he requests this Court to reconsider the issue.

This Court has held that N.C.G.S. § 15A-2000(a)(2) provides that the same jury that determines the guilt of a defendant should recom-

mend the appropriate sentence for the defendant in a capital case. *See, e.g., State v. Bondurant*, 309 N.C. 674, 682, 309 S.E.2d 170, 176 (1983). N.C.G.S. § 15A-2000(a)(2) "does not provide for the exchange of jurors for the sentencing phase based upon their convictions concerning the death penalty." *Id.* Furthermore, this Court has held that "death-qualifying" a jury is constitutional under both the federal and state Constitutions. *State v. Conner*, 335 N.C. 618, 627-28, 440 S.E.2d 826, 831-32 (1994) (citing *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776 (1968)); *see also State v. Taylor*, 332 N.C. 372, 390, 420 S.E.2d 414, 424-25 (1992).

Defendant has failed to show any compelling reason why we should reexamine our holdings at this time. Thus, these assignments of error are overruled.

GUILT-INNOCENCE PHASE ISSUES

[22] By another question presented, defendant contends that the trial court erred when it sustained an objection by the prosecutor with regard to a question asked by defendant to Detective Poplin on cross-examination. The exchange took place as follows:

> Q. You described to Tony Watts the description that was then being used for the alleged assailant of Audrey Hall; is that correct?
>
> A. That's correct.
>
> Q. And was that person identified as having come by the house after Hall left?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Well, sustained. You don't have to answer.

Defendant did not make an offer of proof developing Detective Poplin's testimony. Thus, defendant has failed to properly preserve this issue for appellate review according to N.C.G.S. § 8C-1, Rule 103(a)(2) (2001); *see, e.g., Atkins*, 349 N.C. at 79, 505 S.E.2d at 108. Assuming *arguendo* that the substance of the testimony was "apparent from the context" in that Detective Poplin's answer to the question would have been "yes," the statement would still have been excluded as hearsay because it was being offered for the truth of the matter asserted, and defendant offered the trial court no exception to the rule in order to allow the statement to be admitted. *See* N.C.G.S.

§ 8C-1, Rules 801, 802 (2001). Therefore, defendant's assignment of error is overruled.

[23] Defendant next contends that the trial court erred by denying his objections and motions to strike the testimony of David Spittle concerning DNA profiles and his conclusions. David Spittle, a special agent with the North Carolina State Bureau of Investigation assigned to the forensic crime lab in Raleigh, was called as a witness by the State and accepted as an expert in forensic DNA analysis by the trial court. Agent Spittle conducted DNA analysis in the Audrey Hall case by using blood samples from defendant and blood samples and vaginal material from Hall. In his testimony, Agent Spittle stated:

> My conclusion is as follows, the DNA profile obtained from the male fraction of the vaginal swab item 5C has more than one contributor. Evidence of DNA carryover from the victim's profile was observed. Assuming a single semen donor, the DNA banding pattern is consistent with a mixture of the victim's[,] that would be Audrey Marie Hall[,] and [defendant's] DNA profile.

Defendant contends that this conclusion was based on the inaccurate premise that there was only one male donor of semen and that it is therefore, inadmissible. We disagree.

Throughout his testimony, Agent Spittle stated that the DNA banding pattern consisted of more than one contributor. As stated above, Agent Spittle concluded that the DNA banding pattern reflected a mixture of defendant's DNA and Hall's DNA. Defense counsel asked Agent Spittle on cross-examination whether it was possible that there could have been another male donor. Agent Spittle answered that there could have been more than one donor, but the donor "would have to have the same DNA profile or contain the same DNA results."

N.C.G.S. § 8C-1, Rule 702(a) 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) (2001). DNA evidence is admissible in North Carolina, *State v. Pennington*, 327 N.C. 89, 100-101, 393 S.E.2d 847, 854 (1990), and Agent Spittle was giving his opinion of the test-

ing results based upon his expertise in the field of forensic DNA analysis. This opinion was not based upon an inaccurate premise, but rather upon Agent Spittle's analysis of the testing results and his experience in doing so. Furthermore, defendant was able to cross-examine Agent Spittle as to whether there was a possibility that there could have been another male donor. We also note that defendant did not specify the reasons for his objections to Agent Spittle's testimony with regard to this matter. Thus, we conclude that Agent Spittle's testimony was not based on an inaccurate premise and that the trial court did not err in overruling defendant's objections and motions to strike Agent Spittle's testimony concerning the DNA evidence.

[24] Next, defendant argues that the trial court erred by denying his objection to the State's introduction of still photographs of defendant that were obtained from a videotape made by the news media during a pretrial hearing. The State used the photographs to demonstrate the length of defendant's fingernails. The photographs were cropped in order to show defendant's fingernails and the side of his face. Defendant contends that the introduction of these photographs was in violation of Rule 15(i) of the General Rules of Practice for the Superior and District Court. Defendant also argues that these photographs were inadmissible under N.C.G.S. § 8C-1, Rules 401 and 403.

At the outset, we note that defendant made no argument at trial on the basis that the photographs were inadmissible under N.C.G.S. § 8C-1, Rules 401 and 403. Thus, defendant did not preserve these specific arguments for appellate review. N.C. R. App. P. 10(b)(1); *see also State v. Frye*, 341 N.C. 470, 495-96, 461 S.E.2d 664, 676-77 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996).

Rule 15(i) of the General Rules of Practice for the Superior and District Court provides:

> (i) *Impermissible Use of Media Material.* None of the film, video tape, still photographs or audio reproductions developed during or by virtue of coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent and collateral thereto, or upon any retrial or appeal of such proceedings.

Gen. R. Pract. Super. and Dist. Ct. 15(i), 2002 Ann. R. N.C. 11, 14. As stated above, the State used the photographs to demonstrate the length of defendant's fingernails, and the photographs were cropped

in order to show only defendant's fingernails and the side of his face. Thus, even assuming *arguendo* that defendant is correct in his assertion that the trial court erred in admitting these photographs, we hold that defendant has failed to show prejudice as required by N.C.G.S. § 15A-1443(a), and we cannot conclude that a different result would have been reached at trial had the trial court not admitted these photographs. Therefore, this assignment of error is overruled.

[25] In defendant's next question presented, he contends that the trial court erred by denying his motion for an *in camera* inspection of certain records of the victims and by sustaining the State's objections to certain questions asked in regard to the Jacqueline Crump case.

With regard to the motion for an *in camera* inspection, defendant requested the trial court to issue an order

> requiring the Prosecutor, the Wake County Department of Social Services, Wake County Public Schools, Dorothea Dix Hospital, and any other agency of the State of North Carolina, the County of Wake, or any of its subdivisions, which have records relating to the alleged rape/sexual assault victims in this case, to produce those records in Court for an in camera inspection by the presiding Judge for which this case will be heard.

The trial court denied the motion as overly broad and gave defendant the opportunity to file a more specific motion if he chose to do so.

"A judge is required to order an *in camera* inspection and make findings of fact concerning the evidence at issue only if there is a possibility that such evidence might be material to guilt or punishment and favorable to the defense." *State v. Phillips*, 328 N.C. 1, 18, 399 S.E.2d 293, 301, *cert. denied*, 501 U.S. 1208, 115 L. Ed. 2d 977 (1991). Since there was no specific request made for evidence that is "obviously relevant, competent and not privileged," *State v. Hardy*, 293 N.C. 105, 127-28, 235 S.E.2d 828, 842 (1977), we hold that the trial court did not err in denying defendant's request for this *in camera* inspection.

We also note that defendant refers to a pretrial motion for discovery of medical records, and he claims that the trial court did not rule in a timely manner on this motion. However, defendant asked the court to hold the matter open until another motion was heard, which the court agreed to do, but defendant cites to nothing in the record

or transcript where he sought a ruling on this motion. Therefore, defendant has abandoned this issue. *See* N.C. R. App. P. 10(b)(1).

[26] As stated above, defendant also contends the trial court erred by sustaining the State's objections to certain questions asked by defendant in the Jacqueline Crump case. A nurse testified for the State about her emergency treatment of Crump. On cross-examination, defendant asked the nurse whether she remembered or acknowledged that a report written by a doctor also included a showing of a history of mental illness on the part of Crump. The State objected, and defendant made no offer of proof. A doctor also testified for the State as to his treatment of Crump in the emergency room. On cross-examination, defendant asked the doctor about the results of a urine and blood-alcohol screen on Crump and whether her record revealed a history of mental problems. Once again, the State objected, and defendant made no offer of proof.

We conclude that since defendant made no offer of proof as to the answers to these questions, he has failed to preserve any issue for appellate review according to N.C.G.S. § 8C-1, Rule 103(a)(2). *See, e.g., Atkins*, 349 N.C. at 79, 505 S.E.2d at 108. Assuming *arguendo* that the substance of the testimony was "apparent from the context," the statements would still have been excluded as hearsay because they were being offered for the truth of the matter asserted, and defendant offered the trial court no exception to the rule in order to allow the statements to be admitted. *See* N.C.G.S. § 8C-1, Rules 801, 802.

[27] Next, defendant contends that the trial court erred by allowing certain testimony to be introduced through Lisa Cozart over his objections. Cozart was called as a witness for the State during the Jacqueline Crump case. In 1995, Cozart was defendant's case manager for a program that helped homeless people find employment and housing. Cozart testified as to various aspects of her working relationship with defendant. The portion of Cozart's testimony to which defendant objected went as follows:

> Q. And can you describe that discussion?
>
> A. He was frustrated living at the AME shelter. He said that he had had some items stolen and was just frustrated and ready to leave there.
>
> Q. Did you have a discussion with him at that time about his attitude?

A. I did. He was—in his frustration he was quite irritated, was a bit argumentative with me at that time and I basically told him that I would not allow him to remain in my office and speak that way and that he—

[DEFENSE COUNSEL]: Objection, motion to strike.

THE COURT: Motion denied.

Q. You can finish your answer.

A. I just told him that he would not be able to take his frustrations out on me.

[DEFENSE COUNSEL]: Objection, motion to strike.

THE COURT: Denied.

Defendant contends that it was error for the trial court to allow this testimony because it was not relevant under N.C.G.S. § 8C-1, Rule 401, and because the prejudicial effect of the testimony substantially outweighed its probative value under N.C.G.S. § 8C-1, Rule 403. We disagree.

Under N.C.G.S. § 8C-1, Rule 401, " '[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Furthermore, this Court has previously stated as follows:

> "Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury."

State v. Agee, 326 N.C. 542, 548, 391 S.E.2d 171, 174-75 (1990) (quoting *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985)).

The State argues that in the entire context of Cozart's testimony, the discussion at issue was relevant. The testimony at issue developed naturally, helped the jury understand the working relationship between Cozart and defendant, and aided the jury in understanding defendant's background and his daily activities in Raleigh. The State further argues that Cozart's testimony was also relevant to show defendant's attitude towards women, which was a recurring theme

throughout the case. Thus, it is up to the jury to determine the proper weight that this testimony deserves.

However, we hold that defendant has failed to show prejudice as required by N.C.G.S. § 15A-1443(a), and we cannot conclude that a different result would have been reached at trial had the trial court not admitted this testimony. Therefore, this assignment of error is overruled.

[28] In defendant's next question presented before this Court, he contends that it was error for the trial court not to suppress the identification of defendant by Vicki Whitaker. Even assuming *arguendo* that the trial court did err in not suppressing Whitaker's identification of defendant, we hold that defendant was not prejudiced and has no basis for appeal on this issue since he was acquitted of the charges in the Whitaker case. Furthermore, defendant has made no argument that Whitaker's identification of defendant prejudiced his case against the other victims. Thus, this assignment of error has no merit.

[29] In defendant's next issue before this Court, he contends that the trial court erred in allowing a certain portion of Detective Turner's testimony, with regard to the Kimberly Warren case, to be admitted over his objection.

At trial, Warren testified that at some point during her struggle with defendant, she screamed, and then defendant ran away. The prosecutor asked Warren if she remembered which way defendant ran, and Warren responded, "No." Detective Turner testified with regard to the statement that Warren gave to her in order to corroborate Warren's testimony. Defendant assigns error to the following testimony by Turner that occurred on direct examination:

> Q. Okay. I think you testified that she indicated she was able to scream?
>
> A. Yes.
>
> Q. What happened—what did she tell you happened after she screamed?
>
> A. Well, she said she screamed and at that time he ran. And I asked her where he ran, and she—she really didn't know where he ran, but she assume[d] he ran back up the path that they came down.
>
> [DEFENSE COUNSEL]: Objection.

A. That she saw him a few minutes later.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[DEFENSE COUNSEL]: Motion to strike.

THE COURT: Denied.

Defendant argues that this testimony violates N.C.G.S. § 8C-1, Rule 602 because Warren had no personal knowledge as to where defendant ran.

Defendant also assigns error to Turner's testimony with regard to a man named Jamal whom Warren had told about the incident with defendant. Turner testified on cross-examination as follows:

Q. And later in the interview you talked to her about Jamal. Right?

. . . .

A. Yes.

Q. And you asked her when she told Jamal?

A. Yes.

Q. And she told you she told Jamal maybe two days after it happened?

A. Right.

On redirect examination by the prosecutor, Turner testified in part as follows:

Q. Now, did she also tell you how Jamal acted when she told Jamal?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

A. Yes. I asked her how did he act? Like he didn't care, or? And she finished by saying that he acted kind of nervous like, like he knew something about it but he didn't want to talk about it.

[DEFENSE COUNSEL]: Motion to strike.

THE COURT: Denied.

Defendant contends that this testimony violates N.C.G.S. § 8C-1, Rule 403.

We decline to address whether the trial court erred in allowing the above testimony to be admitted because even assuming *arguendo* that it was error for the trial court to admit this testimony, we hold that defendant has failed to show prejudice as required by N.C.G.S. § 15A-1443(a), and we cannot conclude that a different result would have been reached at trial had the trial court not admitted this testimony. Furthermore, with regard to the testimony by Detective Turner as to where Warren said defendant ran, the evidence showed that the police were able to capture defendant shortly thereafter. Therefore, any alleged prejudice from that testimony was nullified. Thus, the assignments of error under this issue are overruled.

[30] By another question presented, defendant contends that the trial court erred by overruling his objection to Detective Poplin's testimony when Poplin used the term "sexual assault" in his testimony with regard to the Shelly Jackson case. On direct examination by the State, Poplin testified, in part, as follows:

> Q. Detective Poplin, as your investigation continued and you indicated you were involved in the Patricia Ashe case and you also became involved in the Audrey Hall case investigation, did you become involved in other investigations as well in which you saw similarities?
>
> A. Yes, I did.
>
> Q. And did you as part of your investigations and duties with the Raleigh Police Department at some later point become aware of the defendant John Williams Junior?
>
> A. Yes, I did.
>
> Q. And when was that?
>
> A. On February the 4th, 1997 John Williams was arrested following attempted sexual assault of victim Shelly Jackson in the 600 block of West Hargett Street. The victim Shelly Jackson and the defendant were in the rear of a van in a furniture company lot.
>
> [DEFENSE COUNSEL]: Move to strike the answer, specifically the use of the [term] sexual assault. It's conclusive.
>
> THE COURT: Overruled.

Q. As part of your investigation, did you obtain a search warrant for the defendant's blood?

A. Yes, I did.

Q. And as part of . . . that investigation did you request that the DNA from the defendant be compared to the DNA from the victim in this case, Patricia Ashe?

A. Yes, I did.

Defendant argues that the use of the term "attempted sexual assault" by a law enforcement officer invaded the province of the jury and that the testimony was improper under N.C.G.S. § 8C-1, Rules 701 and 702.

Once again, even assuming *arguendo* that it was error for the trial court to admit this testimony, we hold that defendant has failed to show prejudice as required by N.C.G.S. § 15A-1443(a), and we cannot conclude that a different result would have been reached at trial had the trial court not admitted this testimony. Therefore, this assignment of error is overruled.

[31] In defendant's next question presented before this Court, he contends that the trial court erred by not excluding the testimony of Sylvia Wilson and Felicia Lawrence as improper Rule 404(b) evidence with regard to the Deborah Elliot case. The State sought to elicit testimony from Wilson and Lawrence pertaining to certain prior offenses committed against them by defendant in Augusta, Georgia. At a hearing to determine if Wilson and Lawrence would be allowed to testify, the trial judge ruled that the evidence of motive, plan, opportunity, intent, and *modus operandi* of these alleged offenses was so similar to the offenses for which defendant was charged that the testimony was admissible under Rule 404(b). The trial judge ruled that the evidence was admissible in the cases of all of the victims except Elliot. Defendant specifically argues that the trial court erred by not instructing the jury that the testimony of Wilson and Lawrence should not be used in determining defendant's guilt or innocence in the Elliot case. We disagree.

Investigator Mike Lantam of the Richmond County, Georgia, Sheriff's Department investigated the crime against Wilson in Augusta, Georgia. After Lantam testified, Wilson and Lawrence testified. After this testimony, the trial judge gave the following instruction to the jury:

> Members of the jury, as it relates to the testimony, especially the last three witnesses concerning matters in the State of Georgia, any evidence of other crimes or wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. However, such evidence may be admissible to be considered by you as a jury for other purposes such as any proof of motive, opportunity, intent, preparation, plan, scheme, knowledge or identity, and for that purpose only.

Thereafter, the State began to present evidence in the Deborah Elliot case.

First, we conclude that this was a proper Rule 404(b) instruction, as it reads almost verbatim from the North Carolina Rules of Evidence. "If defendant desired a different, more limiting instruction, he should have requested it at that time." *State v. Hopper*, 292 N.C. 580, 589, 234 S.E.2d 580, 585 (1977). Also, the timing of this instruction leads this Court to conclude that the jury would have understood the instruction to apply to the previous cases for which evidence was already offered. Furthermore, defendant did not request that a limiting instruction be given to the jury for the Elliot case with regard to the Georgia evidence. This Court has previously stated that "[t]he admission of evidence, competent for a restricted purpose, will not be held error in the absence of a request by defendant for a limiting instruction. Such an instruction is not required to be given unless specifically requested by counsel." *Chandler*, 324 N.C. at 182, 376 S.E.2d at 735 (citation omitted). Therefore, we conclude that the trial court did not err by not instructing the jury that the testimony of Wilson and Lawrence should not be used in determining the guilt or innocence of Elliot. Thus, the assignments of error presented under this question presented are overruled.

[32] Next, defendant contends that the trial court erred by allowing Cynthia Pulley to testify about certain aspects of her relationship with defendant, as the trial court had already ruled similar testimony from another witness, Carolyn Barker, inadmissible. The trial court held a hearing in order to determine whether to admit the testimony of Pulley. The trial court concluded that the testimony of Pulley regarding choking and knife incidents was admissible under Rule 404(b), that alleged attacks on Pulley and Derrick Jackson were not too remote in time as to lose their relevance, and that an incident in which defendant allegedly forcibly stole Pulley's purse and for which defendant was arrested and incarcerated was admissible under Rule 404(b). Defendant argues that admitting this evidence was error

under Rule 404(b) in that the relationship between defendant and Pulley was so dissimilar to the crimes for which defendant was being tried that the evidence should have been deemed inadmissible. We disagree.

N.C.G.S. § 8C-1, Rule 404(b) reads in part as follows:

> (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) (2001). Also, "[e]vidence of another offense or prior bad act 'is admissible so long as it is relevant to show any other fact or issue other than the character of the accused.' " *State v. Ratliff*, 341 N.C. 610, 618, 461 S.E.2d 325, 329-30 (1995) (quoting *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986)). This Court has further stated the following:

> Evidence of other crimes committed by a defendant may be admissible under Rule 404(b) if it establishes the chain of circumstances or context of the charged crime. Such evidence is admissible if the evidence of other crimes serves to enhance the natural development of the facts or is necessary to complete the story of the charged crime for the jury.

State v. White, 340 N.C. 264, 284, 457 S.E.2d 841, 853 (citations omitted), *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995).

In the instant case, Pulley's testimony concerning the choking incidents between herself and defendant were admissible under Rule 404(b) in order to show motive, plan, common scheme, and intent, as the trial court found, since defendant had shown a pattern of choking his victims. *See, e.g., State v. Sexton*, 336 N.C. 321, 352-53, 444 S.E.2d 879, 897, *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994). Moreover, the relationship between defendant and Pulley and Jackson was relevant and admissible under Rule 404(b) as evidence of motive, since defendant had accused Pulley and Jackson of murdering Elliot. This relationship helped to prove the identity of defendant as the person who murdered Elliot. Ultimately, the evidence of this relationship and defendant's prior bad acts were so intertwined with the principal crime that it was properly admitted.

We also note that the fact that Carolyn Barker's proposed testimony was ruled inadmissible has no bearing on whether to admit the testimony of Pulley. The trial court's ruling on whether to admit Pulley's testimony was not dependent on his ruling on Barker's testimony. Thus, we conclude that the trial court did not err in admitting Pulley's testimony under Rule 404(b), and we therefore overrule these assignments of error with regard to this issue.

[33] In defendant's next issue before this Court, he contends that the trial court erred by allowing the jury to decide whether certain testimony from Detective Turner was admissible as corroborative evidence of Cynthia Pulley's testimony. Defendant argues that this was a question of law for the court to decide. On direct examination by the State, Turner testified in part as follows:

> Q. Now, did you also again on that same page, did you also talk with [Pulley] about whether or not he would leave during the night; whether or not the defendant would leave her during night?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled. Offered for the purpose of corroborating the testimony of Ms. Pulley.
>
> [DEFENSE COUNSEL]: Your Honor, I don't believe there was any such testimony.
>
> THE COURT: It will be up to the jury to determine whether or not it corroborates. So, I'll allow her to testify.
>
> A. When I was talking to her about that, she said that he would leave in the middle of the night and she didn't know where he would go, and that happened on a couple of occasions.
>
> [DEFENSE COUNSEL]: Motion to strike.
>
> THE COURT: Denied.

Defendant's contention is that the jury, in essence, was allowed to decide on the admissibility of this evidence. We disagree.

From reading the transcript, we conclude that the trial judge decided that this specific testimony from Turner was corroborative of Pulley's testimony, and therefore the testimony was admissible. The trial judge left it up to the jury to determine what corroborative effect the testimony would have. Furthermore, throughout the trial, the trial judge had given the jury limiting instructions on the use of corrobo-

rative evidence. Therefore, the jury was aware of what it meant for the judge to say that evidence was going to be admitted as corroborating evidence. Thus, we conclude that the trial judge, not the jury, decided on the admissibility of this evidence, and we therefore overrule this assignment of error.

We also note that defendant attempts to argue in his brief that this evidence was inadmissible under N.C.G.S. § 8C-1, Rule 608 and as inadmissible hearsay. However, defendant did not object on these grounds at trial. Thus, defendant did not preserve these specific arguments for appellate review. N.C. R. App. P. 10(b)(1); *see also Frye*, 341 N.C. at 495-96, 461 S.E.2d at 676-77.

[34] Defendant next argues that the trial court erred by allowing certain testimony by Detective William Medlin to be admitted as corroborative evidence of William Hargrove's testimony pertaining to the Deborah Elliot case. During Medlin's testimony, the prosecutor asked him about an interview that he had conducted with Hargrove. Hargrove was responsible for a van that belonged to the A.S.K., a store that was combined with a temporary employment agency. Hargrove would drive people to work in the van, and he lived in the van some of the time. Hargrove also used the van to make sexual arrangements between men and some of the women he knew. Defendant objected on the basis of hearsay to three different instances during Medlin's testimony. We will discuss each instance separately.

The first instance concerned Medlin's statement that Hargrove told Medlin that defendant knew Deborah Elliot, that Hargrove had seen defendant and Elliot speaking to each other, and that defendant had met Elliot through Hargrove. Defendant contends that this testimony by Medlin was hearsay and not corroborative of Hargrove's testimony.

The pertinent part of Hargrove's testimony was as follows:

> Q. Ah, and when John would come down there, you and John would be hanging out together. You'd be drinking liquor, and smoking dope, and chasing women. Right?
>
> A. Yes.
>
> Q. Okay. And you would carry John around, and you and he would sort of go out together?
>
> A. Yes.

Q. And so a lot of times you were with John when he was with women and having sex with women. Isn't that true?

A. In a way of speaking, yes.

Q. All right. You never saw John get violent or ugly with a woman, did you?

A. No. Not in my presence, no.

Q. Jean Elliot was a friend of [y]ours, but you never saw John with Ms. Elliot?

A. No.

Hargrove used his van at times to arrange meetings between prostitutes and their customers. Hargrove also admitted to arranging women for defendant on various occasions and also at times being present when defendant was having sex with these women. Thus, taken in context, Hargrove's testimony about not seeing defendant and Elliot together could be construed as Hargrove not seeing defendant and Elliot together in a sexual manner. Therefore, Medlin's testimony would not contradict Hargrove's testimony.

> In order to be admissible as corroborative evidence, a witness's prior consistent statements merely must tend to add weight or credibility to the witness's testimony. Further, it is well established that such corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates.

State v. Farmer, 333 N.C. 172, 192, 424 S.E.2d 120, 131 (1993) (citation omitted). Furthermore, the trial judge is in the best position to rule on such an issue, and he determined that Medlin's testimony corroborated the testimony of Hargrove. Thus, we conclude that the trial court did not err in ruling that Medlin's testimony corroborated Hargrove's testimony and that the weight to be given to such corroboration was for the jury to decide.

The second instance to which defendant objected concerned whether Hargrove told Medlin that defendant usually carried a box cutter. Hargrove had previously testified that he did not know whether defendant carried a knife or any other kind of weapon. However, Medlin testified that Hargrove had told him that defendant "usually carried a regular box cutter." Defendant contends

that Medlin's testimony contradicts Hargrove's testimony, and therefore, it cannot be admitted for purposes of corroboration.

Even assuming *arguendo* that it was error for the trial court to admit this testimony as corroboration, we hold that defendant has failed to show prejudice as required by N.C.G.S. § 15A-1443(a), and we cannot conclude that a different result would have been reached at trial had the trial court not admitted this testimony. Sylvia Wilson and Audrey Hall testified that defendant had a box cutter. Kimberly Warren testified that defendant had a sharp object in his hand. Shirley Jackson thought defendant had a razor in his hand, and the police seized a box cutter from defendant shortly after his assault on Jackson. Plus, Deborah Elliot's bra had been cut apart. Thus, Medlin's testimony was not necessary to prove to the jury that defendant used a box cutter to assault his victims.

The third instance to which defendant objected involves a mistake Medlin made in repeating what Hargrove had told him. The pertinent part of Medlin's testimony went as follows:

> Q. Now, with regard to Kimberly Warren, did Mr. Hargrove indicate to you that he knew an individual by that name?
>
> . . . .
>
> A. He did not give a last name at the time. No, ma'am; just that he knew a female by the first name of Kim.
>
> Q. And directing your attention to page thirty-two of your interview, did you have a conversation with Mr. Hargrove about this individual named Kim?
>
> [DEFENSE COUNSEL]: Objection, hearsay.
>
> THE COURT: Overruled.
>
> A. Yes, ma'am.
>
> Q. And what did he tell you about Kim?
>
> [DEFENSE COUNSEL]: Objection, hearsay.
>
> THE COURT: Overruled.
>
> A. He stated that Ms. Warren stated that the defendant was trying to make her take her clothes off; said he tried to cut her throat, and she throwed her arms. That he cut her on the arm or hand. Said she kicked him in the—his statement were—was

"balls." He stated, "I don't know anything other than that." I'm sorry. That's actually from previous cases discussed in here.

[DEFENSE COUNSEL]: Motion to strike.

THE COURT: Overruled.

Q. Now, with regard to Kim Warren, what did he tell you about Kim?

A. It's actually on page thirty-four of the interview. He stated—

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

A. He stated that Ms. Warren "told me about that he had tried to make her—make her give him some head and she got away from him."

Q. Did he tell you anything—did he tell you anything about a weapon, or anything involved in that?

[DEFENSE COUNSEL]: Objection, hearsay.

THE COURT: Overruled.

A. Yes, ma'am.

Q. And what did he tell you about that?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

A. That Ms. Warren told him that he, he being the defendant, put a knife to her throat and tried to make her give him head.

Defendant argues that the testimony regarding Medlin describing an event which actually pertained to another case was "Unidentifiable Hearsay Testimony" and was therefore inadmissible. However, we conclude that this statement by Medlin was an honest mistake that was immediately corrected. Medlin was referred by the prosecutor to the wrong page of his interview with Hargrove. Once Medlin realized the mistake, he quickly turned to the correct page and continued his testimony. Defendant has given us no reason to believe that this mistake constituted prejudicial error and that a different result would have been reached at trial had the trial court not admitted this testimony. *See* N.C.G.S. § 15A-1443(a). Thus, even if there was error on the part of the trial court, we conclude that it was not prejudicial.

For the reasons stated above regarding the three instances of Medlin's testimony to which defendant objected, we find no error, and we therefore overrule this assignment of error.

[35] By another question presented, defendant contends that the trial court erred by overruling his objections and motions to strike certain testimony by Gloria Anderson with regard to the Deborah Elliot case. Anderson's testimony related to her seeing defendant on 24 December 1996 between 9:00 a.m. and 10:00 a.m., after defendant had been released from jail for taking Cynthia Pulley's purse. Anderson's relevant testimony was as follows:

Q. How did the defendant act when he came up to you?

[DEFENSE COUNSEL]: Object.

A. He acted real strange. He acted like he had seen a ghost or something. I mean, he was just weird. He was upset. He wanted to see Cynthia about a pocketbook or something, something about the pocketbook.

[DEFENSE COUNSEL]: Objection, motion to strike.

THE COURT: Overruled.

Q. Did he say anything about Cynthia at the time?

A. He said he was going to kill her if he saw her.

[DEFENSE COUNSEL]: Object, motion to strike.

THE COURT: Overruled.

Q. Did you hear him say that?

A. Yes, I did.

Q. And what did you say in response to that?

A. Me and my friend-girl told him don't do that.

Defendant argues that this testimony was irrelevant under N.C.G.S. § 8C-1, Rule 401; that the testimony was prejudicial under N.C.G.S. § 8C-1, Rule 403; and that the testimony was inadmissible hearsay.

However, considering the overwhelming evidence against defendant with regard to the Elliot case, we hold that defendant has failed to show prejudice as required by N.C.G.S. § 15A-1443(a), and we cannot conclude that a different result would have been reached

at trial had the trial court not admitted this testimony. Therefore, this assignment of error is overruled.

[36] Defendant's next question presented before this Court pertains to certain testimony from Detectives Poplin and Turner concerning defendant's demeanor towards Turner, who is a female, during their interview of defendant on 25 February 1997. Defendant contends that the testimony was irrelevant. We disagree.

The relevant portion of Detective Poplin's testimony on direct examination was as follows:

> Q. Detective Poplin, during the course of this interview, you were asking the defendant some questions at some points during the interview, and Detective Turner, you indicated, was also present. She asked the defendant some questions during the interview?
>
> A. Yes.
>
> Q. And during the course of the time that you spent with the defendant, did you notice any change in his demeanor between the times that you would ask him a question and the time that Detective Turner would ask him a question?
>
> [DEFENSE COUNSEL]: Object.
>
> THE COURT: Overruled.
>
> A. Initially, he was more polite to me, he would answer my questions, but when she asked questions, he seemed more hostile and would give shorter, quicker answers. He didn't seem to really like to speak with her. Later in the interview, he was doing the same with me as well, but initially he was more, I guess the term would be friendly towards me.
>
> [DEFENSE COUNSEL]: Move to strike.
>
> THE COURT: Denied.

As to defendant's objection to Detective Turner's testimony, the following colloquy ensued between the prosecutor and Turner on direct examination:

> Q. Now with regard to that particular interview that you did with the defendant on February 25th of 1997, did you speak with the defendant during that period of time as well?

A. Yes.

Q. What was his demeanor like with you, Detective Turner?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

A. Well, he—it appeared that he was short with me, and when I looked directly at John to ask him a question he would not look at me with the answer. He would look at Detective Poplin.

[DEFENSE COUNSEL]: Motion to strike.

THE COURT: Denied.

Q. Did he treat you different than he treated Detective Poplin?

[DEFENSE COUNSEL]: Objection; speculation.

THE COURT: Overruled.

A. Yes.

Q. And how was that?

A. He was short with his answers, and just looked at Detective Poplin instead of me while talking.

We conclude that the foregoing testimony had no impact on the case considering the overwhelming evidence against defendant. Therefore, once again, we hold that defendant has failed to show prejudice as required by N.C.G.S. § 15A-1443(a), and we cannot conclude that a different result would have been reached at trial had the trial court not admitted this testimony. Therefore, the assignments of error under this issue are overruled.

[37] Next, defendant argues that the trial court erred by admitting certain testimony by Detective Turner regarding her observation of defendant's reaction upon his seeing Audrey Hall enter the courtroom. During jury selection, Turner had entered the courtroom at the same time as Audrey Hall. On direct examination, the prosecutor questioned Turner about that incident as follows:

Q. Were you in a position to observe the defendant's demeanor when Ms. Hall came into the courtroom?

A. Yes.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

Q. What was his demeanor and actions when Ms. Hall came into the courtroom?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

A. Well, Ms. Hall came out of that door first, then Ms. Scott, and then I was last, and she went into the back to sit down about three or four rows back, and I came to the front so I was heading towards the front, and I noticed that the defendant, John Williams, had a very strong reaction whenever he looked back and saw her.

[DEFENSE COUNSEL]: Objection. Motion to strike.

THE COURT: Overruled.

A. He, ah—

Q. What was that reaction?

A. He looked at her, and he turned around and he looked at her again, and he spoke to his attorney . . . and pointed his finger back like that (indicating), and I thought that was very strange because during the interview that I was with Detective Poplin in the interview of the defendant, John Williams, he said he didn't know her.

Defendant contends that this testimony was speculative and inadmissible. We disagree.

N.C.G.S. § 8C-1, Rule 701 provides as follows:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C.G.S. § 8C-1, Rule 701 (2001). Defendant had previously stated to Detectives Poplin and Turner that he did not know Hall, even though other evidence was introduced to the contrary. Thus, Turner's testimony as to defendant's conduct towards Hall was a reasonable inference that was rationally based on Turner's perception and it helped to

refute defendant's statement that he did not know Audrey Hall. It is for the jury to determine the proper weight to give to this evidence. Therefore, we conclude that this evidence was relevant and admissible, and we overrule this assignment of error.

[38] Defendant next contends that the trial court erred in the Deborah Elliot case by admitting into evidence two exhibits that were used during the interview of defendant on 25 February 1997. The exhibits consisted of a diagram and some photographs. Defendant used the diagram and photographs when giving his statement on 25 February 1997. Defendant did not object to the introduction of these exhibits, but he did object to Detective Poplin's testimony in relation to what defendant said regarding the exhibits during the interview. We have previously determined in this opinion that defendant's statement on 25 February 1997 was admissible. The exhibits were a part of that statement, and defendant has not given us any reason to reconsider our decision on that issue. Thus, the assignments of error presented under this issue are overruled.

[39] In defendant's next issue before this Court, he contends that the trial court erred in the Deborah Elliot case during the jury view of the crime scene by not permitting defendant to raise a bay roll-up door at the old Pine State building. Defendant, in his statement to Detectives Poplin and Turner on 25 February 1997, said that he witnessed Elliot being murdered while he was looking under the roll-up door at the old Pine State building. Defendant said that the door had been raised approximately eighteen inches. Detective Poplin testified that he returned to the scene and raised the roll-up door approximately eighteen to twenty inches and that he could see into the area only two or three feet. A jury view of the crime scene at the old Pine State building was held on 19 February 1998. At the jury view, the trial judge reiterated his ruling not to allow defendant to conduct any demonstrations with regard to the roll-up door because the circumstances at the time of the jury view were not the same as at the time of the offense. For the reasons set forth below, we agree with the trial court's decision.

"The test for admissibility of evidence regarding a demonstration is whether, if relevant, the probative value of the evidence 'is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.' " *Golphin*, 352 N.C. at 434, 533 S.E.2d at 215 (quoting *State v. Allen*, 323 N.C. 208, 225, 372 S.E.2d 855, 865 (1988), *sentence vacated on other grounds*, 494 U.S. 1021,

108 L. Ed. 2d 601 (1990)). Furthermore, "[t]he determination of whether relevant evidence should be excluded pursuant to Rule 403 'is a matter left to the sound discretion of the trial court, and the trial court can be reversed only upon a showing of abuse of discretion.' " *Id.* (quoting *Wallace*, 351 N.C. at 523, 528 S.E.2d at 352-53). We find no evidence, and defendant has provided no argument, that the trial court abused its discretion in determining that a demonstration was inappropriate because of changed circumstances. The trial judge is in the best position to make the ruling, and we find no reason to overrule his decision. Moreover, defendant has given us no reason to believe that even if it was error not to allow the demonstration, a different result would have been reached at trial had the trial court not committed this error. *See* N.C.G.S. § 15A-1443(a). Therefore, this assignment of error is overruled.

[40] Defendant's next contention is that the trial court erred by allowing Gustavo Medina to testify concerning statements he overheard defendant make while in jail. Medina was serving a sixty-day sentence for DWI in the Wake County jail. The trial court conducted a hearing before Medina testified in order to determine the admissibility of his testimony. The trial court determined that some of Medina's proffered testimony was admissible under N.C.G.S. § 8C-1, Rules 404(b) and 801(d). At trial, Medina testified as follows:

Q. Okay. So you could hear what they were saying?

A. Yeah.

Q. Could you see them talking, too?

A. Yeah. He was talking.

Q. Okay. What was he talking about?

A. About the girls killed.

Q. I'm sorry?

A. About the girls killed.

Q. Okay—

[DEFENSE COUNSEL]: Objection. Motion to strike.

THE COURT: Overruled.

Q. And what did he say about the girls that got killed?

A. It was him; that he did it.

Q. Did you see him say that he did it?

A. Yes.

Q. Did you hear him say that he did it?

A. Yes.

Q. Did you know him at the time?

A. I recognize him, his face. It was in the newspaper.

Defendant argues that this testimony was inadmissible under N.C.G.S. § 8C-1, Rules 404(b) and 801(d). For the reasons discussed below, we conclude that this testimony was admissible under Rule 801(d), and therefore, we decline to address defendant's argument under Rule 404(b).

N.C.G.S. § 8C-1, Rule 801(d) reads, in pertinent part, that "[a] statement is admissible as an exception to the hearsay rule if it is offered against a party and it is . . . his own statement, in either his individual or a representative capacity." N.C.G.S. § 8C-1, Rule 801(d)(a). Further, "[a]n admission is a statement of pertinent facts which, in light of other evidence, is incriminating." *State v. Trexler*, 316 N.C. 528, 531, 342 S.E.2d 878, 879-80 (1986).

The trial court found as fact that "Mr. Medina heard the defendant make some incriminating statements with regard to the defendant's involvement in the murders for which he is currently on trial." The trial court also found that "Mr. Medina heard and saw the defendant tell other inmates that 'I killed those girls and two more in Georgia.' " These findings of fact plus Medina's testimony regarding what he heard defendant say lead us to conclude that Medina's testimony was admissible as an admission by defendant under N.C.G.S. § 8C-1, Rule 801(d)(A).

[41] Next, defendant contends that the trial court erred by admitting into evidence videotapes and photographs that showed crime scenes and injuries with respect to Audrey Hall, Jacqueline Crump, Patricia Ashe, Sylvia Wilson, and Deborah Elliot. Defendant argues that the introduction of this evidence was inadmissible under N.C.G.S. § 8C-1, Rules 401 and 403. We disagree, and we will address each instance of alleged error with respect to each person listed above.

With regard to Audrey Hall, the trial court admitted exhibits AH-1 through AH-6, which included photographs of Hall. Defendant

contends that he objected to the introduction of these photographs. However, the State introduced these exhibits to illustrate Hall's testimony, and defendant did not object to the introduction of these exhibits at that time. Later in the trial, the State used these exhibits to illustrate Detective Poplin's testimony. A visual presenter was also set up in order to aid the testimony. At that time, defendant objected to the introduction of these photographs and "specifically renew[ed] the objection to the [specific] photo" that was being shown on the visual presenter. Defendant also reiterated that he specifically renewed his objection to all of the exhibits.

Defendant was mistaken in the belief that he had previously objected to the introduction of these exhibits. Since defendant did not object to the introduction of these exhibits during Hall's testimony, he has lost the benefit of his objection to these exhibits at this time, and he has failed to properly preserve this argument for appeal. *See* N.C.G.S. § 8C-1, Rule 103(a)(1); N.C. R. App. P. 10(b)(1). Even if defendant had objected, we conclude that these exhibits were not so cumulative in nature as to constitute undue prejudice. Thus, this assignment of error is overruled.

As to Jacqueline Crump, defendant contends that the trial court erred by allowing the State to introduce photographs that repeatedly showed the bloody wall of the tunnel and Crump's injuries. First, defendant cites no transcript reference that refers to the State's introduction of any photographs depicting Crump's injuries, and the State contends that it never introduced any photographs depicting Crump. Thus, the only photographs in issue are those of the crime scene.

At trial, when the State moved to introduce exhibits JC-4 through JC-15, which depicted the crime scene in the Crump case, defendant just said, "Objection." The trial court admitted the exhibits for the purpose of illustrating the testimony of City-County Bureau of Identification Agent Harley Frame, who took the photographs on 26 October 1995.

> A general objection, when overruled, is ordinarily not adequate unless the evidence, considered as a whole, makes it clear that there is no purpose to be served from admitting the evidence. Counsel claiming error has the duty of showing not only that the ruling was incorrect, but must also provide the trial court with a specific and timely opportunity to rule correctly.

State v. Jones, 342 N.C. 523, 535-36, 467 S.E.2d 12, 20 (1996) (citation omitted); *see also* N.C.G.S. § 8C-1, Rule 103(a)(1). We conclude that defendant's general objection to these exhibits was not adequate to preserve this assignment of error properly for appellate review. Therefore, this assignment of error is overruled.

With regard to the Patricia Ashe case, the exhibits included a videotape of the crime scene, photographs taken during the autopsy, and photographs of Ashe's body at the crime scene. At trial, defendant did not object to the admission of the photographs of Ashe's body at the crime scene, and he did not assign error to the admission of the photographs. Thus, the crime scene photographs are not in issue. *See* N.C. R. App. P. 10(c)(1); N.C. R. App. P. 28(b)(6).

Defendant contends that the videotape focused the jury on Ashe's body and that the autopsy photographs were repetitive. Defendant provides no other support for his argument except to make this blanket statement. We find nothing in the record or transcripts to conclude that the videotape or photographs were repetitive or that the trial court abused its discretion by allowing these exhibits to be admitted. Furthermore, defendant has not carried his burden by showing that even if it was error for the trial court to admit these exhibits, a different result would have been reached at trial had the trial court not committed this error. *See* N.C.G.S. § 15A-1443(a). Thus, these assignments of error are overruled with regard to this question presented.

Next, with regard to Sylvia Wilson, defendant argues that Investigator Lantam was shown a series of photographs of the crime scene and of Wilson's injuries. Defendant also contends that Lantam admitted that two of the exhibits were basically the same. Once again, defendant provides no argument in support of his contentions. Furthermore, we conclude that the photographs were not too gruesome or repetitive and cumulative as to violate N.C.G.S. § 8C-1, Rule 403. Therefore, this assignment of error is overruled.

Finally, as to Deborah Elliot, the State introduced exhibits consisting of eleven photographs taken at the crime scene, three photographs taken at Elliot's autopsy, and a videotape of the crime scene and Elliot's body at the Wake Medical Center morgue. Defendant argues that these exhibits were gruesome and repetitive and were thus inadmissible. We disagree.

"As a general rule, gory or gruesome photographs have been held admissible so long as they are used for illustrative purposes and are

not introduced solely to arouse the passions of the jury." *Warren*, 348 N.C. at 110, 499 S.E.2d at 448. Also, "[p]hotographs depicting '[t]he condition of the victim's body, the nature of the wounds, and evidence that the murder was done in a brutal fashion [provide the] circumstances from which premeditation and deliberation can be inferred.' " *State v. Hyde*, 352 N.C. 37, 54, 530 S.E.2d 281, 293 (2000) (quoting *Warren*, 348 N.C. at 111, 499 S.E.2d at 448), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001). Furthermore, this Court has previously stated the following:

> Photographs "showing the condition of the body when found, its location . . . , and the surrounding scene at the time . . . are not rendered incompetent by the portrayal of the gruesome events which the witness testifies they accurately portray." *State v. Elkerson*, 304 N.C. 658, 665, 285 S.E.2d 784, 789 (1982). Repetitive photographs may be introduced, even if they are revolting, as long as they are used for illustrative purposes and are not aimed solely at prejudicing or arousing the passions of the jury.

State v. Peterson, 337 N.C. 384, 393-94, 446 S.E.2d 43, 49 (1994). The same principles that apply to the admissibility of photographs apply to the admissibility of videotapes. *Blakeney*, 352 N.C. at 310, 531 S.E.2d at 816.

After reviewing the record and the exhibits, we conclude that the photographs and videotape submitted in the Elliot case were not so gruesome and repetitive as to require their inadmissibility. Applying the above principles and the requirements of N.C.G.S. § 8C-1, Rule 403, we also conclude that the trial court properly admitted this evidence. Therefore, these assignments of error are overruled as they pertain to this issue.

[42] Defendant next argues that the trial court erred by denying his motion to dismiss the murder and rape charges in the Patricia Ashe case at the end of the State's evidence and at the end of all of the evidence based on the insufficiency of the evidence. We disagree. The jury convicted defendant of first-degree murder based on premeditation and deliberation and based upon the felony murder rule, with rape as the underlying felony. The jury also convicted defendant of first-degree rape in the Ashe case.

The question that must be answered when presented with a motion to dismiss a charge at the close of all the evidence is

> whether, upon consideration of all the evidence in the light most favorable to the State, there is substantial evidence that the crime charged in the bill of indictment was committed and that defendant was the perpetrator. Substantial evidence is that amount of "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995).

State v. Armstrong, 345 N.C. 161, 164-65, 478 S.E.2d 194, 196 (1996) (citation omitted). "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382-83 (1988). In order to overcome a motion to dismiss, the evidence does not have to rule out every hypothesis of innocence. *See Golphin*, 352 N.C. at 458, 533 S.E.2d at 229. Furthermore, "contradictions and inconsistencies do not warrant dismissal; the trial court is not to be concerned with the weight of the evidence. Ultimately, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (citation omitted).

When viewing all of the evidence in the light most favorable to the State, we conclude that the trial court did not err in denying defendant's motion to dismiss the murder and rape charges in the Ashe case. The evidence at trial tended to show that DNA testing was conducted on vaginal swabs taken from Ashe and that a DNA match was found with defendant. Also, the doctor who performed the autopsy on Ashe's body concluded that Ashe died as a result of strangulation. Scrapes and scratches were found on both sides of Ashe's neck as well as on the front of her neck. Although the sexual encounter may have been voluntary in the beginning, the evidence indicates that at some point it turned involuntary as testified to by Dr. John Butts, who stated that the multiple scratches and scrapes on Ashe's neck are signs indicative of someone struggling. Furthermore, the Rule 404(b) evidence presented at trial showed that defendant would consistently choke his victims while raping or assaulting them, which would be consistent with the evidence in the Ashe case.

Other evidence at trial showed that there was evidence of crack cocaine use at the scene of the crime that was consistent with defendant's *modus operandi* of inducing women to go with him in

order to consume crack. Moreover, defendant denied to Detectives Poplin and Turner that he knew Patricia Ashe, but the DNA evidence refutes this statement. Finally, defendant's statement, overheard by Gustavo Medina, that he killed those girls provides further evidence in order to survive a motion to dismiss. Overall, the evidence presented in this case considered in the light most favorable to the State could permit a jury to find that these crimes were committed against Ashe and that defendant was the perpetrator of these crimes. Therefore, this assignment of error is overruled.

[43] Defendant also argues that it was error to submit as an aggravating circumstance N.C.G.S. § 15A-2000(e)(5), which provides that "[t]he capital felony was committed while the defendant was engaged . . . in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any . . . rape or a sex offense." However, we have found no instance where defendant objected to the submission of this aggravating circumstance at trial, and defendant has cited no transcript page in which he objected to the submission of this aggravating circumstance. Thus, defendant has failed to properly preserve this alleged error and has therefore waived appellate review of this issue. *See* N.C. R. App. P. 10(b)(1); *Thomas*, 350 N.C. at 363, 514 S.E.2d at 515. Accordingly, this assignment of error is overruled.

[44] Defendant next contends that the trial court erred by denying his motion to dismiss the murder charge in the Deborah Elliot case, both at the end of the State's evidence and at the end of all of the evidence, based on the insufficiency of the evidence. The jury convicted defendant of first-degree murder of Elliot based upon premeditation and deliberation and under the felony murder rule with attempted rape as the underlying felony. Specifically, defendant argues that the evidence was insufficient in order to determine that defendant was the perpetrator of the murder and that the evidence was insufficient in order to determine that defendant attempted to rape Elliot. We disagree and will discuss each argument separately.

As to the sufficiency of the evidence that defendant was the perpetrator of the Elliot murder, there was enough evidence to submit the charge to the jury. As previously stated, Elliot's body was found in a building that was formerly part of the Pine State Creamery. Defendant was familiar with this area because he had stayed there three weeks earlier with Cynthia Pulley. Shoe tracks inside the dispatcher's shack were determined to be consistent with the soles of

Elliot's shoes. Defendant's shoe print was also found inside the shack. It was also determined that the shoe print was fresh since the area was very dusty, and dust had not yet covered the shoe print. Also, defendant told Detectives Poplin and Turner through his statement of 25 February 1997 that he had witnessed Elliot's murder by looking into the bay area of the building through a gap in a roll-up door. Detective Poplin testified that he attempted to look into the bay area through the roll-up door, with the door lifted up to about the size that defendant said the door was open, and he determined that it was not possible to see the events that defendant described. Defendant told the detectives where the murder took place, the nature of the weapon, and the nature of the blows. Defendant had also lied to Detective Curtis Womble and Officer A.S. Odette as to when he had last seen Elliot.

Furthermore, Elliot had been choked, and the scratches on her neck were consistent with the marks that defendant had left on his other victims. Also, the crime scene was close to the house where defendant had stayed with Cynthia Pulley and was about four blocks from the location where the attacks on Kimberly Warren and Shelly Jackson took place. On a final note, Gustavo Medina, while in the Wake County jail, overheard defendant say that he had killed those girls.

Overall, the evidence presented in this case, considered in the light most favorable to the State, could permit a jury to find that defendant was the perpetrator of the murder of Deborah Elliot. Thus, the trial court did not err in denying defendant's motions to dismiss, thereby allowing the jury to decide whether defendant was the perpetrator of the Elliot murder.

[45] Next, as to the sufficiency of the evidence that defendant attempted to rape Elliot, which evidence was the basis for the felony murder conviction, we conclude that the evidence was sufficient to survive defendant's motions to dismiss.

"The elements of an attempt to commit any crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996). First, Elliot's body was found naked except for her shoes and socks. Elliot's bra had been cut apart, and a couple of buttons appeared to have been torn off of her shirt. Rule 404(b) evidence tended to show that defendant lured his victims to isolated

locations where he would assault them in part by choking them while raping or attempting to rape them. The evidence showed that Elliot was choked, which was consistent with some of defendant's other victims. Considering all of this evidence in the light most favorable to the State, we conclude that a reasonable inference could be made that defendant attempted to rape Elliot. Therefore, the trial court did not err by permitting the jury to find that defendant attempted to rape Elliot.

[46] Once again, defendant argues that the trial court erred by submitting N.C.G.S. § 15A-2000(e)(5) as an aggravating circumstance. As stated previously, we have found no instance where defendant objected to the submission of this aggravating circumstance at trial, and defendant has cited no transcript page in which he objected to the submission of this aggravating circumstance. Thus, defendant has failed to properly preserve this alleged error and has therefore waived appellate review of this issue. *See* N.C. R. App. P. 10(b)(1); *Thomas*, 350 N.C. at 363, 514 S.E.2d at 515. Therefore, this assignment of error is overruled.

[47] In defendant's next question presented, he argues that the trial court erred by not giving the jury an alibi instruction with respect to the Audrey Hall case.

During the charge conference at the guilt-innocence phase of the trial, the judge asked the parties for any specific instructions that they would like the judge to consider. With respect to an alibi instruction, defendant just responded "301.10, alibi." The State objected to the alibi instruction on the basis that there was no evidence to warrant the instruction. Defendant responded by arguing that there was evidence that defendant had an alibi for the Deborah Elliot case, but defendant did not make an argument for an alibi instruction with regard to the other victims. The judge ultimately gave the jury an alibi instruction only for the Elliot case. At the end of the jury charge, defendant objected to the alibi instruction being limited to just the Elliot case. The judge responded that he gave the instruction that defendant requested. Defendant then argued that there was evidence to support the instruction in the Audrey Hall case. For the reasons discussed below, defendant failed to properly request the alibi instruction with regard to the Audrey Hall case.

"[S]ince the decision in *State v. Hunt*, 283 N.C. 617, 197 S.E.2d 513 (1973), the trial judge is not required to instruct on alibi unless defendant specifically requests such instruction." *State v. Waddell*,

289 N.C. 19, 33, 220 S.E.2d 293, 303 (1975) (citation altered), *death sentence vacated,* 428 U.S. 904, 49 L. Ed. 2d 1210 (1976). In this case, defendant did not request an alibi instruction for the Audrey Hall case until after the jury charge. Defendant's request was with regard only to the Deborah Elliot case. Furthermore, the evidence in the Hall case was insufficient to support an alibi instruction. The only evidence suggesting alibi was on cross-examination of Cynthia Pulley when she stated that she could not recall when in May 1996 defendant had left for his trip to Augusta, Georgia. This does not constitute enough evidence to support an alibi instruction. Thus, defendant did not properly request the alibi instruction, nor did the evidence support the instruction. Therefore, this assignment of error is overruled.

[48] In defendant's next question presented, he argues that the trial court erred by giving a general flight instruction and a flight instruction with regard to first-degree murder cases. The State requested the instructions, to which defendant objected, but defendant eventually conceded that the instruction was appropriate in the Shelly Jackson case. The trial court ultimately gave the following instruction to the jury with regard to flight:

> The State contends and the defendant denies that the defendant, Mr. Williams, fled at the time of these alleged offenses. 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 a consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish the defendant's guilt of any crime.
>
> Further, this circumstance has no bearing on the question of whether the defendant acted with premeditation and deliberation in the two murder charges. Therefore, it must not be considered by you as evidence of premeditation or deliberation in those two cases.

Defendant argues that the evidence did not support this instruction in any case except the Jackson case. We will not address the instruction with regard to the Jackson case because defendant conceded that the instruction in that case was correct, and we will also not address the instruction with regard to the Vicki Whitaker case because defendant was acquitted in that case.

We first note that defendant has provided virtually no factual support in his brief for his argument that the flight instruction was not supported by the evidence. In *State v. Steen*, 352 N.C. 227, 264, 536 S.E.2d 1, 23 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001), this Court determined that the defendant abandoned his assignment of error because he did not specifically assess the evidence or make an argument with cited authorities, and therefore, the assignment of error was not presented in a way for this Court to give it meaningful review. *See also* N.C. R. App. P. 28(a), (b)(5). However, even assuming *arguendo* that the flight instruction was improper as to the other victims, we hold that defendant has failed to show prejudice as required by N.C.G.S. § 15A-1443(a), and we cannot conclude that a different result would have been reached at trial had the trial court not given this instruction. Accordingly, this assignment of error is overruled.

SENTENCING ISSUES

[49] Next, defendant contends that the trial court committed plain error at the capital sentencing proceeding by instructing the jury on the mitigating circumstance set forth in N.C.G.S. § 15A-2000(f)(1) and thereby allowing the State to introduce evidence of prior incidents committed by defendant that were "irrelevant and grossly prejudicial." We disagree.

As defendant concedes, since he did not object to this mitigating circumstance being admitted at the time (he actually considered requesting it himself at one point), we must review this issue under a plain error analysis to determine whether defendant is entitled to a new capital sentencing proceeding. *See* N.C. R. App. P. 10(c)(4).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). Thus, in our review of the record for plain error, we must determine whether the submission of the (f)(1) mitigator and the subsequent rebuttal evidence by the State "was so egregious and prejudicial that defendant was not able to receive a fair sentencing proceeding as a result of the trial court's decision." *State v. Lemons*, 352 N.C. 87, 97, 530 S.E.2d 542, 548 (2000), *cert. denied*, 531 U.S. 1091, 148 L. Ed. 2d 698 (2001). After reviewing the whole record, we find no plain error.

N.C.G.S. § 15A-2000(f)(1) reads: "The defendant has no significant history of prior criminal activity." In response to the (f)(1) mitigator, the rebuttal evidence by the State included the following: (1) a forgery conviction from the State of Georgia; (2) misdemeanor convictions for simple battery and simple assault against Carolyn Barker and criminal trespass against the property of Rusty Griffin, all of which occurred in Georgia; (3) information dealing with a probation violation based on a shoplifting charge and having contact with Carolyn Barker; (4) the charges stemming from the assault on Sylvia Wilson in Georgia, to which Wilson had already testified during the trial; (5) a misdemeanor charge of harassing phone calls to Carolyn Barker; (6) a simple battery charge involving Carolyn Barker; (7) an indictment for burglary against Gwendolyn Smoot, which was reduced to criminal trespass; and (8) a charge of motor vehicle theft, which was not pursued because defendant was being charged for an offense in another county.

The jury had just found defendant guilty of the first-degree murder of Deborah Elliot, the first-degree murder of Patricia Ashe, the first-degree rape of Patricia Ashe, the first-degree rape of Audrey Hall, the first-degree sexual offense of Audrey Hall, the assault with a deadly weapon with intent to kill inflicting serious injury on Audrey Hall, the first-degree rape of Jacqueline Crump, the assault with a deadly weapon with intent to kill inflicting serious injury on Jacqueline Crump, the attempted first-degree rape of Shelly Jackson, the assault with a deadly weapon with intent to kill on Shelly Jackson, and the assault with a deadly weapon of Kimberly Warren. Based on these findings by the jury, we conclude that any alleged error by the trial court in allowing the (f)(1) mitigator to be introduced and thereby allowing the State's rebuttal evidence was not "so egregious and prejudicial that defendant was not able to receive a

fair sentencing proceeding as a result of the trial court's decision," and therefore it did not rise to the level of plain error. *Lemons*, 352 N.C. at 97, 530 S.E.2d at 548. Accordingly, this assignment of error is overruled.

[50] Defendant next argues that his execution would violate provisions of the International Covenant on Civil and Political Rights, which this country ratified on 8 September 1992. Specifically, defendant argues that the long delays between sentencing and execution and the conditions in which death row inmates are kept constitute "cruel, inhuman or degrading treatment or punishment" in violation of article VII of the covenant, and because of errors briefed in this appeal, the death penalty in this case constitutes the arbitrary deprivation of life in violation of article VI, section 1 of the covenant.

This issue was presented to this Court and specifically overruled in *State v. Smith*, 352 N.C. 531, 566, 532 S.E.2d 773, 795 (2000), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360 (2001). Defendant has presented no new arguments or any compelling reason for this Court to reconsider the issue in the present case. Therefore, this assignment of error is overruled.

[51] In defendant's next question presented before this Court, he contends that the trial court erred in determining that his prior record level was VI rather than V and that the trial court therefore erred in sentencing him for his noncapital felony convictions. The trial court added a point to defendant's prior record level as authorized under N.C.G.S. § 15A-1340.14(b)(6), which provides: "If all the elements of the present offense are included in the prior offense, 1 point." N.C.G.S. § 15A-1340.14(b)(6) (Supp. 1996) (amended 1997). The additional point that the trial court added pursuant to this section gave defendant a total of nineteen points, causing defendant to be placed in the highest prior record level, level VI. *See* N.C.G.S. § 15A-1340.14(c). Without this extra point, defendant would have been sentenced according to prior record level V. *Id.*

The State concedes that "[t]he error in adding a point under N.C.G.S. § 15A-1340.14(b)(6) arises because the only relevant prior offenses for the purposes of that subdivision were defendant's convictions in Georgia in 1977 for attempted rape and aggravated assault. The State cannot establish that all the elements of the present offenses are included in these two prior offenses." Thus, the State concedes this issue in that the trial court erred by adding a point to

defendant's prior record level and that the extra point resulted in longer sentences for the noncapital felony offenses.

However, the State does not concede this issue as it relates to defendant's conviction against Jacqueline Crump for assault with a deadly weapon with intent to kill inflicting serious injury. The State argues that the trial court imposed the longest minimum sentence in the presumptive range allowed by N.C.G.S. § 15A-1340.17(c) for each felony conviction, under the theory that defendant's prior record level was VI. If the trial court had considered defendant's prior record level to be V, then the court could not have imposed minimum sentences of such duration. However, the State continues by stating that in the Crump assault, the trial court broke away from this practice and sentenced defendant to a minimum of 145 months, although the highest minimum term for this class C felony at prior record level VI is 168 months. Under the State's theory, 145 months falls within the range for minimum presumptive sentences for class C felonies at a prior record level V, and therefore, the trial court may have been somewhat lenient in the Crump assault case. Thus, the State contends that defendant has not suffered any harm in the sentence for the Crump assault from the trial court's error finding defendant to have a prior record level of VI. We disagree.

Defendant was sentenced at an incorrect prior record level, and the trial court sentenced defendant according to this incorrect prior record level. We are not persuaded by the State's contention that defendant was not harmed because the trial court could have sentenced defendant to lesser time for the Crump assault if the proper prior record level had been calculated. If the trial court was lenient with regard to sentencing defendant in the Crump assault case, as the State contends, then that is for the trial court to determine, not the State. Therefore, we remand this case for resentencing on only the noncapital felony convictions at a prior record level V.

PRESERVATION ISSUES

Defendant raises nine additional issues which he concedes have been previously decided contrary to his position by this Court: (1) the trial court erred in denying defendant's motion to strike the death penalty on the ground that it is unconstitutional, and the court committed plain error by imposing a sentence of death that was arbitrary and conflicted with the constitutional requirement of individualized sentencing; (2) the trial court erred in its denial of defendant's

motion to restrict death-qualification of the jury; (3) the trial court erred in its denial of defendant's motion to bifurcate the jury; (4) the trial court erred by instructing the sentencing jury that a unanimous verdict was required for defendant to receive a sentence of life imprisonment; (5) the trial court erred by using the term "may" in its instructions in sentencing Issue Three; (6) the trial court erred by instructing the jurors that they had a duty to recommend a sentence of death if they unanimously answered "yes" to Issue Four; (7) the (e)(9) aggravating circumstance that a murder is "especially heinous, atrocious, or cruel" is unconstitutionally vague and arbitrary; (8) the trial court erred by denying defendant's pretrial motion for individual jury *voir dire*; (9) the trial court erred by granting the State's motion to limit defendant's questions on *voir dire*.

Defendant raises these issues in order to urge this Court to re-examine its prior holdings with regard to these issues. We have considered defendant's arguments on these issues, and we find no compelling reason to reverse our prior holdings. Therefore, the assignments of error presented under this issue are overruled.

PROPORTIONALITY REVIEW

[52] 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) (2001).

In the instant case, defendant was convicted of two counts of first-degree murder. Each conviction was based both on premeditation and deliberation and under the felony murder rule.

Following the capital sentencing proceeding as to the Elliot murder, the jury found the following submitted aggravating circumstances: 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); the murder was committed by defendant while defendant was engaged in an attempt to commit first-degree rape, N.C.G.S. § 15A-2000(e)(5); the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and the murder was part of

a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11).

Also, as to the Elliot murder, the jury found two statutory mitigating circumstances: that the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2), and that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(6). Two additional statutory mitigating circumstances were submitted to but not found by the jury: defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1), and the catchall statutory mitigating circumstance, N.C.G.S. § 15A-2000(f)(9). Of the twenty-five nonstatutory mitigating circumstances submitted, the jury found that seventeen had mitigating value.

As to the Ashe murder, the jury found the following submitted aggravating circumstances: 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); the murder was committed by defendant while defendant was engaged in the commission of first-degree rape, N.C.G.S. § 15A-2000(e)(5); and the murder was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11). The jury did not find the (e)(9) aggravator in this case, that the murder was especially heinous, atrocious, or cruel.

Also, as to the Ashe murder, the jury found two statutory mitigating circumstances: that the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2), and that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(6). Two additional statutory mitigating circumstances were submitted to but not found by the jury: defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1), and the catchall statutory mitigating circumstance, N.C.G.S. § 15A-2000(f)(9). Of the twenty-four nonstatutory mitigating circumstances submitted, the jury found that sixteen had mitigating value.

After thoroughly reviewing the record, transcripts, and briefs in this case, we conclude that the evidence fully supports as to each murder the aggravating circumstances found by the jury. 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." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

In our proportionality review, it is proper to compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). This Court has determined that the sentence of death was disproportionate in seven cases. *Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *Young*, 312 N.C. 669, 325 S.E.2d 181; *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *Bondurant*, 309 N.C. 674, 309 S.E.2d 170; *Jackson*, 309 N.C. 26, 305 S.E.2d 703.

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. In the instant case, defendant was also convicted on the theory of premeditation and deliberation as to each murder. We have said that "[t]he finding of premeditation and deliberation indicates a more cold-blooded and

calculated crime." *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). Additionally, this Court has never found a sentence of death to be disproportionate in a case where the jury found a defendant guilty of murdering more than one victim. *State v. Goode*, 341 N.C. 513, 552, 461 S.E.2d 631, 654 (1995).

Finally, as previously stated, in each murder, the jury found the following aggravating circumstances: (1) defendant had been previously convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3); (2) in the Ashe case, the murder was committed while defendant was engaged in the commission of first-degree rape, and in the Elliot case the murder was committed while defendant was engaged in attempted first-degree rape, N.C.G.S. § 15A-2000(e)(5); and (3) the murder was part of a course of conduct in which defendant engaged and that course of conduct included the commission by defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11). The jury also found as to one of the victims the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). "There are four statutory aggravating circumstances which, standing alone, this Court has held sufficient to support a sentence of death." *Wallace*, 351 N.C. at 535, 528 S.E.2d at 360 (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)). The N.C.G.S. § 15A-2000(e)(3), (e)(5), (e)(9), and (e)(11) statutory aggravating circumstances which the jury found in these two murders ((e)(9) was found only in the Elliot murder) are among those four aggravating circumstances. *See id.*

It is also proper for this Court to "compare this case with the cases in which we have found the death penalty to be proportionate." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. In addition, while it is important for this Court to review all the cases in the pool when engaging in our duty of proportionality review, "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.* It is sufficient to state that we have concluded that the instant case is more similar to cases in which we have found the death penalty proportionate than to those in which we have found the sentence of death disproportionate.

Based on the foregoing and the entire record in this case, we cannot conclude as a matter of law that the sentences of death were either excessive or disproportionate. 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. We further conclude that defendant's trial on the noncapital charges was free from prejudicial error, but we remand those cases for resentencing as discussed previously herein.

NO. 97CRS8388, NO. 97CRS17582, FIRST-DEGREE MURDER: NO ERROR.

NO. 97CRS17583, NO. 97CRS17584, FIRST-DEGREE RAPE: REMANDED FOR RESENTENCING.

NO. 97CRS17587, FIRST-DEGREE SEXUAL OFFENSE: REMANDED FOR RESENTENCING.

NO. 97CRS17588, ASSAULT WITH A DEADLY WEAPON: REMANDED FOR RESENTENCING.

NO. 97CRS17590, NO. 97CRS17591, ASSAULT WITH A DEADLY WEAPON WITH INTENT TO KILL INFLICTING SERIOUS INJURY: REMANDED FOR RESENTENCING.

NO. 97CRS8000, ATTEMPTED FIRST-DEGREE RAPE: REMANDED FOR RESENTENCING.

NO. 97CRS8001, ASSAULT WITH A DEADLY WEAPON WITH INTENT TO KILL: REMANDED FOR RESENTENCING.

STATE OF NORTH CAROLINA v. KEITH DEDRICK WILEY

No. 100A01

(Filed 28 June 2002)

1. Search and Seizure— Fourth Amendment—expectation of privacy—letters from prison inmate

The trial court did not err in a capital first-degree murder prosecution by admitting a letter written by defendant while in the New Hanover jail which was read by jail personnel pursuant

to an announced policy. Defendant did not have a subjective expectation of privacy in the unsealed envelope he handed to a deputy and, even if he did, that expectation was not objectively reasonable.

2. Appeal and Error— juvenile adjudication—aggravating circumstance—motion for appropriate relief—ineffective assistance of counsel--claims not before Supreme Court

The substance of a motion for appropriate relief presented in defendant's prior juvenile case, which resulted in an adjudication of delinquency used as an aggravating circumstance in defendant's capital sentencing proceeding, was not properly before the Supreme Court in an appeal from defendant's first-degree murder conviction and sentence of death where the Court had previously denied review of the trial court's ruling on that motion. Furthermore, defendant's ineffective assistance of counsel claim with regard to his attorney's handling of the motion for appropriate relief in the juvenile case was inappropriate in defendant's appeal from the murder conviction and death sentence but must be raised in a separate proceeding.

3. Appeal and Error— preservation of issues—jury selection

A defendant in a capital first-degree murder prosecution did not preserve for appeal the issue of whether the trial court erred by dividing prospective jurors into separate panels where defendant waived review on constitutional grounds by not challenging the organization of the jury panels at trial, waived his statutory allegations by failing to comply with the requirements of N.C.G.S. § 15A-1211(c), and did not preserve plain error review with a mere statement in a footnote.

4. Jury— selection—views on death penalty

The trial court in a capital prosecution for first-degree murder did not err by excusing a prospective juror for cause because of his views on the death penalty where the juror initially indicated his ability to vote for the death penalty and follow the judge's instructions, then stated that he would automatically vote for life imprisonment without parole.

5. Jury— selection—capital punishment—stake-out questions

The trial court did not err in a capital first-degree murder prosecution by not allowing defense counsel to ask prospective

jurors improper stake-out questions concerning the kind of fact scenarios they would deem worthy of the death penalty or worthy of life imprisonment. Defendant was permitted to ask whether prospective jurors felt that the death penalty was the only appropriate punishment for premeditated and deliberate murder.

6. Sentencing— capital—prosecutor's characterization of process

The trial court did not err during jury selection in a capital first-degree murder prosecution by allowing the prosecutor to refer to the capital sentencing procedure with terms such as "highly structured," "tightly structured," and "rigid." Defendant's failure to object to some characterizations waived his argument and it could not be resurrected by alleging plain error; the alleged error is not analogous to cases where structural error has been found to exist; and, as to the instances where defendant objected, the trial court's instructions to the jury cured any error.

7. Constitutional Law— effective assistance of counsel—reference in opening argument to physical evidence—not an admission

A capital first-degree murder defendant was not denied effective assistance of counsel where his attorney in her opening statement may have signaled that physical evidence would link defendant to the victim's car, but she made it clear that such evidence was of dubious validity. In context, her statements hardly constitute an admission; moreover, admitting a fact is not equivalent to an admission of guilt.

8. Criminal Law— prosecutor's closing argument—description of evidence—not grossly improper

There was no gross impropriety requiring the trial court to intervene ex mero motu in a capital first-degree murder prosecution where defendant contended that the State in its closing argument made statements not supported by the evidence. The purpose of the State's argument was to respond to defendant's attacks on its witness's inconsistent statements and was within the wide latitude afforded counsel in making arguments.

9. Criminal Law— prosecutor's closing argument—credibility of witnesses

The prosecutor did not improperly vouch for the credibility of the State's witnesses during the closing argument in a capital

prosecution for first-degree murder where the prosecutor was merely giving the jury reasons to believe State's witnesses who had given prior inconsistent statements and who had at first been unwilling to cooperate with investigators.

10. Appeal and Error— preservation of issues—mere allegation of plain error—insufficient

Defendant did not preserve the issue of whether the trial court erred in a capital sentencing proceeding by not suppressing a juvenile delinquency adjudication based upon an admission of solicitation to murder on the ground that N.C.G.S. § 15A-2000(e)(3) conflicted with former N.C.G.S. § 7A-638 where defendant failed to make this argument at trial; merely relying on the words "plain error" without explaining why the error rises to that level waives appellate review.

11. Constitutional Law— ex post facto prohibition—use of juvenile plea in capital sentencing

The submission of a prior juvenile adjudication in a capital sentencing proceeding did not violate the ex post facto prohibition, even though defendant's delinquency plea came before the amendment to N.C.G.S. § 15A-2000(e)(3) allowing juvenile adjudications to be submitted as aggravating circumstances. Defendant is being punished for the present offense of first-degree murder rather than receiving additional punishment for his 1992 delinquent conduct. U.S. Const. art. I, § 10; N.C. Const. art. I, § 16.

12. Evidence— letter written by juvenile—from law enforcement files—admissible

The trial court did not err in a capital sentencing proceeding by admitting a letter written by defendant when he was fourteen that formed the basis of his juvenile adjudication for solicitation to commit murder where the letter was introduced from Sheriff's Department files through the testimony of the investigating officer. Although there was statutory protection for juvenile court records, there is no prohibition against the use of law enforcement records and the State properly introduced the evidence to illustrate the circumstances surrounding the prior adjudication.

13. Sentencing— capital—merging jury instructions—not an unrecorded charge conference

There was no prejudicial error in an alleged unrecorded charge conference in a capital sentencing proceeding where, at the end of one day, the trial court directed the parties to submit their proposed aggravating and mitigating circumstances by the next morning, court resumed the next afternoon, when the court apologized for keeping the jury waiting and explained that they had been working all morning on jury instructions, trying to merge two versions of word processing. Defendant did not argue that he was absent from court at any time or that his right to be present was violated and did not establish that what took place was an unrecorded charge conference rather than a clerical session. N.C.G.S. § 15A-1231(b).

14. Appeal and Error— preservation of issues—suggestion by judge—failure to assign error

Defendant's unsupported argument that the trial court erred in a capital sentencing proceeding by suggesting that the State look at the pattern jury instructions after the State submitted its proposed aggravating circumstances was not properly preserved for appellate review where defendant did not assign error. Moreover, the trial court did not err.

15. Sentencing— capital—prosecutor's argument—disparagement of defendant's expert

The trial court did not err by not intervening ex mero motu during the State's closing argument in a capital sentencing proceeding when the State disparaged defendant's expert witness. The State's argument was aimed at questioning the witness's ability to make a meaningful diagnosis after spending ninety minutes with defendant.

16. Sentencing— capital—prosecutor's argument—proceeding tightly structured

There was no error in a capital sentencing proceeding where the State in its closing argument characterized the proceeding as rigid and tightly structured. Although defendant argued that the comments invited the jury to disregard defendant's right to an individualized sentencing proceeding, viewed in context the prosecutor's argument proposed only that rules must be applied to capital sentencing and stressed that the jurors not base their decision on impermissible grounds.

17. Sentencing— capital—aggravating circumstances—evidence—double counting—limiting instruction—separate evidence

The trial court did not permit the jury in a capital sentencing proceeding to rely upon the same evidence in finding the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious or cruel that it used to find either of the two aggravating circumstances submitted under N.C.G.S. § 15A-2000(e)(5) that the murder occurred during the commission of an armed robbery or a first-degree kidnapping where the court instructed the jury that the same evidence could not be used as a basis for finding more than one aggravating circumstance, and there was substantial evidence of the especially heinous, atrocious, or cruel nature of the killing apart from the evidence that the murder was committed during the commission of a kidnapping or an armed robbery.

18. Sentencing— capital—instructions—life imprisonment without parole

The trial court did not err in a capital sentencing proceeding in its instructions on life imprisonment. Nothing in N.C.G.S. § 15A-2002 requires the judges to say "life imprisonment without parole" every time they allude to or mention the alternative sentence and the court's instruction in this case met the statutory instruction.

19. Sentencing— capital—death penalty not disproportionate

A sentence of death for first-degree murder was not disproportionate where the jury found defendant guilty under the theory of premeditation and deliberation and under the felony murder rule, and the jury found five aggravating circumstances, including two circumstances submitted under N.C.G.S. § 15A-2000(e)(5) that the murder was committed during the commission of first-degree kidnapping and during the commission of an armed robbery.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Lanier, J., on 27 May 1999 in Superior Court, New Hanover County, upon a jury verdict finding defendant guilty of first-degree murder. On 10 May 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 12 February 2002.

Roy Cooper, Attorney General, by Robert C. Montgomery, Assistant Attorney General, for the State.

Margaret Creasy Ciardella for defendant-appellant.

MARTIN, Justice.

On 3 November 1997 Keith Dedrick Wiley (defendant) was indicted for the first-degree murder of George Richard "Richie" Futrelle, II (Futrelle or the victim). Defendant was tried capitally at the 10 May 1999 session of Superior Court, New Hanover County, and on 25 May 1999, the jury found defendant guilty of first-degree murder based on malice, premeditation, and deliberation and under the felony murder rule. Following 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 entered consecutive sentences of 116 to 149 months for first-degree kidnapping and 103 to 133 months for robbery with a dangerous weapon. Defendant gave notice of appeal.

The state's evidence at trial tended to show the following: On 18 October 1997, fourteen-year-old Alicia Doster ran away from home to live with defendant and another male named Justin Pallas in an abandoned house located at 440 Morning Glory Drive in Wilmington. On the morning of 20 October 1997, Doster heard defendant say he was going to kill Richie Futrelle because Futrelle owed him twenty or twenty-five dollars for cocaine snorted the previous night. Defendant later explained to Doster and Pallas that he planned to kill Futrelle whether or not Futrelle had the money owed to defendant. Doster testified that Pallas asked Futrelle to come to the abandoned house. Defendant told Doster that his plan to kill Futrelle was as follows: Defendant and Pallas were to beat Futrelle after he sat down on the bed in a back bedroom, and then Doster was to give defendant and Pallas some cables to tie Futrelle up.

When the victim arrived at the abandoned house, defendant hit Futrelle in the head with a juice bottle. Futrelle fell to the floor, whereupon defendant and Pallas kicked and beat him. Defendant and Pallas took the victim's wallet, and defendant placed it in his jeans. Doster and Pallas then gagged the victim with a bandanna and hog-tied his hands and feet with the cables.

Defendant and Pallas then put the victim—still bound and gagged—into the trunk of the car in which he had arrived. The victim

repeatedly banged on the trunk and called out for help. In response, Pallas turned up the radio, and defendant commented on the song playing, saying, "this is the shit."

They drove to a remote area off Murrayville Road. When they opened the trunk, they saw that Futrelle had freed himself from the cables and was trying to get up. They removed him from the trunk and forced him to his knees so they could tie him up again. Doster gagged Futrelle while defendant and Pallas tied his hands behind his back and bound his feet so he could barely walk. As Doster followed behind with the gun, defendant and Pallas led Futrelle to a ditch filled with water and laid him on his back. Futrelle freed himself and tried to run, screaming, "no, man, no, don't do it." Defendant fired the gun at Futrelle, handed the gun to Pallas, and told him to "finish him off." Pallas then shot Futrelle twice.

Defendant, Pallas, and Doster then drove to the residence of John Mullins. En route, defendant and Pallas discussed how they shot Futrelle. Upon their arrival, defendant and Pallas told Mullins how they had killed Futrelle. Defendant told Doster to dispose of the victim's wallet, which Doster did. Defendant and Pallas returned to the victim's car and wiped it down to clean it. En route, they ran into friends Brian Jacobs and Jeremy Joesting, to whom they described the killing.

Deputy Carlton Floyd and Detective Kevin Foss of the New Hanover County Sheriff's Department went to the abandoned house around 3:00 p.m. the same day searching for Doster and Doster's car, which she had taken from her mother. They saw that the house was in disarray, and they found the car behind the house. Inside the house, they found a sawed-off .410 shotgun, a jacket, and some tools. The detectives, at that time unaware of Futrelle's murder, went to Mullins' house. When Mullins arrived at the door, Detective Floyd and other officers entered the residence and apprehended Doster and Pallas. Upon patting down Pallas, Detective Floyd found a box of .410 shotgun shells in his right pants pocket. Officers found a twelve-gauge shotgun, knives, and drug paraphernalia in the house. Defendant, Pallas, Doster, and Mullins were arrested, handcuffed, and transported to the Sheriff's Department for processing on various charges. During the booking process at the jail, Pallas took the victim's car keys out of his pocket and put them on the floor, where they were discovered by a jailer.

On 21 October 1997, Futrelle's mother called the police to report that her son was missing. On 23 October 1997, hunters contacted police about a body in a ditch off Murrayville Road. Deputy B.E. Parker and other officers from the Sheriff's Department went to the scene and observed the body of a man face-down in shallow water with his feet bound. Crime scene investigator Larry Hines observed three wounds, two on the back and one in the arm. The victim's feet were bound with a belt and cord, but the hands were not tied. Hines found tied cord about seven feet from the body. Officers also found plastic wadding from a shotgun shell when the body was rolled over and found another piece of wadding nearby.

Jim Gregory, special agent and forensic chemist with the State Bureau of Investigation (SBI), examined the cords and cables and determined that those found on Futrelle's body matched those recovered at the abandoned house.

An autopsy of Futrelle's body, performed by Onslow Memorial Hospital pathologist Dr. John Almeida, revealed a large, gaping gunshot wound in the right arm above the elbow, with an entrance in the front and an exit in the back. Dr. Almeida testified that this wound would have been painful but not fatal. The body also had a shotgun wound on the left thigh, two pellet wounds to the chest, and shotgun wounds to the back and buttock area. The slug to the victim's thigh broke his hip and would have been very painful but only fatal if left untreated. The buckshot in the victim's back, which ripped through his left lung and ruptured his aorta, also would have been very painful and immediately fatal. The slug to the victim's buttock damaged his kidney and partially ruptured the left lobe of his liver, which would have been excruciatingly painful and would have caused death in five to ten minutes. Dr. Almeida testified that the cause of death was multiple shotgun wounds.

On 23 October 1997, Deputy Floyd learned that Futrelle wore a white baseball cap and recalled that he had seen a white baseball cap at the abandoned house. Deputy Floyd went to visit Doster at her mother's home, but Doster said she knew nothing about Futrelle's death. On 26 October 1997, Doster went to the Sheriff's Department for an interview. While at the Sheriff's Department, Doster told officers that she was the one who had tied up Futrelle, had put him in the trunk, and had driven to the Murrayville Road location. She said that she did not see who shot Futrelle and that she did not know where his car was taken. She later testified that she did not tell the truth at the Sheriff's Department because she was scared and wanted to pro-

tect defendant and Pallas, whom she believed would get into more trouble than she would as a juvenile.

After Doster talked with officers at the Sheriff's Department on 26 October, Investigator Mike Sorg transported her to the juvenile service center. While en route to the center, Doster told Sorg that she felt bad about what had happened and that she had taken credit for something she did not do. Doster took Sorg to the area where defendant and Pallas had left Futrelle's car, and the next day, Sorg found the car in the woods. Deputy Hines examined the car and the surrounding area, and found a cord, a dishcloth, and an ashtray. No usable fingerprints were found on the car.

Eugene Bishop, SBI special agent assigned to the firearm and tool mark section, performed tests on the twelve-gauge shotgun. The tests showed that the shotgun was fired less than two feet from Futrelle's back. The wound in Futrelle's arm was consistent with having been caused by a shot from less than two feet away.

Charles Brown, an inmate housed in the same cell as defendant, informed investigators that defendant stated that he had killed a man because he was angry about a drug debt. Defendant said he shot the victim with a sawed-off shotgun once in the arm and once in the leg, causing the victim to fall into a ditch. Defendant said he handed the gun to another man, who went into the ditch and shot the victim.

Defendant presented no evidence in the guilt phase of the trial. Additional facts are provided as necessary below.

PRETRIAL AND JURY SELECTION ISSUES

[1] Defendant argues that the trial court committed reversible error by denying his motion to suppress a letter intercepted by jail personnel. The letter contained the word "alibi" and listed various dates, times, and information concerning defendant's whereabouts and activities. The state used the letter during its case-in-chief as evidence tending to show that defendant was attempting to manufacture an alibi.

Evidence presented on *voir dire* showed that defendant had asked personnel at the New Hanover County jail to give an unsealed letter to defendant's father, who had visited defendant and who was still in the waiting room. In accordance with jail policy for incoming and outgoing mail without the words "legal mail" written on them and

not addressed to an attorney, Deputy Sheriff Ingram Cephas scanned the letter "to make sure there[] [was] no contraband or any issues which might lead to . . . a jail break or possible harm to any deputies" and to make sure detainees were not "communicating between cell blocks." Detainees are told of mail inspection policy when they enter the jail. Cephas testified that it was common practice for inmates to leave their nonlegal mail unsealed because they are aware of the subsequent examination of their mail by jail officials. While scanning the letter, Cephas saw dates that might have something to do with the case. Cephas made a copy of the letter, gave the original to defendant's father, and gave the copy to investigators.

On 10 May 1999, the trial court denied defendant's motion to suppress the letter. Defendant challenged the trial court's denial of his motion on the basis of his Fourth, Sixth, and Fourteenth Amendment rights under the United States Constitution as well as rights contained in Sections 19 through 23 of the North Carolina Constitution. In his brief to this Court, however, defendant grounds his argument on his First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights, and "defendant's rights under the state constitution." Because defendant did not raise a First, Fifth, or Eighth Amendment challenge in his pretrial motion, or at any point during the trial, and because defendant abandoned his Sixth Amendment challenge by failing to support this assertion in his brief, we will consider only those arguments presented to the trial court and preserved for appeal. *See* N.C. R. App. P. 10(b)(1), 28(b)(6); *see also State v. Hunter*, 305 N.C. 106, 111-12, 286 S.E.2d 535, 539 (1982) (holding that the theory upon which the case was tried controls in determining the validity of exceptions and that a constitutional question not raised and passed upon in the trial court will not ordinarily be considered on appeal); *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) (holding that a defendant may not raise a constitutional issue on appeal not presented to the trial court).

The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. U.S. Const. amend. IV; *see also* N.C. Const. art. I, §§ 18, 19, 23. The Fourth Amendment protects against governmental invasions into a person's legitimate expectation of privacy, which has two components: (1) the person must have an actual expectation of privacy, and (2) the person's subjective expectation must be one that society deems to be reasonable. *Smith v. Maryland*, 442 U.S. 735, 740, 61 L. Ed. 2d 220, 226-27 (1979).

Given the realities of institutional confinement, any reasonable expectation of privacy a detainee retains necessarily is of diminished scope. *Bell v. Wolfish*, 441 U.S. 520, 557, 60 L. Ed. 2d 447, 480 (1979). Although inmates do not forfeit all constitutional protections by reason of their confinement in prison, *Wolff v. McDonnell*, 418 U.S. 539, 555-56, 41 L. Ed. 2d 935, 950-51 (1974), the threshold determination of whether a prisoner's expectation is "legitimate" or "reasonable," and thus deserving of the Fourth Amendment's protection, necessarily entails a balancing of the security interest of the penal institution against the privacy interest of the prisoner, *State v. Primes*, 314 N.C. 202, 210, 333 S.E.2d 278, 282 (1985). This is true for convicted prisoners as well as pretrial detainees who remain cloaked with a presumption of innocence. *State v. Martin*, 322 N.C. 229, 235, 367 S.E.2d 618, 621 (1988) (discussing *Wolfish*, 441 U.S. at 559, 60 L. Ed. 2d at 481).

The question in the instant case is whether defendant had an expectation of privacy in a letter, handed to jail personnel, contained in an unsealed envelope not marked with the words "legal" and not addressed to an attorney. We conclude defendant did not hold a subjective expectation of privacy in the unsealed envelope he delivered to Deputy Cephas, and even if he did, this expectation was not objectively reasonable.

In *Stroud v. United States*, 251 U.S. 15, 64 L. Ed. 103 (1919), the United States Supreme Court held that the Fourth Amendment rights of the accused were not violated when letters containing incriminating material written by a prisoner were intercepted by prison personnel and later used by the prosecution. *Id.* at 21-22, 64 L. Ed. 2d at 111. The United States Supreme Court noted the letters came into the possession of prison officials under established practice, reasonably designed to promote institutional discipline. *Id.* at 21, 64 L. Ed. at 111. Courts in other jurisdictions that have handed down opinions subsequent to *Stroud* have held jail officials do not violate an inmate's Fourth Amendment rights by inspecting the inmate's mail. *See, e.g., United States v. Whalen*, 940 F.2d 1027, 1034-35 (7th Cir.) (holding that, because prison officials are permitted to examine inmate mail to ensure that the mail does not interfere with the orderly running of the prison, contain threats, or facilitate criminal activity, there is no expectation of privacy in mail that inmates are required to leave unsealed), *cert. denied*, 502 U.S. 951, 116 L. Ed. 2d 352 (1991); *Smith v. Shimp*, 562 F.2d 423, 426-27 (7th Cir. 1977) (reasoning that what a pretrial detainee places in nonprivileged mail, he

knowingly exposes to possible inspection by jail officials and consequently yields to reasonable search and seizure); *United States v. Baumgarten*, 517 F.2d 1020, 1028 (8th Cir.) (holding that because the reading of an inmate's letter in accordance with established and known institutional practices did not violate constitutional guidelines, the "plain view" doctrine allowed the subsequent copying and dissemination of the letter), *cert. denied*, 423 U.S. 878, 46 L. Ed. 2d 111 (1975); *State v. Matthews*, 217 Kan. 654, 657-58, 538 P.2d 637, 641 (1975) (holding that, under circumstances where prisoner knew of official policy of reading prisoners' outgoing and unsealed mail, prisoner cannot say the state gained access to the contents of a letter by unlawful search and seizure); *State v. Cuypers*, 481 N.W.2d 553 (Minn. 1992) (holding that search of the outgoing mail of a pretrial detainee based on known jail security and safety regulations was not an unreasonable search); *State v. Johnson*, 456 S.W.2d 1, 2 (Mo. 1970) (holding that pretrial detainee cannot seek to preserve as private a letter he placed before the jail officials knowing it would be read by jailer prior to mailing); *State v. McKoy*, 270 Or. 340, 343-48, 527 P.2d 725, 726-28 (1974) (holding that, in light of the legitimate purpose for scrutiny of the mail, the order and security of the penal institution, and the fact the prisoner was aware of the institution's practice of reading prisoner mail, prisoner's Fourth Amendment right was not violated when the sheriff read, copied, and forwarded to the state's attorney a letter handed to him by the inmate in an unsealed envelope).

Although this Court has not specifically addressed the constitutional propriety of reading inmates' mail, we have held that a pretrial detainee has no reasonable expectation of privacy in his jail cell, and thus the jailer did not violate the Fourth Amendment when he read a detainee's notebook and found a letter urging someone to commit perjury at trial. *Martin*, 322 N.C. at 235, 367 S.E.2d at 621-22. We reasoned that because the jailer had the right to inspect anything he may have found in the cell, he also had the authority to read the inmate's notebook to better enable him to maintain order in the facility. *Id.*

When a prisoner or pretrial detainee is made aware that his nonlegal mail will be subjected to official scrutiny before reaching its intended recipient, pursuant to institutional policies to maintain order and safety, the inmate's constitutional rights are not violated by the subsequent examination of such mail because he or she has no reasonable expectation of privacy in it. Furthermore, because the

prison officials had the right to examine these letters, "there is no rule 'requiring them to close their eyes to what they discover.' " *McKoy*, 270 Or. at 347, 527 P.2d at 728 (quoting *United States v. Morin*, 378 F.2d 472, 475 (2d. Cir. 1967)). Copying and forwarding such letters thus does not violate Fourth Amendment prohibitions. Defendant's argument is without merit.

[2] Defendant next argues he received ineffective assistance of counsel (IAC) when his trial attorney allowed his prior delinquency adjudication to be used as an aggravating circumstance under N.C.G.S. § 15A-2000(e)(3). Defendant also contends that the trial court's failure to suppress the use of the delinquency adjudication during the penalty phase violated his rights as embodied in the Due Process and Ex Post Facto Clauses of the United States and North Carolina Constitutions. We address the issues surrounding defendant's IAC claim here and turn to the latter constitutional issues in the penalty phase discussion, *infra*.

On 12 May 1992, defendant, then age fourteen, was adjudicated delinquent pursuant to a plea agreement whereby defendant admitted he had committed the offense of solicitation to commit murder, a class E felony. On 4 May 1999, defendant filed a motion for appropriate relief (MAR) in District Court, New Hanover County, in the juvenile case (91 J 258). In his MAR, defendant contended his admission was not entered freely, voluntarily, and knowingly and that it was entered without the effective assistance of counsel. Following a hearing, the trial court entered an order denying the MAR. On or about 22 March 2001, defendant filed in this Court a petition for writ of certiorari and a motion to bypass the Court of Appeals (No. 176P01) seeking review of the trial judge's order in conjunction with the present appeal. On 5 April 2001, this Court denied defendant's petition for writ of certiorari, *State v. Wiley*, — N.C. —, 548 S.E.2d 158 (2001), and defendant's motion to bypass the Court of Appeals, *State v. Wiley*, — N.C. —, 548 S.E.2d 158 (2001).

Defendant argues that the trial court erred by denying the MAR made in his juvenile case. Defendant also raises an IAC claim in regard to his attorney's handling of the MAR in the juvenile case and notes that the present record is inadequate to permit argument on this issue without the safeguards available in article 89 of chapter 15A of the North Carolina General Statutes. The substance of the MAR presented in the juvenile case is not properly before this Court because this Court has already denied review of the trial court's ruling on that motion. *Wiley*, — N.C. at —, 548 S.E.2d at 158.

Defendant's presentation of an IAC claim arising from a MAR in a different case is similarly inappropriate in this forum. As the IAC claim arises from defendant's juvenile case, it must be raised in a separate proceeding.

[3] Defendant next argues that the trial court's division of prospective jurors into separate panels violated the randomness requirement of jury selection. The trial court placed prospective jurors in five different panels composed of twenty-five people each, and announced its intention to call the panels one at a time. The trial court called the first panel of prospective jurors, and after this panel was exhausted, the trial court called in all the jurors from panels two and three. With six prospective jurors remaining on panels two and three, the trial court called in panel four. When the jury selection process was completed and selection of alternates began, jurors were still being called from panel four, and before panel four was exhausted, the trial court called in panel five.

Defendant asserts that when only one prospective juror remains, all parties know the identity of the next person called into the jury box. This division, defendant claims, constituted "structural error" that violated the randomness requirement of N.C.G.S. § 15A-1214(a) and defendant's right to a fair and impartial jury under the Sixth Amendment to the United States Constitution and Article I, Sections 23 and 24 of the North Carolina Constitution.

Defendant did not challenge the organization of the jury panels at trial, on constitutional grounds or otherwise, and therefore has waived review of the constitutionality of the trial court's actions. *See State v. Golphin*, 352 N.C. 364, 411, 533 S.E.2d 168, 202 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001); *see also State v. Cummings*, 353 N.C. 281, 292, 543 S.E.2d 849, 856, *cert. denied*, —— U.S. ——, 151 L. Ed. 2d 286 (2001). Defendant's statutory allegation is preserved for appellate review, however, because, "[w]hen a trial court acts contrary to a statutory mandate, the right to appeal the court's action is preserved, notwithstanding the failure of the appealing party to object at trial." *State v. Jones*, 336 N.C. 490, 497, 445 S.E.2d 23, 26 (1994).

N.C.G.S. § 15A-1214(a) provides: "The clerk, under the supervision of the presiding judge, must call jurors from the panel by a system of random selection which precludes advance knowledge of the identity of the next juror to be called." N.C.G.S. § 15A-1214(a) (2001). A challenge to the organization of the jury:

(1) May be made only on the ground that the jurors were not selected or drawn according to law.

(2) Must be in writing.

(3) Must specify the facts constituting the ground of challenge.

(4) Must be made and decided before any juror is examined.

N.C.G.S. § 15A-1211(c) (2001). Defendant never challenged the jury selection process in writing and never objected in any way to the allegedly improper method of placing prospective jurors in panels. Because defendant failed to comply with the requirements of section 15A-1211(c), he has waived this assignment of error. *See State v. Workman*, 344 N.C. 482, 498-99, 476 S.E.2d 301, 310 (1996) (holding defendant's assignment of error to be without merit "[i]n light of the fact that defendant failed to follow the procedures clearly set out for jury panel challenges and further failed, in any manner, to alert the trial court to the alleged improprieties"); *see also Golphin*, 352 N.C. at 411-12, 533 S.E.2d at 202. Furthermore, by merely stating in a footnote that he specifically asserts plain error, defendant did not preserve plain error review. As we stated in *State v. Cummings*, 352 N.C. 600, 536 S.E.2d 36 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001), by simply relying on the words "plain error" as the extent of his argument, defendant fails to argue plain error and thereby waives appellate review. *Id.* at 636-37, 536 S.E.2d at 61; *see also* N.C. R. App. P. 10(c)(4).

[4] Defendant next challenges the trial court's excusal for cause of prospective juror Lindenschmidt because of his views on the death penalty. Defendant argues the state challenged this prospective juror because his answers indicated his "leanings were toward the punishment of life without parole" and the dismissal violated defendant's right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 23, and 24 of the North Carolina Constitution. Defendant also alleges that this violated his right to a fair and reliable sentencing hearing under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 23, and 27 of the North Carolina 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, 516-23, 20 L. Ed. 2d 776, 782-85 (1968); *see also State v. Gregory*, 340 N.C. 365,

394-96, 459 S.E.2d 638, 654-56 (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 must be impartial about finding the facts and applying the law, *Wainwright v. Witt*, 469 U.S. 412, 423, 83 L. Ed. 2d 841, 851 (1985), and 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. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 907-08 (1993) (citing *Lockhart v. McCree*, 476 U.S. 162, 176, 90 L. Ed. 2d 137, 149-50 (1986)). The holding in *Wainwright* established that a prospective juror was properly excluded when 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). In the absence of an abuse of discretion, we will not disturb the trial court's decision to exclude prospective juror Lindenschmidt for cause. *State v. Cunningham*, 333 N.C. 744, 754, 429 S.E.2d 718, 723 (1993).

The record reveals prospective juror Lindenschmidt stated on several occasions during questioning that he would automatically vote for life imprisonment without parole. When questioned by the state, prospective juror Lindenschmidt initially indicated his ability to vote for a sentence of death and to follow the law. The state passed

the prospective juror to the defense, and the following questioning occurred:

> [DEFENSE COUNSEL]: [W]hat I'm trying to find out is if, in a case of premeditated and deliberate murder, no matter what the other facts and circumstances, if you would automatically vote for either the death penalty or for life without parole.
>
> JUROR NUMBER SEVEN: Life without parole.
>
> [DEFENSE COUNSEL]: No matter what the judge told you about the law?
>
> JUROR NUMBER SEVEN: Yeah.

After defendant completed his questioning, the state asked to question prospective juror Lindenschmidt again based on answers he gave to defense counsel. The trial court permitted the questioning to be reopened, and the following transpired:

> [PROSECUTOR]: Mr. Lindenschmidt, in asking the questions a little while ago, I believe [defense counsel] asked you, would you automatically vote one way or the other, and you said life without parole, is that correct?
>
> JUROR NUMBER SEVEN: Yes.
>
> [PROSECUTOR]: So you would always vote for life without parole?
>
> JUROR NUMBER SEVEN: Yeah.
>
> [PROSECUTOR]: Okay. And is that—you've sort of had that opinion for a good while, I take it.
>
> JUROR NUMBER SEVEN: Yes.
>
> [PROSECUTOR]: Okay. And you think that would substantially affect your ability to return a death penalty?
>
> JUROR NUMBER SEVEN: Possibly, unless something else came up to change my mind, but that would be my first opinion.
>
> [PROSECUTOR]: So you would—I believe the question you were asked, would you automatically vote life without parole, and you said yes.
>
> JUROR NUMBER SEVEN: Yeah.

While Lindenschmidt initially indicated his ability to vote for the death penalty and follow the judge's instructions, he repeatedly stated he would "automatically" vote for life imprisonment without parole. Such responses imparted "the definite impression that [this] prospective juror would be unable to faithfully and impartially apply the law." *Wainwright*, 469 U.S. at 426, 83 L. Ed. 2d 852; *see also State v. Fair*, 354 N.C. 131, 144, 557 S.E.2d 500, 512 (2001) (trial court did not abuse its discretion by excusing juror who stated unequivocally that he would not follow the trial court's instructions on the law if they were inconsistent with his personal beliefs), *cert. denied*, — U.S. —, — L. Ed. 2d —, 70 U.S.L.W. 3741 (2002). The trial court properly excused prospective juror Lindenschmidt for cause. *See Cunningham*, 333 N.C. at 753-54, 429 S.E.2d at 723. Accordingly, we reject this argument.

[5] Defendant next contends the trial court interfered with his constitutional right to utilize peremptory challenges. After asking two prospective jurors whether they opposed life imprisonment without parole as a punishment for first-degree murder, the following colloquy ensued:

> [DEFENSE COUNSEL]: Have you ever heard of a case where you thought that life without the possibility of parole should be the punishment?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: Let me ask this. Have you ever heard of a case where you thought that the death penalty should be the punishment?
>
> [PROSECUTOR]: Objection.
>
> BY THE COURT: Sustained.

Outside the presence of the jury, defendant offered to rephrase the objectionable questions and "ask each juror whether or not they [sic] could conceive of a case where life without the possibility of parole ought to be the punishment." The state objected, arguing that because the defense had already asked the question of whether a prospective juror could fairly consider life in prison without parole, a question conceiving of different scenarios constituted an improper stake-out question. The trial court agreed, stating that it was "not going to allow the hypothetical aspect of the question."

Defendant then asked the court if he could ask the question if he proceeded to ask a follow-up question:

> [DEFENSE COUNSEL]: If I follow up with—if I follow my question, "can you conceive of . . . . Well, what type of case is that?" The issue is this, Judge: if the only kind of case a juror can conceive giving a life sentence in is a self-defense case—
>
> THE COURT: Why don't you ask them that question. I mean, you know, the question I've always seen asked is, do you think that the death penalty is the only appropriate penalty for someone who has been convicted of first degree murder.

The trial court permitted defendant to ask several prospective jurors whether they felt that "the death penalty is the only appropriate punishment for people that are convicted of first degree murder when it's premeditated and deliberate."

Defendant argues that by precluding defense counsel from asking questions in which he could discern any bias or predisposition in the jurors, the trial court impaired defendant's right to exercise his peremptory challenges intelligently, in violation of defendant's right to a fair and impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 23, and 24 of the North Carolina Constitution. He also contends the trial court's action violated defendant's right to a fair and reliable sentencing hearing under the Eighth and Fourteenth Amendments and Article I, Sections 19, 23, and 27 of the North Carolina Constitution.

Voir dire plays an essential role in guaranteeing a criminal defendant's Sixth Amendment right to an impartial jury because it is the means by which prospective jurors who are unwilling or unable to apply the law impartially may be disqualified from jury service. *Rosales-Lopez v. United States*, 451 U.S. 182, 188, 68 L. Ed. 2d 22, 28 (1981) (plurality opinion) ("Without an adequate *voir dire*, the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled."); *see also State v. Anderson*, 350 N.C. 152, 170, 513 S.E.2d 296, 307 (*voir dire* serves the dual purposes of helping counsel determine whether a basis for a challenge for cause exists and of assisting counsel in exercising peremptory challenges), *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326 (1999). *Voir dire* that impairs the defendant's ability to exercise his challenges

intelligently is grounds for reversal, irrespective of prejudice. *Swain v. Alabama*, 380 U.S. 202, 219, 13 L. Ed. 2d 759, 772 (1965), *overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986).

In *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492 (1992), the United States Supreme Court held that a capital defendant must be allowed to ask during *voir dire* whether prospective jurors would automatically vote to impose the death penalty in the event of a conviction. *Id.* at 733-36, 119 L. Ed. 2d 492 at 505-07. This Court has stated:

> *Morgan* stands for the principle that 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. "Within this broad principle, however, the trial court has broad discretion to see that a competent, fair, and impartial jury is impaneled; its rulings in this regard will not be reversed absent a showing of abuse of discretion."

State v. Robinson, 336 N.C. 78, 102-03, 443 S.E.2d 306, 317 (1994) (quoting *State v. Yelverton*, 334 N.C. 532, 541, 434 S.E.2d 183, 188 (1993)), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995); *see also State v. Conner*, 335 N.C. 618, 644, 440 S.E.2d 826, 841 (1994) (defendant entitled to inquire under *Morgan* into whether a prospective juror would automatically vote for the death penalty irrespective of the facts and circumstances).

The fact that the trial court prevented defense counsel from asking questions concerning various fact scenarios that would cause jurors to vote for a particular punishment did not breach the mandate of *Swain* and *Morgan*. Far from being precluded from inquiring into and assessing suspected biases, defendant was allowed to ask prospective jurors the very question that frames the holding in *Morgan*: whether prospective jurors would automatically vote for the death penalty.

The initial questions defense counsel sought to ask were not inquiries into whether jurors would follow the law or the court's instructions, but rather were improper stake-out questions. *See State v. Jaynes*, 353 N.C. 534, 549-50, 549 S.E.2d 179, 191-92 (2001) (not improper for trial court to prohibit defense counsel from asking whether prospective jurors could imagine if there is anything that

they could hear that would make them consider a life sentence), *cert. denied*, — U.S. —, 152 L. Ed. 2d 220 (2002). We have repeatedly held that attempts to stake out a prospective juror in advance regarding what his or her decision might be under certain specific factual scenarios are improper. *See, e.g.*, *State v. Simpson*, 341 N.C. 316, 336, 462 S.E.2d 191, 202 (1995), *cert. denied*, 516 U.S. 1161, 134 L. Ed. 2d 194 (1996); *State v. Skipper*, 337 N.C. 1, 19-20, 446 S.E.2d 252, 261-62 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995). The questions asked by defense counsel in the instant case reflect just such improper efforts to pin down prospective jurors regarding the kind of fact scenarios they would deem worthy of the death penalty or worthy of life imprisonment.

Defendant argued both at trial and before this Court that his question should have been allowed because this Court has condoned a similar question asked by the state in *State v. Green*, 336 N.C. 142, 158-59, 443 S.E.2d 14, 23-24, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). In *Green*, the trial court allowed the state to ask each prospective juror if he or she "could conceive of any first-degree murder case where the juror believed the death penalty would be the right and correct punishment." *Id.* at 158, 443 S.E.2d at 24. In holding that the trial court did not err, the Court in *Green* recognized that the extent and manner allowed for questioning of prospective jurors is a matter within the trial court's discretion. *Id.* at 159, 443 S.E.2d at 24. Contrary to defendant's assertion, a finding that there was no abuse of discretion in *Green* does not transform such a question into a constitutionally required inquiry for all defendants. The trial court here did not abuse its discretion, but simply chose to exercise its discretion differently than did the trial court in *Green*. Defendant's argument is without merit.

[6] In his next argument, defendant claims the trial court committed constitutional error in failing to preclude the state from "grossly mischaracterizing" North Carolina's capital sentencing procedure. During jury selection, the state on various occasions referred to the capital sentencing proceeding by describing it as a "highly structured procedure," "a tightly structured process," "a rigid procedure," "a very tightly structured process," a "rigid structure," "a tightly structured procedure," "this tight structure of the law," "this tight process," a "rigid framework," a "strict structure," "a strictly defined legal process," "a tightly structured format," "a strict format," a "tightly rigid structure," and a "rigid sort of flow chart."

Defendant argues that the trial court's sanctioning of the state's various descriptions of a capital sentencing proceeding during jury selection violated defendant's constitutional rights because such a mischaracterization did not allow any juror to individualize his or her decision whether to impose a death sentence. *See Lockett v. Ohio*, 438 U.S. 586, 605, 57 L. Ed. 2d 973, 990 (1978) (even if a jury finds no mitigating circumstances, each juror must still decide whether the death sentence is appropriate in a particular case). He further argues that by allowing the state to describe the capital sentencing proceeding in such inexorable terms, the trial court violated defendant's constitutional right to a fair and impartial adjudicator.

Our review of the transcript reveals that the state described the capital sentencing proceeding on approximately forty-six occasions during jury selection, each time employing a form of the phraseology noted above. The following quote fairly represents the tenor of the remarks to which defendant takes exception:

> [PROSECUTOR]: Okay. As we indicated, the defendant is also charged with armed robbery and kidnapping, and the judge will give you the law on those charges, also. Now, if the defendant is found not guilty of the charges, of course, the case is over. If he is found guilty of first degree murder, then you move into a second stage, and that's called a sentencing stage, . . . where you determine whether or not death or life is the appropriate punishment for this crime. And the way you make that decision is through a rigid legal framework, a rigid legal framework—
>
> [DEFENSE COUNSEL]: Objection. Ask the court to charge what the law is.
>
> THE COURT: Overruled. He's talking about the process.
>
> [PROSECUTOR]: And what you do is, following this rigid legal framework, you determine first—and His Honor will go over this, but I want to sort of give y'all a background so you understand my questions. Using this rigid legal framework, the first question you will determine is whether or not aggravating factors exist. Now, aggravating factors are factors that would call for the death penalty, and you will determine those from the evidence as you hear it from the stand, and they—in other words, you find facts and determine whether aggravating factors exist, and all twelve of you would have to agree to that, those aggravating factors, and the standard of proof is all on the state, and it's beyond a reasonable doubt, and we'll talk about that.

> If you find no aggravating factors, then life imprisonment would be imposed. Then the next question, if you find aggravating factors exist, you go to the next question and you determine whether mitigating factors exist. Now, mitigating factors are factors that would call for a life sentence, and the defendant will have the burden of proof on mitigating factors, but it is not the same standard that the state has. One of you can find a mitigating factor, and then all of you should consider those mitigating factors.
>
> But the gist of it is, you determine whether aggravating factors exist that call for the death penalty, whether mitigating factors exist that call for life, and then you get down to the third question, and you balance the two and you determine, based on the facts as you find them, whether the aggravating factors outweigh the mitigating. Actually, I think the question is worded, do the mitigating—are the mitigating insufficient to outweigh the aggravating? But the result is the same. The aggravating have to outweigh the mitigating and, if you find that, beyond a reasonable doubt, and you find that the aggravating are sufficiently substantial to call for the death penalty, then it would be your duty to impose a verdict of death. And it's a process that is a rigid process that you follow, so that you do not automatically find life and you do not automatically find death, but you go through this legal process.

Defendant acknowledges he failed to object to most of the statements he now challenges, but claims that all the errors are structural and therefore are preserved for appeal. Furthermore, he contends that "[i]n the event this Court holds otherwise, in those instances where defendant failed to object, he brings forward those errors under the 'plain error' rule."

It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal. *State v. Smith*, 352 N.C. 531, 557-58, 532 S.E.2d 773, 790 (2000), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360 (2001); *see also State v. Nobles*, 350 N.C. 483, 498, 515 S.E.2d 885, 895 (1999) ("[T]he rule is that when defendant fails to object during trial, he has waived his right to complain further on appeal."). Additionally, this Court has held that plain error analysis applies only to jury instructions and evidentiary matters and has specifically declined to extend application of the plain error doctrine

to situations where a party failed to object to statements made by the other party during jury *voir dire*. *State v. Greene*, 351 N.C. 562, 566-67, 528 S.E.2d 575, 578, *cert. denied*, 531 U.S. 1041, 148 L. Ed. 2d 543 (2000); *State v. Atkins*, 349 N.C. 62, 81, 505 S.E.2d 97, 109-10 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). Accordingly, where defendant failed to object to the state's characterization of the capital sentencing proceeding made during *voir dire*, defendant's argument is waived and cannot be resurrected through plain error analysis.

Defendant's argument that the state's allegedly improper characterization constituted structural error is also unavailing. We recently held that the state's alleged attempt to stake out prospective jurors as to their sentence recommendation did not constitute structural error. *State v. Anderson*, 355 N.C. 136, 142-43, 558 S.E.2d 87, 92-93 (2002). As we explained in *Anderson*, " 'structural error,' is a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself,' " and has rarely been found to exist. *Id.* at 142, 558 S.E.2d at 92 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 113 L. Ed. 2d 302, 331 (1991)). The alleged error of which defendant complains is not analogous to cases where structural error has been found to exist. *See Sullivan v. Louisiana*, 508 U.S. 275, 281-82, 124 L. Ed. 2d 182, 190 (1993) (erroneous instruction to jury on reasonable doubt); *Vasquez v. Hillery*, 474 U.S. 254, 263-64, 88 L. Ed. 2d 598, 609 (1986) (unlawful exclusion of jurors of defendant's race); *Waller v. Georgia*, 467 U.S. 39, 44-50, 81 L. Ed. 2d 31, 37-41 (1984) (deprivation of right to public trial); *McKaskle v. Wiggins*, 465 U.S. 168, 187-88, 79 L. Ed. 2d 122, 139 (1984) (deprivation of right to self-representation at trial); *Gideon v. Wainwright*, 372 U.S. 335, 343-45, 9 L. Ed. 2d 799, 805-06 (1963) (total deprivation of the right to counsel); *Tumey v. Ohio*, 273 U.S. 510, 532-35, 71 L. Ed. 749, 759 (1927) (absence of impartial judge). Structural error analysis is therefore inapposite to the present argument.

"[W]hile counsel is allowed wide latitude in examining jurors on *voir dire*, the form of counsel's questions is within the sound discretion of the trial court." *State v. Jones*, 339 N.C. 114, 134, 451 S.E.2d 826, 835 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995); *see also State v. Conaway*, 339 N.C. 487, 508, 453 S.E.2d 824, 837-38 ("The trial court has broad discretion to see that a competent, fair, and impartial jury is impaneled, and its rulings in that regard will not be reversed absent a showing of an abuse of its discretion."), *cert.*

denied, 516 U.S. 884, 133 L. Ed. 2d 153 (1995); *State v. Bryant*, 282 N.C. 92, 96, 191 S.E.2d 745, 748 (1972) ("The regulation of the manner and the extent of the inquiry rests largely in the trial judge's discretion."), *cert. denied*, 410 U.S. 958, 35 L. Ed. 2d 691, *and cert. denied*, 410 U.S. 987, 36 L. Ed. 2d 184 (1973). The only question properly before us, then, is whether the trial court abused its discretion in declining to sustain defendant's few objections to the state's characterization of the capital sentencing proceeding. We hold that the trial court did not abuse its discretion in overruling defendant's objections.

" 'The purpose of *voir dire* is to ensure an impartial jury to hear defendant's trial.' " *Anderson*, 350 N.C. at 170, 513 S.E.2d at 307 (quoting *Gregory*, 340 N.C. at 388, 459 S.E.2d at 651). The right to an impartial jury recognizes that each side will be allowed to inquire into the ability of prospective jurors to follow the law, and questions designed to measure prospective jurors' ability to follow the law are proper within the context of *voir dire*. *State v. Jones*, 347 N.C. 193, 203, 491 S.E.2d 641, 647 (1997). We have also held that a jury has a duty to recommend a death sentence if it makes the findings pursuant to N.C.G.S. § 15A-2000(c). *State v. Holden*, 321 N.C. 125, 161, 362 S.E.2d 513, 535 (1987) (a jury may not exercise unbridled discretion and return a sentencing verdict wholly inconsistent with the findings it made pursuant to N.C.G.S. § 15A-2000(c)), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). One may reasonably interpret the state's questioning as seeking to determine whether the jurors could understand and follow the three-step sentencing procedure outlined in N.C.G.S. § 15A-2000(c). As such, this questioning was permissible. *Cf. State v. Zuniga*, 320 N.C. 233, 250, 357 S.E.2d 898, 910 (holding that it would be permissible to ask whether a juror would be able to consider the death penalty if the juror determined aggravating circumstances outweighed mitigating circumstances), *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987).

Even assuming, without deciding, that there were inaccuracies in the state's description of North Carolina's capital sentencing procedure, the trial court's instructions to the jury, which were in accordance with the North Carolina pattern jury instructions, cured any error. *See State v. Steen*, 352 N.C. 227, 249, 536 S.E.2d 1, 14 (2000) (holding that trial court did not abuse its discretion by overruling the defendant's objection to the state's jury selection questions where the defendant had ample opportunity to explain the significance of mitigating circumstances to prospective jurors and the trial court fully

instructed the jury on the procedure for determining punishment), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). Accordingly, defendant's argument must fail.

GUILT-INNOCENCE PHASE

[7] Defendant argues he was denied effective assistance of counsel when his attorney made an "admission" during her opening statement that defendant was at the scene of the killing and that there was physical evidence linking defendant to the killing. Defense counsel emphasized in her opening statement that the identity of the killer and the credibility of the witnesses were at issue:

> You've heard [the prosecutor] tell you what the evidence will show and you've heard a lot during jury selection about the process you'll be going through. [The prosecutor] has told you what his evidence will show, and many of the facts he's mentioned to you are not disputed. A brutal murder was committed. The victim was Richie Futrelle, who was killed by multiple gunshot wounds. The facts of how he died are not in issue here. Who was involved and the extent of those persons' involvement are issues in this case. Also, the amount and credibility of evidence presented by the state are issues in this case.

Defense counsel then focused the jurors' attention on the anticipated testimony of Alicia Doster and her credibility as a witness:

> [DEFENSE COUNSEL]: You will only hear one person testify who was present or anywhere near present at the time that happened, and that person is Alicia Doster. She was fourteen at the time it happened. She was a runaway who stole her mother's car and went to stay in an abandoned house in the neighborhood. It was a house where many of the young kids stayed and hung out. . . .
>
> There's evidence that there was smoking and drinking and some drug use going on at that house. Now, she'll tell you that three people were involved and, you know, that's not disputed. Three people were apparently involved in that. The first one is Alicia Doster, and she has made a deal with the State of North Carolina to testify in this case. . . .
>
> Now, the second person who you'll hear about is Keith Wiley, and he's sitting in this courtroom today . . . .

Now, there is one [more] person who you won't see here, you won't hear from him, you won't see him, you won't hear anything from him at all, and that is Justin Pallas. And he's not present in the courtroom and he won't offer any testimony at all.

[PROSECUTOR]: Well, objection to that, your Honor.

THE COURT: Overruled.

[DEFENSE COUNSEL]: He was present at the time that all of this happened, and Miss Doster will certainly testify to that. . . .

. . . .

You will hear and see plenty of physical evidence, as well. Not much of this physical evidence will put Keith Wiley at the scene of the crime or at the scene where the automobile was disposed of. There will be no fingerprints on the car that belonged to Keith Wiley. You will hear that six cigarette butts were found in the car. Three of those belonged to two different males who were not identified. Don't know who put those cigarettes in the car or when. Don't know whose they were.

. . . .

. . . Nothing else was found in the scene—at the scene that belonged to Keith Wiley. None of Keith's fingerprints were found on the alleged murder weapon.

Defendant contends these remarks constitute IAC because they amount to an admission of guilt to which he did not consent. In *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), this Court held that an admission to the jury of defendant's guilt by defense counsel without the consent of the defendant constitutes ineffective assistance of counsel and a *per se* violation of the Sixth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution. *Id.* at 178-80, 337 S.E.2d at 506-08.

Nowhere in defense counsel's remarks did she concede defendant was present at the scene. Although it is arguable that defense counsel signaled some physical evidence would be presented linking defendant to Futrelle's car, counsel made it clear that such evidence was of dubious validity because its origin was unknown. Placed in context, her statements hardly constitute an admission. *See, e.g.*, *State v. Hinson*, 341 N.C. 66, 78, 459 S.E.2d 261, 268 (1995) (holding

that there was no *Harbison* violation where the defendant took challenged statements out of context). Admitting a fact is not equivalent to an admission of guilt. *State v. Strickland*, 346 N.C. 443, 454, 488 S.E.2d 194, 200 (1997) (where defense counsel repeatedly mentioned during jury *voir dire* the uncontroverted evidence that the defendant was holding the gun when the victim was killed, such statements were not the equivalent of asking the jury to find the defendant guilty of any charge, and therefore, *Harbison* does not control), *cert. denied*, 522 U.S. 1078, 139 L. Ed. 2d 757 (1998). Accordingly, defendant's claim of IAC fails.

[8] Defendant next argues the state improperly vouched for the credibility of its witnesses and made statements not supported by the evidence during closing argument in violation of defendant's constitutional rights to due process and a fair trial. Because defendant did not object to the state's arguments to which he now assigns error, defendant must show that the alleged impropriety was so gross that the trial court abused its discretion in not correcting the arguments *ex mero motu*. *See Cummings*, 353 N.C. at 296-97, 543 S.E.2d at 858-59. "Under this standard, '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. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001) (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)); *see also State v. Smith*, 351 N.C. 251, 269, 524 S.E.2d 28, 41 (" '[T]he trial court is not required to intervene *ex mero motu* unless the argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial.' ") (quoting *Atkins*, 349 N.C. at 84, 505 S.E.2d at 111), *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100 (2000).

As a general rule, counsel possesses wide latitude to argue facts in evidence and all reasonable inferences arising from those facts. *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986). Counsel is prohibited, on the other hand, from arguing facts which are not supported by the evidence. *See, e.g., State v. Lynch*, 300 N.C. 534, 551, 268 S.E.2d 161, 171 (1980); *State v. Monk*, 291 N.C. 37, 53, 229 S.E.2d 163, 173 (1976). During closing argument, the state addressed the inconsistent statements made by Doster concerning the incident:

> But then she came forward and began to tell the truth and has told pretty much the truth, and we'll get into that in a minute. . . . But when it comes to the defendant Wiley being involved in it, she's always said he was.
>
> It happened at the house. He instructed her how to tie him up, how to tie Richie up. Wiley was there from the very beginning. The defendant was there from the very beginning, in her statement, constantly through it. Now, you can pick and you can say well, she didn't say this, that time, but she said this, this time. But she's always said Keith Wiley was there.

Defendant argues that because in her very first "statement" to the police, Doster denied any knowledge of the shooting, the state's argument that Doster "always said Keith Wiley was there" was not supported by the evidence.

The purpose of the state's argument was to provide a response to defendant's attacks on Doster's inconsistent statements to investigators regarding details of the incident. The state simply emphasized Doster's consistency in placing defendant in her rendering of the crime, once she did come forward, in order to counter defendant's focus on any inconsistencies in Doster's subsequent statements. It was a fact in evidence that every time Doster gave an affirmative account of the incident, she implicated defendant. Therefore, the state's argument that Doster always said Keith Wiley was there falls within the range of "wide latitude" we afford counsel in making arguments to juries because the argument was supported by the evidence. *See Williams*, 317 N.C. at 481, 346 S.E.2d at 410.

Even assuming for the sake of argument that Doster's first indication that she knew nothing about the murder was a "statement" and that the state's comment that Doster "always said Keith Wiley was there" was an inaccurate description of the evidence, such comment did not stray so far from the bounds of propriety as to impede defendant's right to a fair trial. We are not persuaded by defendant's characterization of the state's remark as grossly improper, especially in light of the fact that defense counsel did not think it prejudicial when spoken at trial, because there is no merit to the argument that the outcome of the trial would have been different had the court intervened *ex mero motu* to correct this alleged error.

[9] Defendant also argues that the prosecutor improperly vouched for the credibility of the state's witnesses during closing argument.

After mentioning prior statements made by Doster, the prosecutor stated, "then she came forward and began to tell the truth and has told pretty much the truth." After describing Mullins' reticence to recounting what he knew about the incidents, the prosecutor stated, "he's come forward and he's told the truth." When the prosecutor described how Jacobs had tried to avoid getting involved in the investigation, he said "he doesn't want to get thrust in the middle of this, and he tried to stay out of it, but he's come forward and he's told the truth." Finally, after he commented that Jeremy Joesting never said he was told about the murder by defendant or Pallas, the prosecutor stated, "Now, if we have some type of control or some type of way to massage them and threaten people, don't you know he would have said the same thing? But he was just telling the truth." Defendant argues that because the state's case rested primarily on the testimony of several witnesses who stated they either saw defendant commit the crimes or heard defendant describe his commission of the crimes, these comments during closing violated N.C.G.S. § 15A-1230(a), which provides that "[d]uring a closing argument to the jury an attorney may not . . . express his personal belief as to the truth or falsity of the evidence." N.C.G.S. § 15A-1230(a) (2001).

Defendant's characterization of this argument as one vouching for the state's witnesses is implausible. The prosecutor was merely giving the jury reasons to believe the state's witnesses who had given prior inconsistent statements and were previously unwilling to cooperate with investigators. *See, e.g., State v. Burrus*, 344 N.C. 79, 93-94, 472 S.E.2d 867, 877 (1996) (argument that accomplices who had entered plea agreement to testify against the defendant would have downplayed their own involvement if they had intended to lie on witness stand did not constitute improper vouching for the credibility of accomplices but was meant to give reasons why jury should believe state's evidence); *State v. Bunning*, 338 N.C. 483, 488-89, 450 S.E.2d 462, 464 (1994) (not improper vouching where prosecutor described state's witness as a "fine detective, this professional law-enforcement officer," and argued that witness should be believed because "[he] isn't going to put his reputation and his career on the line"). Even if we assume, without deciding, that the prosecutor's argument did constitute improper vouching for state witnesses, the argument was not so grossly improper as to require the court to intervene *ex mero motu*. This argument is therefore without merit.

CAPITAL SENTENCING PROCEEDING

[10] As previously noted, on 12 May 1992, defendant was adjudicated delinquent pursuant to a plea agreement whereby defendant admitted that he had committed the offense of solicitation to commit murder, a class E felony. Defendant assigns error to the trial court's failure to suppress the juvenile adjudication and argues: (1) the statute authorizing the use of a juvenile adjudication of delinquency as an aggravating circumstance in a capital case conflicts with another statute, (2) submission of defendant's prior juvenile adjudication as an aggravating circumstance violated his right to due process, and (3) submission of the prior adjudication constituted an abridgement of the Ex Post Facto Clauses under the United States and North Carolina Constitutions.

N.C.G.S. § 15A-2000(e)(3), which was in effect at the time of the murder, allows for the submission of an aggravating circumstance to the jury upon a conviction of first-degree murder if:

> [t]he defendant had been previously convicted of a felony involving the use or threat of violence to the person or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a Class A, B1, B2, C, D, or E felony involving the use or threat of violence to the person if the offense had been committed by an adult.

N.C.G.S. § 15A-2000(e)(3) (2001). Defendant contends that N.C.G.S. § 15A-2000(e)(3) conflicts with former N.C.G.S. § 7A-638, which provided as follows:

> An adjudication that a juvenile is delinquent or commitment of a juvenile to the Division of Youth Services shall neither be considered conviction of any criminal offense nor cause the juvenile to forfeit any citizenship rights.

N.C.G.S. § 7A-638 (1995) (repealed effective 1 July 1999 and recodified at N.C.G.S. § 7B-2412).

Prior to trial, the trial court denied defendant's motion to suppress his prior adjudication of delinquency. Defendant renewed his motion during the penalty phase of the trial, and the trial court again ruled the adjudication was admissible. However, at no point prior to this appeal did defendant make the argument that N.C.G.S. § 15A-2000(e)(3) conflicted with N.C.G.S. § 7A-638. Defendant asserts plain error but provides no explanation as to why any alleged error

rises to the level of plain error. As noted previously, by simply relying on the words "plain error" as the extent of his argument in support of plain error, defendant has effectively failed to argue plain error and has thereby waived appellate review. *See Cummings*, 352 N.C. at 636-37, 536 S.E.2d at 61; *see also* N.C. R. App. P. 10(c)(4).

[11] We next turn to whether the submission of defendant's prior juvenile adjudication comported with due process and whether it violated state and federal constitutional prohibitions against the enactment of *ex post facto* laws. *See* U.S. Const. art. I, § 10; N.C. Const. art. I, § 16. Because defendant did not raise these constitutional issues at trial, he has failed to preserve them for appellate review and they are waived.[1] N.C. R. App. P. 10(b)(1); *Benson*, 323 N.C. at 322, 372 S.E.2d at 519; *Hunter*, 305 N.C. at 112, 286 S.E.2d at 539. Pursuant to our authority under Rule 2 of the North Carolina Rules of Appellate Procedure to foreclose manifest injustice, however, we address defendant's *ex post facto* argument to ascertain whether the trial court committed reversible error under a plain error analysis. *See State v. Lemons*, 352 N.C. 87, 92, 530 S.E.2d 542, 545 (2000) (for constitutional issue addressed pursuant to Court's discretionary authority under Rule 2 of the North Carolina Rules of Appellate Procedure, the defendant's failure to object at trial and to raise a constitutional issue required consideration of his argument under plain error standard of review), *cert. denied*, 531 U.S. 1091, 148 L. Ed. 2d 698 (2001).

The United States and the North Carolina Constitutions prohibit the enactment of *ex post facto* laws. U.S. Const. art. I, § 10 ("No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts . . . ."); N.C. Const. art. I, § 16 ("Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive,

1. In his pretrial motion to suppress, defendant contended that his solicitation to commit murder plea was not entered freely, voluntarily, and knowingly. At the pretrial motion hearing, defendant did not argue the motion based on due process. Similarly, prior to sentencing, defendant renewed his motion but did not argue it on due process grounds. Defendant abandoned his due process position at trial and cannot now revitalize it on appeal. *See* N.C. R. App. P. 10; *State v. Larrimore*, 340 N.C. 119, 149, 456 S.E.2d 789, 805 (1995); *see also Weil v. Herring*, 207 N.C. 6, 6, 175 S.E. 836, 838 (1934) (noting that "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 to get a better mount in the Supreme Court.") Additionally, as noted previously, defendant raised this issue in a MAR, review of which has already been denied by this Court. *Wiley*, — N.C. —, 548 S.E.2d 158.

unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted."). Because both the federal and state constitutional *ex post facto* provisions are evaluated under the same definition, we analyze defendant's state and federal constitutional contentions jointly. *See State v. Robinson*, 335 N.C. 146, 147-48, 436 S.E.2d 125, 126-27 (1993). The prohibition against the enactment of *ex post facto* laws applies to

> "1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*."

Collins v. Youngblood, 497 U.S. 37, 42, 111 L. Ed. 2d 30, 38-39 (1990) (quoting *Calder v. Bull*, 3 U.S. 386, 390, 1 L. Ed. 648, 650 (1798)) (alterations in original).

Defendant argues that allowing the state to submit his 12 May 1992 adjudication of delinquency as an aggravating circumstance at sentencing violated the prohibition against *ex post facto* laws because the 12 May 1992 adjudication of delinquency predated the amendment to N.C.G.S. § 15A-2000(e)(3) allowing juvenile adjudications to be submitted to a jury as aggravating circumstances. Defendant further argues that N.C.G.S. § 15A-2000(e)(3) rendered his delinquency plea involuntary and nullified his right to fair notice that his delinquency adjudication would be used against him. We disagree.

In *State v. Taylor*, 128 N.C. App. 394, 496 S.E.2d 811, *aff'd per curiam*, 349 N.C. 219, 504 S.E.2d 785 (1998), we affirmed a Court of Appeals opinion addressing an issue very similar to the present case. The defendant in *Taylor* was convicted of second-degree rape in 1996. *Id.* at 396, 496 S.E.2d at 813. Upon sentencing, the trial court aggravated the defendant's sentence for the rape with a prior adjudication of delinquency. *Id.* at 396-97, 496 S.E.2d at 813. The effective date of the Structured Sentencing Act, which permitted the sentencing court to consider prior adjudications of delinquency as an aggravating factor in noncapital felony convictions, was 1 October 1994. *Id.* at 397-98, 496 S.E.2d at 814. When the defendant was adjudicated

delinquent, the operative law allowed the sentencing court to aggravate a defendant's sentence based only on prior criminal convictions obtained in adult proceedings. *Id.* at 397, 496 S.E.2d at 813-14. The defendant argued that the retroactive application of the delinquency aggravating factor to his subsequent rape conviction violated the prohibition against the enactment of *ex post facto* laws. *Id.*

The use of the juvenile adjudication was held not to violate the *ex post facto* clauses in *Taylor* because the defendant had not been punished for conduct that was not proscribed at the time it occurred and because he was not punished more severely for the delinquent conduct than allowed under the law governing at the time of that conduct. *Id.* at 397, 496 S.E.2d at 814. The only crime subject to *ex post facto* analysis in *Taylor* was the second-degree rape that occurred on 19 March 1995. *Id.* at 397-98, 496 S.E.2d at 814. Because the sentencing statute, N.C.G.S. § 15A-1340.16(d)(18a), which was in effect on the date of the crime, did not aggravate second-degree rape or make the punishment greater than it was on 19 March 1995, we upheld the Court of Appeals' decision that there was no *ex post facto* violation. *Id.*

Similarly, in the instant case, the only crime subject to an *ex post facto* analysis is the offense of first-degree murder that occurred on 20 October 1997. Section 15A-2000(e)(3), which was amended effective 1 May 1994 and was applicable to offenses committed on or after that date, permitted the use of a prior adjudication of delinquency as an aggravating circumstance for submission to the jury in a capital proceeding. Section 15A-2000(e)(3) does not criminalize defendant's 1992 delinquent conduct without fair notice, as defendant alleges, nor does it aggravate the 1992 juvenile adjudication, render it an involuntary plea, or inflict greater punishment for that conduct than was allowed at the time it was committed. Defendant is not receiving additional punishment for his 1992 delinquent conduct, but rather is being punished for the present offense of first-degree murder.

The Colorado Supreme Court has addressed an issue similar to the one in the instant case. The situation in *Myers v. District Ct. for Fourth Jud'l Dist.*, 184 Colo. 81, 518 P.2d 836 (1974), involved a Colorado statute permitting direct filings against juveniles over the age of sixteen who had been adjudicated delinquent within the previous two years for acts that would have been felonies if committed by an adult. *Id.* at 83-84, 518 P.2d at 837. The petitioners asserted that the direct filing constituted an additional penalty for their prior adjudications of delinquency. *Id.* at 84, 518 P.2d at 838. The court held that

the statute did not punish prior adjudications of delinquency, but merely provided a mechanism whereby juveniles may be treated as adults. *Id.* at 84-85, 518 P.2d at 838.

> Thus, the section imposes a potentially greater penalty upon the alleged felonious conduct in light of the record of delinquency of the accused. The penalty is for the second incident of allegedly felonious conduct which was committed after the effective date of the section. Petitioners' situation is "aggravated" by the recent amendments to the Children's Code only because of their alleged actions since the effective date of such amendments. This is not an ex post facto law.

Id. at 84, 518 P.2d at 838.

A line of cases providing illumination on the present issue is found in judicial analysis of habitual felon statutes, where underlying felonies occurring before the enactment of habitual felon statutes have been upheld against *ex post facto* challenges. *See Gryger v. Burke*, 334 U.S. 728, 92 L. Ed. 1683 (1948); *State v. Todd*, 313 N.C. 110, 117-18, 326 S.E.2d 249, 253 (1985). As the United States Supreme Court declared, an enhanced sentence "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger*, 334 U.S. at 732, 92 L. Ed. at 1687. For the foregoing reasons, we reject this argument.

[12] Defendant next argues that the trial court committed constitutional and statutory error by admitting a letter written by defendant when he was fourteen that had formed the basis of defendant's juvenile adjudication for solicitation to commit murder. At the sentencing hearing, following an *in camera* hearing regarding the admissibility of the evidence, the state introduced the letter from the Sheriff's Department files through Detective Kurt Bartley, the officer who had investigated the 1992 solicitation offense. Defendant failed to raise any constitutional issue regarding the admission of the letter at trial. Thus, to the extent defendant argues that the admission of the letter was constitutional error, this Court will not consider such assignment of error for the first time on appeal. *See* N.C. R. App. P. 10(b)(1); *Benson*, 323 N.C. at 321-22, 372 S.E.2d at 519.

Defendant argued, in a pretrial motion to suppress the juvenile file and by objection at trial, that the admission of the letter violated

the statute providing for confidentiality of juvenile court records. *See* N.C.G.S. § 7A-675 (1989) (repealed 1998 and recodified at N.C.G.S. ch. 7B, art. 30). Because it formed the basis of defendant's admission to solicitation to commit murder, defendant argues the letter was constructively part of defendant's juvenile file regardless of where the document was stored. Defendant further argues that allowing disclosure of confidential records violates the intent and purpose of the confidentiality requirement of the 1992 juvenile code.

The state correctly points out that at all times (at the time defendant was adjudicated delinquent, at the time of the murder, and at the time of defendant's trial for murder), there was no prohibition against the use of *law enforcement* records and files. Instead, the statute provided only for the confidentiality of *juvenile* records. The statute explicitly stated:

> Law-enforcement records and files concerning a juvenile shall be kept separate from the records and files of adults except in proceedings when jurisdiction of a juvenile is transferred to superior court. Law-enforcement records and files concerning juveniles shall be open only to the inspection of the prosecutor, court counselors, the juvenile, his parent, guardian, and custodian.

N.C.G.S. § 7A-675(e). In the absence of a prohibition on the use of law enforcement files, the state properly introduced evidence about the prior adjudication, as it would for a prior violent felony conviction, to illustrate the circumstances surrounding the offense of solicitation to commit murder. *See State v. Roper*, 328 N.C. 337, 364-65, 402 S.E.2d 600, 616 (holding that "the State is entitled to present witnesses in the penalty phase of the trial to prove the circumstances of prior convictions and is not limited to the introduction of evidence of the record of conviction"), *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991); *State v. Taylor*, 304 N.C. 249, 279-80, 283 S.E.2d 761, 780-81 (1981) (holding that although the defendant stipulated to the fact of his prior conviction, the state could introduce testimony concerning the murder at sentencing because " 'the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case' ") (quoting *Elledge v. State*, 346 So. 2d 998, 1001 (Fla. 1977)), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983). This argument is without merit.

[13] Defendant next argues that his constitutional and statutory rights were violated when the trial court held an unrecorded charge

conference during the capital sentencing proceeding. After defendant concluded his presentation of evidence during the capital sentencing proceeding, the trial court excused the jury for the day, and the parties proceeded with the charge conference. The trial court directed the parties to submit their proposed aggravating and mitigating circumstances by the next morning and stated, "My secretary will be here in the morning at 9:00 and, hopefully, we can put those things together and then we can get on with the jury arguments." The parties informed the trial court that defendant already possessed the state's proposed aggravating circumstances and the state requested disclosure of defendant's proposed mitigating circumstances. The parties then explained to the trial court what statutory aggravating and mitigating circumstances were being requested. The trial court ended the evening conference stating, "All right, I'll see all of you here in the morning, and we'll be here sometime close to 9:00. Let's take a recess until—well, take a recess until 10:00."

The transcript contains the following reporter's parenthetical notation in the record: "(THE EVENING RECESS WAS TAKEN. COURT RESUMED SESSION ON 5/27/99 AT 12:47 P.M. WITH THE DEFENDANT AND HIS ATTORNEYS PRESENT, THE PROSECUTORS PRESENT, THE JURY ABSENT.)" Thereafter, the court made the following statement: "All right, ladies and gentlemen, I think we are about ready for the final arguments of the attorneys. Since 9:00, we've been here trying to work on the jury instructions, and I believe we have them close to the form that we can utilize." The jury returned to the courtroom at 12:54 p.m., and the court addressed the jurors as follows:

> Ladies and gentlemen of the jury, I want to apologize for keeping you waiting but, like so many things, we've been trying to merge two versions of word processing, and I am not good enough to do it. My secretary and the clerk have managed to get it done, but it has taken an inordinately long period of time. I do think that we are pretty much ready to proceed.

At the completion of the closing arguments, the trial court instructed the jury and then asked the parties whether there were any requests for additional instructions or corrections. Defense counsel stated, "Not from the defendant, Your Honor."

Defendant asserts that between 9:00 a.m. and 12:47 p.m. on 27 May 1999 the trial court held an unrecorded charge conference in violation of section 15A-1231(b), denying him his constitutional right to

meaningful appellate review of his trial. Defendant does not argue, however, that he was absent from the court at that time or that his right to be present was violated in any way. Section 15A-1231(b) provides:

> Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury. The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.

N.C.G.S. § 15A-1231(b) (2001).

Defendant relies on language in *State v. Exum*, 343 N.C. 291, 470 S.E.2d 333 (1996), for the proposition that when the in-chambers conference is not recorded and the nature and content of the private discussion cannot be gleaned from the record, the state cannot show the error was harmless beyond a reasonable doubt, and the court must order a new trial. *Id.* at 294-96, 470 S.E.2d at 335. Defendant's reliance on *Exum* is mistaken, however, because the situation there involved the application of the harmless error standard to an *ex parte* in-chambers conference that implicated defendant's constitutional right to be *present* at every stage of the trial. *Id.* at 294, 470 S.E.2d at 335. Unlike the situation in *Exum*, defendant was present at the alleged charge conference, and challenges only its lack of recordation.

We further note that defendant has failed to establish that what took place that morning was, in fact, an unrecorded charge conference and not a clerical session in which the parties and court personnel attempted to get the instructions into a written format suitable for the jury. Assuming, without deciding, that it was an unrecorded charge conference, defendant is required to show he was materially prejudiced by any such conference in order to be entitled to a new sentencing hearing. *See* N.C.G.S. § 15A-1231(b). Defendant cannot show that anything that might have occurred during the unrecorded proceedings materially prejudiced his case because appellate review of defendant's case has not been thwarted.

In *State v. Wise*, 326 N.C. 421, 390 S.E.2d 142, *cert. denied*, 498 U.S. 853, 112 L. Ed. 2d 113 (1990), this Court addressed the requisite showing of material prejudice for purposes of an alleged violation of the recordation requirement under section 15A-1231(b). *Id.* at 432, 390 S.E.2d at 149. We held in *Wise* that where both sides indicated they were satisfied with the charge, defendant cannot show material prejudice from the failure to record the charge conference. *Id.* As in *Wise*, defendant in the instant case may not assign error to the lack of recordation where he had the opportunity to object to the charge but declined to do so. *See, e.g., State v. Bacon*, 326 N.C. 404, 412, 390 S.E.2d 327, 331 (1990) (defendant failed to show material prejudice where trial court summarized unrecorded proceeding into the record and defendant declined court's offer to object).

The substance of any rulings made by the trial court at an unrecorded conference would be evident from the record of the trial court's charge to the jury. Meaningful appellate review is not thwarted where the legal arguments of counsel are not recorded because it is the trial court's actual instructions that facilitate appellate review. *Cf. State v. Blakeney*, 352 N.C. 287, 307, 531 S.E.2d 799, 814 (2000) (defendant's argument that unrecorded bench conference on admissibility of evidence rendered appellate review impossible was rejected because it is the trial court's evidentiary rulings, the substance of which is apparent based on the resulting admission of evidence, not the arguments of counsel, that facilitate review), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001). In any event, the lack of recording of a charge conference does not necessarily preclude meaningful appellate review because it does not prevent a defendant from assigning error to the trial court's jury instructions, as defendant has done in the instant case.

[14] Defendant alleges further that the trial court prejudiced him with regard to proposed instructions for aggravating circumstances. After the state submitted its proposed aggravating circumstances, the court stated, "All right. Well, look at the pattern jury instructions particularly on (e)(3) and (e)(5) because, as I see, there's wording there that you may want to have me give." Defendant contends that by offering assistance to the state, the court stepped out of its requisite neutral role and became an advocate for the state. Furthermore, defendant speculates that the trial court continued in its role as an advocate for the state during the alleged unrecorded charge conference. Defendant argues that this prejudiced him because it resulted in the trial court's ultimately giving more detailed pattern instruc-

tions on the aggravating circumstances. Defendant has not assigned error to the trial court's alleged advocacy even though it is found in the *recorded* portion of the proceedings. Defendant also has not assigned error to the pattern instructions given by the trial court on any grounds. Defendant's unsupported argument on this issue is without merit and is not properly preserved for our review. *See* N.C. R. App. P. 10(b)(1) and (2). As regards this portion of defendant's argument, we hold the trial court did not err.

[15] Defendant next assigns error to the trial court's failure to intervene *ex mero motu* during the state's closing argument during the sentencing proceeding. Defendant argues that he was prejudiced by the state's disparaging remarks about defendant's expert witness and by the state's exhortation to the jury to disregard defendant's right to an individualized sentencing proceeding. Because defendant did not object at trial to the state's arguments to which he now assigns error, he must show that the alleged impropriety was so gross that the trial court abused its discretion in not intervening *ex mero motu*. *See Cummings*, 353 N.C. at 296-97, 543 S.E.2d at 858-59.

During the sentencing phase, defendant introduced the testimony of Dr. Jerry Sloan, a psychiatrist. Dr. Sloan testified to defendant's history of mental disorders and the present nature of defendant's mental problems. During cross-examination, Dr. Sloan testified that he spent a total of ninety minutes with defendant. Dr. Sloan also testified that he spent about sixty minutes with defendant's parents and an unstated amount of time reviewing defendant's mental health records. During his closing argument, the prosecutor referred to "the 90-minute evaluation," on several occasions referred to Dr. Sloan as "the 90-minute specialist," and once referred to Dr. Sloan as the "90-minute man."

Although control of the jury argument is left to the discretion of the trial judge and counsel is allowed wide latitude in the closing argument of hotly contested cases, *State v. Fullwood*, 343 N.C. 725, 740, 472 S.E.2d 883, 891 (1996), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997), the substance of these arguments is dictated by statute:

> During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the

> basis of matters outside the record except for matters concerning which the court may take judicial notice.

N.C.G.S. § 15A-1230(a). Defendant complains that the state's characterization undermined Dr. Sloan's credibility and insinuated that the jury should ignore the fact that defendant had been mentally ill since he was thirteen years old.

After careful review of the record, we conclude that the state's argument was proper and that the references to Dr. Sloan's examination were aimed at questioning his ability to make a meaningful and accurate diagnosis of defendant based on spending ninety minutes with him. *See State v. Norwood*, 344 N.C. 511, 536, 476 S.E.2d 349, 361 (1996) (not improper for the state to impeach the credibility of an expert during closing argument), *cert. denied*, 520 U.S. 1158, 137 L. Ed. 2d 500 (1997). Even though Dr. Sloan spent more than ninety minutes evaluating defendant's case, including time spent with his parents and with defendant's mental health records, the state's argument was clearly focused only on the ninety minutes spent with defendant.

Defendant's allegation that he was prejudiced by the suggestion that jurors disregard Dr. Sloan's testimony is belied by the fact that the jury found the existence of the (f)(2) and (f)(6) mitigating circumstances: that the murder was committed while defendant was under the influence of mental or emotional disturbance and that defendant's capacity to conform his conduct to the requirements of the law was impaired. We are convinced that by finding these statutory mitigating circumstances, members of the jury considered Dr. Sloan's testimony to be compelling and, more important for purposes of defendant's argument, that they found the state's characterization of Dr. Sloan insufficient to negate the compelling nature of his expertise.

[16] Defendant also challenges the state's characterization of the capital sentencing proceeding as a "rigid procedure" and a "tightly structured process," this time during the state's sentencing proceeding closing argument. Defendant also challenges the state's admonition to the jury that

> [i]t's important . . . that y'all do your duty as a jury. You know, the law has got to treat everybody the same, and that's why we've got this tightly structured process that you go through. That's

> why it's important that you stay within the parameters of that process.

Defendant argues the impropriety of the state's remarks should be characterized as "gross" because such comments invited the jury to disregard defendant's right to an individualized sentencing proceeding and implied that the jury could not consider or be compassionate regarding defendant's culpability. *See California v. Brown*, 479 U.S. 538, 545, 93 L. Ed. 2d 934, 942 (1987) (O'Connor, J., concurring) (principles of guided discretion and individualized consideration are necessary elements in a moral inquiry into the culpability of the defendant).

Viewed in its original context, the prosecutor's argument proposed only that rules must be applied to capital sentencing and stressed that the jurors not base their decision on impermissible grounds. *See State v. Rouse*, 339 N.C. 59, 93, 451 S.E.2d 543, 561-62 (1994) (holding that the prosecutor may make statements during closing arguments discouraging the jury from sympathy unrelated to the evidence affecting its decision), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995); *see also Brown*, 479 U.S. at 542-43, 93 L. Ed. 2d at 940-41 (instruction informing the jurors that they must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling does not by itself violate the Eighth and Fourteenth Amendments to the United States Constitution).

Defendant cites concerns noted in *Gregg v. Georgia*, 428 U.S. 153, 49 L. Ed. 2d 859 (1976), discussing *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346 (1972), that "the penalty of death not be imposed in an arbitrary or capricious manner . . . are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." *Id.* at 195, 49 L. Ed. 2d at 887. Defendant further cites language from *Godfrey v. Georgia* that such guidance is sufficient only if it "channel[s] the sentencer's discretion by '["]clear and objective standards[,"]' [*Gregg*, 428 U.S. at 198, 49 L. Ed. 2d at 888 (quoting *Coley v. State*, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974)),] that provide 'specific and detailed guidance,' [*Proffitt v. Florida*, 428 U.S. 242, 253, 49 L. Ed. 2d 913, 923 (1976),] and that 'make rationally reviewable the process for imposing a sentence of death[,]' [*Woodson v. North Carolina*, 428 U.S. 280, 303, 49 L. Ed. 2d 944, 960 (1976)]." *Godfrey v. Georgia*, 446 U.S. 420, 428, 64 L. Ed. 2d 398, 406 (1980).

Contrary to defendant's assertion, we perceive the prosecutor's remarks as attempting to move the jury toward, not away from, the directives of *Furman*. By characterizing the process as "tightly structured" or "rigid," the prosecutor was merely conveying the notion that the legislature has made rationally reviewable the weighty deliberative process involved in capital cases by calling attention and giving meaning to the three-step procedure outlined in section 15A-2000(c)(3). Rather than running contrary to the dictates of *Furman*—that the death penalty must be administered in a non-arbitrary fashion—the prosecutor's remarks channeled the jury's deliberative process toward the guideposts outlined in section 15A-2000(c)(3).[2] Moreover, defendant had the opportunity during closing argument to direct the jury's attention to the fact that it is wholly within the discretion and individualized consideration of each juror to decide whether a statutory aggravator is warranted by the evidence beyond a reasonable doubt, whether the aggravating circumstances are sufficiently substantial to call for the imposition of the death penalty, and whether the mitigating circumstances are insufficient to outweigh any found aggravating circumstances. Defense counsel did, in fact, make such an argument to the jury, stating:

> And you know, it's a guideline, and you've seen it right here, the guidelines that you're to follow in making your decision when you go back into the jury room. It's not exactly a rigid structure, because there are 12 of you and each of you bring to this courtroom your entire life of experience, and you've heard that you can come up with a mitigating factor, you can use the ones that we have submitted or, if there's something else about Keith Wiley that you believe he's—this [is] a case less likely for the death penalty, you can consider that. And that's not, you know, a tightly structured maze that guides you right through to only one conclusion. It doesn't. You are each allowed to be in there.

Defense co-counsel also argued during closing as follows:

> Twelve human beings have to go ahead and decide what level of proof . . . fully satisfies them that the death penalty is appropriate in this case. If there was a rigid procedure, we could grab that computer terminal over there and we could plug in the facts

2. The prosecutor's evenhandedness regarding the sentencing process is illustrated by the fact that he also stated, "You follow the questions and the answers, and you weigh these aggravating factors and you weigh the mitigating factors, and that leads you to the ultimate verdict."

> and the computer terminal could tell us whether or not Keith Wiley lives or dies, but that's not the way it works.

Based on the foregoing, we hold that the trial court did not abuse its discretion in failing to intervene *ex mero motu* during the state's closing argument when the prosecutor characterized the capital sentencing proceeding as "rigid" or "tightly structured." This argument is meritless.

[17] Defendant next argues the trial court erred by failing to prevent the jury from "double-counting" the evidence. Defendant alleges the evidence supporting the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance, that the murder was especially heinous, atrocious, or cruel, overlapped with the evidence supporting two aggravating circumstances submitted under N.C.G.S. § 15A-2000(e)(5), that the murder occurred during the commission of robbery with a dangerous weapon and that the murder occurred during the commission of first-degree kidnapping. Defendant concedes that there was sufficient evidence to support robbery and kidnapping as separate aggravating circumstances.[3] Defendant argues, however, that a reasonable likelihood existed that the jury relied upon the same evidence in finding the (e)(9) aggravating circumstance that it relied upon in finding either the aggravating circumstance that the murder occurred during the commission of robbery with a dangerous weapon or the aggravating circumstance that the murder occurred during the commission of first-degree kidnapping. Even though the trial court gave a limiting instruction, defendant argues that this instruction was insufficient to satisfy the requirements of *State v. Gay*, 334 N.C. 467, 495, 434 S.E.2d 840, 856 (1993), in which this Court held that the trial court must instruct the jury so as to ensure that the jurors not use the same evidence to find more than one aggravating circumstance. Defendant also contends that, although he did not object to the trial court's instructions to the jury at the end of the sentencing evidence, the lack of a recorded charge conference impermissibly hindered his preservation of this issue for appellate review. Regardless of what transpired during the unrecorded portion of the trial, we choose to consider this issue, pursuant to N.C. R. App. P. 2, to avoid a perceived deprivation of meaningful appellate review.

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3. Defendant assigned error to the trial court's submission of the (e)(9) aggravating circumstance on the ground that it was not supported by the evidence. Because he does not make this argument in his brief, however, defendant has abandoned this particular issue. *See* N.C. R. App. P. 28(a).

Upon instructing the jury on all the aggravating circumstances, the trial court instructed the jury in accordance with the pattern jury instructions as follows: "You are instructed that the same evidence cannot be used as a basis for finding more than one aggravating factor." Defendant indicated his satisfaction with the trial court's instruction by not objecting at that time and has provided no supporting authority for his contention that the pattern instruction was insufficient.

We have long held that a jury is presumed to follow the instructions given to it by the trial court. *State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208 (citing *Francis v. Franklin*, 471 U.S. 307, 324 n.9, 85 L. Ed. 2d 344, 360 n.9 (1985)), *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). Furthermore, any inadequacy in the instruction may be overcome by substantial evidence of the especially heinous, atrocious, or cruel nature of the killing apart from the evidence as to whether the murder was committed during the commission of first-degree kidnapping or robbery with a dangerous weapon. *Cf. State v. Moseley*, 338 N.C. 1, 56, 449 S.E.2d 412, 445 (1994) (holding that an error in failing to give *any* instruction was harmless where there was clearly sufficient, independent evidence to support each of the aggravating circumstances in question), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995).

Here, the victim was hog-tied and gagged, and his pleas for help were ignored after he was placed in the trunk of a car. The victim was tied up again after becoming untied, placed on his back in a ditch, shot while he pleaded for mercy, and shot again when defendant handed the weapon over to his accomplice to "finish him off" as the victim screamed. The pathologist who performed the autopsy on the victim noted that the wounds inflicted on the victim would have been excruciatingly painful. The record contains a wealth of evidence supporting the (e)(9) aggravating circumstance that surmounts a challenge to any alleged inadequacies in the trial court's limiting instruction. Further, this evidence does not overlap with other evidence showing that defendant took the victim's car by use of a deadly weapon and transported the victim to a remote area against his will for the purpose of inflicting serious bodily harm. Defendant's argument is nonmeritorious.

[18] Defendant next contends that the trial court erred by failing to instruct the jury adequately that a sentence of life imprisonment means life in prison without parole. He also contends that the error

was compounded when the Issues and Recommendation as to Punishment form erroneously described the punishment as "life in prison," not as "life in prison without parole."

At the beginning of its instructions to the jury during sentencing, the trial court stated:

> All right, members of the jury, having found the defendant guilty of murder in the first degree, it is now your duty to recommend to the Court whether the defendant should be sentenced to death or to life imprisonment. Now, *again, when I say life imprisonment I mean life without parole.* Your recommendation will be binding upon the Court. If you unanimously recommend that the defendant be sentenced to death, the Court will impose a sentence of death. *If you unanimously recommend a sentence of life imprisonment, the Court will impose a sentence of life imprisonment without parole.*

(Emphasis added.) Defendant again alludes to his argument that, although he did not object to the instructions or the Issues and Recommendation as to Punishment form, the allegedly unrecorded charge conference precludes meaningful appellate review. Even though defendant was given a full opportunity to object at the conclusion of the trial court's instruction but did not do so, *see Wise*, 326 N.C. at 432, 390 S.E.2d at 149, we choose to consider this issue, pursuant to N.C. R. App. P. 2, to avoid a perceived deprivation of meaningful appellate review.

Defendant's contention mirrors one we recently rejected in *State v. Davis*, 353 N.C. 1, 40-41, 539 S.E.2d 243, 269 (2000), *cert. denied*, —— U.S. ——, 151 L. Ed. 2d 55 (2001). In *Davis*, the trial court instructed the jury, "If you unanimously recommend a sentence of life imprisonment, the court will impose a sentence of life imprisonment without parole," but the defendant argued the phrase was used infrequently or sporadically. *Id.* at 41, 539 S.E.2d at 269. Section 15A-2002 requires the trial court to "instruct the jury, in words substantially equivalent to those of this section, that a sentence of life imprisonment means a sentence of life without parole." N.C.G.S. § 15A-2002, para. 2 (2001). We held in *Davis* that nothing in this section requires the judge to state "life imprisonment without parole" every time he alludes to or mentions the alternative sentence. *Davis*, 353 N.C. at 41, 539 S.E.2d at 269.

The trial court in the instant case stated at the beginning of its instructions to the jury, "Now, again, when I say life imprisonment I

mean life without parole," and reiterated this instruction later, saying, "If you unanimously recommend a sentence of life imprisonment, the Court will impose a sentence of life imprisonment without parole." We hold that defendant's right to a fair sentencing proceeding was not violated because the trial court's instruction met the requirement of section 15A-2002. Defendant's argument therefore fails.

PRESERVATION ISSUES

Defendant raises twelve additional issues that have previously been decided by this Court contrary to his position: (1) whether the trial court erred by denying defendant's motions to disclose the theory upon which the state sought the death penalty, to receive a bill of particulars, and to dismiss the short-form indictment; (2) whether the trial court erred by denying defendant's motion for individual juror *voir dire* and for sequestration; (3) whether the trial court erred by denying defendant's motion to strike the death penalty as unconstitutional, arbitrary, and facially discriminatory; (4) whether the trial court erred by failing to prevent the state from asking questions during *voir dire* as to whether the death penalty is a necessary law; (5) whether the trial court erred by instructing the jury that it could consider during the penalty phase all the competent evidence submitted in both phases; (6) whether the trial court erred by using the terms "satisfaction" and "satisfy" to define the burden of proof on mitigating circumstances; (7) whether the trial court erred by instructing the jury that it had a duty to recommend a sentence of death if it found that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the death penalty; (8) whether the trial court erred by instructing the jury that its answers to Issues One, Three, and Four on the Issues and Recommendation as to Punishment form must be unanimous; (9) whether the trial court erred by using the word "may" in its instructions as to mitigating circumstances; (10) whether the trial court erred in its instructions as to what each juror may consider with regard to the mitigating circumstances; (11) whether the trial court erred by denying defendant's motion to prohibit the state from death-qualifying the jury; and (12) whether the aggravating circumstance under section 15A-2000(e)(9) is unconstitutionally vague and overbroad, both on its face and as applied.

We have considered defendant's contentions on these issues and find no compelling reason to depart from our prior holdings. Therefore, we reject these arguments.

PROPORTIONALITY REVIEW

[19] 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 penalty 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. At defendant's capital sentencing proceeding, the jury found the five aggravating circumstances submitted for its consideration: (1) that defendant had a previous conviction for felonies involving the use or threat of violence, N.C.G.S. § 15A-2000(e)(3); (2) that defendant was previously adjudicated delinquent for committing an offense that would be a felony involving the use or threat of violence if committed by an adult, N.C.G.S. § 15A-2000(e)(3); (3) that the murder was committed during the commission of robbery with a dangerous weapon, N.C.G.S. § 15A-2000(e)(5); (4) that the murder was committed during the commission of first-degree kidnapping, N.C.G.S. § 15A-2000(e)(5); and (5) that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9).

Two statutory mitigating circumstances were found by the jury: (1) that the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); and (2) that defendant's capacity to conform his conduct to the requirements of law was impaired, N.C.G.S. § 15A-2000(f)(6). Of the eleven nonstatutory mitigating circumstances submitted by the trial court, one or more of the jurors found the following four to have mitigating value: (1) that at the age of thirteen, defendant was admitted to Brynn Marr Psychiatric Hospital, where he was diagnosed with a mental disorder and released after only two weeks because his insurance coverage had expired; (2) that defendant was unconditionally released from training school, back into society, suffering from a "Psychotic Thought Disorder," thereby making him a danger to himself and to others; (3) that for approximately two years between his release from training school and this

crime, defendant did not receive any treatment for his mental illness; and (4) that defendant has, and has had, a loving and protective relationship with his brothers.

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 arbitrary consideration. Thus, we now address 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.' " *Atkins*, 349 N.C. at 114, 505 S.E.2d at 129 (quoting *Holden*, 321 N.C. at 164-65, 362 S.E.2d at 537). "In 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 found the death penalty to be disproportionate in seven cases. *Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). We conclude that this case is not substantially similar to any case in which this Court has found the death penalty disproportionate.

This conclusion is supported by several characteristics of this case. First, the jury found defendant guilty of first-degree murder under both the felony murder rule and under a theory of premeditation and deliberation. This is significant because the presence of premeditation and deliberation indicates "a more calculated and cold-blooded crime." *State v. Lee*, 335 N.C. 244, 297, 439 S.E.2d 547, 575, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994). Second, the jury's finding that the defendant committed the murder while engaged in the commission of another violent felony under N.C.G.S. § 15A-2000(e)(5) has been held to be sufficient, standing alone, to sustain a death sentence. *See Zuniga*, 320 N.C. at 274-75, 357 S.E.2d

at 923-24. Here, the jury twice found that this aggravating circumstance existed.

"We also compare this case with the cases in which we have found the death penalty to be proportionate." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although this Court reviews all of the cases in that pool when engaging in our duty of proportionality review, we have repeatedly stated that "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.*; *see also State v. Gainey*, 355 N.C. 73, 116, 558 S.E.2d 463, 490 (2002) (noting that "similarity of cases is not the last word on the subject of proportionality"). Whether a sentence of death is disproportionate in a particular case "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 (quoting *State v. Williams*, 308 N.C. 47, 81, 301 S.E.2d 335, 356, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983)). Accordingly, we conclude that this case is more similar to cases in which we have found the death penalty proportionate than to those in which we have found it disproportionate.

Based on the foregoing and the entire record in this case, we cannot conclude as a matter of law that the sentence of death was excessive or disproportionate. We hold that defendant received a fair trial and capital sentencing proceeding, free from prejudicial error. Therefore, the judgment of the trial court sentencing defendant to death must be left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. TERRY ALVIN HYATT

No. 402A00

(Filed June 28 2002)

1. Confessions and Incriminating Statements— Miranda warnings—right to counsel—statement voluntary

The trial court did not err in a capital first-degree murder prosecution by denying defendant's motion to suppress incriminating statements for violation of his right to counsel where, assuming that defendant was in custody, he was advised of

his Miranda rights prior to questioning. In the absence of actual coercion, the Miranda presumption that coercion exists is overcome by the recital of warnings and any voluntary statements defendant made after officers advised him of his rights were admissible.

2. Constitutional Law— Sixth Amendment right to counsel—questioning—adversarial proceeding not instituted

A first-degree murder defendant's Sixth Amendment right to counsel had not attached at the time of questioning where adversarial proceedings in the form of a formal charge, preliminary hearing, indictment, information, or arraignment had not been instituted against him.

3. Constitutional Law— Fifth Amendment right to counsel—insufficient request

A capital first-degree murder defendant did not invoke his Fifth Amendment right to counsel where defendant allegedly asked his father at the father's residence to get him an attorney but the two officers present testified that they did not hear defendant request an attorney; defendant's request while in the interrogation room to speak to his father did not invoke his Fifth Amendment right to counsel because his father was not in a position to offer him the legal assistance necessary to protect his rights; defendant's statement during interrogation that his father wanted him to have an attorney did not constitute an unambiguous request for counsel; and defendant's willingness to speak to officers unassisted by counsel after his rights were read to him, printed out for his review, and explained to him after his ambiguous utterances regarding his father's wishes constituted a waiver.

4. Constitutional Law— right to counsel—waiver—defendant not aware of counsel's presence in police station

A capital first-degree murder suspect knowingly waived his right to counsel even though he was kept unaware that an attorney retained for him by his father was outside the interrogation room and the State did not interfere with defendant's right to counsel by denying the lawyer's repeated requests for access to his client. The right to counsel is personal to defendant and an otherwise intelligent, knowing, and voluntary waiver is unaffected by a suspect's lack of knowledge about his or her attorney's wishes or efforts.

5. Criminal Law— joinder of offenses—transactional similarity and temporal proximity

The trial court did not err by joining two murder prosecutions where there was transactional similarity and temporal proximity in that both victims were taken to isolated areas of Buncombe County; both were robbed, raped, and killed by stabbing in the left chest; both victims were abandoned in isolated areas; and the two victims were killed four months apart.

6. Homicide— first-degree murder—requested instruction on second-degree—denied

The trial court properly refused a requested instruction on second-degree murder in a capital first-degree murder prosecution where the evidence was that defendant kidnapped both victims, accompanied them into the woods with a knife, and returned alone. This was sufficient to establish premeditation and deliberation and the defendant presented only his denial to negate the State's evidence.

7. Evidence— similar crimes—motive, intent, identity, common plan

The trial court did not err in a first-degree murder prosecution by admitting testimony from a kidnapping victim who was released and who identified defendant as her attacker where the kidnapping was similar to the charged murders, defendant's statement that he had put a lot of bodies in the river was relevant as tending to identify defendant as the murderer in the two charged crimes, and the kidnapping occurred two months after one charged murder and six months after another. Finally, the trial court guarded against the possibility of prejudice by instructing the jury to consider the kidnapping victim's testimony only for the limited purposes of motive, intent, identity, or common plan.

8. Evidence— other crimes—joined prosecutions

The trial court did not improperly allow evidence in one of two joined first-degree murder cases to be used as Rule 404(b) evidence in the other case where the court denied the state's request for a jury instruction allowing the evidence in each case as Rule 404(b) evidence in support of the other and specifically instructed the jury to consider the cases separately. A jury is presumed to follow the instructions given to it by the trial court.

9. Evidence— testimony about lost rape kit—no bad faith

The trial court did not err in a prosecution for two first-degree murders and other crimes which were twenty years old by admitting testimony about a rape kit which was lost prior to trial where the kit was lost during one of three moves by the Sheriff's Department in the intervening years. There was no showing of bad faith by the Sheriff's Department; an SBI serologist testified that it was unlikely that a DNA test could have been performed because there were so few sperm in the sample; defendant admitted participating in the kidnapping and robbery of the victim; and defendant had ample opportunity to cross-examine each of the State's witnesses and to impeach probativeness of the rape kit.

10. Witnesses— speech impairment—sufficiently understandable

The trial court did not abuse its discretion in a capital first-degree murder prosecution by denying defendant's motion to disqualify a witness whose speech was affected by viral encephalitis where the reporter had to ask the witness to repeat himself many times, but it is clear that he was sufficiently understandable when he repeated his testimony.

11. Appeal and Error— preservation of issues—sufficiency of evidence questions

Only sufficiency of evidence questions properly advanced in a brief with supporting arguments and reasoning will be considered. Unsupported evidentiary challenges (specifically, bald assertions of unsupported evidence) are deemed abandoned.

12. Rape— sufficiency of evidence—lack of consent

There was sufficient evidence of rape where testimony that the victim feared defendant because he was carrying a knife was sufficient to show lack of consent, and evidence that she was stabbed multiple times was sufficient to establish personal injury.

13. Witnesses— competency—bias, prior convictions and inconsistent statements

There was sufficient evidence to support charges of first-degree murder, robbery, and kidnapping where defendant contended that the State's case relied largely on the testimony of two witnesses who should have been declared incompetent as a matter of law because of bias, prior convictions, and prior inconsistent statements. When weighing a challenge to the sufficiency of

the evidence, all evidence is to be construed in the light most favorable to the State; it is the province of the jury rather than the court to assess and determine credibility.

14. Homicide— conviction based on felony murder and premeditation—judgment not arrested on predicate felonies

The trial court properly denied a first-degree murder defendant's motion to arrest judgment on the predicate felonies underlying his felony murder convictions where he was also convicted based on premeditation and deliberation. The murder convictions therefore have foundations independent of the predicate felonies and the trial court could properly enter judgment on the remaining felonies.

15. Criminal Law— discovery—refusal to compel

Defendant suffered no prejudice where the court granted the State's request for discovery of defendant's medical, psychological and military record, but the court subsequently denied the State's motion to compel compliance with the original order.

16. Criminal Law— request to dismiss appointed counsel— mere request insufficient

The trial court did not err in a prosecution for first-degree murder and other crimes by denying defendant's motion to substitute appointed counsel with retained counsel 6 days into the trial where defendant argued that filing the motion is itself an adequate indicator of serious problems in the attorney-client relationship. However, the denial of such a motion has been upheld where no justifiable basis was offered for the replacement and where doing so would obstruct the orderly procedure of trial.

17. Constitutional Law— effective assistance of counsel—position to develop issue

A first-degree murder defendant was not in a position to adequately develop an ineffective assistance of counsel (IAC) issue concerning the failure to procure certain records to impeach witnesses, and his IAC claim was dismissed without prejudice to his right to reassert the claim during a subsequent motion for appropriate relief. Defendant could develop a second IAC claim regarding failure to rehabilitate jurors who expressed equivocal views on the death penalty, but could not direct the Supreme Court's attention toward a juror worthy of rehabilitation.

18. Sentencing— capital—death penalty—proportionate

A death penalty was proportionate where the record fully supports the aggravating circumstances found by the jury, there was no evidence that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary consideration, and the case is more similar to cases in which the death penalty was found proportionate than to those in which it was found disproportionate. Defendant kidnapped and raped two women and then murdered them in cold blood by stabbing them multiple times, and the jury found two aggravating circumstances which could have supported a death sentence individually.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of death entered by Downs, J., on 4 February 2000 in Superior Court, Buncombe County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. On 29 October 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 15 April 2002.

Roy Cooper, Attorney General, by Ellen B. Scouten, Special Deputy Attorney General, for the State.

Michael E. Casterline for defendant-appellant.

MARTIN, Justice.

Terry Alvin Hyatt (defendant) was indicted on 3 May 1999 for the first-degree kidnapping, robbery with a dangerous weapon, first-degree rape, and first-degree murder of Harriett Delaney Simmons occurring on or about 15 April 1979 and for the first-degree kidnapping, robbery with a dangerous weapon, first-degree rape, and first-degree murder of Betty Sue McConnell occurring on or about 25 August 1979. Defendant was tried capitally at the 10 January 2000 session of Superior Court, Buncombe County. The jury returned verdicts of guilty for each charge, with the first-degree murder verdicts based on malice, premeditation, and deliberation and under the felony murder rule. At the conclusion of the capital sentencing proceeding, the jury recommended a sentence of death for the murder of Simmons and a sentence of death for the murder of McConnell, and the trial court entered judgment in accordance with these recommendations. The trial court also sentenced defendant to six consecutive terms of life imprisonment for the noncapital felony convictions.

The state's evidence presented at trial, as relevant to defendant's assignments of error, tended to show the following: At 1:00 a.m. on 14 April 1979, Simmons left her job in Raleigh and started driving to Nashville, Tennessee, to visit a friend. Simmons told her family that she expected to arrive in Nashville by 7:00 or 8:00 a.m. When she had not called by 10:30 a.m. the next day, her family called the residence of Simmons' friend in Tennessee and discovered that she had never arrived. They then notified the police that Simmons was missing.

On 20 April 1979, Ronald Wayne Dement, a family friend, decided to drive along the route he believed Simmons would have driven to Nashville. Dement found Simmons' car at a rest stop on Interstate 40 west of Statesville and observed that her suitcase and thermos were inside the car but that her keys and purse were missing. Following a search, Simmons could not be located in the area around the rest stop.

Almost one year after Simmons disappeared, the Buncombe County Sheriff's Department received a report that a skull and skeleton were spotted in a wooded area at the edge of the Pisgah National Forest near Highway 151 in Candler, North Carolina. A search of the area produced bones, clothing, jewelry, a set of car keys, other personal effects, and a short segment of silver duct tape. The personal items found were identified as belonging to Simmons. Billy Matthews, State Bureau of Investigation (SBI) Special Agent, matched the keys recovered at the scene to the number on the sales order made out to Simmons at the Toyota dealership where she purchased her car. Using dental records, the remains were positively identified as those of Simmons. An autopsy and examination of the skeletal remains revealed that death was caused by multiple stab wounds to the left chest made with a knife or knife-like object that would have penetrated the heart, lungs, or other vital organs.

The state's evidence regarding the McConnell case tended to show that around 11:30 p.m. on 24 August 1979, McConnell telephoned her mother from work to let her know she was meeting a friend at a local bowling alley in Asheville. During the early morning hours of 25 August 1979, Don and Sue Helms looked out the window of their home along the French Broad River in Asheville and saw a woman later identified as McConnell lying in a driveway. The woman had multiple stab wounds to her chest, extending from below her neck to her stomach.

When she was discovered by the Helmses, McConnell's body was soaking wet, her chest was covered with blood, her skin was very white, and she was gasping for air. Before she died, McConnell made two statements to the Helmses: "I was stabbed and thrown into the river," and "I was picked up at work by two guys." McConnell's sunglasses were found on the bank of the river, and law enforcement officers found bloodstains in an area of grass, with a trail of blood leading from the river to the point where McConnell was found in the Helmses' driveway, approximately fifty feet from the river. McConnell's car was located upstream, submerged in the river, with a scrape on its side and the driver's window rolled down. An autopsy showed five stab wounds to McConnell's left chest. A wound below the collarbone went through the upper lobe of the lung and perforated the pulmonary artery, causing McConnell's death. The autopsy also revealed the presence of a cloudy material in the vaginal vault, later identified as sperm, which was collected with other rape kit evidence and sent to the SBI lab on 31 August 1979.

On 13 August 1998, Jerry Harmon visited Captain Pat Hefner at the Buncombe County Sheriff's Department. Harmon, who was intoxicated at the time and was a self-proclaimed heavy drinker, informed Captain Hefner that he had information that he wanted to get off his mind. Harmon described to officers the rape and murder of McConnell by defendant. Harmon related that on 24 August 1979, he and defendant "drank all day and—and just rode around and partied." Sometime between 10:00 p.m. and midnight, as defendant and Harmon were driving, defendant pulled the truck beside a car stopped at a traffic light and gestured obscenely to the woman driving the car next to them. When the woman drove off after the light changed, defendant positioned his truck behind the woman's car and drove into its back bumper, forcing it off the road.

Defendant ran to the woman's car, opened the door, pushed the woman into the passenger seat, yelled to Harmon to follow him, and drove off. Harmon followed defendant until he pulled off the road in an isolated wooded area. Defendant exited the car with the woman, holding a knife on her, and took her to the back of the truck Harmon was driving. Defendant told her that they would not hurt her but that they were going to have sex with her and let her go. Defendant proceeded to rape the woman while Harmon watched from outside the truck.

Defendant forced McConnell back into her car and drove to an isolated location adjacent to the French Broad River with Harmon

following in the truck. Defendant took McConnell down to the river and out of Harmon's sight, but Harmon could hear McConnell screaming. Defendant returned to the truck and told Harmon he had stabbed McConnell and thrown her into the river. Harmon followed defendant, who was driving McConnell's car, to another location upstream, where defendant disposed of the car by driving it into the river.

At the time of Harmon's meeting with Captain Hefner, Harmon also informed officers that Dean Helms, a mutual friend of defendant and Harmon, knew about the McConnell murder. In October 1998, R. Timothy Shook, an SBI Agent who focused on unsolved murders, and Detective Anne Benjamin of the Buncombe County Sheriff's Department questioned Helms at his home about the kidnapping. Helms said he was glad to see the officers and had been praying about it. Helms thereafter began describing how he and defendant had kidnapped a woman from a rest area twenty years previously during a drive from Greensboro to Asheville. Agent Shook recognized the details of this account as being very similar to the unsolved murder of Simmons.

At trial, Helms testified that while he and defendant were returning from a beach trip in 1979, they encountered a woman with car trouble at a rest stop. Defendant told the woman they could help by driving her to get a part that would fix her car. Helms testified that the woman got into their van, but later stated that defendant "took her unwillingly." They drove up a mountain outside of Candler, North Carolina, and stopped on a dirt road, where defendant had sex with the woman in the back of the van. Helms testified that defendant did not rape the woman because "she was willing" but that she was scared of both of them because defendant was carrying a knife.

Defendant then took the woman into the woods while Helms remained in the van. Helms heard the woman screaming. After approximately thirty minutes, Helms saw defendant emerge from the woods alone, with blood on the bottom of his shirt. Defendant told Helms that the woman had "took off walking." The two men drove back down the mountain and threw the woman's purse out as they drove.

Defendant presented no evidence during the guilt phase of the trial. Additional facts are provided as necessary below in addressing defendant's arguments.

Defendant first argues that the trial court erred by failing to grant his motion to suppress incriminating statements made to SBI Agent Shook and Detective Benjamin on 19 November 1998. The two officers questioned defendant at his residence in Asheville based on the information they learned from Harmon and Dean Helms. Agent Shook and Detective Benjamin identified themselves as law enforcement officers and informed defendant they wanted to ask him about the death of Amber Lundgren, a homicide victim whose death occurred in early 1998. Defendant was willing to cooperate and volunteered to have blood drawn for DNA analysis at the Buncombe County Health Department. Defendant also reluctantly agreed to have his truck photographed for a vehicle lineup.

Defendant drove himself to the facility in his truck along with Agent Shook, while Detective Benjamin followed in an unmarked patrol car. After the procedure, the officers invited defendant to the Sheriff's Department for questioning. At the Sheriff's Department, defendant was taken to an interview room where Agent Shook informed him that he wanted to discuss the 1979 abduction, rape, and death of McConnell. Defendant became silent and did not talk for some time. Agent Shook showed defendant what he said were defendant's fingerprints on a type of bond paper. Defendant studied the papers for a few moments and eventually stated he was ready to talk to the officers, but he wanted to see his father first.

At that time, the officers read the North Carolina SBI "Interrogation Advisement of Rights" form to defendant. Defendant also read this form and agreed to sign it after Agent Shook wrote on it, "wish to talk to father, James F. Hyatt, first and then give statement." The form advised defendant: (1) that he had the right to remain silent and that anything he said could be used against him in court; (2) that defendant had the right to talk to a lawyer for advice before questioning and to have a lawyer present during questioning; (3) that if he was unable to afford a lawyer, one would be appointed to him before questioning; and (4) that if he chose to answer questions without a lawyer, he would retain the right to stop the questioning at any time and that he could stop the questioning until he consulted with a lawyer. Prior to signing the form, the officers read the following statement on the form to defendant:

> I have read the statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know

> what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Defendant was then handcuffed and transported to his father's residence. Agent Shook and Captain Hefner stood ten to twelve feet away, but they overheard defendant whisper to his father that he was in trouble because of something that occurred a long time ago when he used to spend time with Dean Helms. There is conflicting testimony as to whether defendant's father advised defendant that he should have a lawyer and that he would help defendant retain one, or whether defendant initiated the discussion about retaining a lawyer. The state's evidence was uncontroverted, however, that neither Agent Shook nor Detective Benjamin heard defendant request an attorney while at his father's residence.

Upon returning to the interrogation room at approximately 1:10 p.m., the officers continued to question defendant about the McConnell case, and defendant stated that his father wanted to retain a lawyer for him. Detective Benjamin asked defendant if that was defendant's wish as well and explained that defendant was the one being interviewed. Detective Benjamin reminded defendant that invoking his right to counsel was his decision, not his father's. Defendant responded, "that is what my daddy wants me to do." Defendant then asked to go to the rest room, where he was accompanied by Agent Shook. When they returned, defendant again requested to speak to his father, but Agent Shook replied that he had already been given that opportunity.

Defendant proceeded to describe his involvement in the McConnell case, saying that he did not kill McConnell but that Harmon was the murderer. Defendant described how he and Harmon were riding together and how Harmon got into McConnell's car and drove to the river, where Harmon raped and killed McConnell. Defendant admitted taking McConnell's belongings from her car. At the conclusion of the questioning, Agent Shook read his notes to defendant, and defendant agreed that the information was correct. Agent Shook then told defendant that he wanted to talk about the Simmons case, and defendant was silent for a long time. Defendant stated he was through talking, at which time the interview was concluded, and defendant was placed under arrest.

At the suppression hearing on 10 January 2000, defendant called his father, James Hyatt, who testified he retained counsel for defend-

ant. He stated that he and counsel arrived at the Sheriff's Department around 3:00 p.m. on 19 November 1998 but that they were not permitted to see defendant until 6:00 p.m. Although counsel testified that he made numerous requests that all questioning be stopped until he could talk to defendant, the officers informed him that defendant had not invoked his right to counsel.

The trial court denied defendant's motion to suppress, finding that defendant had been advised of and understood his rights, had signed the waiver form, and had not requested an attorney. Rather, defendant told officers that his father wanted him to have an attorney. The trial court concluded that, as a matter of law, defendant waived his rights and that his statements were understandingly, voluntarily, and knowingly made.

At the outset, we note that the trial court's findings of fact following a hearing on the admissibility of defendant's statements are binding on this Court and conclusive on appeal if supported by competent evidence, even if that evidence is conflicting. *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995); *State v. Barber*, 335 N.C. 120, 129, 436 S.E.2d 106, 111 (1993), *cert. denied*, 512 U.S. 1239, 129 L. Ed. 2d 865 (1994); *State v. Davis*, 305 N.C. 400, 410, 290 S.E.2d 574, 581 (1982); *State v. Jenkins*, 292 N.C. 179, 184-85, 232 S.E.2d 648, 652 (1977). A thorough review of the transcript and record in the present case reveals there was ample, competent evidence to support the trial court's findings of fact.

[1] The trial court's conclusions of law, however, are reviewable *de novo*. *See Barber*, 335 N.C. at 129, 436 S.E.2d at 111 (while trial court's supported findings of fact are binding on an appellate court, conclusions of law are fully reviewable on appeal). First, defendant contends that the trial court erred by failing to conclude as a matter of law that his statements should have been suppressed because he was in the custody of the Sheriff's Department and thus had a right to counsel. Defendant's argument, however, illuminates his misconception of the nature of the protections against compelled self-incrimination afforded by *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), and its progeny.

The United States Supreme Court, in *Miranda*, recognized "the danger of coercion [that] results from the interaction of custody and official interrogation," *Illinois v. Perkins*, 496 U.S. 292,

297, 110 L. Ed. 2d 243, 251 (1990), that threatens to " 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination," *Rhode Island v. Innis*, 446 U.S. 291, 299, 64 L. Ed. 2d 297, 306 (1980) (quoting *Miranda*, 384 U.S. at 457, 16 L. Ed. 2d at 714). The *Miranda* warnings shield a suspect from "inherently compelling" custodial interrogation by advising him or her of specific rights, namely: (1) that the individual has the right to remain silent; (2) that as a consequence of foregoing the right to remain silent, anything the individual says may be used in court against the individual; (3) that the individual has the right to consult with an attorney in order to determine how best to exercise his or her rights prior to being questioned; and (4) that if the individual cannot afford an attorney, one will be appointed. *Miranda*, 384 U.S. at 444-45, 16 L. Ed. 2d at 706-07. In the absence of actual coercion, the presumption created by *Miranda*—that coercion exists if a suspect is not advised of his or her rights before being questioned while in custody—is overcome by the recital of warnings. *State v. Buchanan*, 353 N.C. 332, 336-37, 543 S.E.2d 823, 826 (2001) (citing *Oregon v. Elstad*, 470 U.S. 298, 306-07, 84 L. Ed. 2d 222, 230-31 (1985)).

Defendant's assertion that his right to counsel was violated is misplaced. Even assuming, without deciding, that defendant was in custody, he was advised of his *Miranda* rights prior to questioning. Moreover, the officers advised defendant of his rights at the moment defendant indicated a willingness to discuss his knowledge of the 1979 abduction, rape, and death of McConnell. Therefore, any voluntary statements defendant made thereafter are admissible in court.[1] *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 706-07.

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[2] 1. Furthermore, to the extent defendant's argument can be construed to suggest that his Sixth Amendment right to counsel attached at the time of questioning, this argument fails because "[i]t 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." *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). Here, defendant's Sixth Amendment right to counsel had not ripened at the time of questioning because adversarial judicial proceedings, in the form of a " 'formal charge, preliminary hearing, indictment, information, or arraignment,' " had not been instituted against him. *State v. Franklin*, 308 N.C. 682, 689, 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); *see generally United States v. Gouveia*, 467 U.S. 180, 187-89, 81 L. Ed. 2d 146, 153-55 (1984).

[3] Defendant also asserts that he invoked his Fifth Amendment right to counsel by asking his father to retain a lawyer for him. Defendant contends that this request was overheard by Agent Shook and Detective Benjamin, who accompanied defendant to his father's house. Defendant argues that his affirmative invocation of counsel was made apparent when an attorney retained by his father arrived at the Sheriff's Department. Defendant further argues that he invoked his Fifth Amendment right to counsel when he told Agent Shook that his father wanted him to have a lawyer. Defendant alleges that by denying his second request to meet with his father, the officers effectively denied him access to the attorney retained by his father. These arguments are without merit.

If a criminal suspect invokes his right to counsel at any time during custodial interrogation, the interrogation must cease, and it cannot be resumed in the absence of an attorney unless the defendant initiates further discussion with the officers. *State v. Jackson*, 348 N.C. 52, 55, 497 S.E.2d 409, 411, *cert. denied*, 525 U.S. 943, 142 L. Ed. 2d 301 (1998), *overruled on other grounds by Buchanan*, 353 N.C. at 340, 543 S.E.2d at 828. In *Davis v. United States*, 512 U.S. 452, 129 L. Ed. 2d 362 (1994), the United States Supreme Court held that to invoke his or her right to counsel, "the suspect must unambiguously request counsel." *Id.* at 459, 129 L. Ed. 2d at 371. The invocation of the right to counsel " 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' " *Id.* (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178, 115 L. Ed. 2d 158, 169 (1991)). The test is an objective one that assesses whether a reasonable officer under the circumstances would have understood the statement to be a request for an attorney. *See Jackson*, 348 N.C. at 56, 497 S.E.2d at 411 (citing *Davis*, 512 U.S. at 459, 129 L. Ed. 2d at 371). Unless the in-custody suspect "actually requests" an attorney, lawful questioning may continue. *Davis*, 512 U.S. at 462, 129 L. Ed. 2d at 373.

In the instant case, even if we assume, without deciding, that defendant was in custody, defendant never sufficiently articulated his desire for counsel, either at his home or in the interrogation room, so that a reasonable officer under the circumstances would have understood the statement to be a request for an attorney. Defendant's father testified that Agent Shook was standing nearby when defendant whispered to his father, "I want you to get me a lawyer," and that the officer "could have heard it." Cindy L. Spalding, defendant's girlfriend, testified that she heard defendant ask his father to "get him an attor-

ney" and also that she approached Captain Hefner's vehicle where defendant sat in the front passenger seat when defendant asked her "to make sure that his dad got him a lawyer." Although Agent Shook and Detective Benjamin accompanied defendant, they both repeatedly testified that they did not hear defendant request an attorney at any time.

It is axiomatic that, as a threshold issue to assessing whether a reasonable officer under the circumstances would have understood a statement made by a suspect to be a request for an attorney, the statement must at least be perceived by the accompanying officer. *See id.* at 459, 129 L. Ed. 2d at 371. In the instant case, as found by the trial court, neither Agent Shook nor Detective Benjamin heard defendant's alleged invocation of his right to counsel. We therefore need not assess whether such statements could reasonably be construed as an expression of a desire for the assistance of counsel.

With respect to defendant's statements during interrogation to the effect that his father wanted him to have an attorney present and his second request to speak to his father, such statements do not, as a matter of law, constitute an unambiguous request for counsel. *See id.* at 461-62, 129 L. Ed. 2d at 373. In *Fare v. Michael C.*, 442 U.S. 707, 61 L. Ed. 2d 197 (1979), the United States Supreme Court rejected the contention that a juvenile's request to speak with his probation officer served to invoke his *Miranda* rights. *Id.* at 724, 61 L. Ed. 2d at 212. The rule in *Miranda* that a request for an attorney is *per se* an invocation of one's Fifth Amendment rights is based on the unique role attorneys play in our society as the protectors of legal rights in dealing with the police and the courts. *Id.* at 719, 61 L. Ed. 2d at 208-09. In declining to equate a request to speak with a probation officer, a clergyman, or a close friend as an invocation of one's Fifth Amendment rights, the Court in *Michael C.* recognized the role those trained as attorneys play in the adversary system of criminal justice and promoted lawyers as uniquely qualified to alleviate the concerns embodied in *Miranda*, namely, the danger of coercion resulting from the interaction of custody and official interrogation. *Id.* Likewise, in the instant case, defendant cannot claim to have invoked his Fifth Amendment right to counsel by asking to speak to his father because his father was not in a position to offer the type of legal assistance necessary to protect defendant's rights during custodial interrogation. *See id.*

Additionally, defendant's statement to the effect that his *father* wanted him to have a lawyer present during the interrogation was

insufficient to constitute an invocation of defendant's Fifth Amendment right to counsel. This statement did not unambiguously convey *defendant's* desire to receive the assistance of counsel. Moreover, when defendant conveyed his father's wish that he get an attorney, Detective Benjamin made no attempt to dissuade defendant from exercising his Fifth Amendment right. Rather, she clarified that defendant, and not his father, must be the one to decide whether to seek the assistance of counsel. *See Davis*, 512 U.S. at 461-62, 129 L. Ed. 2d at 373 (emphasizing that, in light of a suspect's ambiguous or equivocal statement, good police practice may necessitate clarification of whether the suspect desires an attorney, but nonetheless declining to adopt a constitutional rule requiring such clarification). Defendant's willingness to speak to Detective Benjamin and Agent Shook unassisted by counsel after having his *Miranda* rights read to him, printed out for his review, and explained to him upon his ambiguous utterances regarding his father's wishes constituted a waiver of defendant's Fifth Amendment rights. " '[F]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process,' " *id.* at 460, 129 L. Ed. 2d at 372 (quoting *Moran v. Burbine*, 475 U.S. 412, 427, 89 L. Ed. 2d 410, 424-25 (1986)), and "[a] suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted, *id.* at 460-61, 129 L. Ed. at 372.

[4] Next, defendant alleges that there cannot be a knowing waiver of one's right to counsel where a suspect is kept unaware of his lawyer's presence outside the interrogation room and, furthermore, that by denying his attorney's repeated requests for access to his client, the state interfered with defendant's right to counsel.

In *Burbine*, the United States Supreme Court considered the same argument made by defendant in the instant case: that a state's refusal to inform the defendant of his attorney's attempts to reach him undermines the validity of a defendant's otherwise proper waiver. 475 U.S. at 420, 89 L. Ed. 2d at 420. The Court rejected this argument: "[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." *Id.* at 422, 89 L. Ed. 2d at 421.

The Court reasoned that requiring police to inform a suspect of his lawyer's efforts to contact him would constitute an unnecessary

handicap on otherwise permissible investigatory efforts and would upset the subtle balance, embodied in *Miranda*, between the legitimate and substantial interest of the public in securing admissions of guilt and the protection of a suspect in the inherently coercive environment of custodial interrogation. *Id.* at 426-27, 89 L. Ed. 2d at 424-25. Rather than requiring police to keep a suspect abreast of the status of his legal representation, the Court held as follows:

> Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.

Id. at 422-23, 89 L. Ed. 2d at 422. This Court has followed *Burbine* for over fifteen years as the controlling law under the federal and state Constitutions and has held that an otherwise intelligent, knowing, and voluntary waiver of Fifth Amendment rights is unaffected by a suspect's lack of knowledge about his or her attorney's wishes or efforts. *See State v. Reese*, 319 N.C. 110, 130-32, 353 S.E.2d 352, 363-64 (1987); *see also State v. Peterson*, 344 N.C. 172, 178-79, 472 S.E.2d 730, 733-34 (1996) (reiterating that because right to counsel is personal to a defendant, a decision to speak to officers and waive Fifth Amendment rights was voluntarily, knowingly, and intelligently made even if attorney demanded that he be present during any interrogation and advised the officers not to talk to his client). Defendant's argument is without merit.

[5] Defendant next argues that the trial court's joinder of the Simmons and McConnell cases substantially prejudiced his right to a fair trial. Following a pretrial hearing on the state's motion for joinder, the trial court found the common *modus operandi* and temporal proximity of the Simmons and McConnell cases sufficient to support joinder. Defendant argues that any "surface similarities" between the Simmons and McConnell murders are far outweighed by their differences. We disagree.

Joinder is proper under N.C.G.S. § 15A-926(a) if there is a transactional connection between the separate criminal offenses. N.C.G.S. § 15A-926(a) (2001); *State v. Moses*, 350 N.C. 741, 750, 517 S.E.2d 853, 860 (1999), *cert. denied*, 528 U.S. 1124, 145 L. Ed. 2d 826 (2000). The trial court must also consider if joinder of the offenses would hinder the defendant's ability to present a defense or deprive the

accused of a fair trial. *State v. Greene*, 294 N.C. 418, 421-22, 241 S.E.2d 662, 664 (1978).

While the question of whether consolidated offenses are transactionally related is fully reviewable on appeal, *State v. Chapman*, 342 N.C. 330, 343, 464 S.E.2d 661, 668 (1995), *cert. denied*, 518 U.S. 1023, 135 L. Ed. 2d 1077 (1996), we will not disturb the trial court's decision absent an abuse of discretion, *State v. Weathers*, 339 N.C. 441, 447, 451 S.E.2d 266, 269 (1994). In *Chapman*, we stated that a transactional connection could be established by demonstrating a common *modus operandi* in the commission of the separate crimes, as well as by the existence of a temporal proximity between the offenses. *Chapman*, 342 N.C. at 343, 464 S.E.2d at 668. Here, substantial similarities between the offenses demonstrate the existence of a transactional connection: both victims were females traveling alone on public roads; both victims were taken to isolated areas of Buncombe County; both were robbed, raped, and killed by stabbing in the left chest area; and both victims were abandoned in isolated areas. In addition, temporal proximity is established by the fact that the two victims were killed four months apart.

Although defendant argues that joinder in this case was unfairly prejudicial, he makes no showing of prejudice in his brief to support his assertion, and he has therefore abandoned this issue on appeal. *See* N.C. R. App. P. 10(b)(1), 28(b)(6). Furthermore, because the facts amply establish the existence of a transactional connection, we leave undisturbed the decision of the trial court to consolidate the offenses.

[6] Defendant next argues the trial court erred in denying his request for an instruction on second-degree murder. Defendant asserts that because reasonable doubt existed on the issue of whether defendant premeditated and deliberated the Simmons and McConnell homicides, the trial court must instruct on the lesser-included offense of second-degree murder. We find no merit in defendant's argument.

We have stated the rule for determining whether an instruction for the lesser-included offense of second-degree murder is required as follows:

> [I]f the State's evidence is sufficient to satisfy its burden of proving each element of first-degree murder, including premeditation and deliberation, and there is no evidence other than defendant's denial that he committed the crime to negate these

elements, the trial court should not instruct the jury on second-degree murder.

State v. Conaway, 339 N.C. 487, 514, 453 S.E.2d 824, 841, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995); *see also State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 925 (2000).

The state's evidence showed that defendant kidnapped both victims, accompanied both victims into the woods with a knife, and returned alone. This evidence was sufficient to establish that the multiple-stabbing deaths of McConnell and Simmons were committed by defendant with premeditation and deliberation. Defendant presented no evidence to negate the state's evidence other than his denial of guilt. Because there was no evidence upon which the jury could find defendant guilty of second-degree murder and because defendant did not negate any of the elements of first-degree murder, including the elements of premeditation and deliberation, there was no basis upon which the trial court could submit an instruction on second-degree murder. Thus, the trial court properly refused to submit defendant's requested instruction.

[7] In his next argument, defendant argues the trial court erred in admitting the testimony of Carolyn Brigmon under N.C.G.S. § 8C-1, Rule 404(b). During *voir dire* on 25 January 2000, Brigmon testified that she was kidnapped by defendant at knifepoint as she was walking home from work at 4:00 a.m. on 19 October 1979. Brigmon stated that defendant threw her into his truck and took her to a remote area. She said that as they drove, defendant kept a knife by his side and repeatedly ran his finger over the blade. Brigmon testified that although defendant told her to take her clothes off, she convinced him not to rape her. He told her, "I'm going to do something I've never done before. I'm going to give you back your life." He also said, as they were crossing a bridge over the river, that he "had put a lot of bodies in there" and that he would do the same to her if she told anyone. Defendant robbed her of forty-four dollars and threw her purse out the window. Brigmon went to the police immediately and identified defendant as her attacker. Defendant was charged with armed robbery and kidnapping, and he subsequently pled guilty.

The trial court permitted Brigmon to take the stand and admitted her testimony as evidence of motive, intent, plan, and identity under Rule 404(b). Defendant argues that the prior crime involving Brigmon was so remote in time and so dissimilar that any probative

value was substantially outweighed by the prejudice visited on defendant. Defendant's argument is without merit.

Rule 404(b) provides:

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

N.C.G.S. § 8C-1, Rule 404(b) (2001). Rule 404(b) is a "rule of inclusion of relevant evidence of other crimes, wrongs, or acts by a defendant, subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

To admit evidence of defendant's prior crimes or bad acts under Rule 404(b), there must be " 'some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes.' " *State v. Riddick*, 316 N.C. 127, 133, 340 S.E.2d 422, 426 (1986) (quoting *State v. Moore*, 309 N.C. 102, 106, 305 S.E.2d 542, 545 (1983)). For example, we have held that an unrelated prior assault was properly admitted to prove identity of the defendant as the murderer where each of the defendant's victims was taken by surprise, confined in the trunk of a car, forced to strip, robbed, and shot in the head. *State v. Lemons*, 348 N.C. 335, 352, 501 S.E.2d 309, 320 (1998), *sentence vacated on other grounds*, 527 U.S. 1018, 144 L. Ed. 2d 768 (1999).

In the instant case, the kidnapping, threatening, and robbing of Brigmon was particularly similar to the Simmons and McConnell cases. These actions tend to indicate that the same person committed the crimes charged. In each of the three cases, the perpetrator captured lone females, took them to isolated locations in Buncombe County, and committed or attempted to commit the same crimes against them by using or threatening to use a knife. Additionally, defendant's statement that he had put a lot of bodies into the river was relevant in tending to identify defendant as the murderer of Simmons and McConnell.

Defendant's argument that the offenses against Brigmon were too remote to be relevant is unavailing. The case involving Brigmon

occurred two months after the McConnell murder and six months after the Simmons murder. In *State v. Carter*, 338 N.C. 569, 451 S.E.2d 157 (1994), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995), we upheld the use, under Rule 404(b), of an assault committed by the defendant eight years prior to the offense for which he was being tried because both offenses were committed in a particularly similar manner—a blow below the right eye with a brick-like object. *Id.* at 588-89, 451 S.E.2d at 167. In *State v. Hipps*, 348 N.C. 377, 501 S.E.2d 625 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999), we upheld the use, under Rule 404(b), of a murder committed seventeen years prior to the murder for which the defendant was being tried because the knife wounds and head trauma were sufficiently similar. *Id.* at 404-05, 501 S.E.2d at 641-42. The trial court properly admitted evidence of the Brigmon case pursuant to Rule 404(b).

By arguing the admission of Brigmon's testimony generates a great danger of unfair prejudice to him, defendant appears to assert that even if the testimony is admissible under Rule 404(b), the evidence of the offenses against Brigmon should have been excluded under Rule 403 of the North Carolina Rules of Evidence. Rule 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403 (2001). The exclusion of evidence under Rule 403 is a matter generally left to the sound discretion of the trial court, *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986), which we leave undisturbed unless the trial court's ruling is "manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision," *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). Here, the trial court did not abuse its discretion by admitting evidence of bad acts otherwise admissible under Rule 404(b). Rather, the trial court guarded against the possibility of prejudice by instructing the jury to consider Brigmon's testimony only for the limited purposes of motive, intent, identity, or common plan. The trial court specifically admonished the jury not to consider Brigmon's testimony on the issue of defendant's character. *See, e.g., Lemons*, 348 N.C. at 352-53, 501 S.E.2d at 320 (prior misconduct admissible and not unfairly prejudicial under Rule 403 where trial court gave limiting instruction regarding permissible uses of 404(b) evidence). Defendant's argument is rejected.

[8] By his next argument, defendant asserts that the trial court committed prejudicial error in allowing evidence in the Simmons case to

be used as Rule 404(b) evidence in the McConnell case, and vice versa. During the charge conference, the state requested a jury instruction allowing the evidence in each case as Rule 404(b) evidence in support of the other. The trial court denied the state's request. Furthermore, the trial court specifically instructed the jury to consider the Simmons case and the McConnell case separately. We have long held that a jury is presumed to follow the instructions given to it by the trial court. *State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208 (citing *Francis v. Franklin*, 471 U.S. 307, 324 n.9, 85 L. Ed. 2d 344, 360 n.9 (1985)), *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). Defendant's contentions are rejected.

[9] Defendant next argues that the trial court erred by admitting testimony regarding a rape kit that was unavailable to defendant because it was lost prior to trial. Laboratory tests of the rape kit evidence, collected during an examination of McConnell by SBI serologist Brenda Bissette on 31 August 1979, revealed the presence of sperm. The rape kit was lost, however, during one of three moves by the Sheriff's Department in the past twenty years. Although defendant concedes the rape kit establishes the presence of sperm, he argues that the evidence should be excluded because no tests were conducted to determine whether the sperm found matched his DNA. Defendant argues that the evidence should have been excluded under Rule 403 as unfairly prejudicial, confusing, and misleading. Defendant also argues that he was denied the opportunity to examine a potentially significant piece of exculpatory evidence.

We have upheld the admission of evidence subsequently lost or destroyed where the exculpatory value of tests a defendant seeks to perform on that evidence is speculative and there is no showing of bad faith or willful intent on the part of any law enforcement officer. *See State v. Hunt*, 345 N.C. 720, 724-25, 483 S.E.2d 417, 420-21 (1997); *State v. Mlo*, 335 N.C. 353, 373, 440 S.E.2d 98, 108, *cert. denied*, 512 U.S. 1224, 129 L. Ed. 2d 841 (1994). In the instant case, Bissette testified to the speculative nature of the DNA examination sought by defendant, stating that it was highly unlikely that a DNA test could be performed because so few sperm were present in the sample. Furthermore, defendant presents no argument and makes no showing of bad faith or willful intent on the part of the Sheriff's Department. Finally, as stated above, we entrust the matter of exclusion of evidence under Rule 403 to the sound discretion of the trial court unless the decision was arbitrarily made or manifestly unsupported by reason. *Syriani*, 333 N.C. at 379, 428 S.E.2d at 133. Here, defendant

admitted participating in the kidnapping and robbery of McConnell; thus, we cannot say the trial court's decision was unsupported or arbitrary. We further note defendant had ample opportunity to cross-examine each of the state's witnesses and to otherwise impeach the probativeness of the rape kit evidence. This argument is rejected.

[10] Defendant next argues that the trial court erred by denying defendant's motion to disqualify Dean Helms as a witness on the grounds that he was unintelligible and incapable of being cross-examined. At trial, Helms testified that he suffered from viral encephalitis, a motor disease that affected his speech.

The obligation of the trial court to make a preliminary competency determination is embodied in Rules 104(a) and 601 of the North Carolina Rules of Evidence, whereby the trial court may disqualify a witness when the trial court determines he is "incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation, by one who can understand him." N.C.G.S. § 8C-1, Rules 104(a), 601 (2001). Absent a showing that the trial court's ruling on a challenge to the competency of a witness could not have been the result of a reasoned decision, we must leave the ruling undisturbed. *State v. Hicks*, 319 N.C. 84, 89, 352 S.E.2d 424, 426 (1987). While we acknowledge the court reporter had to ask Helms to repeat himself many times, it is clear from our review of the transcript that Helms was sufficiently audible and understandable when he repeated his testimony. Thus, we cannot say that the trial court abused its discretion in permitting Helms to testify as a competent witness.

[11] Defendant next argues the trial court erred in denying defendant's motion to dismiss the charges of first-degree rape, robbery with a dangerous weapon, first-degree kidnapping, and first-degree murder in both the Simmons and McConnell cases because of the insufficiency of the evidence. In addressing the sufficiency of the evidence, we consider only those errors defendant properly advances in his brief with supporting arguments and reasoning, and deem abandoned any unsupported evidentiary challenges, namely those in which defendant baldly asserts insufficient evidence. N.C. R. App. P. 28(b)(6); *see also State v. Lloyd*, 354 N.C. 76, 87, 552 S.E.2d 596, 607 (2001).

We recently reiterated the long-standing rule governing motions to dismiss as follows:

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998). Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. *State v. Frogge*, 351 N.C. 576, 584, 528 S.E.2d 893, 899, *cert. denied*, 531 U.S. 994, 148 L. Ed. 2d 459 (2000). As to whether substantial evidence exists, the question for the trial court is not one of weight, but of the sufficiency of the evidence. *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001). In resolving this question, the trial court must examine the evidence in the light most advantageous to the State, drawing all reasonable inferences from the evidence in favor of the State's case. *Id.* Moreover, "[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988); *see also Frogge*, 351 N.C. at 585, 528 S.E.2d at 899.

State v. Mann, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002).

[12] Defendant specifically challenges the rape charge in the Simmons case on the grounds that the state did not prove lack of consent. In order for the jury to convict a defendant of first-degree rape, the state must demonstrate that a defendant engaged in vaginal intercourse by force and against the victim's will and either: (1) employed or displayed a dangerous or deadly weapon or an article reasonably believed to be a dangerous or deadly weapon, (2) inflicted serious personal injury, or (3) committed the offense aided and abetted by one or more other persons. N.C.G.S. § 14-27.2(a)(2) (2001).

The testimony of Dean Helms and the circumstantial evidence were sufficient to prove defendant committed the first-degree rape of Simmons. Helms testified that Simmons feared defendant because defendant was carrying a knife. This testimony was sufficient to show lack of consent. *See State v. Alston*, 310 N.C. 399, 407, 312 S.E.2d 470, 475 (1984) (consent induced by fear of violence is not legal consent). Additionally, the evidence that Simmons was stabbed multiple times is sufficient to establish the personal injury element of first-degree rape. *See State v. Herring*, 322 N.C. 733, 739, 370 S.E.2d 363, 367-68 (1988).

[13] Defendant next addresses the sufficiency of the evidence supporting the charges of first-degree murder, robbery with a dangerous

weapon, and first-degree kidnapping of Simmons, as well as each of the charges against defendant in the McConnell case. Defendant contends that the state's case relied largely on the testimony of Dean Helms and Jerry Harmon and that the charges should be dismissed because neither witness was credible as a matter of law. Defendant notes that both witnesses were felons with significant criminal histories, their respective accounts of the events at trial conflicted with earlier statements to police, and their respective statements were self-serving. In essence, defendant proposes that where a witness is impeached with evidence of bias, prior convictions, or prior inconsistent statements, this Court must declare that witness incompetent as a matter of law. This argument ignores the fact that when weighing a challenge to the sufficiency of the evidence, we are to construe all evidence in the light most favorable to the state. *State v. Alexander*, 337 N.C. 182, 187, 446 S.E.2d 83, 86 (1994). Defendant's proposition would occasion the fall of a long-standing principle in our jurisprudence that we are unprepared to abandon: that it is the province of the jury, not the court, to assess and determine witness credibility. *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001), *cert. denied*, — U.S. —, — L. Ed. 2d —, 70 U.S.L.W. 3741 (2002); *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991); *State v. Orr*, 260 N.C. 177, 179, 132 S.E.2d 334, 336 (1963); *State v. Wood*, 235 N.C. 636, 637-38, 70 S.E.2d 665, 667 (1952); *State v. Bowman*, 232 N.C. 374, 376, 61 S.E.2d 107, 108-09 (1950); *State v. McLeod*, 196 N.C. 542, 545, 146 S.E. 409, 410 (1929).

[14] In his next argument, defendant alleges the trial court erred in failing to arrest judgment on the predicate felonies underlying defendant's felony murder convictions. Because defendant was also convicted of the murders based on premeditation and deliberation, the murder convictions have foundations independent of the predicate felonies. *See State v. Burgess*, 345 N.C. 372, 382, 480 S.E.2d 638, 643 (1997); *State v. Prevette*, 317 N.C. 148, 155-56, 345 S.E.2d 159, 164 (1986); *see also State v. Goodman*, 298 N.C. 1, 20, 257 S.E.2d 569, 582 (1979) (where the defendant was found guilty of murder on basis of premeditation and deliberation, other felonies do not merge with the murder conviction). The trial court could therefore properly enter judgment on the remaining felonies. The trial court's denial of defendant's motion to arrest judgment was therefore proper, and defendant's argument is rejected.

[15] Defendant next argues that the trial court erred in granting the state's request for discovery of defendant's medical, psychological,

and military records in violation of N.C.G.S. § 15A-906. Defendant asserts the trial court's error prejudiced him, thereby warranting a new trial. We disagree.

On 6 January 2000, the trial court denied the state's motion to compel defendant to provide access to his records in compliance with a 16 December 1999 order. Because the motion was denied, defendant cannot show prejudice under N.C.G.S. § 15A-1443. We therefore need not entertain this argument. *See State v. Braxton*, 352 N.C. 158, 202, 531 S.E.2d 428, 454 (2000) (defendant not prejudiced where trial court reversed its prior ruling and instructed jury on lesser-included offenses according to defendant's initial request), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *see also State v. Woods*, 345 N.C. 294, 311-12, 480 S.E.2d 647, 655 (defendant has no grounds to assign error on appeal where trial court sustains defendant's objection), *cert. denied*, 522 U.S. 875, 139 L. Ed. 2d 132 (1997).

[16] Defendant next challenges the trial court's denial of his motion filed 18 January 2000, six days into trial, seeking the dismissal of the public defenders appointed to represent defendant and the substitution of retained counsel. The motion cited a "lack of confidence" in appointed counsel and a "breakdown in communication" between defendant and appointed counsel as its bases. Defendant did not allege ineffective assistance of counsel at trial. Although the trial court invited defendant to present evidence in support of the motion, defendant presented only an affidavit stating that he or someone on his behalf was prepared to pay for substituted counsel. The trial court declared that it would consider the motion as containing an "implicit . . . prospective motion to continue." The trial court then made findings and denied the motion. In his brief to this Court, defendant makes no argument that his Sixth Amendment rights were abridged. Rather, defendant argues that the act of filing the motion should be an adequate indicator of serious problems in the attorney-client relationship because defendant was represented by attorneys with whom he had significant differences.

Defendant offers no authority for the proposition that a mere request to substitute appointed counsel with retained counsel is sufficient. In fact, this Court has upheld the denial of a defendant's request to substitute retained counsel where he or she offered no justifiable basis for the replacement and where doing so would obstruct the orderly procedure of trial. *State v. Poole*, 305 N.C. 308, 318-19, 289 S.E.2d 335, 341-43 (1982) (" 'Without any . . . justifiable basis, there is

no constitutional right under the Sixth Amendment to a continuance to enable defendant to seek new counsel on the day of the trial.' ") (quoting *United States v. Hampton*, 457 F.2d 299, 301-02 (7th Cir.), *cert. denied*, 409 U.S. 856, 34 L. Ed. 2d 101 (1972)); *State v. Gray*, 292 N.C. 270, 281, 233 S.E.2d 905, 913 (1977) ("Defendant's assertion that he wished to employ his own counsel, made as it was, on the day trial was to begin . . . , was no ground for the dismissal of his court-appointed counsel."). The trial court in its discretion properly denied defendant's motion. This argument is rejected.

[17] By his next argument, defendant alleges that potential ineffective assistance of counsel (IAC) claims arose at trial. Defendant contends that although the claims are sufficiently apparent for him to identify, they are not sufficiently developed to present for resolution on the merits.

To avoid procedural default under N.C.G.S. § 15A-1419(a)(3), defendants must raise those IAC claims on direct review that are apparent from the record. *See* N.C.G.S. § 15A-1419(a)(3) (2001). In the instant case, defendant contends that two IAC claims are suggested by the record but are insufficiently developed for review: (1) his attorneys were inadequately prepared because they failed to procure certain records, and (2) defense counsel made no effort to rehabilitate jurors challenged for cause because of their views on the death penalty.

With regard to the first IAC issue—that defendant's counsel was ineffective in failing to procure certain records that could be used to impeach key government witnesses—we hold that because defendant is not in a position to adequately develop this IAC claim at this time, his claim is dismissed without prejudice to his right to reassert this claim during a subsequent motion for appropriate relief proceeding. *See State v. Kinch*, 314 N.C. 99, 106, 331 S.E.2d 665, 669 (1985). Regarding defendant's second IAC claim—that defense counsel failed to rehabilitate jurors who expressed equivocal views on the death penalty—the record reveals that such claims may be developed and argued without the safeguards available in article 89 of chapter 15A of the North Carolina General Statutes. Defendant asserts before this Court that his attorneys did not rehabilitate jurors with allegedly equivocal views on the death penalty. He presents no supporting arguments, however, and fails to direct our attention toward the *voir dire* of a single juror worthy of rehabilitation. We find no merit to this IAC claim.

PRESERVATION ISSUES

Defendant raises additional issues that have previously been decided by this Court contrary to his position: (1) whether the trial court erred in denying defendant's motion to strike the death penalty as unconstitutional, (2) whether the trial court erred in denying defendant's motion to dismiss the short-form murder indictments because they failed to allege all the elements of first-degree murder, and (3) whether the trial court erred in allowing the state to death-qualify the jury. We have considered defendant's contentions on these issues and find no compelling reason to depart from our prior holdings. Therefore, we reject these arguments.

PROPORTIONALITY REVIEW

[18] Finally, pursuant to our statutory duty, 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 penalty 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) (2001).

Defendant was convicted of two counts of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. The jury found four aggravating circumstances to exist in each case: (1) the murder occurred during the commission of first-degree rape, N.C.G.S. § 15A-2000(e)(5); (2) the murder occurred during the commission of robbery with a dangerous weapon, N.C.G.S. § 15A-2000(e)(5); (3) the murder occurred during the commission of first-degree kidnapping, N.C.G.S. § 15A-2000(e)(5); and (4) 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 or persons, N.C.G.S. § 15A-2000(e)(11).

The trial court submitted two statutory mitigating circumstances as to each murder on defendant's behalf: the age of defendant at the time of the crime, N.C.G.S. § 15A-2000(f)(7); and the catchall circumstance, N.C.G.S. § 15A-2000(f)(9). The jury did not find these mitigating circumstances in either of the two cases. Of the thirty-three nonstatutory mitigating circumstances identically submitted for consideration regarding each murder, one or more jurors found that twelve existed and had mitigating value.

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 arbitrary consideration. Thus, we now address 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. Atkins*, 349 N.C. 62, 114, 505 S.E.2d 97, 129 (1988) (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). "In 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 found the death penalty to be disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517, (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. 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. First, defendant was found guilty of two first-degree murders on the basis of premeditation and deliberation and under the felony murder rule. We have held that a finding of premeditation and deliberation indicates "a more calculated and cold-blooded crime." *State v. Lee*, 335 N.C. 244, 297, 439 S.E.2d 547, 575, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994). Defendant kidnapped and raped two women and then murdered them in cold blood by stabbing them multiple times. This evidence of premeditation and deliberation supports the proportionality of the death penalty in this case. Second, this Court has never found the death penalty to be disproportionate in a case where a defendant was found guilty of multiple murders. *State v. McLaughlin*, 341 N.C. 426, 464, 462 S.E.2d 1, 22 (1995), *cert. denied*,

516 U.S. 1133, 133 L. Ed. 2d 879 (1996). Third, the jury found the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance and the N.C.G.S. § 15A-2000(e)(11) aggravating circumstance in connection with each murder. This Court has held that either the (e)(5) aggravating circumstance or the (e)(11) aggravating circumstance, standing alone, is sufficient to support a sentence of death. *See State v. Bacon*, 337 N.C. 66, 110 n.8, 446 S.E.2d 542, 566 n.8 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995).

"We also compare this case with the cases in which we have found the death penalty to be proportionate." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although this Court reviews all of the cases in that pool when engaging in its duty of proportionality review, we have repeatedly stated that "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.* 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 (quoting *State v. Williams*, 308 N.C. 47, 81, 301 S.E.2d 335, 356, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983)), *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). Accordingly, we conclude that this case is more similar to cases in which we have found the death penalty proportionate than to those in which we have found it disproportionate.

Based on the foregoing and the entire record in this case, we cannot conclude as a matter of law that the sentences of death were excessive or disproportionate. We hold that defendant received a fair trial and capital sentencing proceeding, free from prejudicial error. Therefore, the judgments of the trial court must be left undisturbed.

NO ERROR.

FRANKLIN R. DEWITT v. EVEREADY BATTERY CO., INC.

No. 329A01

(Filed June 28, 2002)

1. Products Liability; Warranties— implied warranty of merchantability—circumstantial evidence of breach

A plaintiff does not need to prove a specific defect to carry his or her burden of proof in a products liability action based upon a breach of implied warranty of merchantability and the burden sufficient to raise a genuine issue of material fact in such a case may be met if the plaintiff produces adequate circumstantial evidence of a defect. This evidence may include certain enumerated factors, and, when a plaintiff seeks to establish a case by means of circumstantial evidence, the trial judge is to consider these factors initially and determine whether they are sufficient as a matter of law to support a finding of breach of warranty. The plaintiff does not have to satisfy all of the factors and, if the judge determines that the case may be submitted to the jury, the weighing of the factors should be left to the finder of fact.

2. Products Liability; Warranties— implied warranty of merchantability—circumstantial factors—malfunction of product

In an action arising from a burn allegedly received from leaking D batteries, plaintiff presented a genuine issue of material fact concerning whether the batteries malfunctioned with plaintiff's testimony that he purchased the batteries in their original blister packaging; read the instructions accompanying a lantern; inserted the batteries into the lantern; and tested the lantern for only five minutes, all on the day of purchase; removed the batteries within twenty-four hours after purchasing them; and two of the batteries had leaked.

3. Products Liability; Warranties— implied warranty of merchantability—circumstantial factors—expert testimony

In an action arising from a burn allegedly received from leaking D batteries, plaintiff's expert's testimony was sufficient to raise a genuine issue of material fact regarding defendant manufacturer's responsibility for defects which were possible causes of the leakage.

4. Products Liability; Warranties— implied warranty of merchantability—circumstantial factors—use of product and timing of malfunction

In an action arising from a burn allegedly received from leaking D batteries, there was evidence presenting a genuine issue of material of fact such that a reasonable person might find that plaintiff put the batteries to their ordinary use when he was injured in plaintiff's testimony that he read the instructions accompanying the lantern relating to the placement of the batteries and knew that inserting them backwards could be dangerous, that he was familiar with handling batteries through his work, and that plaintiff had been kidded in his workplace for his caution in handling batteries. As to the timing of the malfunction, the failure happened shortly after plaintiff purchased the batteries and did no more than test them briefly, and did not occur some extended period of time after the batteries were made or plaintiff first obtained the product.

5. Products Liability; Warranties— implied warranty of merchantability—circumstantial factors—similar accidents

In an action arising from a burn allegedly received from leaking D batteries, there was sufficient evidence to raise a genuine issue of material fact regarding the possibility of other similar incidents where defendant's witness testified that leaking batteries had been made, that there had been "a fairly serious problem" relating to the venting mechanism, and plaintiff's attorney presented documents relating to occasions when design and manufacturing specifications had not been met.

6. Products Liability; Warranties— implied warranty of merchantability—circumstantial factors—elimination of other possibilities

In an action arising from a burn allegedly received from leaking D batteries, defendant's suggestion that an error plaintiff may have committed led to the injury did not rise to a level requiring the trial court to conclude as a matter of law that plaintiff failed to negate a reasonable secondary cause. A plaintiff is required to present a case-in-chief that either contains no evidence of reasonable secondary causes or negates any such evidence that was initially present and need not actively eliminate the possibility of reasonable secondary causes.

7. Products Liability; Warranties— implied warranty of merchantability—circumstantial factors—whether accident occurs without manufacturing defect

There was evidence of a genuine issue of material fact in an action arising from a burn allegedly received from leaking D batteries such that a reasonable person could conclude that a defect in the batteries caused plaintiff's injuries where defendant's witness testified to a simulation in which batteries were placed in a lantern backwards and did not leak. However, a careful review of the evidence of this factor is required.

Justice PARKER concurring in the result only.

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. 143, 550 S.E.2d 511 (2001), affirming in part and reversing and remanding in part an order for summary judgment entered 7 March 2000 by Doughton, J., in Superior Court, Iredell County. Heard in the Supreme Court 13 November 2001.

Homesley, Jones, Gaines, Homesley & Dudley, PLLC, by Clifton W. Homesley and Andrew J. Wingo, for plaintiff-appellee.

Templeton & Raynor, P.A., by Kenneth R. Raynor, for defendant-appellant.

EDMUNDS, Justice.

This products liability action was brought by plaintiff, Franklin Roland DeWitt, against defendant, Eveready Battery Company, Inc., for injuries plaintiff sustained when alkaline batteries manufactured by defendant leaked battery fluid onto plaintiff's ankle. The sole issue presented for this Court's review is whether the Court of Appeals erred in reversing the trial court's entry of summary judgment in favor of defendant on plaintiff's claim that defendant breached the implied warranty of merchantability by manufacturing defective batteries. For the reasons that follow, we hold that summary judgment was improperly entered for defendant on this issue; therefore, we affirm the Court of Appeals.

Taken in the light most favorable to plaintiff, the evidence shows that on 10 December 1995, plaintiff purchased a Coleman battery-powered lantern and eight Eveready "Energizer" size D batteries from a Wal-Mart store in Mooresville, North Carolina. The batteries, manu-

factured by defendant, were sold in sealed packages containing two batteries each. Plaintiff read the instructions accompanying the lantern explaining proper battery installation. He did not remember if these instructions included warnings of potential hazards that could result from incorrect battery placement, nor did he read or see any warnings on the battery packages or on the batteries themselves. However, because his occupation involved installing fire alarms and security systems, he was familiar with the characteristics of such batteries. He knew that it could be dangerous to install the batteries incorrectly and that the contents of damaged or leaking batteries could cause injury.

Plaintiff inserted the eight batteries in the bottom of the lantern. Although he did not notice specifically whether he aligned the batteries correctly, he assumed he did so because he had "put so many batteries in and out of things over the years with raising kids and everything." Plaintiff then operated the lantern for approximately five minutes. He was not satisfied with the meager illumination provided by the lantern, however, so he set it aside.

The next day, plaintiff decided to remove the batteries and return the lantern. At that point, the batteries had been in the lantern for approximately twenty-four hours. Plaintiff held the lantern between his ankles for three to four minutes while he removed the batteries. As he did so, he noticed fluid on some of the batteries. As plaintiff stated during his deposition, "I noticed on one for sure, there was like a slimy feeling." Plaintiff also noticed some "slimy" moisture on the bottom of the lantern. However, he did not realize that the moisture on the batteries or the lantern came from the batteries themselves. Instead, he "didn't know if it was like . . . condensation or what it could be" and simply washed his hands.

Shortly thereafter, plaintiff felt a tingling on his ankle and noticed that it was slightly red. Because he was not in any discomfort and had not experienced any tingling in his fingers prior to washing his hands, he thought he had been bitten by an insect. He also noticed that his sock was moist[1] but, because the weather was warm, assumed the moisture came from perspiration. He added, "The last place I would have thought it [had come] from was the batteries." Accordingly, he did not wash his ankle or remove his sock, but put the lantern back

1. As noted by the Court of Appeals, plaintiff made inconsistent statements as to whether he noticed moisture on his sock prior to leaving for Wal-Mart or upon his return home from the store. However, this discrepancy is not material to our analysis of plaintiff's claim.

in its box and returned it to Wal-Mart. He kept the batteries and later gave them to his attorney.

While driving home, plaintiff felt an uncomfortable warm sensation, "almost like a burning," on his ankle. Once inside his house, he removed his right shoe and sock and discovered that the entire heel of his right foot was black. Plaintiff did not realize that the injury had been caused by leakage from the batteries, but instead thought that he had contracted a flesh-eating disease.

Plaintiff was treated in the emergency room of Lake Norman Regional Medical Center, where tests of the lesions on plaintiff's foot showed a pH level of 11 to 11.5.[2] Plaintiff and medical personnel "finally put two and two together that [plaintiff's injuries led] back to the batteries," and plaintiff was diagnosed with having third- and fourth-degree alkaline chemical burns to his right ankle caused by potassium hydroxide, a chemical that leaked from the batteries. As a result of his injuries, plaintiff has undergone surgeries on his ankle, requiring skin grafts from his thighs and wrist.

On 10 September 1997, plaintiff filed a complaint against defendant, setting out products liability claims based on theories of breach of warranty and negligence. As to the former, plaintiff alleged that defendant breached the implied warranty of merchantability by manufacturing a defective product and by manufacturing a product containing an inadequate warning; as to the latter, plaintiff alleged that defendant was negligent by manufacturing a defective product and by placing inadequate warnings on the batteries. Plaintiff also alleged that defendant manufactured a product with an inadequate design. Defendant filed its answer on 5 November 1997, denying all material allegations and claiming several alternative defenses, including misuse of the batteries, alteration or modification of the batteries, use of the batteries contrary to express instructions or warnings of which plaintiff knew or with the exercise of reasonable care should have known, inconsistent use of the batteries, contributory negligence, and failure to mitigate damages.

Several witnesses provided affidavits or gave deposition testimony on behalf of plaintiff. Joseph Crawford Hubbell, a chemist and bacteriologist, testified that he performed tests for pH and alkalinity on one of the batteries used by plaintiff and on the sock plaintiff was

2. As explained by various witnesses, the pH level of a substance is a measure of its acidity. A level of 7 is approximately neutral, while a level of 12 to 14 is highly caustic.

wearing at the time of his injury. The surface of the battery yielded a pH of 11.20 and an alkalinity of 10.6, and the sock yielded a pH of 10.10 and an alkalinity of 7.10. Hubbell stated that these high pH and alkalinity levels "would be very corrosive" in contact with skin. He also added that the results of the tests of plaintiff's skin at Lake Norman Regional Medical Center were consistent with his findings as to the battery and the sock. Finally, he noted that a new battery just removed from its package would have a neutral pH reading of approximately 7.0 and that leakage from a battery would be the main cause of high pH and high alkalinity levels on the surface of a battery.

William Wayne Beaver, P.E., an electrical engineer specializing in forensic analysis of failed structures and products, gave deposition testimony describing the design of the Eveready "Energizer" size D battery as follows:

> There's an anode and a cathode. The anode generally contains a brass nail that fits into the negative—I'll call that the cap of the battery. The cathode is the can around the battery, which a top is attached to; positive terminal, if you will.
>
> There are chemicals inside the battery that cause a reaction; a donating of electrons, if you will. I believe the anode material is a zinc powder. I believe the cathode material is a manganese dioxide and carbon. And there is an electrolyte solution that is a basic, and I think it's a potassium hydroxide solution in water that is near the anode.

Beaver also described an automatic venting mechanism built into each battery. This mechanism is designed to relieve dangerously high pressure in a battery by piercing the battery casing, allowing the pressure to dissipate at the expense of also allowing the contents of the battery to leak.

> And there is a non-woven separator between the anode and cathode inside the battery. There is a plastic, perhaps nylon, disk that separates the anode and the cathode that also serves a purpose of expanding, if there is internal pressure[]. There is a—that is one part of the venting mechanism. The other part [is] metal spurs that will puncture this seal and venting plastic disk and allow any chemicals to come out of the battery should it have excessive pressure inside the battery.

Beaver examined and took X rays of the eight batteries used by plaintiff in the Coleman lantern. He testified that leakage had occurred[3] and opined that several possibilities could explain the leakage. Two of these possibilities were manufacturing defects: either (1) a small hole in the positive metal case or negative metal top on the batteries, or (2) a gap or tear in the nonmetallic insulating seal between the positive metal case and the negative metal top (in other words, a loose connection where the batteries were crimped). Another possible cause of leakage was an increase of pressure in the battery. Such an increase can result from creating a charge if a battery is installed backwards, that is, with the positive and negative ends pointed in the incorrect direction. Although Beaver agreed with defendant's counsel that initiation of the venting mechanism in the batteries would be "strong evidence that the batter[ies] worked as [they were] supposed to," he later added that an activated venting mechanism could work improperly by venting at the wrong place if part of the battery casing is thinner than designed. Beaver also stated that the venting mechanism could have operated at too low a pressure (for example, if the spurs are too long, they could have penetrated the disk at a pressure lower than that specified for the battery) or that the chemicals in the batteries could have been of the wrong mixture, causing an increase in pressure and subsequent venting. Ultimately, though, Beaver could not tell from the X rays where the leakage originated, whether the venting mechanism in the batteries had been initiated, or whether the batteries vented properly or instead leaked as the result of a defect. He stated that he needed to conduct intrusive testing in order to reach such conclusions.

Dr. Richard G. Pearson, a professor of industrial engineering at North Carolina State University, submitted a detailed affidavit relating to the adequacy of the warning on the batteries used by plaintiff. Based on his review of depositions and case materials, Pearson observed that plaintiff's work made him familiar with the proper usage of batteries and the hazards that could arise from their misuse. He noted his opinion that plaintiff acted reasonably. Pearson also stated that the labeling of the batteries failed to address the specific consequences of chemical exposure and the actions a user should take upon exposure. He added that these warnings failed to comply with industry practice, published standards, and the federal code. Pearson also expressed concerns that defendant has no written pol-

3 Beaver was not asked, and did not volunteer, how many of the batteries had leaked. However, he testified that two of the eight batteries were of low weight.

icy or procedure for the design of warnings and the content of hazard labels, does not test warning comprehension by consumers, and emphasizes marketing rather than industry standards and practice in determining the format of warnings.

In addition to his deposition testimony described above, plaintiff submitted an affidavit in which he stated: (1) "I was aware at the time of my injury that aged batteries could in some way be dangerous"; (2) "I did not know that newly purchased batteries could leak within 30 hours after taking them out of the package"; (3) "I did not know that the substance from the inside of an Energizer D cell battery could soak through my clothes without burning or discoloring the cloth"; (4) "I did not know that the substance from the inside of an Energizer D cell battery could cause the 3rd and 4th degree burns that I received when the substance soaked through my sock and came into contact with my skin"; and (5) "though I did not particularly look for warnings on the package or the batteries themselves, the warnings were so inconspicuous that they did nothing to draw my attention to them."

Terrance N. Telzrow, defendant Eveready's manager of standards, product safety, and environmental affairs, was the only witness who gave deposition testimony on behalf of defendant. Telzrow's description of the composition and function of a size D alkaline battery was similar to that provided by Beaver. Telzrow described the venting apparatus as a safety device in the battery that "activates at a pressure well below the pressure at which the battery would explode and throw out shrapnel." Because the venting mechanism pierces the battery to allow gas to escape, Telzrow added that the fluid contents of the battery may also leak out. Telzrow noted, however, that the venting mechanism does not activate immediately upon the buildup of pressure but is "directly related to the current that's pushed through the battery in the charging condition."

During his deposition, Telzrow listed four circumstances that can lead to an increase in pressure in a battery and cause the venting mechanism to activate: (1) recharging the battery; (2) putting a battery in backwards, which results in "charging" or "forc[ing] a current in . . . the opposite way in which it was designed"; (3) mixing old and new batteries, which causes "driving into reverse" when the "voltage switches [and] the positive becomes a negative and the negative becomes a positive"; and (4) gross contamination in the battery. Although Telzrow stated that neither he nor his assistants conducted intrusive or destructive examination of the batteries used by plaintiff,

they took photographs and X rays of the batteries, weighed them, tested the open and closed circuit voltage of the batteries, and recorded the manufacturing date of the batteries. They determined that two of the batteries had low weight and observed from the X rays that these two batteries contained bulges as "a result of internal pressure built up in the battery." From this examination, Telzrow concluded that the venting mechanism activated properly in the two batteries and was of the opinion that the two batteries leaked as a result of being "charged" or placed backwards in the Coleman lantern.

On 2 September 1999, defendant filed a motion for summary judgment. The motion was heard at the 28 February 2000 session of Superior Court, Iredell County, and on 7 March 2000, the trial judge, having considered the pleadings, discovery, and affidavits detailed above, entered an order granting summary judgment in favor of defendant. Plaintiff appealed, and in a divided opinion, the Court of Appeals affirmed the entry of summary judgment in favor of defendant on the issues of inadequate warning, inadequate design, and negligence. However, the Court of Appeals reversed the trial court as to the issue of defendant's breach of implied warranty of merchantability by manufacturing defective batteries and remanded the case to the superior court for trial on this issue. The majority of the Court of Appeals addressed plaintiff's ability to show a defect in the product and held that "a product defect may be inferred from evidence the product was put to its ordinary use and the product malfunctioned." *DeWitt v. Eveready Battery Co.*, 144 N.C. App. 143, 150, 550 S.E.2d 511, 516 (2001). The Court of Appeals then held that, considering the evidence in a light most favorable to plaintiff, a reasonable person could find that plaintiff properly placed the batteries into the lantern and thus put the batteries to their ordinary use at the time of his injury, and that the leakage of fluid from the batteries was a malfunction of the batteries. The court concluded that because this evidence was sufficient to raise a genuine issue of material fact as to whether the batteries were defective, summary judgment was improperly allowed as to this issue.

The dissenting judge focused solely on the issue of defendant's breach of implied warranty of merchantability and argued that plaintiff had failed to produce substantial evidence of the batteries' defect. The dissenter contended there was no evidence that the batteries malfunctioned because "in fact, every indication was that they operated properly by activating the safety 'venting' mechanism when pressure began to build in the batteries." *Id.* at 158, 550 S.E.2d at 521. The

dissenter also focused on plaintiff's "assumption" that he inserted the batteries properly and argued that: "This [assumption] does not, in my belief, constitute the 'substantial evidence' which is necessary to defeat a motion for summary judgment." *Id.* at 159, 550 S.E.2d at 521. Accordingly, the dissenting judge would have affirmed the trial judge's grant of summary judgment as to all issues.

Defendant appeals to this Court on the basis of the dissent. On 22 August 2001, this Court denied plaintiff's petition for discretionary review as to the additional issues of defendant's inadequate warning and inadequate design.

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (1999) (amended 2000). Although "[d]etermining what constitutes a genuine issue of material fact is often difficult," *Marcus Bros. Textiles v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999), this Court has stated that an issue is genuine if it is supported by substantial evidence, *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972), and "[a]n issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action," *id.* " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' " *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977) (quoting *State ex rel. Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977)), and means "more than a scintilla or a permissible inference," *Utilities Comm'n v. Great S. Trucking Co.*, 223 N.C. 687, 690, 28 S.E.2d 201, 203 (1943).

The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact. *Nicholson v. American Safety Util. Corp.*, 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997). This burden may be met "by proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Collingwood v. General Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once the moving party satisfies these tests, the burden shifts

to the nonmoving party to "produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial." *Id.* The trial judge must consider all the presented evidence "in a light most favorable to the nonmoving party," *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001), and "[a]ll inferences of fact must be drawn against the movant and in favor of the nonmovant," *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992). In addition, because summary judgment is " 'a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue.' " *Marcus Bros. Textiles v. Price Waterhouse, LLP*, 350 N.C. at 220, 513 S.E.2d at 325 (quoting *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971)). With these principles in mind, we now turn to defendant's appeal.

This case is governed by North Carolina's Products Liability Act, which is codified in chapter 99B of the North Carolina General Statutes. N.C.G.S. ch. 99B (1995) (amended effective 1 January 1996 for causes of action arising on or after that date). Under the Act, a "product liability action" is defined as "any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging or labeling of any product." N.C.G.S. § 99B-1(3). Pursuant to the Act, a plaintiff may base a products liability action against a manufacturer or seller on contract principles of breach of warranty. *Tetterton v. Long Mfg. Co.*, 314 N.C. 44, 50, 332 S.E.2d 67, 71 (1985) ("[o]n the face of this statute, it seems evident that this [A]ct . . . was meant and intended to apply to manufacturers and retail sellers alike"); *see also* N.C.G.S. § 99B-1.2 (2001) ("nothing [in the North Carolina Products Liability Act] shall preclude a product liability action that otherwise exists against a manufacturer or seller for breach of warranty"). Where the action is for breach of implied warranty brought by the buyer against a manufacturer, privity is not required. N.C.G.S. § 99B-2(b); *see also Tetterton v. Long Mfg. Co.*, 314 N.C. at 51, 332 S.E.2d at 71. In this case, because plaintiff did not bring suit against Wal-Mart, the retail seller, our analysis focuses solely on defendant manufacturer's liability.

An action for breach of implied warranty of merchantability is established by N.C.G.S. § 25-2-314 of the North Carolina Uniform

Commercial Code and "is a 'product liability action' within the meaning of the Products Liability Act if, as here, the action is for injury to [a] person . . . resulting from a sale of a product." *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 304, 354 S.E.2d 495, 498, 499 (1987) ("the General Assembly, when enacting the Products Liability Act after the Uniform Commercial Code had been adopted, did not intend that the two acts be mutually exclusive, but intended an harmonious integration of the two"). Section 25-2-314 provides, in pertinent part:

> (1) Unless excluded or modified (G.S. 25-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .
>
> (2) Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under the contract description; and
>
> . . . .
>
> (c) are fit for the ordinary purposes for which such goods are used . . . .

N.C.G.S. § 25-2-314(1), (2)(a), (2)(c) (2001). To establish a breach of implied warranty of merchantability under the statute, a plaintiff must prove the following elements: (1) " 'that the goods bought and sold were subject to an implied warranty of merchantability' "; (2) " 'that the goods did not comply with the warranty in that the goods were defective at the time of sale' "; (3) " 'that his injury was due to the defective nature of the goods' "; and (4) " 'that damages were suffered as a result.' " *Morrison v. Sears, Roebuck & Co.*, 319 N.C. at 301, 354 S.E.2d at 497 (quoting *Cockerham v. Ward*, 44 N.C. App. 615, 624-25, 262 S.E.2d 651, 658 (1980)). "The burden is upon the purchaser to establish a breach by the seller of the warranty of merchantability [in this case, defendant manufacturer] by showing that a defect existed at the time of the sale." *Cockerham v. Ward*, 44 N.C. App. at 625, 262 S.E.2d at 658 (citing *Rose v. Epley Motor Sales*, 288 N.C. 53, 61, 215 S.E.2d 573, 578 (1975)). Here, the parties do not dispute that the first, third, and fourth elements have been established in plaintiff's allegations. At issue is the second element, whether the batteries were defective at the time of sale.

Plaintiff does not argue that this element has been satisfied by evidence of a specific defect in the batteries, but instead asserts that a defect may be inferred from evidence that the batteries were put to their ordinary use and subsequently malfunctioned. Citing *Red Hill Hosiery Mill, Inc. v. MagneTek, Inc.*, 138 N.C. App. 70, 530 S.E.2d 321 (2000), the Court of Appeals accepted this contention, stating, "A product defect may be shown by evidence a specific defect existed in a product. Additionally, when a plaintiff does not produce evidence of a specific defect, a product defect may be inferred from evidence the product was put to its ordinary use and the product malfunctioned." *DeWitt v. Eveready Battery Co.*, 144 N.C. App. at 150, 550 S.E.2d at 516. We agree.

Although this Court has never explicitly so held, a number of our decisions have approved the use of circumstantial evidence under analogous circumstances. In *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982), the plaintiff was injured in a hockey game when his mouth guard shattered after being hit by another player's hockey stick. One of the plaintiff's claims against the defendant manufacturer and the defendant seller of the mouthguard was for breach of implied warranty of merchantability. As to this issue, the defendants argued that the plaintiff's allegations of a defective condition were insufficient because they were "based solely upon the fact that the mouthguard broke." *Id.* at 450, 293 S.E.2d at 415. We rejected the defendants' contention and held that summary judgment in favor of the defendants was inappropriate. *Id.* In *Rose v. Epley Motor Sales*, 288 N.C. 53, 215 S.E.2d 573, the plaintiff purchaser sued the defendant sellers of an automobile for breach of implied warranties of merchantability and fitness for a particular purpose. Citing the sections of the Uniform Commercial Code applicable to implied warranties, we held:

> [T]he evidence is sufficient to show the plaintiff purchased a used automobile from the defendant dealer in such commodities, that nothing whatever was . . . done to the automobile after the sale which altered its condition, that at all times following the sale the plaintiff operated it in a normal and proper manner, that three hours after the sale, while it was being so operated, it was totally destroyed by a fire originating in its motor compartment and that on the following day the plaintiff demanded rescission of the contract of sale, which demand the defendant refused. From the facts shown by the plaintiff's evidence, taken to be true, it may reasonably be inferred that the vehicle sold to him by the

> defendants was not in condition suitable for ordinary driving at the time of the sale, three hours before the fire.
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> . . . .
>
> . . . The burden is upon the buyer to establish a breach by the seller of the warranty of merchantability; that is, to show that the defect which caused the fire existed at the time of the sale. The evidence in the record is sufficient to permit an inference to this effect, but it does not compel such a finding even if true and the credibility of the plaintiff's evidence is for the jury.

Id. at 59, 61, 215 S.E.2d at 577, 578 (citation omitted). Accordingly, we held that the defendants' motion for directed verdict at the conclusion of the plaintiff's evidence was properly denied. In *Jones v. Siler City Mills, Inc.*, 250 N.C. 527, 108 S.E.2d 917 (1959), the plaintiff brought suit against the defendant for negligence and breach of express and implied warranties, arguing that the chicken feed the defendant sold to the plaintiff was unsuitable for laying chickens. Noting that the issues submitted on appeal related to the alleged breach of implied warranty, we held that "[w]hen considered in the light most favorable to plaintiff, we are of the opinion that the circumstantial evidence, together with the opinion testimony of [plaintiff's experts], was sufficient to support a finding that the feed consumed by plaintiff's hens contained [an inappropriate additive]. Hence, defendant's motion for judgment of nonsuit was properly overruled." *Id.* at 532, 108 S.E.2d at 920.

This rule, allowing a plaintiff to prove a product defect circumstantially, has been accepted by a majority of jurisdictions that have considered the issue. The leading case espousing this principle is *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), in which the New Jersey Supreme Court held that, as to the plaintiffs' breach of implied warranty of merchantability claim against the defendant automobile manufacturer, "[i]n our view, the total effect of the circumstances shown from purchase to accident is adequate to raise an inference that the car was defective and that such condition was causally related to the mishap. Thus, determination by the jury was required." *Id.* at 409, 161 A.2d at 97 (citations omitted). The court cited the following circumstances in making its decision:

> The proof adduced by the plaintiffs disclosed that after servicing and delivery of the car, it operated normally during the succeeding ten days, so far as the [plaintiffs] could tell. They had

> no difficulty or mishap of any kind, and it neither had nor required any servicing. It was driven by them alone. The owners service certificate provided for return for further servicing at the end of the first 1,000 miles—less than half of which had been covered at the time of [the plaintiff driver's] injury.
>
> The facts, detailed above, show that on the day of the accident, ten days after delivery, [the plaintiff] was driving in a normal fashion, on a smooth highway, when unexpectedly the steering wheel and the front wheels of the car went into the bizarre action described. Can it reasonably be said that the circumstances do not warrant an inference of unsuitability for ordinary use against the manufacturer and the dealer? Obviously there is nothing in the proof to indicate in the slightest that the most unusual action of the steering wheel was caused by [the plaintiff driver's] operation of the automobile on this day, or by the use of the car between delivery and the happening of the incident. Nor is there anything to suggest that any external force or condition unrelated to the manufacturing or servicing of the car operated as an inducing or even concurring factor.

Id. at 409-10, 161 A.2d at 97-98. The New Jersey court cited several cases to support its holding and noted that "[a]lthough these latter cases sound in negligence, the test for finding a jury question in them is even more stringent. Circumstantial evidence sufficient to create a jury question as to the negligence of a manufacturer or dealer would clearly justify the same result where the issue is breach of warranty." *Id.* at 412, 161 A.2d at 99.

The court's holding in *Henningsen*, allowing use of circumstantial evidence to establish a defect, has subsequently been referred to both as the "malfunction theory" and as the "indeterminate defect theory." The Pennsylvania Superior Court discussed this theory in detail in several cases:

> When advancing a theory of strict product liability, a plaintiff has the burden of showing that the product was defective, that the defect was the proximate cause of his or her injuries and that the defect existed at the time the product left the manufacturer. *Woodin v. J.C. Penney Co., Inc.*, 427 Pa. Super. 488, 490, 629 A.2d 974, 975 (1993)[, *appeal denied*, 537 Pa. 612, 641 A.2d 312 (1994)]. In certain cases of alleged manufacturing defects, however, the plaintiff need not present direct evidence of the defect. When proceeding on a malfunction theory, the plaintiff may "present a

case-in-chief evidencing the occurrence of a malfunction and eliminating abnormal use or reasonable, secondary causes for the malfunction." *O'Neill v. Checker Motors Corp.*, 389 Pa. Super. 430, 435, 567 A.2d 680, 682 (1989). From this circumstantial evidence, a jury may be permitted to infer that the product was defective at the time of sale. . . .

> . . . Although proof of a specific defect is not essential to establish liability under this theory, the plaintiff cannot depend upon conjecture or guesswork. "The mere fact that an accident happens, even in this enlightened age, does not take the injured plaintiff to the jury." *Stein v. General Motors Corp.*, 58 [Pa.] D. & C.2d 193, 203 (Bucks [County] 1972), *aff'd* [*per curiam*], 222 Pa. Super. 751, 295 A.2d 111 (1972).

[*Woodin v. J.C. Penney Co., Inc.*], 427 Pa. Super. at 492, 629 A.2d at 975-976. The malfunction theory, thus, does not relieve the burden of establishing a defect. However, "[t]he malfunction itself is circumstantial evidence of a defective condition . . . ." *D'Antona v. Hampton Grinding Wheel Co., Inc.*, 225 Pa. Super. 120, 124, 310 A.2d 307, 309 (1973).

Ducko v. Chrysler Motors Corp., 433 Pa. Super. 47, 50-51, 639 A.2d 1204, 1205-06 (1994) (citations omitted); *accord Dansak v. Cameron Coca-Cola Bottling Co.*, 703 A.2d 489, 495-96 (Pa. Super. 1997), *appeal denied*, 556 Pa. 676, 727 A.2d 131 (1998).

> Thus, in a products liability case the plaintiff seeks to prove, through whatever means he or she has available under the circumstances of the case, that a product was defective when it left the hands of the manufacturer. In some cases, the plaintiff may be able to prove that the product suffered from a specific defect by producing expert testimony to explain to the jury precisely how the product was defective and how the defect must have arisen from the manufacturer or seller. In cases of a manufacturing defect, such expert testimony is certainly desirable from the plaintiff's perspective, but it is not essential. The plaintiff, even without expert testimony articulating the specific defect, may be able to convince a jury that the product was defective when it left the seller's hands by producing circumstantial evidence. Such circumstantial evidence includes (1) the malfunction of the product; (2) expert testimony as to a variety of *possible* causes; (3) the timing of the malfunction in relation to when the plaintiff first obtained the product; (4) similar accidents involving the same

> product; (5) elimination of other possible causes of the accident; and (6) proof tending to establish that the accident does not occur absent a manufacturing defect. However the plaintiff chooses to present his or her case, the goal is the same: to prove that the product was not only defective, but that such a defect existed when it left the hands of the seller.

Dansak v. Cameron Coca-Cola Bottling Co., 703 A.2d at 496 (citation omitted). The Pennsylvania Supreme Court adopted this reasoning in *Rogers v. Johnson & Johnson Prods., Inc.*, 523 Pa. 176, 565 A.2d 751 (1989). *See also Ruiz v. Otis Elevator*, 146 Ariz. 98, 703 P.2d 1247 (Ct. App. 1985); *Williams v. Smart Chevrolet Co.*, 292 Ark. 376, 730 S.W.2d 479 (1987); *Peris v. Western Reg'l Off-Track Betting Corp.*, 255 A.D.2d 899, 680 N.Y.S.2d 346 (1998).

We note that the cases cited immediately above discuss the use of circumstantial evidence in the context of strict liability. North Carolina has not adopted the law of strict liability in products liability actions, *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 678, 268 S.E.2d 504, 509-10 (1980); *see also* N.C.G.S. § 99B-1.1 (2001), and we cite these cases from other jurisdictions for the sole purpose of establishing that the use of circumstantial evidence has been found proper in cases involving warranty issues. Thus, even though *Dansak* applied the malfunction theory to products liability claims based upon strict liability, the theory frequently has been extended to claims of breach of implied warranty of merchantability.

> In a typical case involving a claim for breach of implied warranty of merchantability, the plaintiff will attempt to establish the precise manner in which the product failed. However, sometimes the product will be destroyed in the accident, or proof of how the product failed to operate safely will otherwise be unavailable. In such "malfunction" cases, the plaintiff may still rely on the merchantability warranty and need not necessarily show with particularity the precise nature of the defect or the precise physical mechanism which caused the product to fail. . . . Thus, it is sufficient . . . for the plaintiff merely to show the malfunction, regardless of the cause. As expressed by one court, "When machinery 'malfunctions[,]' it obviously lacks fitness regardless of the cause of the malfunction. Under the theory of warranty, the 'sin' is the lack of fitness as evidenced by the malfunction itself rather than some specific dereliction by the manufacturer in constructing or designing the machinery."

1 David G. Owen et al., *Madden & Owen On Products Liability* § 4:7, at 152-53 (3d ed. 2000) (quoting *Greco v. Bucciconi Eng'g Co.*, 283 F. Supp. 978, 982 (W.D. Pa. 1967), *aff'd*, 407 F.2d 87 (3d Cir. 1969)); *see also Cooper v. Ingersoll Rand Co.*, 628 F. Supp. 1488, 1495 (W.D. Va. 1986) (holding as to plaintiff's breach of implied warranty of merchantability claim that "[u]nder Virginia law breach of warranty may be established by circumstantial evidence, but the evidence must be sufficient to establish that the result alleged is a probability rather than a mere possibility"). All other states in the Fourth Circuit have reached the same conclusion. *Harrison v. Bill Cairns Pontiac of Marlow Heights, Inc.*, 77 Md. App. 41, 50, 549 A.2d 385, 390 (1988) (noting that under either a strict liability or breach of implied warranty of merchantability theory, "[a]n inference of a defect may be drawn from the happening of an accident, where circumstantial evidence tends to eliminate other causes, such as product misuse or alteration"); *Doty v. Parkway Homes Co.*, 295 S.C. 368, 370, 368 S.E.2d 670, 671 (1988) (holding that "[a] plaintiff may establish a breach of . . . implied warranty [of merchantability] by circumstantial evidence"); *Southern States Coop. Inc. v. Doggett*, 223 Va. 650, 657, 292 S.E.2d 331, 335 (1982) (noting "this is a circumstantial evidence case; and breach of warranty may be established by such evidence"); *Anderson v. Chrysler Corp.*, 184 W. Va. 641, 646, 403 S.E.2d 189, 194 (1991) (holding that a breach of warranty may be proved by circumstantial evidence); *see also Dietz v. Waller*, 141 Ariz. 107, 112, 685 P.2d 744, 749 (1984) (stating that "[t]he issue of breach of implied warranty here depends on virtually the same elements as the strict liability claim, namely the existence of a defect at the time of sale and the defect causing damages during ordinary use," and holding that a plaintiff may rely on circumstantial evidence in proving a defect under either theory).

[1] We join these other jurisdictions in holding that a plaintiff need not prove a specific defect to carry his or her burden of proof in a products liability action based upon a breach of implied warranty of merchantability. Accordingly, the burden sufficient to raise a genuine issue of material fact in such a case may be met if the plaintiff produces adequate circumstantial evidence of a defect. This evidence may include such factors as: (1) the malfunction of the product; (2) expert testimony as to a possible cause or causes; (3) how soon the malfunction occurred after the plaintiff first obtained the product and other relevant history of the product, such as its age and prior usage by plaintiff and others, including evidence of misuse, abuse, or

similar relevant treatment before it reached the defendant; (4) similar incidents, " 'when[] accompanied by proof of substantially similar circumstances and reasonable proximity in time,' " *Jenkins v. Harvey C. Hines Co.*, 264 N.C. 83, 85-86, 141 S.E.2d 1, 3 (1965) (quoting *Styers v. Winston Coca-Cola Bottling Co.*, 239 N.C. 504, 508, 80 S.E.2d 253, 256 (1954)); (5) elimination of other possible causes of the accident; and (6) proof tending to establish that such an accident would not occur absent a manufacturing defect. *See Hamilton v. Emerson Elec. Co.*, 133 F. Supp. 2d 360, 365 (M.D. Pa. 2001); *Harrison v. Bill Cairns Pontiac of Marlow Heights, Inc.*, 77 Md. App. at 51, 549 A.2d at 390; *Dansak v. Cameron Coca-Cola Bottling Co.*, 703 A.2d at 496. When a plaintiff seeks to establish a case involving breach of a warranty by means of circumstantial evidence, the trial judge is to consider these factors initially and determine whether, as a matter of law, they are sufficient to support a finding of a breach of warranty. The plaintiff does not have to satisfy all these factors to create a circumstantial case, *Watson v. Sunbeam Corp.*, 816 F. Supp. 384, 389 (D. Md. 1993), and if the trial court determines that the case may be submitted to the jury, " '[i]n most cases, the weighing of these factors should be left to the finder of fact,' " *Woodin v. J.C. Penney Co.*, 427 Pa. Super. at 492, 629 A.2d at 976 (quoting *Kuisis v. Baldwin-Lima-Hamilton Corp.*, 457 Pa. 321, 336, 319 A.2d 914, 923 (1974)). We now apply these principles to the case before us.

1. Malfunction

[2] Plaintiff testified that he purchased the batteries, which were contained in their original blister packaging; read the instructions accompanying the lantern; inserted the batteries in the lantern; and tested the lantern for only five minutes, all on the day of purchase. He removed the batteries within twenty-four hours after purchasing them. Although the batteries were brand new and used for but a minimal time, two leaked. Viewing all facts and inferences in plaintiff's favor, we hold this evidence presents a genuine issue of material fact such that a reasonable person could find that the batteries at issue malfunctioned.

2. Expert Testimony

[3] Plaintiff's expert, William Beaver, testified at his deposition that there were several possible explanations for the batteries' leakage. Two of the possible explanations were manufacturing defects, described in the facts of this opinion, while another possibility was misuse by plaintiff. Beaver also described several ways that a battery

could malfunction even if the venting mechanism had been initiated. We hold this testimony was sufficient to raise a genuine issue of material fact such that a reasonable mind might accept that there were possible causes of the leakage attributable to defects, which were defendant's responsibility.

3. Use of the Batteries and Timing of the Malfunction

[4] In his deposition, plaintiff indicated that he was not certain whether he put the batteries into the lantern correctly but that he knew which end of a battery was the positive end and, based on his experience, assumed he placed them in the lantern correctly.

> Q. Did you notice whether you put them all in correctly or did you not pay any attention to that?
>
> A. No, I always pay attention to that because I know the side with the dimples is always your positive side on a battery. And that was towards your plus on the device you're installing it in.
>
> Q. As you—and when did you notice that? When you were putting the batteries in or taking them out?
>
> A. What was that?
>
> Q. Notice that you had all the batteries in the right way.
>
> A. I don't even think I really looked to notice, to say honestly.
>
> Q. Just assume you'd done it right?
>
> A. Yeah, yeah, I've put so many batteries in and out of things over the years with raising kids and everything.
>
> Q. So I take it after you put them in there and the light wasn't bright enough, you didn't double check to make sure they were all in right.
>
> A. I can't really say for sure that I did or not.

Defendant argues that plaintiff's "assumption" that he placed the batteries into the lantern correctly is fatal to his claim because it does not constitute substantial evidence necessary to survive a motion for summary judgment. We note that neither plaintiff nor defendant presented evidence as to whether the lantern would illuminate *at all* if one or more batteries were inserted backward. Despite this deficiency in the record, we believe plaintiff presented sufficient additional circumstantial evidence to support his assumption that he

positioned the batteries correctly. He testified that he read the instructions accompanying the lantern relating to placement of the batteries in the lantern and knew that inserting them backwards could be dangerous because "the current isn't flowing [in] the direction that the batteries would accept." He also testified that he was familiar with handling batteries through his work installing fire alarms and security systems, "usually working with batteries a couple times a week." When asked if he was familiar with procedures for disposing of batteries, he responded affirmatively, stating:

> This was more my caution than anything. I always wore a pair of gloves when I took the old batteries out because a lot of times they are corroded from age and we always took them back to the office where we had a pallet that they recycled.
>
> . . . .
>
> . . . I didn't want to touch a battery that was damaged or leaking or anything[.]
>
> . . . .
>
> . . . [P]eople used to kid me because I'd go get my gloves.

In addition, plaintiff submitted the affidavit of Pearson, who observed that plaintiff

> [i]n his job as an installer of security systems, . . . had gained knowledge of battery installation and associated hazards, precautions in use, and remedial action to take in case of exposure.
>
> . . . .
>
> . . . I believe [plaintiff's] actions were that of a reasonable person. In his job he did wear gloves to protect his skin from chemical contact.

Viewing this evidence in a light most favorable to plaintiff and drawing all inferences in his favor, we hold this evidence presents a genuine issue of material fact such that a reasonable person might find that plaintiff put the batteries to their ordinary use when he was injured.

As to the timing of the malfunction, plaintiff presented evidence that he removed the batteries in question from their packaging and tried them out in his new Coleman lantern. Despite this minimal

usage, two batteries leaked almost immediately. Telzrow, defendant's only deposition witness, noted that the batteries in question were manufactured in August 1995 and agreed that they were unusually new, stating, "In this particular case [plaintiff] got very fresh batteries." Accordingly, the malfunction did not occur some extended period of time after the batteries were made or after plaintiff first obtained the product, nor did it occur after prolonged or stressful use of the product. Instead, the failure happened shortly after plaintiff purchased the batteries and did no more than test them briefly.

4. Similar Accidents Involving the Same Product

[5] During his deposition, Telzrow acknowledged that defendant has made defective batteries in the past:

> Q. Is it fair to say then that batteries could leak without being abused?
>
> A. Sure. You can make a defective battery.
>
> Q. And is it also fair to say that [defendant] has made defective batteries which have gone out for sale to the public?
>
> A. Sure.

Telzrow added that "[c]omplaints are generally [that] the product leaked," and described "a fairly serious problem" related to the venting mechanism in the past where batteries manufactured by defendant had leaked within six to nine months after defendant shipped the batteries to a retailer. In addition, during Telzrow's deposition, plaintiff's attorney presented numerous documents obtained from defendant that related to various stages of the making of an "Energizer" size D alkaline battery. Several of these documents showed instances where defendant's design and manufacturing specifications had not been met, with battery failure or leakage being possible results. As to these documents, Telzrow stated:

> Q. Am I correct in also stating that there are instances where those measurements fall outside of [defendant's] established range?
>
> A. That's correct.
>
> Q. And since—taking into consideration that those tests are random samples, is it conceivable that a battery, a D cell battery,

could leave this plant with components that exceed the measurement guidelines that have been established by [defendant]?

A. That's correct.

We hold this evidence was sufficient to raise a genuine issue of material fact such that a reasonable mind might conclude that there is a possibility of other incidents similar to that which befell plaintiff.

5. Elimination of Other Possible Causes

[6] Defendant argues that plaintiff must eliminate the possibility that he incorrectly "charged" the batteries before he can establish by inference a defect in the batteries. We do not adopt this suggestion, but instead adopt the holding in *Dansak v. Coca-Cola Bottling Co.* as follows:

> "[I]n plaintiff's case-in-chief, plaintiff [need not] negate every theoretically conceivable secondary cause for the malfunction. Rather . . . the plaintiff fails to establish a prima facie case only if the plaintiff does not negate evidence of other reasonable, secondary causes or abnormal use that is actually introduced during plaintiff's case-in-chief."

Dansak v. Cameron Coca-Cola Bottling Co., 703 A.2d at 497 (quoting *Schlier v. Milwaukee Elec. Tool Corp.*, 835 F. Supp. 839, 841 (E.D. Pa. 1993)) (alterations in original). Indeed, "[s]ummary judgment is not warranted simply because the defendant hypothesizes (or even presents evidence of) reasonable secondary causes." *Id.* Accordingly, "a plaintiff need not look to actively 'eliminate' the possibility of reasonable secondary causes. He is merely required to present a case-in-chief that either contains no evidence of reasonable secondary causes or negates any such evidence that was initially present." *Hamilton v. Emerson Elec. Co.*, 133 F. Supp. 2d at 366. Plaintiff's deposition testimony does not present evidence of a secondary cause of the leakage unrelated to defendant. Instead, defendant suggests that an error plaintiff may have committed led to plaintiff's injury. This suggestion does not rise to the level requiring the trial court to conclude as a matter of law that plaintiff failed to negate a reasonable secondary cause.

6. Proof Tending to Establish that the Accident Does Not Occur Absent a Manufacturing Defect

[7] Finally, evidence was presented that the accident would not have occurred even if plaintiff did install the batteries backwards. Telzrow

and his staff simulated the circumstances of the accident for defendant by purchasing a duplicate lantern at Wal-Mart and placing two "Energizer" size D batteries into the lantern backwards while placing the other six batteries into the lantern correctly. Telzrow testified that the simulated test was conducted "to determine the current when one or more batteries is reversed to see if our analysis of how long it would take the vent to react is consistent with what [plaintiff] is saying it took to burn him." Although Telzrow is not sure how long his employee simulated the test, he did know that the employee took it past the peak current and let it stabilize. Notably, when asked if he knew whether "any of the batteries leak[ed] under those simulated conditions," Telzrow responded, "No." Telzrow later added that defendant had never received any reports that a battery had leaked while it was being used in a Coleman lantern.

Viewing all of these circumstances in a light most favorable to plaintiff and drawing every reasonable inference in his favor, we hold that this evidence presents a genuine issue of material fact such that a reasonable person could conclude that a defect in the batteries caused plaintiff's injuries. Accordingly, we affirm the holding of the Court of Appeals. Nevertheless, we caution that "because of the almost infinite possibility for slight factual differences in the circumstances surrounding a product liability case," James E. Beasley, *Products Liability and the Unreasonably Dangerous Requirement*, at 355-56 (1981), a careful review of the evidence is required of the trial judge in each case where a plaintiff relies on the malfunction principle, as "seemingly small variations in facts have [led] to diametrically opposite results," *id.*

AFFIRMED.

Justice PARKER concurring in the result only.

The sole issue before this Court is whether plaintiff has made a showing that defendant breached the implied warranty of merchantability sufficient to overcome defendant's motion for summary judgment. A warranty of merchantability is implied in every contract for sale. N.C.G.S. § 25-2-314(1) (2001). To prove that this warranty has been breached,

> "a plaintiff must prove, first that the goods bought and sold were subject to an implied warranty of merchantability; second, that the goods did not comply with the warranty in that the goods

were defective at the time of sale; third, that his injury was due to the defective nature of the goods; and fourth, that damages were suffered as a result. *Tennessee-Carolina Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 210 S.E.2d 181 (1974); *Burbage v. Atlantic Mobilehome Suppliers Corp.*, 21 N.C. App. 615, 205 S.E.2d 622 (1974)."

Morrison v. Sears, Roebuck & Co., 319 N.C. 298, 301, 354 S.E.2d 495, 497 (1987) (quoting *Cockerham v. Ward*, 44 N.C. App. 615, 624-25, 262 S.E.2d 651, 658, *disc. rev. denied*, 300 N.C. 195, 269 S.E.2d 622 (1980)). Although both N.C.G.S. § 25-2-314(1) and *Morrison* speak in terms of a plaintiff suing a merchant, a plaintiff may also "bring a product liability action directly against the manufacturer of the product involved for breach of implied warranty." N.C.G.S. § 99B-2(b) (2001); *see also Morrison*, 319 N.C. at 303-04, 354 S.E.2d at 499.

In my view, under *existing North Carolina law*, the forecast of expert evidence in this case, taken in the light most favorable to plaintiff, raises a genuine issue of material fact as to whether the batteries were defective at the time of sale and is, therefore, sufficient to withstand defendant's motion for summary judgment. N.C.G.S. § 1A-1, Rule 56 (2001). The evidence does not, however, compel such a finding; and the credibility of the evidence is for the jury. *See Rose v. Epley Motor Sales*, 288 N.C. 53, 61, 215 S.E.2d 573, 578 (1975).

STATE OF NORTH CAROLINA v. TIMOTHY LIONELL WHITE

No. 4A01

(Filed 28 June 2002)

1. Sentencing— capital—Rule 403 balancing test

The trial court did not err in a capital sentencing proceeding by admitting evidence of defendant's satanic beliefs where defendant contended that the holding that the Rules of Evidence do not apply in capital sentencing proceedings is not consistent with N.C.G.S. § 15A-2000 and that the court would not have admitted this evidence under a proper balancing test. Any competent and relevant evidence which will substantially support the

imposition of the death penalty may be introduced at the capital sentencing stage and the Rule 403 balancing test is not required.

2. Sentencing— capital—aggravating circumstances—especially heinous, atrocious, or cruel—defendant's satanic beliefs

The trial court did not err in a capital sentencing proceeding by admitting evidence of defendant's satanic beliefs where the State requested submission of the especially heinous, atrocious, or cruel aggravating circumstance, N.C.G.S. § 15A-2000(e)(9). Defendant's statements that the murder was satanically motivated may show depravity of mind which may be considered in determining if the killing was especially heinous, atrocious, or cruel. Moreover, defendant himself solicited direct references to his satanic comments, the court limited the State to the portion of the evidence which showed a motive for the killing, and the failure of the jury to find the aggravator is some indication that the jury carefully considered the evidence and was not influenced by it.

3. Sentencing— capital—defendant's fascination with movie—properly admitted

The trial court did not err in a capital sentencing proceeding by allowing a detective to testify about statements from a man incarcerated with defendant (Nash) concerning defendant's fascination with the movie "Natural Born Killers." The detective's testimony corroborated Nash's testimony, and, as to statements related by the detective to which Nash did not testify, defendant lost the benefit of his earlier objection when others testified to the same effect without objection.

4. Sentencing— capital—evidence that defendant "sick-minded"

There was no prejudice in a capital sentencing proceeding where the State was allowed to elicit testimony from defendant's girlfriend that defendant was a "sick-minded person." Defendant presented substantial evidence that he suffered from severe psychological disturbance and the jury found the mental disturbance mitigator.

5. Sentencing— capital—introduction of disputed evidence

The trial court did not err in a capital sentencing proceeding by allowing the State to introduce a newspaper allegedly found on the victim's chest, even though the evidence was in conflict.

Whether and when the newspaper was placed on the victim's chest was for the jury to decide and, even if the State did not lay a proper foundation, defendant did not meet his burden of showing prejudice.

6. Sentencing— capital—aggravating circumstances—armed robbery and pecuniary gain—not double counting

The trial court did not err in a capital sentencing proceeding by submitting both the aggravating circumstance that the murder was committed while defendant was engaged in an armed robbery and the aggravating circumstance that the murder was committed for pecuniary gain. Independent evidence supported both circumstances; defendant's evidence demonstrated that he stole the victim's car for transportation and the theft of money from her purse supported the pecuniary gain circumstance. Moreover, the court properly limited the jury's consideration of the evidence supporting the circumstances.

7. Sentencing— capital—aggravating circumstances—pecuniary gain—evidence of motive

The evidence in a capital sentencing proceeding was sufficient to submit the pecuniary gain aggravating circumstance even though defendant contended that the evidence did not show that the killing was motivated by pecuniary gain. Given the conflict in the evidence and taking the evidence in the light most favorable to the State, the trial court properly left determination of defendant's motive to the jury.

8. Sentencing— capital—testimony about defendant's family—not admissible

The trial court did not err in a capital sentencing proceeding by excluding evidence from defendant's psychiatrist about the reaction of defendant's parents to his treatment and whether it was important to the psychiatrist to learn defendant's family history. The conduct of other family members did not relate to any aspect of defendant's character or record or to the circumstances of the offense and was not relevant to mitigation; moreover, defendant had the benefit of comments on the same subject from a different therapist when the witness answered before the court ruled on the objection and the State did not move to strike.

9. Sentencing— capital—remorse

There was no prejudicial error in a capital sentencing proceeding where the State asked a detective if she knew whether defendant had told the victim's grandson and daughter that he was sorry. Any error was harmless because the witness answered that she did not know.

10. Sentencing— capital—aggravating circumstances—prior violent felony—juvenile tried as adult

The trial court did not err in a capital sentencing proceeding by submitting the aggravating circumstance of a prior felony conviction involving violence where he had been tried as an adult when he was 16 for a felonious assault committed when he was 15. The age of the perpetrator is irrelevant if the previous conviction meets the criteria for an (e)(3) aggravating circumstance. N.C.G.S. § 15A-2000(e)(3).

11. Evidence— sentencing—capital—autopsy and crime scene photos—admissible

The trial court did not err in a capital sentencing proceeding by denying defendant's pretrial motion to exclude autopsy and crime scene photos which defendant contended were gruesome and inflammatory. Each of the photos represented different aspects of the victim and the autopsy, the number was not unduly repetitious, the photographs were not aimed merely at arousing the passions of the jury, and each had illustrative and probative value.

12. Sentencing— capital—victim's memorial

The trial court did not err in a capital sentencing proceeding by admitting a memorial cookbook dedicated to the victim where the evidence merely reflected the high regard in which the victim was held and was not unduly prejudicial. Nothing suggests that the jury based its decision solely on this evidence, and none of the aggravating circumstances derived from this evidence.

13. Sentencing— capital—death penalty—not disproportionate

A sentence of death imposed upon defendant for first-degree murder was not disproportionate where defendant entered the elderly victim's home, shot her in the chest, and stomped her head before leaving her to die; defendant pled guilty to first-degree murder; and the jury found the (e)(3) prior conviction of a violent felony and (e)(5) murder while engaged in the commis-

sion of an armed robbery aggravating circumstances, either of which, standing alone, is sufficient to sustain a sentence of death.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Albright, J., on 31 August 2000 in Superior Court, Forsyth County, upon defendant's plea of guilty of first-degree murder. Heard in the Supreme Court 12 March 2002.

Roy Cooper, Attorney General, by Barry S. McNeill, Special Deputy Attorney General, for the State.

Dudley A. Witt for defendant-appellant.

PARKER, Justice.

Defendant Timothy Lionell White was indicted on 25 October 1999 for the first-degree murder of Evvie Lane Vaughn. On 7 August 2000 defendant entered a plea of guilty to the charge of first-degree murder. After a capital sentencing proceeding, the jury recommended that defendant be sentenced to death; and the trial court entered judgment accordingly. For the reasons discussed herein, we conclude that defendant's capital sentencing proceeding was free from prejudicial error.

The State's evidence tended to show that defendant lived with his parents in a mobile home on Tobaccoville Road in Forsyth County, next door to the seventy-two-year-old victim, who was his great-aunt. On the morning of 21 July 1999, defendant took four guns from his father's gun cabinet. Shortly after removing the guns, defendant began to play with them in his bedroom. Defendant then put one of the weapons, a .22-caliber handgun, in his back pocket; walked next door; and when the victim opened the door, pointed the pistol at her. In response the victim threw up her arms, screamed, and reached for the gun. Defendant shot her in the chest. After the victim fell to the floor, defendant attempted to shoot her again; but his pistol jammed. Defendant then approached the victim and "stomp[ed] her in the head until he thought she was dead." Defendant removed approximately $100.00 and a set of car keys from the victim's pocketbook; started the victim's Cadillac, which was in the garage; and returned to his home to pack some clothes and the rest of the guns in a duffle type bag. He also wrote a note to his girlfriend acknowledging that he had done wrong. Defendant returned to the victim's home. After locking the doors from the inside, defendant exited through the garage. Defendant then drove to West Virginia in the victim's Cadillac.

Defendant rented a motel room at a motel near Charleston, West Virginia, and struck a conversation with a man, James "Lefty" Booker, staying in another room. During the course of that conversation defendant showed Lefty the guns and asked where he could get rid of them. Lefty took defendant to a house where defendant traded the guns for crack cocaine. Lefty later asked to borrow the Cadillac; defendant agreed; and Lefty left and did not return. Defendant then stole another vehicle in West Virginia and drove to New Orleans, where he was arrested on 25 July 1999 by New Orleans Police Department detectives. After an extradition hearing, defendant was returned to North Carolina.

Detective Elizabeth Culbreth of the Forsyth County Sheriff's Department interviewed defendant in New Orleans, and defendant confessed to the crime. Thereafter, defendant also made a written statement in which he again set forth the circumstances surrounding the killing. Defendant told Detective Culbreth that "he [had] always wanted to know what it would feel like to kill someone."

The victim's grandson James "Jay" Tutterow, nine years old at the time of the murder, lived nearby with his mother and father. On 22 July 1999 around 4:10 p.m., Jay rode his bicycle to see his grandmother. Jay entered the house through the open garage door and an open side door into the house. As Jay approached the kitchen, he saw his grandmother lying on the floor in the area between the kitchen and den. Jay testified that he noticed bruises on his grandmother's elbow; that a newspaper lay across her chest; and that the phone, having been dragged into the kitchen, was right beside her. When his grandmother did not respond to Jay's calling her name, he became scared and ran across the street to the residence of Tammy Bolen. After Jay alerted Mrs. Bolen to the situation with his grandmother, Mrs. Bolen entered the house through the open garage and found the victim lying on the floor with blood and a newspaper on her chest and with her glasses knocked off her face. Mrs. Bolen used the victim's phone to call the victim's daughter, Lynette Tutterow.

Mrs. Tutterow arrived at her mother's house at approximately the same time as Charles White, Jr., defendant's father. Entering her mother's home behind Mr. White, Mrs. Tutterow found her mother lying on the den floor. She used the phone located beside her mother's body to dial 911. Mr. White picked up the shell casing from the floor and said "he knew who did this."

Sergeant Mickey Southern of the Forsyth County Sheriff's Department was the first law enforcement officer on the scene. Sergeant Southern testified that during his preliminary investigation he interviewed Charles White, who was visibly "upset." Charles told him that he had a son who had recently been released from prison in Morganton and that his son had left home and was missing. Sergeant Southern also testified that Charles stated he was missing four pistols from his residence, including a .22-caliber.

Sergeant J.W. Boles from the detective division of the Forsyth County Sheriff's Department arrived shortly after Sergeant Southern and also interviewed defendant's father. Sergeant Boles testified that Mr. White advised him that defendant had just gotten out of jail approximately two months before for stealing cars, theft of firearms, and breaking and entering. When Mr. White realized his son was missing, he searched defendant's room and found two empty gun cases. Mr. White then checked his gun safe and discovered that four guns were missing.

The pathologist who performed the autopsy on the victim testified that the cause of death was the gunshot wound to her chest but that the blunt trauma to her head contributed to her death. The pathologist determined that a small-caliber bullet entered the victim's chest just left of her breastbone. Additionally, the pathologist estimated that the victim suffered at least three blows to her face causing her broken nose and injuries to her jaw and forehead. The pathologist also determined, based on signs of a fresh hemorrhage in the soft tissues and swelling, that the victim was alive at the time she sustained the blunt-trauma injuries.

Defendant presented numerous witnesses who detailed defendant's history of psychological problems and inability to adjust in society. Additional evidence will be discussed as needed to address the issues.

SENTENCING ISSUES

Defendant first argues that the trial court erred and abused its discretion in allowing the State to introduce evidence of defendant's purported satanic beliefs to establish defendant's motive for the murder; that the State's attempt to show a satanic motive for the murder was inconsistent with the submitted aggravating circumstances; that the undue prejudice of this evidence outweighed its probative value; and that for all these reasons, defendant's federal and state constitutional rights were violated. We disagree.

Prior to trial defendant filed a motion *in limine* to preclude the State from offering certain irrelevant and inflammatory evidence unrelated to defendant's religious beliefs or practices at trial. Although the written motion did not specifically mention defendant's satanic beliefs or practices, at the hearing on the motion, defendant argued that the State should be precluded from introducing items of physical evidence suggesting that defendant engaged in satanic practices. These items had been seized during a search of defendant's bedroom. Defendant also sought to preclude the anticipated testimony of State's witness Jeffrey Nash, who had been incarcerated with defendant and with whom defendant had talked, and the testimony of Detective Culbreth, who had interviewed Nash concerning statements made to him by defendant about killing "to get in good graces with his lord, the lord of darkness."

In ruling on defendant's motion *in limine*, the trial court indicated that aspects of the testimony had the potential to be inflammatory and prejudicial and that the court would conduct *voir dire* before permitting the testimony. The trial court noted that "there may be some aspects that will be admissible as to declaration of motive which would be a very legitimate issue in the case." During the presentation of evidence, when the State called Nash, the trial court conducted *voir dire* to determine the admissibility of statements made by defendant to Nash to the effect that defendant's motive in killing the victim was "to get in good graces with his lord, the lord of darkness." The trial court ruled that evidence of the satanic references was admissible "as long as it is interwoven with the issue of motive and in that context." The court stressed that the ruling was "not a license for the State to offer some generalized episodes about Satan worship."

Nash then testified, over objection, that defendant told him that "the police had the motive all wrong" and that "they thought he did it to rob the lady but instead he was doing it as a service to his higher power." According to Nash, defendant also stated that he was trying to "get in good . . . with the graces of the lord of darkness." Over defendant's objection, Detective Culbreth was permitted to testify for corroborative purposes as to statements that Nash had told her defendant had made to him. These statements were consistent with Nash's trial testimony.

On cross-examination of Detective Culbreth, defendant attempted to introduce evidence of statements made by defendant to Detective Culbreth en route from New Orleans to Winston-Salem.

The trial court again conducted *voir dire*. After noting that defendant's statements covered a wide range of topics, including details of the crime, defendant's performance of a satanic ritual, his rejection of the Christian faith, and his acceptance of satanism, the court held that if defendant cross-examined Detective Culbreth about any portion of the statements made to her, then "the door would be opened for the State to question this witness with regard to the other details of the statement given at that time." The trial court then ruled, however, that on account of the undue prejudice that could result from some of the statements and the likelihood that the jury would be unable to follow a curative instruction, the court would not permit evidence or testimony concerning defendant's performance of satanic rituals, his rejection of the Christian faith, his involvement in and acceptance of the skinhead society, or his professed allegiance to Satan as the lord of the underworld. Defendant did not pursue this line of questioning with Detective Culbreth.

During defendant's case in chief, defense witness Phyllis Worrell, the mother of defendant's girlfriend, mentioned that defendant had been drunk one weekend and "had been talking something about the devil and this Satanic stuff that I didn't know about either at the time, and they were sort of preaching to him about God. Let it come out, let it fly. You know, getting him to rebuke the devil, I think." On cross-examination the prosecutor asked, "Did I hear you mention religion?" The prosecutor withdrew the question before the witness said anything further about defendant's practice of satanism. The trial court ruled that the prosecutor was entitled to delve into what the witness referred to. The witness then testified in answer to a follow-up question that she did not hear defendant talk much about it.

[1] Defendant argues that this Court's holding that the North Carolina Rules of Evidence do not apply in capital sentencing proceedings is not consistent with N.C.G.S. § 15A-2000 and that under a proper balancing test, the trial court should not have admitted testimony relating to defendant's statements concerning his motive for the murder. Defendant contends that this testimony does not support the State's theory of the case or the aggravating circumstances submitted to the jury, namely, that the murder was committed during the commission of a felonious robbery, N.C.G.S. § 15A-2000(e)(5)(2001), and that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). Defendant's contentions are without merit.

This Court has consistently held that the "North Carolina Rules of Evidence do not apply to sentencing hearings." *State v. Bond*, 345

N.C. 1, 31, 478 S.E.2d 163, 179 (1996), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997); *see also* N.C.G.S. § 8C-1, Rule 1101(b)(3) (2001). However, "[a]ny competent, relevant evidence which [will] substantially support the imposition of the death penalty may be introduced at this stage." *Bond*, 345 N.C. at 31, 478 S.E.2d at 179; *see also* N.C.G.S. § 15A-2000(a)(3). Inasmuch as any relevant evidence may be introduced, " 'trial courts are not required to perform the Rule 403 balancing test during a sentencing proceeding.' " *State v. Golphin*, 352 N.C. 364, 464, 533 S.E.2d 168, 233 (2000) (quoting *State v. Flippen*, 349 N.C. 264, 273, 506 S.E.2d 702, 708 (1998), *cert. denied*, 526 U.S. 1135, 143 L. Ed. 2d 1015 (1999)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

[2] In the present case, the State requested submission of and the trial court submitted to the jury the (e)(9) aggravating circumstance, whether the murder was especially heinous, atrocious, or cruel. N.C.G.S. §. 15A-2000(e)(9). Accordingly, the State was entitled to introduce any competent, relevant evidence to support a finding of this aggravator. *See* N.C.G.S. § 15A-2000(a)(3). While defendant is correct that the satanic references are irrelevant to the (e)(5) and (e)(6) aggravating circumstances, defendant's contention that the trial court erred in allowing the satanic evidence to establish motive is misplaced. In *State v. Golphin* the defendant wrote a note during trial indicating that the murders for which he and his brother were charged were racially motivated. This Court held that the note was admissible at sentencing to support the (e)(9) aggravator in that whether a murder was racially motivated may be some indication of the " 'depravity of defendant's character.' " *Golphin*, 352 N.C. at 464, 533 S.E.2d at 233 (quoting *State v. Moose*, 310 N.C. 482, 500, 313 S.E.2d 507, 519 (1984)). This Court further noted that what makes a murder especially heinous, atrocious, or cruel is " 'the entire set of circumstances surrounding the killing.' " *State v. Stanley*, 310 N.C. 332, 338-39, 312 S.E.2d 393, 397 (1984) (quoting *Magill v. State*, 428 So. 2d 649, 651 (Fla.), *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983)), *quoted in Golphin*, 352 N.C. at 464, 533 S.E.2d at 233. Whether the killing demonstrates a depravity of mind is a factor that may be considered in determining if the killing was especially heinous, atrocious, or cruel. *Golphin*, 352 N.C. at 464-65, 533 S.E.2d at 233; *see also 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). Similarly, defendant's statements that the murder was satanically motivated may show depravity of mind and were, thus, properly admitted for the jury's

consideration in determining the existence of the (e)(9) aggravating circumstance. Defendant's attempt to distinguish *Golphin* on the basis that the note in *Golphin* was written by the defendant during trial is unpersuasive.

Moreover, in this case, defendant on cross-examination of Nash inquired, "What day was it that y'all were over there that he supposedly said this about the lord of darkness?" In response Nash stated, "I can't recall the exact date." Further, defense witness Phyllis Worrell's testimony referred to defendant talking about "the devil and this Satanic stuff." Hence, defendant lost the benefit of his objection. *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995) (holding that "[w]here evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost"). Having himself solicited direct references to his satanic comments, defendant cannot now complain about the State's introduction of the same or similar evidence.

Finally, we note that even though he was not entitled to it, defendant received the benefit of the trial court's balancing the unduly prejudicial effect of the evidence against its probative value under Rule 403 of the North Carolina Rules of Evidence and limiting the State to that portion which showed motive for the killing. The fact that the jury did not find the (e)(9) aggravator is not relevant to the admissibility of the evidence, but the failure to find the aggravator is some indication that the jury carefully considered the evidence and was not influenced by it in rendering its decision. Accordingly, these assignments of error are overruled.

[3] Defendant next contends that the trial court erred by allowing the State to introduce the substance of Jeffrey Nash's statement to Detective Culbreth to corroborate his previous testimony. We disagree.

The trial court allowed Detective Culbreth to read to the jury the unsworn statement of Nash for the narrow purpose of corroborating Nash's in-court testimony. Defendant first argues the inappropriateness of Detective Culbreth's testimony relating Nash's statements for the same reasons advanced in his previous argument. Defendant further contends that Culbreth's testimony went beyond the scope of and did not corroborate Nash's in-court testimony by including statements by Nash referencing defendant's fascination with the movie "Natural Born Killers."

As stated above, the North Carolina Rules of Evidence do not apply to sentencing hearings, *Bond*, 345 N.C. at 31, 478 S.E.2d at 179; and the State may present any evidence that is competent and relevant to the submitted aggravating circumstances, *Golphin*, 352 N.C. at 464, 533 S.E.2d at 233. In this case Nash's statements were relevant to the (e)(9) aggravating circumstance; Culbreth's testimony corroborated Nash's in-court testimony; and admission of Culbreth's testimony was, thus, proper. Regarding statements related by Culbreth as to which Nash did not specifically testify, defendant has waived his objection. In cross-examining Billie Johnson, defendant's girlfriend, the State, without objection, elicited the fact that defendant signed many of his letters "from Mickey," a reference to the movie "Natural Born Killers," which they both liked. Further, defense witness Dr. James Hilkey testified without objection about defendant's fascination with the movie and with killing. Thus, defendant lost the benefit of his earlier objection. *See Alford*, 339 N.C. at 570, 453 S.E.2d at 516. These assignments of error are overruled.

[4] Defendant next argues that the trial court committed reversible error by allowing the State to introduce testimony that referred to the movie "Natural Born Killers" and characterized defendant as a "sick minded person." Defendant contends that this evidence was not relevant to any aggravating circumstance and that its undue prejudice outweighed its probative value. For the reasons discussed in the previous argument, defendant's arguments relating to references to the movie "Natural Born Killers" and to Dr. Hilkey's testimony about defendant's poem and fascination with killing are without merit. As to the argument that the State was improperly allowed to elicit hearsay testimony from Detective Jason Swaim that defendant's girlfriend referred to defendant as a "sick minded person," assuming *arguendo* that admission of this evidence was error, defendant has failed to show unfair prejudice entitling him to relief. Defendant's expert testimony as to mitigating circumstances was premised on defendant's being under the influence of mental or emotional disturbance at the time of the murder, and defendant presented substantial evidence to show that he suffered from severe psychological disturbance. Since the jury found the existence of this mitigating circumstance, the girlfriend's shorthand, lay characterization of defendant's problems could not have prejudiced defendant. *See* N.C.G.S. § 15A-1443(a) (2001). Accordingly, these assignments of error are overruled.

[5] Defendant next argues that the trial court erred in allowing the State to introduce a newspaper allegedly found on the victim's chest and photographs of the victim's body showing the newspaper on her chest. Defendant contends that the State failed to lay a proper foundation to show that the newspaper was placed on the victim's body by defendant. Defendant places great emphasis on the fact that the neighbor, Mrs. Tammy Bolen, who the victim's grandson Jay Tutterow summoned after finding his grandmother, gave a statement two days later in which she stated:

> I told the detectives that the newspaper was lying across Evvie's chest when I got there but now that I think about it the newspaper was not lying across her when I got there because I remember seeing the blood on her chest. I do not know who put the newspaper on her.

At trial Mrs. Bolen testified that she saw a newspaper on the victim's body and positively identified State's exhibits 8 and 9, photographs of the scene, as illustrating her testimony. Mrs. Bolen explained that upon seeing the photographs, she understood why she thought she had seen a newspaper but then questioned whether she had seen the newspaper because she remembered the blood on the victim's chest. Other witnesses, including the grandson, the medical examiner and law enforcement officers, testified to seeing the newspaper turned to the obituary page lying on the victim's chest. However, the evidence was in conflict on this point. Charles White, defendant's adoptive father, testified that he did not observe a newspaper over the victim; and Detective Culbreth testified that defendant denied placing the newspaper on the victim.

The State is entitled to present any competent, relevant evidence pertaining to sentencing, N.C.G.S. § 15A-2000(a)(3); and the Rules of Evidence do not apply to require a balancing test, *Golphin*, 352 N.C. at 464, 533 S.E.2d at 233. Any evidence pertaining to the circumstances of the crime and to defendant is relevant at sentencing. *See Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 990 (1978). The question of whether and when the newspaper was placed on the victim's chest was for the jury to decide. Even assuming *arguendo* that the State failed to lay a proper foundation, defendant has not met his burden of showing how he was prejudiced by the introduction of this evidence, N.C.G.S. § 15A-1443(a), and these assignments of error are overruled.

[6] Defendant next contends that the trial court erred in submitting both statutory aggravating circumstances that the murder was committed while defendant was engaged in the commission of an armed robbery, N.C.G.S. § 15A-2000(e)(5), and that it was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). Defendant asserts that this error resulted in "double-counting," or the submission to the jury of two aggravating circumstances based upon the same evidence, thereby violating defendant's federal and state due process rights. Defendant further contends that this case is distinguishable from other cases in which this Court has upheld the submission of both of these aggravators in that the trial court failed to limit the evidence that the jury could consider under the pecuniary gain aggravating circumstance. We disagree.

North Carolina law provides that " '[d]ouble-counting' occurs when two aggravating circumstances based upon the same evidence are submitted to the jury." *State v. Call*, 349 N.C. 382, 426, 508 S.E.2d 496, 523 (1998).

> "It is established law in North Carolina that it is error to submit two aggravating circumstances when the evidence to support each is precisely the same. Conversely, where the aggravating circumstances are supported by separate evidence, it is not error to submit both to the jury, even though the evidence supporting each may overlap."

State v. Davis, 353 N.C. 1, 42, 539 S.E.2d 243, 270 (2000) (quoting *State v. East*, 345 N.C. 535, 553-54, 481 S.E.2d 652, 664, *cert. denied*, 522 U.S. 918, 139 L. Ed. 2d 236 (1997)) (citations omitted), *cert. denied* 534 U.S. 839, 151 L. Ed. 2d 55 (2001).

In this case, separate, independent evidence supported submission of both the (e)(5) and (e)(6) aggravating circumstances. As in *Davis* and *East* the theft of the keys and the automobile in the instant case supported the armed robbery necessary for the (e)(5) aggravating circumstance. *See Davis*, 353 N.C. at 42, 539 S.E.2d at 270; *East*, 345 N.C. at 554, 481 S.E.2d at 665. Defendant's evidence demonstrated that he stole the victim's Cadillac for transportation, not to sell it. Indeed, defendant told his girlfriend that he "would be riding in style in a Cadillac." Similarly, defendant's theft of money from the victim's purse supported the (e)(6) pecuniary gain aggravating circumstance just as the defendant's theft of credit cards, checks, and a purse in *Davis* supported the (e)(6) aggravating circumstance. *See Davis*, 353 N.C. at 42, 539 S.E.2d at 270.

Moreover, contrary to defendant's contention, the trial court properly limited the jury's consideration of the evidence supporting the (e)(5) and (e)(6) aggravating circumstances. Regarding the (e)(5) aggravating circumstance, the trial court instructed the jury, "[W]ith respect to this particular aggravating circumstance, members of the jury, the property which the State contends was taken and carried away allegedly is the Cadillac automobile of the deceased." Regarding the (e)(6) aggravating circumstance, the trial court, after instructing that pecuniary gain meant that defendant "has obtained or intends or expects to obtain money or some other thing which can be valued in money," then instructed, "[I]f you find from the evidence and beyond a reasonable doubt that when the defendant killed the victim, the defendant obtained money as a result, you would find this aggravating circumstance and would so indicate by having your foreperson write 'yes' in the space after this aggravating circumstance on the Issues and Recommendation form." Pursuant to these instructions the jury was not permitted to find both aggravating circumstances based upon the same evidence. As in *Davis* each circumstance was "supported by sufficient, independent evidence," and the instruction to the jury was proper. *Id.* at 43, 539 S.E.2d at 270. These assignments of error are, therefore, overruled.

[7] Defendant next contends the trial court erred in submitting the (e)(6) aggravating circumstance, that the victim's murder was committed for pecuniary gain, in that the evidence was insufficient to support a finding of this circumstance. Defendant argues that this aggravator examines a defendant's motive for the killing, not just the fact that money or something of value was taken at the time of the killing; and in this case, the evidence, according to defendant, does not show that the killing was motivated by pecuniary gain. Case law interpreting N.C.G.S. § 15A-2000(e)(6) states that

> "[t]he gravamen of the pecuniary gain aggravating circumstance is that 'the killing was for the purpose of getting money or something of value.' " *State v. Jennings*, 333 N.C. 579, 621, 430 S.E.2d 188, 210 (quoting *State v. Gardner*, 311 N.C. 489, 513, 319 S.E.2d 591, 606 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985))[, *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993)]. This aggravating circumstance considers defendant's motive and is appropriate where the impetus for the murder was the expectation of pecuniary gain. For purposes of determining the sufficiency of the evidence, 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. Moore, 335 N.C. 567, 610-11, 440 S.E.2d 797, 822 (citations omitted), *cert. denied*, 513 U.S. 898, 130 L. Ed. 2d. 174 (1994).

The evidence presented at trial tending to show that defendant killed for financial gain included, but was not limited to, the following: (i) at the time of the murder defendant was not working regularly at his painting job; (ii) defendant's father, Charles White, told investigators that defendant had "no money" and might have sold the weapons for cash to travel to Las Vegas or to go see his girlfriend in Mt. Airy or Virginia; (iii) following the shooting, defendant took approximately $100.00 and two keys from the victim's pocketbook; and (iv) defendant fled in the victim's car to a location near Charleston, West Virgnia, where he exchanged guns for drugs. Considered in the light most favorable to the State, a rational juror could find from this evidence that defendant's motive for the murder was, at least in part, to obtain money to finance his escapade. In talking with Detective Culbreth, defendant indicated that once he pointed the gun at the victim, he figured that he had committed a crime and that he might as well shoot. Defendant also told Nash that he was not crazy but that he would rather play crazy and be in an institution and that that was the only way he could beat the death sentence. These statements suggest that defendant may have fabricated the satanic, lord-of-darkness motive to mask his true intention. Having been previously convicted of breaking and entering and assault with a deadly weapon inflicting serious injury, defendant was not unfamiliar with the criminal process. Given this conflict in the evidence and taking the evidence in the light most favorable to the State, the trial court properly left determination of defendant's motive for the killing to the jury. This assignment of error is overruled.

[8] By his next assignment of error, defendant argues that the trial court erred in limiting the direct testimony of Dr. Halimena Creque, defendant's psychiatrist at Charter Hospital, and the testimony of Tom Desch, a licensed counselor who provided therapy to defendant after his release from Charter. Defendant asserts that limiting this testimony regarding defendant's family history to support mitigating circumstances violated his federal and state due process rights. Specifically, defendant attempted to ask Dr. Creque his opinion of "how well [defendant's] mother and father reacted to the treatment and therapy at Charter" and whether "[it is] important to you as a psychiatrist treating an adolescent as [the defendant] was at this point, to find out problems in family history, such as alcoholism or

violent tendencies." The trial court sustained the State's objections to these questions. The trial court also sustained the State's objection to comments by Mr. Desch that "[t]his was a very hard family to work with because there was so much going on" and that his "third goal was to work with the family to help them parent [defendant] in a way that worked better for [defendant]" as well as Mr. Desch's characterization of defendant's maternal grandmother as "overbearing."

As to the question put to Dr. Creque concerning defendant's parents' reaction to defendant's treatment at Charter, defendant did not make a record of what the answer would have been had Dr. Creque been permitted to respond; hence, this Court cannot conduct appellate review as to possible prejudice. *See State v. Miller*, 321 N.C. 445, 452, 364 S.E.2d 387, 391 (1988). However, the trial court properly noted in sustaining the objection that the parents were not on trial and that their conduct was not at issue.

The scope of mitigation in a capital sentencing proceeding is "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." *Lockett*, 438 U.S. at 604, 57 L. Ed. 2d at 990. As this Court has previously noted, however, this rule does not " 'limit[] the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.' " *State v. Bowman*, 349 N.C. 459, 479, 509 S.E.2d 428, 440 (1998) (quoting *Lockett*, 438 U.S. at 604 n.12, 57 L. Ed. 2d at 990 n.12), *cert. denied*, 527 U.S. 1040, 144 L. Ed. 2d 802 (1999); *accord State v. Nicholson*, 355 N.C. 1, 40, 558 S.E.2d 109, 136 (2002).

As in *Nicholson* the conduct of other family members did not relate to any aspect of defendant's character or record or to circumstance of the offense. *Nicholson*, 355 N.C. at 39, 558 S.E.2d at 136. Therefore, the trial court did not err in excluding this evidence, which was not relevant to mitigation. Moreover, with respect to Mr. Desch's comments, the witness answered before the court ruled on the objection; and the prosecutor did not move to strike. Thus, defendant had the benefit of this testimony. This assignment of error is overruled.

[9] Defendant next contends that the trial court erred in overruling defendant's objection to a question asked of Jay Tutterow, the victim's grandson, and of Lynette Tutterow, the victim's daughter, by the prosecutor. Defendant contends that the court's failure to sustain his

objection to the question whether defendant had ever apologized for his actions violated defendant's Fifth Amendment right against self-incrimination and his due process rights under the North Carlina Constitution. We disagree.

We note initially that the prosecutor asked neither witness if defendant had apologized. Rather, the prosecutor asked Detective Culbreth if she knew whether defendant had told either Jay Tutterow or Lynnette Tutterow that he was sorry for what he had done to the victim. Detective Culbreth answered that she did not know. Assuming *arguendo* that the prosecutor's question was improper, the error was harmless beyond a reasonable doubt inasmuch as the witness answered that she did not know, and no further mention was made of remorse. *See* N.C.G.S. § 15A-1443(b). Accordingly, this assignment of error is overruled.

[10] By another assignment of error defendant contends that the trial court erred in submitting the (e)(3) aggravating circumstance, that "defendant had been previously convicted of a felony involving the use of violence to the person." Defendant argues that, given defendant's age at the time of the previous conviction, the use of this conviction to support the death penalty violates defendant's Eighth, Fourteenth, and Fifth Amendment rights under the federal Constitution and his rights under Article I, Section 27 of the North Carolina Constitution. Defendant was fifteen years old on 25 March 1993, the date of the assault with a deadly weapon inflicting serious injury for which he was tried and convicted as an adult on 6 October 1993; defendant was sixteen years old at the time of the trial, having had a birthday on 16 June. Defendant presents no authority in support of this argument.

In a capital sentencing proceeding, the State must present evidence sufficient to prove an aggravating circumstance beyond a reasonable doubt. *State v. Johnson*, 298 N.C. 47, 75, 257 S.E.2d 597, 617 (1979); *see also* N.C.G.S. 15A-2000(c)(1). The (e)(3) aggravating circumstance states:

> The defendant had been previously convicted of a felony involving the use or threat of violence to the person or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a Class A, B1, B2, C, D, or E felony involving the use or threat of violence to the person if the offense had been committed by an adult.

N.C.G.S. § 15A-2000(e)(3). A conviction for assault with a deadly weapon inflicting serious injury satisfies the requirement of a felony involving the use or threat of violence to the person. *State v. Rose*, 335 N.C. 301, 338-39, 439 S.E.2d 518, 538-39, *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).

Felonious assault with a deadly weapon inflicting serious injury is a class E felony. N.C.G.S. § 14-32(b) (2001). Thus, defendant's conviction would have qualified as an (e)(3) aggravating circumstance even if he had had a juvenile adjudication rather than being tried as an adult. The age of the perpetrator is irrelevant if the previous conviction of a violent felony or juvenile adjudication meets the criteria for the (e)(3) aggravating circumstance. *See State v. Wiley*, 355 N.C. 592, 605, 565 S.E.2d 22, 34 (2002).

[11] Defendant next contends that the trial court erred in denying his pretrial motion *in limine* to preclude introduction of certain autopsy and crime scene photographs. The photographs at issue involved four that showed the victim's body from various angles at the crime scene and nine taken during the autopsy of the victim. Relying on *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988), defendant contends that the photographs were gruesome and inflammatory and had no probative value and that their admission violated defendant's rights under the federal and state Constitutions, Rule 403 of the North Carolina Rules of Evidence, and this Court's holding in *Hennis*.

As noted earlier, the Rules of Evidence are not applicable to a capital sentencing proceeding; hence, the trial court was not required to engage in the Rule 403 balancing test. *Bond*, 345 N.C. at 31, 478 S.E.2d at 179. In *State v. Call* we reiterated the holding in *Hennis* as follows:

> In *Hennis*, this Court concluded that the admission into evidence of photographs which have no probative value beyond that of previously introduced photos constitutes reversible error where their content is gory, they are redundant and repeatedly shown to the jury, and there is a lack of overwhelming evidence of an accused's guilt. [*Hennis*, 323 N.C.] at 286-87, 372 S.E.2d at 528. However, we continue to recognize the long-standing rule that photographs of a murder victim, though gory or gruesome, may be introduced for illustrative purposes so long as they are

not used in an excessive or repetitious manner aimed exclusively at arousing the passions of the jury. *Id.* at 283, 372 S.E.2d at 526. Moreover, the trial court must still balance the prejudicial effect of relevant evidence, including photographs, against its probative value before that evidence can be introduced or excluded. N.C.G.S. § 8C-1, Rule 403 (1997). Finally, what constitutes an excessive number of photos, given the illustrative value of each, is a matter that falls within the trial court's discretion. *Hennis*, 323 N.C. 279, 372 S.E.2d 523.

Call, 349 N.C. at 414, 508 S.E.2d at 516.

In the present case the trial court noted that each of the photographs represented different aspects of the victim and the autopsy. From the record before us, we conclude that the number of photographs submitted into evidence was not unduly repetitious, nor were the photographs merely aimed at arousing the passions of the jury. Each of the pictures submitted by the State had illustrative and probative value and was, thus, properly admitted into evidence. The trial court's denial of defendant's motion *in limine* was not error. Accordingly, these assignments of error are without merit.

[12] Defendant next contends that the trial court erred by allowing the State to introduce into evidence a cookbook that was dedicated to the victim. Relying on *Payne v. Tennessee*, 501 U.S. 808, 825, 115 L. Ed. 2d 720, 735 (1991), defendant argues that his sentencing was fundamentally unfair as a result of admitted prejudicial evidence. We disagree.

This Court, relying on the *Payne* opinion, recently addressed the admissibility of victim-impact statements as follows:

> In *Payne v. Tennessee*, 501 U.S. 808, 825, 115 L. Ed. 2d 720, 735 (1991), the United States Supreme Court held that victim-impact statements are admissible and relevant to the jury's decision whether to impose the death penalty. North Carolina has adopted this rule to allow evidence of victim impact in sentencing hearings. "A victim has the right to offer admissible evidence of the impact of the crime, which shall be considered by the court or jury in sentencing the defendant. The evidence may include . . . [a] description of the nature and extent of any physical, psychological, or emotional injury suffered by the victim as a result of the offense committed by the defendant." N.C.G.S. § 15A-833(a)(1) (1999). The admissibility of victim-impact state-

ments is limited by the requirement that they not be "so prejudicial as to 'render[] the [trial] fundamentally unfair.' " [*State v.*] *Smith*, 352 N.C. [531,] 554, 532 S.E.2d [773,] 788 [(2000)] (quoting *Payne*, 501 U.S. at 825, 115 L. Ed. 2d at 735) (first alteration in original) [, *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360 (2001)].

Nicholson, 355 N.C. at 39, 558 S.E.2d at 135-36 (alterations in original).

In this case the memorial cookbook introduced was not unduly prejudicial. The evidence merely reflected the high regard in which the victim was held among her family and throughout her community. Moreover, defendant presented evidence of similar import through the testimony of defendant's mother, who stated that the victim was "like my mama." As in *Nicholson* nothing suggests that the jury based its decision solely on such evidence; and none of the aggravating circumstances submitted to the jury derived from such evidence. The trial court properly admitted the cookbook, and this assignment of error is overruled.

PROPORTIONALITY

[13] 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. N.C.G.S. § 15A-2000(d)(2); *see also State v. McCollum*, 334 N.C. 208, 239, 433 S.E.2d 144, 161 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

After a thorough review of the transcript, record on appeal, briefs, and oral arguments of counsel, we are convinced that the jury's findings of three of the four aggravating circumstances submitted were supported by the evidence. We also conclude that nothing in the record suggests that defendant's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Finally, we must consider whether the imposition of the death penalty in defendant's case is proportionate to other cases in which the death penalty has been affirmed, considering both the crime and

the defendant. *State v. Robinson*, 336 N.C. 78, 133, 443 S.E.2d 306, 334 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995). The purpose of proportionality review is "to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Proportionality review also acts "[a]s a check against the capricious or random 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. *State v. Syriani*, 333 N.C. 350, 400, 428 S.E.2d 118, 146, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

Defendant pled guilty to first-degree murder. The jury found three of the aggravating circumstances submitted: (i) that defendant had been previously convicted of another felony involving the threat of violence to the person, N.C.G.S. § 15A-2000(e)(3); (ii) that the murder was committed while the defendant was engaged in the commission of robbery with a firearm, N.C.G.S. § 15A-2000(e)(5); and (iii) that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). A fourth aggravating circumstance was submitted to but not found by the jury: that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9).

The trial court submitted four statutory mitigating circumstances for the jury's consideration: (i) the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (ii) defendant's capacity to appreciate the criminality of his conduct was impaired, N.C.G.S. § 15A-2000(f)(6); (iii) defendant's age at the time of the crime, N.C.G.S. § 15A-2000(f)(7); and (iv) 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 three of the statutory mitigating circumstances to exist. The trial court also submitted twenty-one nonstatutory mitigating circumstances; the jury found thirteen 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. *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). This case is not substantially similar to any of the cases in which this Court has found that the death sentence was disproportionate.

In this case defendant pled guilty to first-degree murder. As a result, defendant "admitted guilt 'upon any and all theories available to the state,' including premeditation and deliberation and the felony murder rule." *State v. Meyer*, 353 N.C. 92, 120, 540 S.E.2d 1, 18 (2000) (quoting *State v. Silhan*, 302 N.C. 223, 263, 275 S.E.2d 450, 478 (1981), *overruled on other grounds by State v. Sanderson*, 346 N.C. 669, 488 S.E.2d 133 (1997)), *cert. denied*, 534 U.S. 839, 151 L. Ed. 2d 54 (2001). A conviction under the theory 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).

We further note that the sentencing jury found three 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. We conclude that this case is not substantially similar to either of those cases.

We also consider cases in which this Court has found the death penalty to be proportionate. Defendant in this case entered an elderly victim's home, shot her in the chest, and stomped her head before leaving 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.' " *State v. Adams*, 347 N.C. 48, 77, 490 S.E.2d 220, 236 (1997) (quoting *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987)) (alterations in orig-

inal), *cert. denied*, 522 U.S. 1096, 139 L. Ed. 2d 878 (1998); *accord Nicholson*, 355 N.C. at 72, 558 S.E.2d at 155. Further, both the (e)(5) and (e)(3) aggravating circumstances were found to exist by the jury. This Court has held that either of these aggravating circumstances, standing alone, is 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 bears more similarity to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence disproportionate or to those in which juries have consistently returned recommendations of life imprisonment.

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.

STATE OF NORTH CAROLINA v. MITCHELL DAVID HOLMES

No. 7A01

(Filed 28 June 2002)

1. **Homicide— first-degree murder—short-form indictment—constitutionality**

The trial court did not err by concluding that the short-form indictment used to charge defendant with first-degree murder was constitutional even though it did not allege that the murder was committed either in the course of a felony or with premeditation and deliberation.

2. **Criminal Law— shackling of defendant's legs—reasonably necessary**

The trial court did not abuse its discretion in a first-degree murder, attempted first-degree murder, and robbery with a dangerous weapon case by ordering over defendant's objection that defendant remain shackled by the legs during the trial, because: (1) records showed that defendant had numerous instances of

misconduct while in jail awaiting trial; (2) immediately prior to trial, defendant began fighting with officers when defendant discovered that contraband in his possession had been confiscated; (3) such restraint was reasonably necessary to maintain order and to provide for the safety of persons; (4) defendant's past disregard for order and the safety of others while in custody is a reasonable indicator that defendant may exhibit the same conduct during trial; (5) an incident requiring six people to forcefully subdue defendant occurred a mere twelve days prior to the hearing in question; (6) the trial court considered the factors listed in the Tolley case; (7) the leg shackles were not visible to the jury; and (8) defendant cites to nothing in the record suggesting that defendant was impaired by the restraint, and the trial court indicated that the initial ruling would be reconsidered on a daily basis.

3. Evidence— expert testimony—whether ammunition caused injuries

The trial court did not err in a first-degree murder, attempted first-degree murder, and robbery with a dangerous weapon case by overruling defendant's objection to testimony from the State's firearm analysis and identification expert regarding whether the ammunition he examined could have caused the murder victim's injuries, because even assuming arguendo that the pertinent portion of the testimony constituted medical testimony that was outside the expert's field of expertise, any error was harmless when: (1) the undisputed evidence showed that the shots that killed one victim and injured another were fired from a rifle; (2) the alleged improper testimony served to establish only that the rifle was the weapon that caused the injuries and in no way did the testimony imply that defendant was the man who fired the rifle; and (3) defendant cannot show that there is a reasonable possibility that a different result would have been reached at trial absent this testimony.

4. Evidence— double hearsay—admission of statement harmless error

Although defendant contends the trial court violated his right of confrontation in a first-degree murder and attempted first-degree murder sentencing proceeding by overruling defendant's objection to an SBI agent's double-hearsay testimony that one coparticipant told the agent that another coparticipant said defendant was the shooter, any alleged violation was harmless

because: (1) the jury had already determined beyond a reasonable doubt during the guilt-innocence phase that defendant fired the rifle; (2) the jury had earlier heard similar testimony; and (3) no reasonable probability exists that this double-hearsay statement affected the outcome of the sentencing proceeding.

5. Sentencing— capital—mitigating circumstances—minor participation—refusal to submit—premediation and deliberation—insufficient additional evidence at sentencing—harmless error

The trial court's ruling that it would not submit the mitigating circumstance that "the murder was actually committed by another person" was in effect a refusal to submit the statutory mitigating circumstance that "defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor," N.C.G.S. 15A-2000(f)(4). The trial court did not err by refusing to submit the (f)(4) mitigating circumstance because (1) it was held in *State v. Roseboro*, 351 N.C. 536 (2000) that this circumstance is inapplicable where the defendant was convicted of premeditated and deliberate murder and (2) even if the Court were to hold that the *Roseboro* rule did not apply where additional evidence was presented at the sentencing hearing, defendant's own statement introduced at sentencing showed that his participation was not minor. Furthermore, any error in the trial court's refusal to submit the (f)(4) mitigating circumstance was harmless because, in finding defendant guilty of premeditation and deliberation, the jury found beyond a reasonable doubt that defendant fired a rifle at the victim, and a reasonable probability did not exist that defendant's additional evidence consisting of a self-serving statement would be sufficient to change a juror's mind as to who shot the rifle.

6. Sentencing— capital—mitigating circumstances—initial idea by coparticipant—amendment by trial court

In a capital sentencing proceeding for a first-degree murder committed during a robbery, defendant's proposed nonstatutory mitigating circumstance that the initial idea that resulted in the victim's death was a coparticipant's was properly amended by the trial court to state that the initial idea for the robbery was the coparticipant's in order to avoid a misinterpretation by the jury unsupported by substantial evidence.

7. Sentencing— capital—aggravating circumstances—murder committed during robbery—murder part of a course of conduct—no double counting of evidence

The trial court in a capital sentencing proceeding for a first-degree murder did not improperly allow the jury to use the same evidence that someone went through an attempted murder victim's pockets to support the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the murder was committed during a robbery and the N.C.G.S. § 15A-2000(e)(11) aggravating circumstance that the murder was part of a course of conduct, because: (1) the robbery supported the (e)(5) aggravating circumstance while the attempted murder supported the (e)(11) aggravating circumstance; (2) defendant did not properly request a limiting instruction since he only made an oral request and N.C.G.S. § 15A-1231 provides a party may tender written instructions; and (3) even assuming error arguendo, defendant cannot show a reasonable possibility that a different result would have been reached absent this error.

8. Sentencing— mitigating circumstances—failure to appreciate criminality of conduct

The trial court did not err in a first-degree murder capital sentencing proceeding by failing to submit the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance that defendant did not appreciate the criminality of his conduct or could not conform his conduct to the requirements of law because contrary to defendant's assertions, an expert's testimony that defendant operated under a mental or emotional disturbance at the time of the murder does not show that defendant's ability to appreciate the criminality of his actions or to conform his conduct to the law was impaired, but instead was properly considered under 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.

9. Sentencing— death penalty—not disproportionate

The trial court did not err in a first-degree murder case by sentencing defendant to the death penalty, because: (1) defendant was convicted on the basis of premeditation and deliberation and the felony murder rule; (2) a murder in the home shocks the conscience, and defendant shot the victim in the victim's home; and (3) the jury found the three aggravating cir-

cumstances under N.C.G.S. § 15A-2000(e)(3), (e)(5), and (e)(11), all of which standing alone have been held sufficient to support the death penalty.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Thompson, J., on 8 September 2000 in Superior Court, Johnston County, upon a jury verdict finding defendant guilty 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 an additional judgment. Heard in the Supreme Court 14 February 2002.

Roy Cooper, Attorney General, by Teresa H. Pell, Special Deputy Attorney General, for the State.

Staples Hughes, Appellate Defender, by Charlesena Elliott Walker, Assistant Appellate Defender, for defendant-appellant.

PARKER, Justice.

Defendant Mitchell David Holmes was indicted on 15 February 1999 for the first-degree murder of Dean Ray Creech, the attempted first-degree murder of Ronnie Lynn Hardison, and robbery with a dangerous weapon. Defendant was tried capitally and found guilty of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. He was also found guilty of attempted first-degree murder and of robbery with a firearm. Following a capital sentencing proceeding, the jury recommended a sentence of death for the murder conviction; and the trial court entered judgment accordingly. The trial court also sentenced defendant to a term of 220 to 273 months' imprisonment for the attempted first-degree murder conviction and arrested judgment on the robbery with a firearm conviction as it was the underlying felony for the felony murder conviction.

The State's evidence tended to show that on the evening of 14 January 1999, Jerry Bland and Hardison visited Creech at his trailer in Selma, North Carolina. When the men arrived, they saw a black man wearing a hooded jacket exiting the trailer. Less than an hour later, the same man returned to the trailer, went with Creech into the master bedroom, and again departed. Sometime later, someone knocked on the trailer door; in response, Creech went outside and returned with a small bag of cocaine. Bland and Creech used syringes to inject the cocaine while Hardison "snorted some."

Inside Creech's trailer that night there was an old 12-gauge shotgun in the corner of the living room and a .44 magnum pistol lying on the back of the couch. At Creech's request, Bland determined that the shotgun had no firing pin and was, therefore, inoperable. These guns were later stolen by defendant and his accomplice. At some point during the evening, Creech brought a black bag containing smaller freezer bags filled with marijuana into the living room to show Hardison and Bland.

A short time later, Bland went to the back bathroom to take a shower. While Bland was in the bathroom, someone knocked on the front door of the trailer and called out a name. Hardison testified that when Creech opened the door, defendant, holding a rifle, and another man barged into the trailer and began shouting, wanting to know where the marijuana was located. Defendant pulled back the bolt on the rifle and shot Creech twice. Upon seeing defendant shoot Creech, Hardison turned to flee toward the back of the trailer. After Hardison moved two or three feet, defendant shot him in the back. The shot knocked Hardison down, and he lost feeling in his leg; Hardison then "just laid there" silently, "reckon[ing] they figured I was dead too." Hardison heard the second man ask defendant, "Why did you shoot him?" Defendant indicated that they should quickly attempt to locate the marijuana, as Creech's neighbors likely heard the gunshots. Hardison heard the men rummaging through the trailer, opening cabinet doors, and running around. At one point, one of the men went through Hardison's pockets while Hardison lay on the floor, though they did not locate any money.

Bland was in the bathroom when the incident began. He heard a knock on the front door, then heard the door slam open and a man screaming, "Where's the weed? Where's the money?" several times. Upon hearing the gunshots, Bland lay down in the bathtub and pulled the shower curtain closed. Bland heard the men ransacking the trailer, then, when everything was quiet, heard Hardison yell, "Jerry [Bland], I've been shot. Come help me. I've been shot. I think I'm dying." Bland went to Hardison's aid and found him standing at the bar, holding his abdomen, from which his intestines were protruding. Bland saw Creech, curled up on his side against the wall, not moving and with a lot of blood around his chest. Bland determined that Creech did not have a pulse, then called 911. Pursuant to the 911 operator's request, Bland moved Creech's body flat on the floor and began performing CPR. While Bland was performing mouth-to-mouth resuscitation, "massive bubbles" began coming out of Creech's chest.

Shortly after Bland began performing CPR, officers and paramedics arrived at the scene and determined that Creech was dead.

Gonzalo Santiago testified that around 11:00 or 11:30 that night he and Shantawn Freeman went to a convenience store to buy beer. While at the store, Santiago saw defendant and Michael Frazier; he was acquainted with both men. Frazier approached Santiago and Freeman and told them that he wanted to gather a group to rob some men in Wilson Mills of six pounds of marijuana. Santiago declined the offer, but Freeman agreed to participate. Santiago and Freeman then drove back to Santiago's home, with defendant and Frazier following in their own car. Freeman spoke with defendant and Frazier again at Santiago's home, then defendant, Freeman, and Frazier left together for Wilson Mills, with defendant driving the car, to commit the armed robbery. About one and a half to two hours later, defendant and Freeman returned to Santiago's home. Santiago noticed that defendant and Freeman looked shocked, "like something major just happened." Defendant stated, "I shot him." Santiago looked at Freeman in disbelief; and Freeman nodded, stating, "He shot him. He shot him." Defendant then drove away, while Freeman stayed and told Santiago what had occurred.

The pathologist who performed the autopsy on Creech's body discovered two gunshot wounds but was unable to determine the order in which the wounds were inflicted. The first wound the pathologist described was caused by a bullet that entered the right side of the chest; traveled through the right lung; traveled through the aorta, causing an accumulation of blood around the heart; and created a large, irregular exit wound on the upper left side of the chest. The second wound the pathologist described was caused by a bullet that entered the left lower back; went through the left lung; and exited the left side of the chest, with fragments lodging in the left arm. The pathologist testified that the first bullet was fired from a distance of greater than two feet by a high-velocity weapon. The pathologist opined that either wound alone would have been fatal and that Creech died as a result of these wounds.

Agents investigating the crime scene discovered a large black plastic bag under a pile of clothes in the master bedroom. Inside this large bag were numerous smaller bags containing a total of approximately three and one half pounds of marijuana. Investigators also discovered that one of the bullets that killed Creech subsequently went through the front wall of the trailer and struck a car in the front yard. The bullet that injured Hardison subsequently traveled down the hall-

way before going through a dresser and a wall, crossing an open field, and lodging in the opposite wall of a barn. Spent .30-caliber bullet casings were found beside Creech's body, below the hole in the front wall, and on the sofa. A firearms expert determined that the bullet found in the barn, the lead fragments taken from Creech's body, and the three fired cartridges found in the trailer were consistent in caliber, design, and manufacture. Furthermore, the bullet found in the barn and the bullet fragments recovered from Creech's body were fired from the same weapon. Likewise, the fired cartridges were all fired from the same weapon. The expert further opined that the casings and the bullets could have been fired from the same weapon.

On 25 January 1999 investigators showed Hardison a photographic array of suspects. Hardison conclusively picked defendant out of the lineup as one of the perpetrators and was "ninety percent sure" that defendant was the man with the gun. On 17 January 1999 Frazier told investigators, among other things, that he was the black man that Hardison and Bland had seen on two occasions at the trailer on the night of the murder. As a result of the interview with Frazier, arrest warrants were issued for defendant and Freeman. Defendant was arrested on 18 January 1999 after being seen driving his girlfriend's car. A search of the car revealed a pair of defendant's blue jeans with a bloodstain on the knee. Later DNA testing showed that it was Creech's blood on the blue jeans.

At sentencing defendant presented testimony from numerous witnesses, including testimony from Agent Greg Tart of the State Bureau of Investigation that defendant admitted in an interview on 18 January 1999 that he went to Creech's house with Frazier and Freeman at Frazier's suggestion. According to defendant's statement, read in open court by Agent Tart, Freeman shot Creech and Hardison, then stole the pistol and shotgun from the trailer.

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

JURISDICTIONAL ISSUE

[1] Defendant contends that the short-form murder indictment was insufficient to charge him with first-degree murder as it did not allege that the murder was committed either in the course of a felony or with premeditation and deliberation. Thus, defendant argues, use of the short-form murder indictment 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 indictment directly contravenes two recent United States Supreme Court cases. *See 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 we therefore overrule this assignment of error.

PRETRIAL ISSUE

[2] Defendant contends that the trial court erred in ordering, over defendant's objection, that defendant "remain shackled by the legs, which are not visible to the public or to the jurors who happen to be in the courtroom, and that that not be exposed by any manner to the jury or prospective jurors" during the trial. This error, defendant contends, violated defendant's federal and state constitutional rights to due process and a fair trial, as the restraint was not reasonably necessary. As defendant did not rely on constitutional grounds at trial, we address only whether the trial court abused its discretion in ordering that defendant be restrained. *See State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) (" 'a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal' ") (quoting *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982)).

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 (2001). The factors that a trial judge may consider in making this determination include, *inter alia*,

> the seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.

Tolley, 290 N.C. at 368, 226 S.E.2d at 368.

Frank Gunter, a detention center administrator, testified that records showed that defendant had numerous instances of misconduct while in jail awaiting trial. These incidents included: refusing to return to his cell on several occasions, using obscene language on more than one occasion, giving prescription medication to another inmate, assaulting another inmate, threatening to start a fire in his cell, refusing to permit the food pass door in the cell to be closed, threatening corrections officers on more than one occasion, attempting to start a fire in his cell block, refusing to be handcuffed, being uncooperative and profane, fighting and refusing orders to desist, and tampering with the cell door locking mechanism. Gunter further testified that, while in the detention center immediately prior to trial, defendant began fighting with officers when he discovered that contraband in his possession had been confiscated. Ultimately, it took four sheriff's deputies and two detention center staff members to subdue defendant and place him in his cell. Gunter also testified that defendant repeatedly jammed the lock to his cell door while at the detention center.

The trial court ruled that

> Defendant has participated in a number of disciplinary problems, including assaultive behavior, failure to follow rules, and other

> matters . . . . In order to avoid a possible problem of similar conduct in the courtroom, I am going to initially order that the Defendant is to remain shackled by the legs, which are not visible to the public or to the jurors who happen to be in the courtroom, and that that not be exposed by any manner to the jury or prospective jurors.

In light of defendant's disruptive and assaultive behavior, we conclude that the trial court acted within its discretion to order defendant's restraint. The record shows that such restraint was reasonably necessary to maintain order and to provide for the safety of persons. The Court is not persuaded by defendant's argument that the trial court erred, as the testimony before it related only to defendant's previous conduct rather than to evidence that defendant was a threat to safety or decorum at the time of the trial. Defendant's past disregard for order and the safety of others while in custody is a reasonable indicator that defendant may exhibit the same conduct during trial. We also note that the incident requiring six people to forcefully subdue defendant occurred a mere twelve days prior to the hearing in question.

Defendant further argues that the trial court erred by not considering all of the factors listed in *Tolley*. However, *Tolley* sets out neither a complete enumeration of factors that a judge may consider nor a checklist of factors that the trial court must consider and balance. *See id.* (noting that the factors listed "may" be considered and are "*inter alia*"). The record shows that the trial court properly considered factors allowed under both the statute and this Court's ruling in *Tolley* and that these factors were sufficient for the trial court to determine, within its discretion, that restraint was reasonably necessary.

We further note that the record discloses that the leg shackles were not visible to the jury. Thus, the risk is negligible that the restraint undermined the dignity of the trial process or created prejudice in the minds of the jurors by suggesting that defendant is a dangerous person. *See State v. Wilson*, 354 N.C. 493, 521, 556 S.E.2d 272, 290 (2001). Defendant argues that the shackles "likely adversely affected [defendant's] mental and emotional state and lessened his ability to understand his legal proceedings, communicate with his counsel and assist in his own defense." However, defendant cites to nothing in the record suggesting that defendant was so impaired by the restraint. The trial court clearly indicated that the initial ruling

would be reconsidered on a daily basis; hence, trial counsel could have brought any impairment caused by the restraint, had it existed, to the trial court's attention at any point during the trial.

For the above reasons, we hold that the trial court did not abuse its discretion in ordering defendant restrained during the trial and overrule this assignment of error.

GUILT-INNOCENCE PHASE

[3] In his only assignment of error relating to the guilt-innocence phase of his trial, defendant argues that the trial court erred in overruling his objection to testimony from the State's firearm analysis and identification expert, Agent Thomas Trochum of the State Bureau of Investigation, regarding whether the ammunition he examined could have caused Creech's injuries. Defendant contends that this testimony was outside the expert's area of expertise and, therefore, violated the North Carolina Rules of Evidence as well as defendant's constitutional rights to due process and a fair trial. We note initially that defendant did not object to this testimony on constitutional grounds at trial. Therefore, we decline to address defendant's constitutional claims on appeal. *See Benson*, 323 N.C. at 322, 372 S.E.2d at 519.

Under the North Carolina Rules of Evidence,

> [i]f 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) (2001). Subsequent to testimony regarding Trochum's extensive experience and education, the trial court received him, without objection by defendant, as "an expert in the field of firearm analysis and identification." Trochum thereafter testified, again without objection from defendant, that the bullet located in the barn and the fragments taken from Creech's body were fired from one weapon and that the three fired cartridges found in Creech's trailer were fired from one weapon. Although he could not determine whether the weapon that fired the bullets was the same weapon that expended the cartridges or whether the bullets came from those cartridges, Trochum noted that the bullets and the cartridges were consistent in caliber, design, and manufacture and could have been fired from the same firearm. Trochum also described the mass and veloc-

ity of this ammunition, concluding that such bullets are "excellent penetrators."

Following this testimony, the following exchange occurred:

[PROSECUTOR]: Based on your training and experience, are you familiar with the type of damage that this particular type of ammunition may cause to the human body?

[DEFENSE COUNSEL]: I would object to that, Your Honor.

THE COURT: Objection is overruled.

[AGENT TROCHUM]: Yes, sir.

. . . .

[PROSECUTOR]: I'm now going to show you [the autopsy photographs]. Will you please examine these photographs and tell me whether or not the wounds that you observe there, whether or not you can form an opinion to a reasonable scientific certainty as to whether or not the ammunition that you examined could have caused that particular damage?

[DEFENSE COUNSEL]: I would object.

THE COURT: Overruled.

[AGENT TROCHUM]: These particular cartridges have the ability, of course. In [the first two photographs], you have what appears to be a small penetration here. Certainly that's capable of these particular bullets. In [the last two photographs], you have large wounds here. I would expect to see this from either a fragmenting gunshot, if they—

[DEFENSE COUNSEL]: Objection.

[AGENT TROCHUM]: —were caused by these particular bullets.

THE COURT: Overruled.

[AGENT TROCHUM]: This would—they are not incapable of this type of damage. Again, these are excellent penetrators.

Defendant argues that this quoted portion of the Agent Trochum's testimony constituted medical testimony that was outside his field of expertise.

Assuming *arguendo* that defendant is correct in characterizing the above testimony as outside the expert's field of expertise, any

error was harmless. The undisputed evidence showed that the shots that killed Creech and injured Hardison were fired from the rifle. The testimony showed that the only firearms present at the time were an inoperable shotgun, a .44 magnum pistol, and the rifle brought into the trailer by the perpetrators. No evidence suggests that the .44 magnum pistol was ever used, and all the physical evidence supports a finding that only a .30-caliber weapon was fired. Hardison's testimony further establishes that the only weapon fired during the incident was the rifle.

Defendant argues that, given the relatively weak evidence that defendant was the actual shooter, Agent Trochum's testimony prejudiced defendant by "suggest[ing] that [defendant], whom Hardison identified as the man carrying the bolt-like rifle in the trailer, fired the shots that seriously wounded [Hardison] and fatally wounded Creech." However, the allegedly improper testimony served to establish only that the rifle was the weapon that caused Creech's and Hardison's injuries, a fact already established by the undisputed evidence. In no way did the testimony in question imply that defendant was the man who fired the rifle. Thus, even if the testimony was improper, defendant cannot show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a)(2001). Accordingly, we overrule this assignment of error.

SENTENCING PROCEEDING

[4] By another assignment of error, defendant alleges that the trial court erred in overruling defendant's objection to SBI Agent Tart's double-hearsay testimony that Frazier told him that Freeman said defendant was the shooter. Defendant alleges that admission of this statement violated defendant's constitutional right of confrontation, as he was unable to cross-examine either Freeman or Frazier.

For their involvement in these crimes, Frazier was charged with conspiracy to commit robbery with a dangerous weapon; and Freeman was charged with murder, attempted murder, and robbery with a dangerous weapon. Neither Frazier nor Freeman testified at defendant's trial. During sentencing defendant called Agent Tart to the stand and elicited testimony regarding defendant's confession to the crime and assertion that Freeman was the shooter. On cross-examination, the following colloquy occurred:

[PROSECUTOR]: Agent Tart, prior to the Defendant making his statement, Michael Frazier had already made a statement to you, had he not?

[AGENT TART]: Yes.

[PROSECUTOR]: Is it not true that Michael Frazier told you that this Defendant was the one that shot Dean Creech?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

. . . .

[AGENT TART]: . . . I believe he told me that someone else told him that.

[PROSECUTOR]: That someone else being Shantwan Freeman; is that correct?

[AGENT TART]: Right.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

While the Rules of Evidence do not apply to a capital sentencing proceeding, *State v. Daughtry*, 340 N.C. 488, 517, 459 S.E.2d 747, 762 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996), the constitutional right to confront witnesses does apply, *State v. McLaughlin*, 341 N.C. 426, 458, 462 S.E.2d 1, 19 (1995) (holding that "[a]lthough the evidence at issue [at sentencing] was admissible as a matter of law under the statute, we must also address whether the admission of that [evidence] violated defendant's confrontation rights under the federal and state constitutions"), *cert. denied*, 516 U.S. 1133, 133 L. Ed. 2d 879 (1996).

The Confrontation Clause of the Sixth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, affords criminal defendants the right " 'to be confronted with the witnesses against him.' " *State v. Jaynes*, 353 N.C. 534, 554, 549 S.E.2d 179, 195 (2001) (quoting U.S. Const. amend. VI). "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). Defendant in this case was denied the right to cross-examine the declarants, Freeman and Frazier, inasmuch as Freeman and Frazier

were also charged with crimes arising from these events. Thus, their right under the Fifth Amendment to the United States Constitution not to testify made them unavailable for cross-examination by defendant. *See Lilly v. Virginia*, 527 U.S. 116, 124, 144 L. Ed. 2d 117, 126 (1999). A defendant's mere lack of an opportunity to cross-examine a witness does not necessarily mean, however, that the defendant's confrontation rights were violated:

> When a court can be confident—as in the context of hearsay falling within a firmly rooted exception—that "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility," the Sixth Amendment's residual "trustworthiness" test allows the admission of the declarant's statements.

Lilly v. Virginia, 527 U.S. 116, 136, 144 L. Ed. 2d 117, 134 (1999) (quoting *Idaho v. Wright*, 497 U.S. 805, 820, 111 L. Ed. 2d 638, 655 (1990)). Defendant argues that neither portion of the double-hearsay statement in question comports with any firmly rooted hearsay exception and has no other indicia of trustworthiness; hence, admission of the statement violated defendant's constitutional right to confront the witnesses against him.

Assuming *arguendo* that defendant is correct, any error is harmless beyond a reasonable doubt. Defendant was convicted at the guilt-innocence phase of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. Not having been instructed that it could find defendant guilty of premeditated murder under a theory of acting in concert with Freeman, by this verdict the jury necessarily determined that defendant himself fired the rifle.[1]

Moreover, the jury had already heard similar evidence without objection from defendant. Santiago testified during the guilt-innocence phase that Freeman said "[defendant] shot him. He shot him." Though this testimony occurred during the guilt-innocence phase, "all such evidence is competent for the jury's consideration in passing on punishment" as well. N.C.G.S. § 15A-2000(a)(3)(2001).

1. "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." *State v. Fletcher*, 354 N.C. 455, 473, 555 S.E.2d 534, 545 (2001). Thus, a finding of premeditated murder without being instructed on acting in concert requires the jury to find that defendant himself committed all the acts of murder, including firing the rifle.

Having heard this testimony, the jury was aware that Freeman's version of the events was that defendant was the shooter. Thus, the testimony that Freeman told Frazier, who in turn told Agent Tart, that defendant was the shooter was duplicative of evidence already before the jury.

Therefore, as the jury had already determined beyond a reasonable doubt that defendant fired the rifle and had earlier heard similar testimony, no reasonable probability exists that this double-hearsay statement affected the outcome of the sentencing proceeding. *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 the challenged error raises 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, this assignment of error is overruled.

[5] Defendant contends next that the trial court erred in failing to submit to the jury two nonstatutory mitigating circumstances supported by the evidence: (i) that the murder was actually committed by another person, and (ii) that the initial idea that resulted in the victim's death was Michael Frazier's. Although defendant asserts that as to the first circumstance the request was for a nonstatutory circumstance, the record on appeal fails to include defendant's list of proposed mitigating circumstances. Defendant quotes from the trial court's denial. Therefore, this Court cannot know whether the trial court's oral ruling quoted the requested instruction verbatim. Accordingly, we can only infer from the context of the transcript whether the requested instruction was for a statutory or nonstatutory mitigating circumstance.

The transcript shows that the trial court agreed to submit the mitigating circumstance that defendant had no significant history of prior criminal activity. The trial court then agreed to "give the instruction that this murder was committed while the Defendant was under the influence of mental or emotional disturbance." Immediately thereafter, the trial court addressed the circumstance in question, stating:

> I am not going to give the paragraph on that same page . . . which is whether the murder was actually committed by another person, with the Defendant being convicted of both premeditated and deliberated and felony murder. So I'm not giv-

ing the paragraph on that draft, which is paragraph four, I'm not giving that.

Addressing the next requested circumstance, the trial court stated, "I don't think there's any evidence that the capacity of the Defendant to appreciate the criminality of his conduct and conform his conduct to the requirements of the law was impaired." The trial court then agreed to the submission of defendant's age as a mitigating circumstance.

Thus, the plain language of the circumstances discussed immediately prior to and subsequent to the circumstance in question shows that they are statutory mitigating circumstances N.C.G.S. § 15A-2000(f)(1), (f)(2), (f)(6), and (f)(7), respectively. This context strongly implies that the circumstance in question was also a statutory mitigating circumstance. Furthermore, after discussing defendant's age, the trial court states, "Non-statutory mitigating factors, starting with paragraph five . . . ." This statement demonstrates that the trial court then changed its focus to the proposed nonstatutory mitigating circumstances. Based on this record, we conclude that the trial court's ruling that it would not submit the mitigating circumstance that "the murder was actually committed by another person" was a refusal to submit the proposed statutory mitigating circumstance that "defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor," N.C.G.S. § 15A-2000(f)(4), and analyze defendant's assignment of error accordingly.

"[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." *State v. Fletcher*, 348 N.C. 292, 323, 500 S.E.2d 668, 686 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 113 (1999). "[D]efendant has the burden of producing 'substantial evidence' tending to show the existence of a mitigating circumstance before that circumstance will be submitted to the jury." *State v. Rouse*, 339 N.C. 59, 100, 451 S.E.2d 543, 566 (1994) (quoting *State v. Laws*, 325 N.C. 81, 112, 381 S.E.2d 609, 627 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990)), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995).

Defendant contends that the trial court erred in assuming that a finding by the jury during the guilt-innocence phase that defendant killed the victim with premeditation precluded the jury from finding

during the sentencing phase that defendant did not personally commit the murder. In doing so, defendant argues, the trial court erroneously failed to consider that the jury had additional information at sentencing that was not present at the guilt-innocence phase. Defendant first directs the Court to his statement to investigators after his arrest in which he asserted that he was involved but that Freeman was the shooter. Defendant contends, furthermore, that Agent Tart's testimony regarding statements made by Frazier showed that Freeman had the rifle when he got into the car at Santiago's house and, thus, that Freeman was likely the shooter. Defendant contends that this was additional evidence, not presented at the guilt-innocence phase, that the jury could consider in determining which man fired the shots that killed Creech.

This argument is similar to one we recently rejected in *Fletcher*, 354 N.C. at 477, 555 S.E.2d at 547-48. In *Fletcher*, the defendant was convicted of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. *Id.* at 461, 555 S.E.2d at 538. At a resentencing proceeding, the defendant presented evidence, which was not presented at the guilt-innocence phase, that someone else had committed the murder. *Id.* at 477, 555 S.E.2d at 548. In holding that the trial court did not err in failing to submit the (f)(4) mitigating circumstance, the Court noted that that circumstance is "inapplicable where the defendant is convicted of premeditated and deliberate murder" under *State v. Roseboro*, 351 N.C. 536, 549, 528 S.E.2d 1, 10, *cert. denied*, 531 U.S. 1019, 148 L. Ed. 2d 498 (2000). *Fletcher*, 354 N.C. at 477, 555 S.E.2d at 547-48. In response to the defendant's argument that *Roseboro* should be inapplicable where additional evidence is presented at sentencing, the Court further held that the additional evidence presented at the resentencing was not substantial in showing that the defendant's participation was minor. *Id.* at 477, 555 S.E.2d at 548.

Similarly, even were we to hold that *Roseboro* does not apply where additional evidence is presented at sentencing, no substantial evidence was presented here to support that defendant's participation was minor. Defendant's own statement introduced at sentencing showed that he voluntarily went with Freeman, who was carrying a rifle, to commit an armed robbery. In the course of that robbery, defendant claims to have wrestled with one of the victims, picked up spent shells after Freeman fired the rifle, ascertained that the victims appeared to be dead, helped Freeman push the getaway car out of a ditch, then fled the scene in the car with Freeman. Thus, even if

defendant's statement is viewed as entirely true, the statement is not substantial evidence from which the jury could have concluded that defendant's participation in the murder was minor. Therefore, the trial court properly refused to submit the requested mitigating circumstance.

Moreover, even assuming *arguendo* that this mitigating circumstance should have been submitted, any error was harmless beyond a reasonable doubt. In finding defendant guilty of premeditation and deliberation, the jury had previously determined beyond a reasonable doubt that defendant fired the rifle. The only new evidence presented was a self-serving statement made by defendant to investigators after his arrest and an inconsequential statement that Freeman was carrying the gun earlier in the night. Given that Santiago testified defendant stated that he shot the victims and Hardison identified defendant as the shooter, a reasonable probability does not exist that this additional evidence would be sufficient to change a juror's mind as to who shot the rifle.

[6] The second requested mitigating circumstance in question, that the initial idea that resulted in the victim's death was Michael Frazier's, is properly identified as a nonstatutory mitigating circumstance. 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 *Benson*, 323 N.C. at 325, 372 S.E.2d at 521), *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). During the trial court's review of the proposed nonstatutory mitigating circumstances, the following transpired:

> [PROSECUTOR]: . . . [T]he State would vigorously object to . . . the proposed mitigator that "The initial idea that resulted in the death of the decedent was Michael Frazier's." That is very misleading. That makes it suggest as though it were Michael Frazier's idea to murder the victim. That's not the case at all. . . .
>
> . . . .
>
> . . . If it's going to be submitted, I would respectfully submit it needs to be completely re-worded . . . .

[DEFENSE COUNSEL]: Your Honor, we could say the initial idea for the plan that resulted in the death of the decedent was Michael Frazier's.

. . . .

THE COURT: According to the evidence that's been presented, I think the more appropriate wording would be "the initial idea for the robbery was Michael Frazier's." According to the statement of the Defendant, that's what he said, but—what's in evidence. So I'm going to amend [the proposed mitigating circumstance] to read, "The initial idea for the robbery was Michael Frazier's."

The amended mitigating circumstance was submitted to but not found to exist by the jurors. While defendant agrees that the circumstance that was ultimately submitted is a correct statement, he argues that the proposed mitigator that the initial idea that resulted in the death was Michael Frazier's was also correct. Furthermore, defendant argues that the proposed mitigator was not subsumed in the one actually submitted; the proposed circumstance focused on the correlation between the initial idea and the death rather than the robbery. Moreover, defendant argues, as the robbery indisputably resulted in the death, the requested mitigating circumstance was supported by substantial evidence and should have been submitted to the jury.

Assuming *arguendo* that the proposed circumstance was not subsumed in the submitted circumstance, this argument is still without merit. The jury easily could have misinterpreted the proposed circumstance to mean that the initial idea for the murder was Michael Frazier's—a circumstance not supported by substantial evidence. Thus, the trial court properly amended the requested mitigator to avoid a misinterpretation unsupported by substantial evidence. *See Jaynes*, 353 N.C. at 562, 549 S.E.2d at 199-200 (noting that a broadly worded circumstance susceptible to different interpretations violates the rule that "[a] mitigating circumstance should direct the jurors to *specific* aspects of the crime, defendant's character, or defendant's record which could serve as a basis for finding the defendant is less deserving of the death penalty").

Moreover, we note that once the trial court announced its amendment, defendant did not object to the amended circumstance or offer alternative wording to emphasize the correlation between the initial

plan and Creech's death. Thus, as the proposed nonstatutory circumstance would likely be interpreted in a manner not supported by substantial evidence, we overrule this assignment of error.

[7] Defendant contends by another assignment of error that the trial court erred in denying defendant's request to instruct the jury that it could not use the same evidence to support more than one aggravating circumstance. Defendant further alleges that the trial court subsequently instructed the jury in a manner that permitted finding the (e)(5) aggravating circumstance, that the murder was committed during a robbery, and the (e)(11) aggravating circumstance, that the murder was part of a course of conduct including crimes of violence against others, based solely upon evidence that someone went through Hardison's pockets. We decline to address defendant's claim that this error violated his constitutional due process rights, as a constitutional basis was not raised at trial. *See Benson*, 323 N.C. at 322, 372 S.E.2d at 519.

"Where . . . there is separate evidence supporting each aggravating circumstance, the trial court may submit both 'even though the evidence supporting each may overlap.' " *Rouse*, 339 N.C. at 97, 451 S.E.2d at 564 (quoting *State v. Gay*, 334 N.C. 467, 495, 434 S.E.2d 840, 856 (1993)). In this case, separate evidence supported both the (e)(5) and (e)(11) aggravating circumstances. The jury found defendant guilty of the first-degree murder of Creech, the attempted first-degree murder of Hardison, and robbery with a firearm. Based upon these verdicts, separate, independent evidence supported each aggravating circumstance: the robbery supported the (e)(5) aggravating circumstance, while the attempted murder of Hardison supported the (e)(11) aggravating circumstance. Thus, the trial court's decision to submit both circumstances was proper under *Rouse*.

Defendant contends, however, that the overlap in the evidence, without the requested limiting instruction, allowed the jury to improperly find that the evidence that someone went through Hardison's pockets, which is an attempted robbery, supported both the (e)(5) and (e)(11) aggravating circumstances. "When the court perceives a possible overlap of evidence supporting more than one aggravating circumstance *and* when the court is requested to instruct the jury that the same evidence cannot be used as a basis for finding more than one aggravating circumstance, it should do so." *State v. Smith*, 352 N.C. 531, 565, 532 S.E.2d 773, 795 (2000), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360 (2001). Thus, whether defendant properly requested such a limiting instruction is a key initial inquiry.

The following discussion took place during the sentencing charge conference in this case:

> [DEFENSE COUNSEL]: . . . I would like to ask for an instruction that the same evidence cannot be used in support of more than one aggravator.
>
> THE COURT: Do you have an instruction, proposed instruction?
>
> [DEFENSE COUNSEL]: No, I don't.
>
> THE COURT: The law will take care of it. The instruction will stand as set forth.
>
> [DEFENSE COUNSEL]: Yes, sir.

Based upon this discussion, defendant argues that the trial court should have given the limiting instruction under *Smith.*

We begin our analysis by noting that defendant never properly requested the instruction to which he now claims he was entitled. N.C.G.S. § 15A-1231 provides, in pertinent part, that "[a]t the close of the evidence . . . , any party may tender written instructions." N.C.G.S. § 15A-1231(a)(2001). The transcript reveals that defendant made only an oral request for the limiting instruction. Thus, defendant did not properly request this limiting instruction.

Even were we to assume error *arguendo*, defendant cannot show a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a). At the conclusion of the guilt-innocence phase, the jury found defendant guilty of the first-degree murder of Creech and the attempted first-degree murder of Hardison. The jury also found defendant guilty of robbery with a firearm rather than the available option of attempted robbery with a firearm. No evidence supported a finding that anything was taken from Hardison when someone went through his pockets. Therefore, the conviction for robbery with a firearm was necessarily based on the evidence that the shotgun and pistol were taken from the trailer. The trial court, on the "Issues and Recommendation as to Punishment" form, worded the (e)(5) aggravating circumstance as follows, "Was this murder committed by the Defendant while the Defendant was engaged in the commission of Robbery with a Firearm." The jury having already determined that defendant committed robbery with a firearm, no reasonable possibility exists that it relied on evidence of an attempted

robbery of Hardison to find the (e)(5) aggravating circumstance, particularly where the form directed its attention to commission of the robbery with a firearm. Clearly, the jury found the (e)(5) aggravating circumstance to exist based on the completed robbery and found the (e)(11) aggravating circumstance to exist based on the attempted murder of Hardison. Thus, defendant has failed in his burden to show prejudice resulting from any error. For these reasons, this assignment of error is overruled.

[8] Defendant next contends that the trial court erred in failing to submit the (f)(6) mitigating circumstance, that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. As noted earlier, a statutory mitigating circumstance must be submitted if defendant has produced substantial evidence of the circumstance such that a juror could reasonably find the circumstance to exist.

> The (f)(6) mitigating circumstance
>
> may exist even if a defendant has capacity to know right from wrong, to know that the act he committed was wrong, and to know the nature and quality of that act. It would exist even under these circumstances if the defendant's capacity to appreciate (to fully comprehend or be fully sensible of) the criminality (wrongfulness) of his conduct was impaired (lessened or diminished), or if defendant's capacity to follow the law and refrain from engaging in the illegal conduct was likewise impaired (lessened or diminished).

State v. Johnson, 298 N.C. 47, 68, 257 S.E.2d 597, 613 (1979), *quoted in State v. Ward*, 338 N.C. 64, 107, 449 S.E.2d 709, 733 (1994), *cert. denied*, 514 U.S. 1134, 131 L. Ed. 2d 1013 (1995). Furthermore, this Court has noted that the (f)(6) statutory mitigating circumstance has been found to be supported only in "cases where there was evidence, expert or lay, of some mental disorder, disease, or defect, or voluntary intoxication by alcohol or narcotic drugs, to the degree that it affected the defendant's ability to understand and control his actions." *State v. Syriani*, 333 N.C. 350, 395, 428 S.E.2d 118, 142-43, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993).

Defendant argues that the testimony of Dr. John Warren, an expert in the field of forensic psychology, supports submission of this mitigating circumstance as it established that defendant suffers from a personality disorder brought on by emotional and physical abuse

and aggravated by chronic depression, poly-substance abuse, and the death of his father. However, Dr. Warren also testified that defendant's "mental and emotional state was not such that it would have prohibited him from knowing what was going on around him, or what he was doing." Moreover, Dr. Warren later testified that he was not suggesting that defendant was unable to tell the difference between right and wrong or to appreciate the nature and quality of his actions.

This evidence does not show that defendant's ability to appreciate the criminality of his actions or to conform his conduct to the law was impaired. At most, Dr. Warren's testimony shows that defendant operated under a mental or emotional disturbance at the time of the murder. Thus, this evidence is properly considered under the (f)(2) statutory mitigating circumstance, that the murder "was committed while the defendant was under the influence of mental or emotional disturbance." N.C.G.S. § 15A-2000(f)(2). The (f)(2) mitigating circumstance was submitted to the jury, and the jury found it to exist. Accordingly, we hold that the trial court properly refused to submit the (f)(6) mitigating circumstance.

PRESERVATION ISSUES

Defendant raises two additional issues that he concedes have previously been decided contrary to his position by this Court: (i) whether the trial court erred by instructing jurors that they were permitted to reject submitted nonstatutory mitigators on the basis that they did not have mitigating value; and (ii) whether the North Carolina death penalty statute is unconstitutional in that the death sentence is a cruel and unusual punishment imposed in an arbitrary and discriminatory manner.

Defendant raises these issues for purposes of urging this Court to reexamine its prior holdings. We have considered defendant's arguments on these issues and conclude that defendant has demonstrated no compelling reason to depart from our prior holdings. We thus overrule these assignments of error.

PROPORTIONALITY

[9] 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. *State v. McCollum*, 334 N.C. 208, 239, 433 S.E.2d 144, 161 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

After a thorough review of the transcript, record on appeal, briefs, and oral arguments of counsel, we are convinced that the jury's findings of the three 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. *Robinson*, 336 N.C. at 133, 443 S.E.2d at 334. 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. *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.

In the case at bar, 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 attempted first-degree murder and robbery with a firearm. The jury found all of the aggravating circumstances submitted: (i) that defendant had been previously convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3); (ii) that the murder was committed while defendant was engaged in the commission of robbery with a firearm, N.C.G.S. § 15A-2000(e)(5); and (iii) that 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 or persons, N.C.G.S. § 15A-2000(e)(11).

The trial court submitted four statutory mitigating circumstances for the jury's consideration: (i) defendant has 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 age at the time of the murder, N.C.G.S. § 15A-2000(f)(7); and (iv) 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 only the (f)(2) and (f)(9) statutory mitigating circumstances to exist. The trial court also submitted forty-five nonstatutory mitigating circumstances; the jury found twenty-three of these circumstances to exist and to have mitigating value.

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; *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). This case is not substantially similar to any of the cases in which this Court has found that the death sentence was disproportionate.

We also consider cases in which this Court has found the death penalty to be proportionate. Defendant in this case entered the victim's home, shot two men, ransacked the home, and left the men for dead. "A murder in the home 'shocks the conscience, not only because a life was senselessly taken, but because it was taken [at] an especially private place, one [where] a person has a right to feel secure.' " *State v. Adams*, 347 N.C. 48, 77, 490 S.E.2d 220, 236 (1997) (quoting *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987)) (alterations in original), *cert. denied*, 522 U.S. 1096, 139 L. Ed. 2d 878 (1998). 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." *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). Furthermore, this Court has deemed all three of the aggravating circumstances present in this case, 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 analogous to cases in which we have found the sentence of death proportionate than to those cases in which we have found the sentence disproportionate or to those cases in which juries have consistently returned recommendations of life imprisonment.

Defendant received a fair trial and capital sentencing proceeding, free from prejudicial error; and the death sentence in this case is not disproportionate. Accordingly, the judgments of the trial court are left undisturbed.

NO ERROR.

AMERICAN MFRS. MUT. INS. CO. v. MORGAN

No. 25P02

Case below: 147 N.C. App. 438

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 June 2002.

BEST v. DEPARTMENT OF HEALTH & HUMAN SERVS.

No. 277A02

Case below: 149 N.C. App. 882

Motion by respondent for temporary stay allowed 11 June 2002.

BOSTIC PACKAGING, INC, v. CITY OF MONROE

No. 225P02

Case below: 149 N.C. App. 825

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002.

BRIDWELL v. GOLDEN CORRAL STEAK HOUSE

No. 206P02

Case below: 149 N.C. App. 338

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002.

CREECH v. MELNIK

No. 63P02

Case below: 147 N.C. App. 471
355 N.C. 490

Motion by defendant to reconsider denial of petition for discretionary review denied 27 June 2002.

DOBO v. ZONING BD. OF ADJUST. OF WILMINGTON

No. 256A02

Case below: 149 N.C. App. 701

Notice of appeal by petitioners pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 27 June 2002. Petition by petitioners 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 27 June 2002.

DUNCAN v. DUNCAN

No. 208P02

Case below: 149 N.C. App. 488

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002.

HOLLOMAN v. HARRELSON

No. 221P02

Case below: 149 N.C. App. 861

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002. Conditional petition by defendants (Michael A. Stevens, Margaret Mastin Stevens, and Branch Banking and Trust) for discretionary review pursuant to G.S. 7A-31 as to additional issues of the decision of the Court of Appeals dismissed as moot 27 June 2002.

IN RE BOONE

No. 102P02

Case below: 148 N.C. App. 214

Petition by respondent (Loren Boone) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 June 2002.

IN RE INVESTIGATION OF DEATH OF MILLER

No. 303PA02

Case below: COA02-686

Joint petition for discretionary review pursuant to G.S. 7A-31 prior to a determination by the North Carolina Court of Appeals allowed 27 June 2002.

IN RE MORRIS

No. 246P02

Case below: 149 N.C. App. 972

Petition by respondents (Bonnie Velasco and Lewis Ray Peeler) for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002.

JEFFRIES v. MOORE

No. 147PA02

Case below: 148 N.C. App. 364

Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 27 June 2002.

KEMP v. KEMP

No. 510P01

Case below: 145 N.C. App. 502

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002.

KNIGHT v. WAL-MART STORES, INC.

No. 228A02

Case below: 149 N.C. App. 1

Petition by defendants for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to addition issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 27 June 2002.

LE v. HARRIS

No. 207P02

Case below: 149 N.C. App. 489

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002.

McKINNEY v. RICHITELLI

No. 203PA02

Case below: 149 N.C. App. 973

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 27 June 2002.

MOORE v. BECK

No. 241P02

Case below: Forsyth County Superior Court
133 N.C. App. 192

Petition by petitioner pro se for writ of habeas corpus denied 11 June 2002. Justice Edmunds recused.

OWENBY v. YOUNG

No. 286PA02

Case below: 150 N.C. App. 412

Motion by defendant for temporary stay allowed 12 June 2002 pending determination of defendant's petition for discretionary review.

PIEDMONT TRIAD REG'L WATER AUTH. v. LAMB

No. 312P02

Case below: 150 N.C. App. 594

Motion by plaintiff for temporary stay allowed 24 June 2002 pending determination of plaintiff's petition for discretionary review.

ROSERO v. BLAKE

No. 322A02

Case below: 150 N.C. App. 250

Motion by plaintiff for temporary stay allowed 27 June 2002.

SHACKLEFORD-MOTEN v. LENOIR CTY. DSS

No. 1PA02

Case below: 147 N.C. App. 525

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 27 June 2002 for limited purpose of vacating the order of Court of Appeals dismissing appeal and remanding for reconsideration on the merits. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 27 June 2002.

SONOPRESS, INC. v. TOWN OF WEAVERVILLE

No. 231P02

Case below: 149 N.C. App. 492

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002.

STATE v. BELCHER

No. 260P02

Case below: 149 N.C. App. 973

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 June 2002.

STATE v. BOGGESS

No. 310A97-2

Case below: Durham County Superior Court

Petition by defendant pro se for writ of mandamus denied 21 May 2002.

STATE v. CHADWICK

No. 173P02

Case below: 149 N.C. App. 200

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002.

STATE v. CLAYTON

No. 270P02

Case below: 149 N.C. App. 973

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 June 2002.

STATE v. CONAWAY

No. 389A92-3

Case below: Richmond County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Richmond County, denied 27 June 2002. Motion by defendant to hold consideration of petition for writ of certiorari in abeyance dismissed as moot 27 June 2002.

STATE v. CROCKETT

No. 639P01

Case below: 146 N.C. App. 749

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002.

STATE v. DIXON

No. 262A02

Case below: 150 N.C. App. 46

Petition by Attorney General for writ of supersedeas and motion for temporary stay allowed 29 May 2002.

STATE v. EFFINGHAM

No. 232P02

Case below: 149 N.C. App. 668

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002.

STATE v. EVANS

No. 7P02

Case below: 147 N.C. App. 525

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002.

STATE v. GILLEY

No. 273P02

Case below: 149 N.C. App. 977

Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002.

STATE v. GRAY

No. 556A93-2

Case below: Lenoir County Superior Court

Motion by defendant pro se to reconsider petition for writ of certiorari, motion to appoint counsel, and motion to delay ruling dismissed 27 June 2002.

STATE v. HAMILTON

No. 269P02

Case below: 148 N.C. App. 216

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 June 2002.

STATE v. HANNAH

No. 258P02

Case below: 149 N.C. App. 713

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002.

STATE v. HERRON

No. 237P02

Case below: 149 N.C. App. 668

Petition by defendant (Timothy Herron) for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002.

STATE v. HOLT

No. 209P02

Case below: 149 N.C. App. 490

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002.

STATE v. JONES

No. 198P02

Case below: 146 N.C. App. 394

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 June 2002.

STATE v. KING

No. 247P02

Case below: 149 N.C. App. 669

Notice of appeal by defendant pro se pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 27 June 2002. Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002. Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 June 2002.

STATE v. LARRY

No. 189A95-2

Case below: Forsyth County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Forsyth County, denied 27 June 2002.

STATE v. LEGRANDE

No. 462A01-9

Case below: Stanly County Superior Court

Petition by defendant pro se for writ of mandamus denied 27 June 2002.

STATE v. LYNCH

No. 259P02

Case below: 149 N.C. App. 974

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 27 June 2002. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 June 2002.

STATE v. MOORE

No. 271P02

Case below: 149 N.C. App. 974

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 June 2002.

STATE v. MORRIS

No. 663A01

Case below: 147 N.C. App. 247

Petition by Attorney General for writ of supersedeas dismissed as moot 27 June 2002. Temporary stay dissolved 27 June 2002.

STATE v. QUICK

No. 202A02

Case below: 149 N.C. App. 669

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 27 June 2002.

STATE v. REES

No. 282P02

Case below: 150 N.C. App. 978

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 June 2002.

STATE v. SMITH

No. 521A01-2

Case below: 150 N.C. App. 138

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 June 2002.

STATE v. STOKES

No. 275A02

Case below: 150 N.C. App. 211

Motion by Attorney General for temporary stay allowed 7 June 2002.

STATE v. TRULL

No. 234P02

Case below: 149 N.C. App. 670

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002.

STATE v. WILLIAMS

No. 278A99

Case below: Wake County Superior Court

Motion by defendant for appropriate relief remanded to the Wake County Superior Court 27 June 2002 for determination of the issues contained therein regarding whether the death sentences imposed upon defendant violate N.C.G.S. § 15A-2005.

STATE v. WILLIAMS

No. 253P02

Case below: 149 N.C. App. 795

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002.

STATE EX REL. UTILS. COMM'N v. CAROLINA WATER SERV., INC.

No. 267PA02

Case below: 149 N.C. App. 656

Petition by petitioner (Public Staff) and Intervenor (Roy Cooper) for discretionary review pursuant to G.S. 7A-31 allowed 27 June 2002.

STEPHENSON v. BARTLETT

No. 94PA02-2

Case below: COAP02-161

Motion by defendants to suspend rules allowed 4 June 2002. Petition by defendants for writ of supersedeas and motion for temporary stay and for direct review of the trial court's 31 May 2002 order prior to determination by the Court of Appeals allowed 4 June 2002. Motion by defendants for temporary stay denied 4 June 2002. Petition by defendants for writ of supersedeas denied 4 June 2002.

STORCH v. WINN-DIXIE CHARLOTTE, INC.

No. 205P02

Case below: 149 N.C. App. 478

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002.

SUMMERS v. CITY OF CHARLOTTE

No. 310P01-2

Case below: 149 N.C. App. 509

Motion by defendants to dismiss the appeal for lack of substantial constitutional question allowed 27 June 2002. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002.

TUCKER v. MECKLENBURG CTY. ZONING BD. OF ADJUST.

No. 68A02

Case below: 148 N.C. App. 52

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 27 June 2002.

WADDELL v. WILLIAMS

No. 199P02

Case below: 149 N.C. App. 671

Petition by defendant for writ of supersedeas denied 27 June 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002.

WELDIN v. HARDY

No. 472P01

Case below: 145 N.C. App. 207

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 27 June 2002. Motion by plaintiff for stay denied 27 June 2002. Motion by counsel (David E. Gurganus) to withdraw allowed 27 June 2002.

WILSON v. TAYLOR

No. 196P02

Case below: 149 N.C. App. 491

Petition by defendant for discretionary pursuant to G.S. 7A-31 denied 27 June 2002.

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

PETITION TO REHEAR

LINDSEY v. BODDIE-NOELL ENTERS., INC.

No. 679A01

Case below: 355 N.C. 487

Petition by plaintiff to rehear pursuant to Rule 31 denied 27 June 2002.

APPENDIXES

PRESENTATION OF
LOUIS B. MEYER
PORTRAIT

ORDER ADOPTING AMENDMENTS TO
THE NORTH CAROLINA
RULES OF APPELLATE PROCEDURE

AMENDMENTS TO THE
NORTH CAROLINA RULES
OF PROFESSIONAL CONDUCT

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE NORTH
CAROLINA STATE BAR CONCERNING
THE FAMILY LAW SPECIALTY

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE NORTH
CAROLINA STATE BAR CONCERNING
PLAN OF LEGAL SPECIALIZATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ADMINISTRATION OF THE ADMINISTRATIVE COMMITTEE

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE TRAINING OF LAW STUDENTS

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

Presentation of the Portrait

of

LOUIS B. MEYER

Associate Justice
Supreme Court of North Carolina
1981-1995

October 21, 2002

OPENING REMARKS

and

RECOGNITION OF LOUIS MEYER III

BY

CHIEF JUSTICE I. BEVERLY LAKE, JR.

The Chief Justice welcomed the guests with the following remarks:

I want to welcome each of you here for this special session of the Court to honor former Associate Justice Louis B. Meyer. Louis was a member of the Court for 14 years and during that time, he made lasting friendships built of respect and admiration for a brilliant mind, an incredible work ethic and great loyalty. We have missed his presence on this Bench and the trial bench in North Carolina, and we are pleased today to be able to honor his memory and contributions to this Court and to our jurisprudence.

On a personal note, I knew and was close to Justice Meyer for many years. We were in the Army together, beginning with basic training. We then went through Wake Forest Law School in the same class of 1960. We thereafter experienced the practice of law and politics as philosophical soul mates, and I served with him for one year on this Court. He was my good friend.

Justice Meyer defined the meaning of a real work ethic for all who worked with him on the Court. He made the commute from Wilson every day, and worked long hours. He never let an opinion or petition sit in his chambers before he gave it "his all". The steady work ethic was not left in his chambers alone, however. He pushed his brethren on the Court. He gave our opinions "his all" as well, and we sometimes felt the sting as well as the brilliance of his talent.

Besides the regular "chamber work", Justice Meyer also took it upon himself to master many projects for the Court. In his "spare" time, he developed a book that is still used by new research assistants which orients and guides them in their duties. We call it the "red book". With a mind and touch for technology, he headed our computer committee and instituted a form and standard for the Court to place capitally tried cases in the proportionality review pool. He, and his chambers, wrote and maintained for the Court a notebook on the aggravating and mitigating circumstances and factors in North Carolina's Capital Punishment and Fair Sentencing Act cases. He also

chose and regularly tackled the most difficult utility rate-making cases (reminding me of another of my favorite justices). We miss him not only for what he did for the Court while he was a member—we miss him for what he did for the Court as an institution. He was one of the truly great Justices of this Court.

Chief Justice Lake welcomed official and personal guests of the Court. The Chief Justice then recognized members of the Meyer family.

The Chief Justice acknowledged his research assistants who helped fund the portrait for Justice Meyer, and his former executive assistants, including the Court's right hand, Pam Britt.

The Chief Justice recognized Justice Meyer's oldest son, Louis B. Meyer, III, to present his father's portrait to the Court.

PRESENTATION ADDRESS

BY

LOUIS B. MEYER III

SON OF JUSTICE MEYER

May it please the Court, Chief Justice Lake, honorable Justices of the Supreme Court,

On behalf of my entire family, I want to thank all of you very much for joining us today for this presentation where we will unveil a portrait of my father, Justice Louis B. Meyer, which will then take its place in the Supreme Court's gallery of portraits of past Justices outside this courtroom.

I want to thank Dr. Doug Murray for the special invocation he shared with us a few moments ago. I recall that when Dr. Murray spoke at my father's memorial service three years ago, he told a story that my mother Evelyn shared with him. One day, after my parents attended a funeral, my father commented that not much was said about the deceased, and he told my mother, "Now when I am remembered, I want people to know who I am and where I came from." So today, as we remember Justice Louis Meyer, I want to share with you some memories of who he was and where he came from.

His grandfather, Simon Meyer, was an immigrant from Germany who came to America and worked as a traveling peddler in the South until he settled in Enfield. Simon's nickname was "Meyer the Hustler"

and he earned it. After settling in Enfield, he opened a department store, traded in peanuts and cotton, and raised twelve children. These children grew up to become merchants, lawyers, and one became a doctor. Several of them attended Wake Forest College, a tradition that would last for generations.

One of the children who attended Wake Forest College and its School of Law was my grandfather, the first Louis Meyer. He served in the United States Army in Europe during World War I, along with two of his brothers, and returned to Enfield after the war to practice law. He became friends with Beulah Moore, a young widow with two young children, and later married her.

My father was born to Louis and Beulah in Marion, North Carolina on July 15, 1933 while my grandfather was serving as a lawyer and administrator for the Civilian Conservation Corps, helping the CCC build camps in the North Carolina mountains. After his parents returned to Enfield, my father grew up and attended school there.

My grandfather passed away in 1944, when my father was only 11 years old. Times were hard for my grandmother, who was raising 4 children at the time, and my father worked odd jobs after school and during the summers to help his mother support the family.

During that time, my father came to know and admire a lawyer in Enfield who was busy with a successful law practice but also found time to serve his fellow citizens as a legislator in the North Carolina General Assembly. This lawyer was Joseph Branch, who went on to serve as a Justice and as Chief Justice of the North Carolina Supreme Court, and whose portrait hangs in this courtroom. Joe Branch was a mentor and a role model for the young Louis Meyer. He was like a second father to my father.

When Louis Meyer wanted to follow his father and his uncles and attend Wake Forest College and its School of Law, Joe Branch helped him get admitted to college and law school at Wake Forest College and co-signed notes for him to help pay his college and law school tuition. My father always wanted to be a lawyer like his father and like Joe Branch, and he hoped that maybe one day he would have an opportunity to join Joe Branch's law firm.

After graduating from college at Wake Forest in 1955, Louis Meyer served as an officer in the United States Army and was assigned to the Army's Chemical Corps. While stationed with the Chemical Corps at Fort McClellan in Alabama, he met and fell in love

with a young schoolteacher, Evelyn Spradlin, of Oxford, Alabama, and they were married in 1956.

After a brief stint at Fort Ord in Monterey, California, Louis Meyer's unit was assigned to Camp Desert Rock, Nevada to work with the Atomic Energy Commission. His unit became a decontamination unit that worked 18 atomic test shots for the Atomic Energy Commission in the summer of 1957. These were above-ground test shots where an atomic bomb was detonated from a tower while my father and other members of his unit took cover in trenches about a mile from ground zero.

By the time my father left the Army in 1957, and was ready to earn a law degree, Wake Forest College and its School of Law had relocated to Winston-Salem. So he and Evelyn settled in Winston-Salem, where she taught school and he took a job with the City of Winston-Salem and attended law school at Wake Forest. Chief Justice Lake was one of his law school classmates. My sister Shannon and I were born during the law school years.

Louis Meyer earned his law degree from Wake Forest in 1960. He and Evelyn then moved to Raleigh where she continued her career as a schoolteacher and my father had the good fortune to serve as a law clerk at the North Carolina Supreme Court for a Justice from his hometown of Enfield, Justice Hunt Parker. Chief Justice Jim Exum was one of my father's fellow law clerks that year. Justice Hunt Parker later became the third person from Halifax County to serve as Chief Justice of the North Carolina Supreme Court.

After finishing his service as a law clerk for Justice Parker, Louis Meyer took a job as a Special Agent for the Federal Bureau of Investigation. Later in his professional life, having been a law enforcement agent himself, he always had a special respect for law enforcement officers and the difficult job they have of enforcing the law while respecting individual rights. He was a frequent speaker at meetings of sheriffs associations, district attorneys associations, and other law enforcement organizations.

After leaving the FBI, Louis Meyer and his family settled in Wilson, North Carolina, where he practiced law with the firm of Lucas, Rand, Rose, Meyer, Jones & Orcutt for eighteen years. My brother Adam was born during these years.

While practicing law, my father served as Wilson's city attorney and also as counsel for ElectriCities and the North Carolina Municipal Power Agencies. He was president of the Wilson County and

Seventh Judicial District Bar Associations. He was active in civic affairs and served as Adjunct Professor of Business Law at Atlantic Christian College, now known as Barton College. He was active in the Democratic Party and served as County Chairman for Wilson County and as a member of the State Executive Committee.

Then, in 1981, Louis Meyer was called upon by Governor Jim Hunt to accept an appointment to the North Carolina Supreme Court. He was very glad to accept the appointment from Governor Hunt and join the Court. His friend and fellow law clerk, Jim Exum, was serving on the Supreme Court. His good friend from the Seventh Judicial District, Phil Carlton, was also serving on the Court. Other judges of great wisdom and ability, David Britt, Frank Huskins, and Bill Copeland, were serving on the Court.

Most importantly, his dear friend and mentor, Joe Branch, the man who had been a second father to him and helped him get into and through college and law school, had become the fourth person from Halifax County to serve as Chief Justice of the Supreme Court. In a real sense, Louis Meyer's old hope had come true. He had joined Joe Branch's law firm.

After his appointment to the Supreme Court in 1981, Justice Meyer was elected to the Court in 1982, re-elected to the Court in 1986, and served as a Justice of the Supreme Court until the end of 1994. He served as the Court's Senior Associate Justice for the last 8 years of his career on the Court.

His contributions to the Supreme Court and our state's justice system during his 14-year tenure on the Court are too numerous to fully recount here today, but I will mention some of the more notable ones.

He authored a number of landmark opinions in the areas of municipal law, land use and zoning, utilities law, and criminal law. The many written opinions he authored for the Court are found in Volumes 302 through 339 of the Supreme Court Reports.

He was chairman of the Court's Computer Committee from its inception until he left the Court at the end of 1994. He was instrumental in bringing computer-aided legal research and electronic mail capabilities to our State's appellate courts and trial division.

He chaired the Committee on Continuing Judicial Education and was chairman of a Committee that worked to revise the North Carolina Code of Judicial Conduct.

Throughout his tenure on the Court, Justice Meyer continued his educational pursuits and his support of education and the legal profession. He attended appellate judges seminars at New York University School of Law and earned an LL.M. degree from the University of Virginia School of Law. He was a member of the Board of Visitors of Wake Forest University School of Law and served two terms as a member of the Board of Trustees of Wake Forest University. He was awarded an honorary Doctor of Laws degree by Campbell University in 1989. He served as a Vice President of the North Carolina Bar Association and also served on many of the Bar Association's committees.

He also authored numerous papers and articles on the law and the legal profession and was a frequent lecturer at continuing legal education seminars. He was recognized as an authority on North Carolina's sentencing laws and criminal procedure in capital cases.

Perhaps his greatest contribution to the Court was what he did for and what he meant to all of the people at the Court who had the pleasure of working with him.

To his fellow Justices, he was a persuasive advocate for the positions he took on issues confronting the Court in the cases before it, but above all he was a loyal counselor, colleague, and friend. In the Court's private conferences, as he often recounted in speeches he gave about the workings of the Court, the fur would fly, tempers would flare, and the Justices would get red in the face with each other, but when conference was over and the door opened, none of that left the conference room, no grudges were held, and he and the other Justices left the conference as colleagues and friends.

Justice Meyer was one of the most hardworking Justices ever to grace the Court's bench. Like his grandfather, he was a "hustler." He was a tireless perfectionist who took pride in making sure that every one of the opinions turned out by the Court, whether or not it was his opinion, was exhaustively researched and solidly based in law and policy. A mental picture of Justice Meyer that one of his law clerks shared with me was of my father sitting behind his big desk, holding a small pencil in that big right paw, making changes to improve an opinion before it was circulated.

To his executive assistants, everyone in the Clerk's office, and all of the Court's staff, Justice Meyer was a true friend who always had time to help them with a problem, listen to their concerns, ask about family, or share a story or a laugh. His sense of humor and sense of fun was legendary at the Court. He was well known to everyone at

the Court for rounding the corner, poking his head in their office, and asking them, "Are you happy in your work?" Often times, when someone at the Court would give him some news that he didn't want to hear, he would look at them in mock disbelief and say, "You know not!"

Peggy Byrd of the Clerk's office tells me that when she would bring him a petition for certiorari to review, he would tell her "P. Byrd, you know this is not mine!" Once, when Justice Meyer was sending an opinion of the Court back to the Superior Court where the case was tried, instead of back to the Court of Appeals as was required, Peggy Byrd had to come and tell him that he could not do that, that he had to send the opinion back to the Court of Appeals. He told her, "I'm a Supreme Court Justice and I can do anything I want to do, and I want to send it to the Superior Court." Later, he learned that Peggy was right and he came to her and said, "Well, I found out I can't send the opinion back to the Superior Court . . . but I still want to."

To his law clerks, Justice Meyer was a friend and counselor, and he was a mentor in the truest sense of the word. I'm sure that if you were to look up that word in the dictionary, you would see his picture next to it. It didn't matter that he was the experienced, successful lawyer and Supreme Court Justice, and the law clerk was the young, novice attorney, fresh out of law school. He solicited their opinions on a case and treated them as equals in their discussions of the law. He instilled confidence in them and encouraged them to present opposing viewpoints.

Justice Meyer was like a second father to his law clerks. He gave them personal support in times of trouble. He shared good times with them as well. When they were ready to leave their clerkships and look for jobs, Justice Meyer introduced them to lawyers and law firms, gave them recommendations, and helped them get jobs. He had learned well from the example that had been set for him by Joe Branch.

I want to thank Justice Meyer's law clerks, and my mother Evelyn, for their generous contributions that made it possible for us to have my father's portrait created for the Supreme Court's gallery.

1994 was Justice Meyer's last year on the Supreme Court. He ran for re-election to the Court that year, but lost in the primary election. He was sad and disappointed that he would have to leave the Supreme Court and that he would not have the opportunity, which

likely would have been present if he had retained his seat as the Court's Senior Associate Justice for another 8 years, to be the fifth person from Halifax County to serve as Court's Chief Justice. But he faced his election defeat with dignity and grace and respect for the vote of the people. He felt that the people had spoken and he determined to move on and see what life held in store for him.

It was then that he got another call from Jim Hunt, who had returned to the governor's office. Upon leaving the Supreme Court at the end of 1994, Justice Meyer was appointed by Governor Hunt to be a Special Superior Court Judge, and he served as a Superior Court Judge until his retirement from the bench in 1999. It was a great honor to my father to have the opportunity to serve as a Superior Court Judge. He often mentioned to others that now he was going to be a "real judge."

During his long career on the Supreme Court, he made friends with many of our State's Superior Court Judges. He was a frequent speaker at Superior Court Judges' conferences. He recognized the difficulties that Superior Court Judges face during trial, and he appreciated the fact that when the Supreme Court issued an opinion to reverse a Superior Court Judge's ruling made during a trial, the Supreme Court had ample opportunity to research and deliberate its decision, while the Superior Court Judge often had no such opportunity.

When he began serving as a Superior Court Judge, Judge Meyer reflected back on a statement that his old friend Phil Carlton made to him when he joined Justice Carlton on the Supreme Court. Justice Carlton had been the Chief District Court Judge of the Seventh Judicial District before he began serving our State on a statewide basis. He told my father that he would rather be a Chief District Court Judge than a Chief Justice of the Supreme Court. He felt that as Chief District Court Judge he was performing the true function of a judge, he was closer to the administration of justice, and he could see the impact his decisions had on the lives of the people and the families in the area where he lived. He told my father that he felt he was making the greatest contribution a lawyer could make during his service as a trial judge.

My father had this same belief about his service as a Superior Court Judge.

In his life away from the bench, Louis Meyer was a loving and devoted husband to his wife of 43 years, Evelyn, a loving father to his children, and devoted grandfather to his grandson, Philip.

Justice Meyer was a sportsman. He loved to hunt and fish. One of his greatest joys in life was his membership in the "Deacon Fishing Bunch," a group of Wake Forest law school alumni that includes a number of judges from the state and federal benches in our State. They go fishing twice a year at Durant Island near the mouth of the Alligator River, and they call themselves the "Old and Bold." Chief Justice Lake is a member of the Old and Bold. My father cherished the fellowship and camaraderie he shared with this special group of friends.

And their tradition of going fishing has been passed down to their sons. We have our own division of the "Deacon Fishing Bunch" that we call the "Lean and Mean." As you can see, I needed special permission to be a member.

Justice Meyer was a man of faith. He was a member of the First Baptist Church of Wilson, where he served on the Board of Deacons and the Board of Trustees and was a Sunday School teacher for over 25 years. His devotion to his brothers and sisters in the Church had no limitations. He was especially close to the members of his Sunday School class with whom he shared the bonds of faith and fellowship for more than 30 years.

His faith in God was a cornerstone of his strong sense of justice. The short and simple verse of scripture that appears on his gravestone says it best. From the Book of Micah, Chapter 6, Verse 8, it reads:

"What does the Lord require of you but to do justice, and to love kindness, and to walk humbly with your God."

Everyone in the Church benefitted from his wisdom, his leadership, and his kindness. And I believe that all of our State's citizens have benefitted from his contributions to our justice system.

At the end of his life, Justice Meyer fought a courageous battle with cancer. Even as he struggled with the symptoms and the treatments, he worked with lawyers to get final orders completed and filed in his cases. He eventually lost that battle and died on Christmas Day in 1999.

Let me close by telling you about the portrait of Justice Meyer that will be unveiled in a moment. The portrait was created by Raleigh artist Rebecca Patman Chandler. She is also the artist who created the portrait of Chief Justice Joseph Branch, which hangs in this courtroom. When my father's portrait is unveiled in a moment, Justice Meyer will once again look up to the man he looked up to and

admired for so many years, and the two old friends and colleagues will once again gaze upon each other in this courtroom where they worked together to advance the cause of justice in this State.

Now, I will ask my sister Shannon Cave and my brother Adam Meyer to come forward and unveil the portrait of our father, a man who touched so many lives with his genuine kindness and wise counsel, and a man whose contributions and service to this Court and the citizens of this State will always be remembered and treasured, Justice Louis B. Meyer.

Thank you.

ACCEPTANCE OF JUSTICE MEYER'S PORTRAIT BY CHIEF JUSTICE LAKE

On Behalf of the Supreme Court, it is my pleasure to accept this beautiful portrait to be placed in the permanent collection of portraits of former Associate Justices in the halls of the Supreme Court Building. The portrait was done by Rebecca Patman Chandler. I direct the Clerk to hang the portrait of Justice Meyer with all due speed.

In the Supreme Court of North Carolina

Order Adopting Amendments to the North Carolina Rules of Appellate Procedure

Rules of Appellate Procedure 30(e)(2) and 30(e)(4) are hereby amended as described below:

Rule 30(e)(2) is modified to state:

"The text of a decision without published opinion shall be posted on the Administrative Office of the Court's North Carolina Court System Internet web site and reported only by listing the case and the decision in the Advance Sheets and the bound volumes of the North Carolina Court of Appeals Reports."

Rule of Appellate Procedure 30 is amended further to add a new subsection (e)(4) which states:

"Counsel of record and *pro se* parties of record may move for publication of an unpublished opinion, citing reasons based on Rule 30(e)(1), and serving a copy of the motion upon all other counsel and *pro se* parties of record. The motion shall be filed and served within 10 days of the filing of the opinion. Any objection to the requested publication, by the counsel or *pro se* parties of record, must be filed within 5 days after service of the motion requesting publication. The panel which heard the case shall determine whether to allow or deny such motion."

These amendments to the Rules shall be effective 1 January, 2002.

Adopted by the Court in Conference this the 18th day of October, 2001. The Appellate Division Reporter shall publish these Rules in the Advance Sheets of the Supreme Court and the Court of Appeals and on the Administrative Office of the Court's North Carolina Court System Internet web site, at the earliest practicable date.

Butterfield, J.
For the Court

AMENDMENTS TO THE
NORTH CAROLINA
RULES OF PROFESSIONAL CONDUCT

0.1 PREAMBLE: A LAWYER'S PROFESSIONAL RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. ~~As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A~~ As an evaluator, a lawyer acts ~~as evaluator~~ by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4

~~[3]~~ [4] In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the ~~Revised~~ Rules of Professional Conduct or other law.

~~[4]~~ [5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's proce-

dures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

~~[5]~~ [6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

~~[6]~~ [7] A lawyer should render public interest legal service and provide civic leadership. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, society, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

~~[7]~~ [8] ~~Traditionally, the~~ The legal profession ~~has been~~ is a group of people united in a learned calling for the public good. At their best, lawyers ~~have assured~~ assure the availability of legal services to all, regardless of ability to pay, and as leaders of their communities, states, and nation, lawyers ~~have utilized~~ use their education and experience to improve society. It is ~~acknowledged that it is~~ the basic responsibility of each lawyer ~~engaged in the practice of law~~ to provide community service, community leadership, and public interest legal services without fee, or at a substantially reduced fee, in such areas as poverty law, civil rights, public rights law, charitable organization representation, and the administration of justice.

~~[8] The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, voluntary efforts by the profession to provide legal assistance in coping with the web of statutes, rules, and regulations are imperative for communities and persons of modest and limited means.~~

[9] The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer. Personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in, or otherwise support, the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus~~, it has been necessary for~~ the profession and government ~~to institute~~ instituted additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs ~~have been~~ were developed, and ~~others~~ programs will be developed by the profession and the government. Every lawyer should support all proper efforts to meet this need for legal services.

~~[10] As important as the provision of pro bono legal services is, participation of lawyers in civic leadership is equally important. In the long run, because of their values, education, and experience, lawyers who render unpaid service in nonlegal settings to help provide new jobs, improve educational opportunities, and meet the spiritual needs of a community, can enhance the quality of life of all citizens.~~

~~[11]~~ [10] Many of a lawyer's professional responsibilities are prescribed in the ~~Revised~~ Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

~~[12]~~ [11] A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and, at the

same time, assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves ~~that~~ the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[12] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ~~upright~~ ethical person while earning a satisfactory living. The ~~Revised~~ Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[13] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[14] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for the abuse of legal authority is more readily challenged by a self-regulated profession.

[15] The legal profession's relative autonomy carries with it a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the ~~Revised~~ Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[16] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The ~~Revised~~ Rules of Professional Conduct, when properly applied, serve to define that relationship.

RULE 0.2 SCOPE

[1] The ~~Revised~~ Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has ~~professional~~ discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act, or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary, and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[2] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[3] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

~~[3]~~ [4] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that ~~may~~ attach when the

lawyer agrees to consider whether a client-lawyer relationship shall be established. Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

~~[4]~~ [5] Under various legal provisions, including constitutional, statutory, and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. ~~They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so.~~ These rules do not abrogate any such authority.

~~[5]~~ [6] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

~~[6]~~ [7] Violation of a Rule should not give rise itself to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the

administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. ~~Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extradisciplinary consequences of violating such a duty.~~ Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

~~[7] Moreover, these Rules are not intended to govern or affect judicial application of either the attorney client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney client and work product privileges.~~

~~[8] The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances to clients that communications will be protected against disclosure.~~

~~[9]~~ [8] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative. Research notes were prepared to compare counterparts in the original Rules of Professional Conduct (adopted 1985, as amended) and to provide selected references to other authorities. The notes have not been adopted, do not constitute part of the ~~Revised~~ Rules, and are not intended to affect the application or interpretation of the Rules and Comments.

RULE ~~0.3~~ 1.0: TERMINOLOGY

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confidential information" denotes information described in Rule 1.6~~(a) and (b)~~.

~~(c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.~~

(c) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (f) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(d) "Firm" or "law firm" denotes a lawyer or lawyers in a ~~private firm,~~ law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation, government entity, or other organization ~~and lawyers employed in a legal services organization. See Comment, Rule 1.10~~.

(e) "Fraud" or "fraudulent" denotes conduct ~~having~~ that is fraudulent under the substantive or procedural law of North Carolina and has a purpose to deceive ~~and not merely negligent misrepresentation or failure to apprise another of relevant information~~.

(f) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation appropriate to the circumstances.

(g) ~~(f)~~ "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(h) ~~(g)~~ "Partner" denotes a ~~partner in a partnership or limited liability partnership~~ member of a partnership, a shareholder in a law firm organized as a professional corporation, ~~and~~ or a member of an association authorized to practice law ~~a professional limited liability company~~.

(i) ~~(h)~~ "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(j) ~~(i)~~ "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter

in question and that the circumstances are such that the belief is reasonable.

(k) ~~(j)~~ "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(l) "Screened" denotes the isolation of a lawyer from any participation in a professional matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(m) ~~(k)~~ "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(n) ~~(l)~~ "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other ~~a government~~ body ~~exercising~~ acting in an adjudicative ~~or quasi-adjudicative authority~~ capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, may render a binding legal judgment directly affecting a party's interests in a particular matter.

(o) Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist

each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of North Carolina and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a

course of conduct. See, e.g, Rules 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (o) and (c). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (o).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

RULE 1.1, COMPETENCE

~~(a)~~ A lawyer shall not handle a legal matter ~~which~~ that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

~~(b) A lawyer shall not handle a legal matter without preparation adequate under the circumstances.~~

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or

associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency, a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to, or consultation or association with, another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that which is reasonably necessary under the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into, and analysis of, the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined, in part, by what is at stake; major litigation and complex transactions ordinarily require more ~~elaborate~~ extensive treatment than matters of lesser complexity consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. ~~If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.~~

Distinguishing Professional Negligence

[7] An error by a lawyer may constitute professional malpractice under the applicable standard of care and subject the lawyer to civil liability. However, conduct that constitutes a breach of the civil standard of care owed to a client giving rise to liability for professional malpractice does not necessarily constitute a violation of the ethical duty to represent a client competently. A lawyer who makes a good-faith effort to be prepared and to be thorough will not generally be subject to professional discipline, although he or she may be subject to a claim for malpractice. For example, a single error or omission made in good faith, absent aggravating circumstances, such as an error while performing a public records search, is not usually indicative of a violation of the duty to represent a client competently.

[8] Repeated failure to perform legal services competently is a violation of this rule. A pattern of incompetent behavior demonstrates that a lawyer cannot or will not acquire the knowledge and skills necessary for minimally competent practice. For example, a lawyer who repeatedly provides legal services that are inadequate or who repeatedly provides legal services that are unnecessary is not fulfilling his or her duty to be competent. This pattern of behavior does not have to be the result of a dishonest or sinister motive, nor does it have to result in damages to a client giving rise to a civil claim for malpractice in order to cast doubt on the lawyer's ability to fulfill his or her professional responsibilities.

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) ~~A~~ Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, ~~subject to paragraphs (c), (d) and (e),~~ and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

(1) A lawyer shall abide by a client's decision whether to ~~accept an offer of settlement of~~ settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(2) A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel ~~which~~ that do not prejudice the rights of ~~his or her~~ **a** client, or by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(3) In the representation of a client, a lawyer may exercise his or her professional judgment to waive or fail to assert a right or position of the client.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the ~~objectives~~ scope of the representation if the limitation is reasonable under the circumstances. ~~the client consents after consultation~~.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

~~(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.~~

Comment

Scope of Representation Allocation of Authority between Client and Lawyer

[1] ~~Both lawyer and client have authority and responsibility in the objectives and means of representation. The~~ Paragraph (a) confers upon the client ~~has~~ the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. ~~Within those limits, a client also has a right to consult with the lawyer about the means~~

~~to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client lawyer relationship partakes of a joint undertaking. In questions of means the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.~~ The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation. Lawyers are encouraged to treat opposing counsel with courtesy and to cooperate with opposing counsel when it will not prevent or unduly hinder the pursuit of the objective of the representation. To this end, a lawyer may waive a right or fail to assert a position of a client without first obtaining the client's consent. For example, a lawyer may consent to an extension of time for the opposing party to file pleadings or discovery without obtaining the client's consent.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

~~[2]~~ [4] In a case in which the client appears to be suffering ~~mental disability~~ diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

~~[3]~~ [5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

~~Services Limited in Objectives or Means~~ Agreements Limiting Scope of Representation

~~[4]~~ [6] The ~~objectives or~~ scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. ~~For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles.~~ When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. ~~The~~ A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific ~~objectives or~~ means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude ~~objectives or means~~ actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agree-

ment for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] Although paragraph (c) does not require that the client's informed consent to a limited representation be in writing, a specification of the scope of representation will normally be a necessary part of any written communication of the rate or basis of the lawyer's fee. See Rule 1.0(e) for the definition of "informed consent."

~~[5]~~ [9] ~~An agreement~~ All agreements concerning ~~the scope of~~ a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. ~~Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.~~ See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

~~[6]~~ [10] ~~A~~ Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer ~~is required to give~~ from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. ~~The~~ Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent ~~does not,~~ of itself, make a lawyer a party to the course of action. ~~However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct.~~ There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. There is also a distinction between giving a client legitimate advice about asset protection and assisting in the illegal or fraudulent conveyance of assets.

~~[7]~~ [11] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. ~~The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the~~ The lawyer is required to avoid ~~furthering the purpose~~ assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how ~~it~~ the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally ~~supposes is~~ supposed was legally proper but then discov-

ers is criminal or fraudulent. ~~Withdrawal~~ The lawyer must, therefore, withdraw from the representation~~, therefore, may be required~~ of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. See Rule 4.1.

~~[8]~~ [12] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

~~[9]~~ [13] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer ~~should~~ must not participate in a ~~sham~~ transaction~~; for example, a transaction~~ to effectuate criminal or fraudulent ~~escape~~ avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[14] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

RULE 1.3: DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and ~~may~~ take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer ~~should~~ must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. ~~However, a~~ A lawyer is not bound, however, to press for every advantage that might be realized for a client. ~~A~~ For example, a lawyer ~~has~~ may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. ~~A lawyer's work load~~

~~should be controlled so that each matter can be handled adequately.~~ The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

~~[2]~~ [3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

~~[3]~~ [4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client ~~but has not been specifically instructed concerning pursuit of an~~ and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer ~~should advise~~ must consult with the client ~~of~~ about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review

client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule .0122 of Subchapter 1B of the Rules of the North Carolina State Bar (providing for court appointment of a lawyer to inventory files and take other protective action to protect the interests of the clients of a lawyer who has disappeared or is deceased or disabled).

Distinguishing Professional Negligence

[~~4~~][6] Conduct that may constitute professional malpractice does not necessarily constitute a violation of the ethical duty to represent a client diligently. Generally speaking, a single instance of unaggravated negligence does not warrant discipline. For example, missing a statute of limitations may form the basis for a claim of professional malpractice. However, where the failure to file the complaint in a timely manner is due to inadvertence or a simple mistake such as mislaying the papers or miscalculating the date upon which the statute of limitations will run, absent some other aggravating factor, such an incident will not generally constitute a violation of this rule.

[~~5~~] [7] Conduct sufficient to warrant the imposition of professional discipline is typically characterized by the element of intent or scienter manifested when a lawyer knowingly or recklessly disregards his or her obligations. Breach of the duty of diligence sufficient to warrant professional discipline occurs when a lawyer consistently fails to carry out the obligations that the lawyer has assumed for his or her clients. A pattern of delay, procrastination, carelessness, and forgetfulness regarding client matters indicates a knowing or reckless disregard for the lawyer's professional duties. For example, a lawyer who habitually misses filing deadlines and court dates is not taking his or her professional responsibilities seriously. A pattern of negligent conduct is not excused by a burdensome case load or inadequate office procedures.

RULE 1.4: COMMUNICATION

(a) A lawyer shall ~~keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.~~:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to consult with the client about the means to be used to accomplish the client's objectives. In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

~~[1]~~ [5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. ~~For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.~~ ~~[2]~~ Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, ~~in negotiations where~~ when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that ~~might~~ are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily ~~cannot~~ will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

~~[3]~~ [6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult.

However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from ~~mental disability~~ diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. ~~Practical exigency may also require a lawyer to act for a client without prior consultation.~~

Withholding Information

~~[4]~~ [7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

RULE 1.5: FEES

(a) A lawyer shall not ~~enter into~~ make an agreement for, charge, or collect an illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses. ~~(b) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence experienced in the area of law involved would be left with a definite and firm conviction that the fee is clearly excessive.~~ The factors to be considered in determining whether a fee is clearly excessive include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) ~~(c)~~ When the lawyer has not regularly represented the client, the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) a contingent fee for representing a defendant in a criminal case; however, a lawyer may charge and collect a contingent fee for representation in a criminal or civil asset forfeiture proceeding if not otherwise prohibited by law; or

(2) a contingent fee in a civil case in which such a fee is prohibited by law.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or~~, by written agreement with the client,~~ each lawyer assumes joint responsibility for the representation;

(2) the client ~~is advised of and does not object to the participation of all the lawyers involved~~ agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

(f) Any lawyer having a dispute with a client regarding a fee for legal services must:

(1) make reasonable efforts to advise his or her client of the existence of the North Carolina State Bar's program of fee dispute resolution at least 30 days prior to initiating legal proceedings to collect the disputed fee; and

(2) participate in good faith in the fee dispute resolution process if the client submits a proper request.

Comment

Appropriate Fees and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are not clearly excessive under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must not be clearly excessive. A lawyer may seek reimbursement for expenses for in-house services, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

~~[1]~~ [2] When the lawyer has regularly represented a client, ~~they~~ an understanding will have ordinarily ~~will have~~ evolved ~~an understanding~~ concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, ~~an~~ a written understanding as to ~~the fee~~ fees and expenses should be promptly established. ~~It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed~~

~~amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client.~~ Generally, furnishing the client with a simple memorandum or copy of the lawyer's customary fee arrangements will suffice, provided that the writing states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the ~~fee~~ terms of the engagement reduces the possibility of misunderstanding. ~~Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.~~

[3] Contingent fees, like any other fees, are subject to the standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is clearly excessive, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

~~[2]~~ [4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). This does not apply when the advance payment is a true retainer to reserve services rather than an advance to secure the payment of fees yet to be earned. A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, provided this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8~~(j)~~(i). However, a fee paid in property instead of money may be subject to ~~special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property~~ the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

~~[3]~~ [5] Once a fee agreement has been reached between attorney and client, the attorney has an ethical obligation to fulfill the contract and represent the client's best interests regardless of whether

the lawyer has struck an unfavorable bargain. An attorney may seek to renegotiate the fee agreement in light of changed circumstances or for other good cause, but the attorney may not abandon or threaten to abandon the client to cut the attorney's losses or to coerce an additional or higher fee. Any fee contract made or remade during the existence of the attorney-client relationship must be reasonable and freely and fairly made by the client having full knowledge of all material circumstances incident to the agreement. If a dispute later arises concerning the fee, the burden of proving reasonableness and fairness will be upon the lawyer. ~~Fees, including contingent fees, should not be excessive as to percentage or amount.~~

~~[4]~~ [6] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. ~~When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.~~

Prohibited Contingent Fees

[7] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

~~[5]~~ [8] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is

used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee ~~on~~ either on the basis of the proportion of services they render or ~~by agreement between the participating lawyers~~ if ~~all assume~~ each lawyer assumes responsibility for the representation as a whole. ~~and~~ In addition, the client ~~is advised and does not object. It does not require disclosure to the client of~~ must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. A lawyer may divide a fee with an out-of-state lawyer who refers a matter to the lawyer if the conditions of paragraph (e) are satisfied. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails ~~the obligations stated in Rule 5.1 for purposes of the matter involved~~ financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[9] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

~~[6]~~ [10] Participation in the fee dispute resolution program of the North Carolina State Bar is mandatory when a client requests resolution of a disputed fee. Before filing an action to collect a disputed fee, the client must be advised of the fee dispute resolution program. Notification must occur not only when there is a specific issue in dispute, but also when the client simply fails to pay. However, when the client expressly acknowledges liability for the specific amount of the bill and states that he or she cannot presently pay the bill, the fee is not disputed and notification of the client is not required. In making reasonable efforts to advise the client of the existence of the fee dispute resolution program, it is preferable to address a written communication to the client at the client's last known address. If the address of the client is unknown, the lawyer should use reasonable efforts to acquire the current address of the client. Notification is not required in those instances where the State Bar does not have jurisdiction over the fee dispute as set forth in 27 N.C.A.C. 1D, .0702.

~~[7]~~ [11] If fee dispute resolution is requested by a client, the lawyer must participate in the resolution process in good faith. The State Bar program of fee dispute resolution uses mediation to

resolve fee disputes as an alternative to litigation. The lawyer must cooperate with the person who is charged with investigating the dispute and with the person(s) appointed to mediate the dispute. Further information on the fee dispute resolution program can be found at 27 N.C.A.C. 1D, .0700, et. seq. The lawyer should fully set forth his or her position and support that position by appropriate documentation.

[12] A lawyer may petition a tribunal for a legal fee if allowed by applicable law or, subject to the requirements for fee dispute resolution set forth in Rule 1.5(f), may bring an action against a client to collect a fee. The tribunal's determination of the merit of the petition or the claim is reached by an application of law to fact and not by the application of this Rule. Therefore, a tribunal's reduction or denial of a petition or claim for a fee is not evidence that the fee request violates this Rule and is not admissible in a disciplinary proceeding brought under this Rule.

RULE 1.6: CONFIDENTIALITY OF INFORMATION

~~(a) "Confidential information" refers to information protected by the attorney-client privilege under applicable law, and other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. For the purposes of this rule, "client" refers to present and former clients.~~

~~(b) "Confidential information" also refers to information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance or to whom assistance is being offered. For the purposes of this rule, "client" refers to lawyers seeking assistance from lawyers' or judges' assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court.~~

~~(c) Except when permitted under paragraph (d), a lawyer shall not knowingly:~~

~~(1) reveal confidential information of a client;~~

~~(2) use confidential information of a client to the disadvantage of the client; or~~

~~(3) use confidential information of a client for the advantage of the lawyer or a third person, unless the client consents after consultation.~~

(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) ~~(d)~~A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

~~(1) confidential information, the disclosure of which is impliedly authorized by the client as necessary to carry out the goals of the representation;~~

~~(2) confidential information with the consent of the client or clients affected, but only after consultation with them;~~

~~(3)~~ (1) ~~confidential information when permitted under~~ to comply with the Rules of Professional Conduct, ~~or required by~~ the law or court order;

~~(4)~~ (2) ~~confidential information concerning~~ to prevent the commission of a crime by the client ~~the intention of a client to commit a crime and the information necessary to prevent the crime~~;

(3) to prevent reasonably certain death or bodily harm;

~~(5)~~ (4) ~~confidential information to the extent the lawyer reasonably believes necessary~~ to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;

(5) to secure legal advice about the lawyer's compliance with these Rules;

(6) ~~confidential information to the extent the lawyer reasonably believes necessary~~ to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client; ~~and~~ or

(7) ~~confidential information to the extent permitted by~~ to comply with the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court.

(c) The duty of confidentiality described in this Rule encompasses information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance or to whom assistance is being offered. For the purposes of this Rule, "client" refers to lawyers seeking assistance from lawyers' or judges' assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court.

Comment

~~[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.~~

~~[2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.~~

~~[3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.~~

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client acquired during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information acquired during a lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

~~[4]~~ [2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer ~~maintain confidentiality of~~ must not reveal information ~~relating to the representation~~ acquired during the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate

fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

~~[5]~~ [3] The principle of client-lawyer confidentiality is given effect ~~in two~~ by related bodies of law~~:~~: the attorney-client privilege, ~~(which includes~~ the work product doctrine~~) in the law of evidence~~ and the rule of confidentiality established in professional ethics. The attorney-client privilege ~~applies~~ and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not ~~merely~~ only to matters communicated in confidence by the client but also to all information ~~relating to the~~ acquired during the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

~~[6] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.~~

[4] Paragraph (a) prohibits a lawyer from revealing information acquired during the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

~~[8]~~ [5] ~~A~~ Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation~~, except to the extent that the client's instructions or special circumstances limit that authority~~. In ~~litiga-~~

~~tion~~ some situations, for example, a lawyer may ~~disclose information by admitting~~ be impliedly authorized to admit a fact that cannot properly be disputed or~~, in negotiation by making~~ to make a disclosure that facilitates a satisfactory conclusion to a matter. ~~[9]~~ Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

~~[10]~~ [6] ~~The~~ Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information acquired during the representation of their clients, the confidentiality rule is subject to limited exceptions. ~~For example~~, In becoming privy to information about a client, a lawyer may foresee that the client intends to commit a crime. ~~To the extent~~ Paragraph (b)(2) recognizes that a lawyer ~~is prohibited from making~~ should be allowed to make a disclosure~~,~~ to avoid sacrificing the interests of the potential victim ~~are sacrificed~~ in favor of preserving the client's confidences ~~even though~~ when the client's purpose is wrongful. ~~However, to the extent that a lawyer is required or permitted to disclose a client's purpose, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. A rule governing disclosure of threatened criminal activity thus involves a balancing of one group of potential victims against those of another.~~ Similarly, paragraph (b)(3) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

~~[11] Generally speaking, information relating to the representation must be kept confidential, as stated in paragraph (e). However, where the client is or has been engaged in criminal or fraudulent conduct or the integrity of the lawyer's own conduct is involved, the principle of confidentiality may have to yield depending on the~~

~~lawyer's knowledge about and relationship to the conduct in question and the seriousness of that conduct. Several situations must be distinguished.~~

~~[12] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.~~

~~[13] Second, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in paragraph (d)(4), the lawyer has the professional discretion to reveal information in order to prevent such consequences. It is very difficult for a lawyer to "know" when such a purpose will actually be carried out, for the client may have a change of mind.~~

~~[13]~~[7] ~~Third, the~~ A lawyer may have been innocently involved in past conduct by ~~the~~ a client that was criminal or fraudulent. ~~In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.~~ Even if the involvement was innocent, however, the fact remains that the lawyer's professional services were made the instrument of the client's crime or fraud. The lawyer, therefore, has a legitimate interest in being able to rectify the consequences of such conduct, and has the professional right, although not a professional duty, to rectify the situation. Exercising that right may require revealing information ~~relating to the~~ acquired during the representation. Paragraph ~~(d)(5)~~ (b)(4) gives the lawyer professional discretion to reveal such information to the extent necessary to accomplish rectification.

~~[15] The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. When practical, the lawyer should first seek to persuade the client to take suitable action, making it unnecessary for the lawyer to make any disclosure. In any case, a disclosure adverse to the client's interests should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to make the disclosure permitted by paragraphs (d)(4) and (d)(5) does not violate this rule.~~

[8] Although paragraph (b)(2) does not require the lawyer to reveal the client's anticipated misconduct, the lawyer may not coun-

sel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

[9] Paragraph (b)(4) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information acquired during the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. ~~[17]~~ Paragraph (b)(4) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[10] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(5) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

~~Dispute Concerning a Lawyer's Conduct~~

~~[18]~~ [11] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (~~d~~)(b)(6) does not require

the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, ~~applies~~ where a proceeding has been commenced. ~~Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.~~

~~[10]~~ [12] ~~If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together.~~ A lawyer entitled to a fee is permitted by paragraph ~~(d)~~ (b)(6) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. ~~As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.~~

[13] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information acquired during the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(1) permits the lawyer to make such disclosures as are necessary to comply with the law.

[14] Paragraph (b)(1) also permits compliance with a court order requiring a lawyer to disclose information relating to a client's representation. If a lawyer is called as a witness to give testimony

concerning a client or is otherwise ordered to reveal information relating to the client's representation, however, the lawyer must, absent informed consent of the client to do otherwise, assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal. See Rule 1.4. Unless review is sought, however, paragraph (b)(1) permits the lawyer to comply with the court's order.

[15] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[16] Paragraph (b) permits but does not require the disclosure of information acquired during a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(7). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. When practical, the lawyer should first seek to persuade the client to take suitable action, making it unnecessary for the lawyer to make any disclosure. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

~~Disclosures Otherwise Required or Authorized~~

~~[20] If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (c) requires the lawyer to invoke the privilege when it is applicable. The lawyer must~~

~~comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.~~

~~[21] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supercedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.~~

Acting Competently to Preserve Confidentiality

[17] A lawyer must act competently to safeguard information acquired during the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[18] When transmitting a communication that includes information acquired during the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

~~[22]~~ [19] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Lawyer's Assistance Program

~~[7]~~ [20] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's par-

ticipation in an approved lawyers' or judges' assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek help through such programs. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance, which may then result in harm to their professional careers and injury to their clients and the public. The rule, therefore, requires that any information received by a lawyer on behalf of an approved lawyers' or judges' assistance program be regarded as confidential and protected from disclosure to the same extent as information received by a lawyer in any conventional ~~attorney~~ client-lawyer relationship.

1.7: CONFLICT OF INTEREST: ~~GENERAL RULE~~ CURRENT CLIENTS

~~(a) A lawyer shall not represent a client if the representation of that client will be, or is likely to be, directly adverse to another client, unless:~~

~~(1) the lawyer reasonably believes the representation will not adversely affect the interest of the other client; and~~

~~(2) each client consents after consultation which shall include explanation of the implications of the common representation and the advantages and risks involved.~~

~~(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:~~

~~(1) the lawyer reasonably believes the representation will not be adversely affected; and~~

(2) ~~the client consents after consultation which shall include explanation of the implications of the common representation and the advantages and risks involved.~~

~~(c) A lawyer shall have a continuing obligation to evaluate all situations involving potentially conflicting interests, and shall withdraw from the representation of any party the layer cannot adequately represent without using the confidential information of another client or a former client except as Rule 1.6 allows.~~

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Comment

~~Loyalty to a Client~~ General Principles

[1] Loyalty ~~is an~~ and independent judgment are essential ~~element~~ elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(f) and (c).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] ~~An impermissible~~ A conflict of interest may exist before representation is undertaken, in which event the representation ~~should~~ must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). ~~The~~ To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the ~~parties~~ persons and issues involved ~~and to determine whether there are actual or potential conflicts of interest~~. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

~~[2]~~ [4] If ~~such~~ a conflict arises after representation has been undertaken, the lawyer ~~should~~ ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved ~~and the lawyer withdraws because a conflict arises after representation~~, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also ~~Rule 2.2(c)~~ Comments [5] and [29]. ~~As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.~~

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

~~[3]~~ [6] ~~As a general proposition, loyalty~~ Loyalty to a current client prohibits undertaking representation directly adverse to that

client without that client's informed consent. ~~Paragraph (a) expresses that general rule.~~ Thus, absent consent, a lawyer ~~ordinarily~~ may not act as an advocate in one matter against a person the lawyer represents in some other matter, even ~~if it is~~ when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only ~~generally~~ economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients. ~~Paragraph (a) applies only when the representation of one client would be directly adverse to the other.~~

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

~~[4]~~ [8] ~~Loyalty to a client is also impaired when~~ Even where there is no direct adverseness, a conflict of interest exists if a ~~lawyer cannot~~ lawyer's ability to consider, recommend or carry out an appropriate course of action for the client ~~because~~ may be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent a seller of commercial real estate, a real estate developer and a commercial lender is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. ~~Paragraph (b) addresses such situations. A possible conflict~~ The mere

possibility of subsequent harm does not itself preclude the representation or require disclosure and consent. The critical questions are the likelihood that a ~~conflict~~ difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. ~~Consideration should be given to whether the client wishes to accommodate the other interest involved.~~

Lawyer's ~~Interests~~ Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

~~[6]~~ [10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, ~~a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If~~ if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. ~~A~~ Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to

another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.19.

Interest of Person Paying for a Lawyer's Service

~~[10]~~ [13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). ~~For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.~~ If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

~~Consultation and Consent~~ Prohibited Representations

~~[5]~~ [14] ~~A client~~ Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph ~~(a)(1) with respect to representation directly adverse to a client, and paragraph~~ (b)~~(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances~~, some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide repre-

sentation on the basis of the client's consent. When the lawyer is representing more than one client ~~is involved~~, the question of ~~conflict~~ consentability must be resolved as to each client. ~~Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.~~

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reason-

ably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

~~[7]~~ [23] Paragraph ~~(a)~~ (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. ~~Simultaneous~~ On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph ~~(b)~~ (a)(2). ~~An impermissible~~ A conflict may exist by reason of substantial discrepancy in the par-

ties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if ~~the risk of adverse effect is minimal and~~ the requirements of paragraph (b) are met. ~~Compare Rule 2.2 involving intermediation between clients.~~

~~[8] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.~~

~~[9] A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.~~

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the

clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

~~Other Conflict Situations~~ Nonlitigation Conflicts

~~[11]~~ [26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation ~~sometimes may be difficult to assess~~. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for ~~adverse effect~~ material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that ~~actual conflict~~ disagreements will arise and the likely prejudice to the client from the conflict ~~if it does arise~~. The question is often one of proximity and degree. See Comment [8].

~~[13]~~ [27] ~~Conflict~~ For example, conflict questions may ~~also~~ arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may ~~arise~~ be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. ~~The~~ In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

~~[12]~~ [28] Whether a conflict is consentable depends on the circumstances. See Cmt. [15]. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally

antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate

should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

~~[14]~~ [35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

~~Conflict Charged by an Opposing Party~~

~~[15] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.~~

RULE 1.8: CONFLICT OF INTEREST: ~~PROHIBITED TRANSACTIONS~~ CURRENT CLIENTS: SPECIFIC RULES

(a) ~~A lawyer shall not enter into a business transaction with a client under any circumstances unless it is fair to the client.~~ A lawyer shall not enter into a business transaction with a client ~~in which the~~

~~lawyer and the client have differing interests and wherein the client expects the lawyer to exercise his or her independent professional judgment for the protection of the client,~~ or knowingly acquire an ownership, possessory, security or other pecuniary interest directly adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing ~~to the client~~ in a manner ~~which~~ that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel ~~in~~ on the transaction; and

(3) the client ~~consents~~ gives informed consent, in a writing ~~thereto~~ signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) ~~During or subsequent to legal representation of a client, a lawyer shall not enter into a business transaction with a client for which a fee or commission will be charged in lieu of, or in addition to, a legal fee if the business transaction is related to the subject mater of the legal representation, any financial proceeds form the representation, or any information, confidential or otherwise, acquired by the lawyer during the course of the representation.~~

A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer ~~as parent, child, sibling, or spouse~~ any substantial gift ~~from a client, including a testamentary~~ unless the lawyer or other recipient of the gift~~, except where the client~~ is related to the ~~donee~~ client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, ~~including expenses of investigation and medical examinations and cost of obtaining and presenting evidence provided the client remains ultimately liable for such costs and expenses~~ the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client ~~consents after consultation~~ gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client ~~consents after consultation, including~~ gives informed consent, in a writing signed by the client. The lawyer's disclosure ~~of~~ shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless ~~permitted by law and~~ the client is independently represented in making the agreement~~,~~; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client ~~without first advising~~ unless that person is advised in writing ~~that~~ of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent ~~representation is appropriate~~ legal counsel in connection therewith.

~~(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly~~

~~adverse to a person whom the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship. This provision shall not be construed to disqualify other lawyers in the affected lawyer's firm.~~.

~~(j)~~ (i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses, provided the requirements of Rule 1.8(a) are satisfied; and

(2) contract with a client for a reasonable contingent fee in a civil case, except as prohibited by Rule 1.5.

(j) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i), that applies to any one of them shall apply to all of them.

Comment

Note: See Rule 1.19 for the prohibition on client-lawyer sexual relationships.

Business Transactions Between Client and Lawyer

[1] ~~As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a)~~ A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are gov-

erned by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not~~, however,~~ apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] ~~Because of the actual and potential conflicts of interests, paragraph (b) prohibits the sale of business services to a client or former client if the proposed transaction relates to the subject matter or the proceeds of representation. For example, a lawyer who is also a securities broker or insurance agent should not endeavor to sell securities or insurance to a client when the lawyer knows by virtue of the representation that such client has received funds suitable for investment.~~ Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction

or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

~~[3]~~ [6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer

or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, ~~however,~~ the client should have the detached advice that another lawyer can provide. ~~Paragraph (c) recognizes an~~ The sole exception to this Rule is where the client is a relative of the donee ~~or the gift is not substantial~~.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

~~[4]~~ [9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and ~~paragraph (j)~~ paragraphs (a) and (i).

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances

are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

~~[5] A lawyer may be paid from a source other than the client. Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. For instance, when a corporation and its director or employees are involved in a controversy in which they have conflicting interest, the corporation may provide funds for separate legal representation of the directors or employees if the clients consent after consultation and the arrangement ensures the lawyer's professional independence. Where the client is a class, consent may be obtained on behalf of the class by court supervised procedure.~~

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule. 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibili-

ties to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

~~[6] Paragraph (h) is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.~~

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by

law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

~~Family Relationships Between Lawyers~~

~~[7] Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the lawyers are associated.~~

~~Acquisition of~~ Acquiring Proprietary Interest in Litigation

~~[8]~~ [16] Paragraph ~~(i)~~ (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. ~~This~~ Like paragraph (e), the general rule~~, which~~ has its basis in common law champerty and maintenance~~,~~ and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule ~~also~~ permits a lawyer to acquire a lien to secure the lawyer's fee or expenses provided the requirements of Rule 1.7~~(b)~~ are satisfied. Specifically, the lawyer must reasonably believe that the representation will not be adversely affected after taking into account the possibility that the acquisition of a proprietary interest in the client's cause of action or any res involved therein may cloud the lawyer's judgment and impair the lawyer's ability to function as an advocate. The lawyer must also disclose the risks involved prior to obtaining the client's consent. Prior to initiating a foreclosure on property subject to a lien securing a legal fee, the lawyer must notify the client of the right to require the

lawyer to participate in the mandatory fee dispute ~~arbitration~~ resolution program. See Rule 1.5(f).

[17] The Rule is subject to specific exceptions developed in decisional law and continued in these Rules~~, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e)~~. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Imputation of Prohibitions

[18] Under paragraph (j), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client.

RULE 1.9: CONFLICT OF INTEREST: DUTIES TO FORMER ~~CLIENT~~ CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client ~~consents after consultation~~ gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client ~~consents after consultation~~ gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use ~~confidential~~ information ~~protected from disclosure by Rule 1.6~~ relating to the representation to the disadvantage of the former client except as ~~Rule 1.6 or Rule 3.3~~ these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal ~~confidential~~ information relating to the representation except as ~~Rule 1.6 or Rule 3.3~~ these Rules would permit or require with respect to a client.

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. ~~The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus~~ Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one or more of the clients in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent or the continued representation of the client(s) is not materially adverse to the interests of the former clients. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule ~~may depend~~ depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. ~~On the other hand, a lawyer who recurrently handled a type of problem for a former~~

~~client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions.~~ The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the information learned by the lawyer to establish a substantial risk that the lawyer has information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

~~[3]~~ [4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should under-

take representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

~~[4] Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there may be a presumption that all confidences known by the partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.~~

~~[5] The other rubric formerly used for dealing with disqualification is the appearance of impropriety. This rubric has a twofold problem. First, the appearance of impropriety can be taken to include any new client lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.~~

~~Confidentiality~~

~~[8]~~ [5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9~~(b)~~(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] ~~Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in~~ Application of paragraph (b) depends on a situation's particular ~~circumstances~~ facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

~~[7] Application of paragraph (b) depends on a situation's particular facts. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.~~

~~[9]~~ [7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

~~Adverse Positions~~

~~[10] The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail absten-~~

~~tion of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of paragraphs (b) and (c) concerning confidentiality have been met.~~

~~[11]~~ [8] ~~Information~~ Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Whether information is "generally known" depends in part upon how the information was obtained and in part upon the former client's reasonable expectations. The mere fact that information is accessible through the public record or has become known to some other persons, does not necessarily deprive the information of its confidential nature. If the information is known or readily available to a relevant sector of the public, such as the parties involved in the matter, then the information is probably considered "generally known." See Restatement (Third) of The Law of Governing Lawyers, 111 cmt. d.

~~[12]~~ [9] ~~Disqualification from subsequent representation is~~ The provisions of this Rule are for the protection of former clients and can be waived ~~by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client~~ if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). ~~[13]~~ With regard to ~~an opposing party's raising a question of conflict of interest~~ the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

RULE 1.10: ~~IMPUTED DISQUALIFICATION~~ IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7~~, 1.8(e),~~ or 1.9~~, or 2.2~~, unless the prohibition is based on a personal interest of the prohibited lawyer, including a prohibition under Rule 6.6, and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer is timely screened from any participation in the matter; and

(2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

~~(c)~~ (d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" ~~includes~~ denotes lawyers in a ~~private firm, and~~ law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization~~, or in a legal services organization~~. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. ~~For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to infor-~~

~~mation concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved.~~ See Rule 1.0, Comments [2] - [4].

[~~2~~] ~~With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.~~

[~~3~~] ~~Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.~~

~~[5] Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences and, therefore, to the protections provided in Rules 1.6, 1.9 and 1.11. However, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations and, thus, has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.~~

Principles of Imputed Disqualification

[~~6~~] [2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated.

Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

~~[7]~~ [5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

~~[8] The duty of loyalty to a client obliges a lawyer to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual~~

~~lawyer involved, but does not necessarily entail abstention of other lawyers through imputed disqualification. If a lawyer has left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of Rule 1.9(b) and Rule 1.10 (b) concerning confidentiality have been met.~~

[6] Where the conditions of paragraph (c) are met, imputation is removed, and consent to the new representation is not required. Lawyers should be aware, however, that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation.

[7] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(2) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, nor does it specifically prohibit the receipt of a part of the fee from the screened matter. However, Rule 8.4(c) prohibits the screened lawyer from participating in the fee if such participation was impliedly or explicitly offered as an inducement to the lawyer to become associated with the firm.

[8] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] Rule 1.10(d) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

~~[4]~~ [10] Where a lawyer has joined a private firm after having represented the government, ~~the situation~~ imputation is governed by Rule 1.11~~(a) and~~ (b) and (c)~~,~~, not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served ~~private~~ clients~~, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7 and 1.9~~ in private practice, nongovernmental employment or in another government agency, former-client conflicts are

not imputed to government lawyers associated with the individually disqualified lawyer.

[11] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (j) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

RULE 1.11: ~~SUCCESSIVE~~ SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND ~~PRIVATE EMPLOYMENT~~ EMPLOYEES

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rules 1.9(a) and (b), except that "matter" is defined as in paragraph (e) of this Rule;

(2) is subject to Rule 1.9(c); and

(3) shall not otherwise represent a ~~private~~ client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency ~~consents after consultation~~ gives its informed consent, confirmed in writing, to the representation.

(b) ~~No~~ When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter ~~and is apportioned no part of the fee therefrom~~; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

~~(b)~~ (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means

information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter ~~and is apportioned no part of the fee therefrom~~.

~~(c)~~ (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2 shall not:

~~(1)~~ (A) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless ~~under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter~~ the appropriate government agency gives its informed consent, confirmed in writing; or

~~(2)~~ (B) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

~~(d)~~ (e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

~~(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.~~

Comment

~~[1]~~ [1] ~~This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.~~ A lawyer ~~representing a government agency, whether employed or specially retained by the government,~~ who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against ~~representing adverse interests~~ concurrent conflicts of interest stated in Rule 1.7 ~~and the protections afforded former clients in Rule 1.9~~. In addition, such a lawyer ~~is~~ may be subject to ~~Rule 1.11 and to~~ statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client under Rule 1.9. Rule 1.10, however, is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(3) and (d)(2) impose additional obligations on a lawyer who has served or is currently serving as an officer or employee of the government. They apply in situations where a lawyer is not adverse to a former client and are designed to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1), (a)(2) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

~~[2]~~ [4] ~~Where~~ This Rule represents a balancing of interests. On the one hand, where the successive clients are a ~~public~~ government agency and ~~a private~~ another client, public or private, the risk exists that power or discretion vested in that agency ~~public authority~~ might be used for the special benefit of ~~a private~~ the other client. A lawyer should not be in a position where benefit to ~~a private~~ the other client might affect performance of the lawyer's professional functions on behalf of the government ~~public authority~~. Also, unfair advantage could accrue to the ~~private~~ other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. ~~However~~ On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(1), (a)(3) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

~~[3]~~ [5] When ~~the client is an agency of~~ a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency ~~should be treated~~ as ~~a private~~ another client for purposes of this Rule ~~if the lawyer thereafter represents an agency of another government~~, as when a lawyer ~~represents~~ is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [6].

~~[4]~~ [6] Paragraphs ~~(a)(1) and~~ (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement~~. They prohibit directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified~~. nor do they specifically prohibit the receipt of a part of the fee from the screened

matter. However, Rule 8.4(c) prohibits the screened lawyer from participating in the fee if such participation was impliedly or explicitly offered as an inducement to the lawyer to become associated with the firm.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely significantly to injure the client, a reasonable delay may be justified.

~~[5] Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.~~

~~[6]~~ [8] Paragraph ~~(b)~~ (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

~~[7]~~ [9] Paragraphs (a) and ~~(c)~~ (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

~~[8] Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.~~

RULE 1.12: FORMER JUDGE ~~OR~~, ARBITRATOR, MEDIATOR, OR OTHER THIRD-PARTY NEUTRAL

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer~~, arbitrator~~ or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent ~~after consultation~~, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a

judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge, or other adjudicative officer ~~or arbitrator~~ may negotiate for employment with a party or ~~attorney~~ lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, or other adjudicative officer ~~or arbitrator~~.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter ~~and is apportioned no part of the fee therefrom~~; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable ~~it~~ them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (b). Other law or codes of ethics gov-

erning third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, nor does it specifically prohibit the receipt of a part of the fee from the screened matter. However, Rule 8.4(c) prohibits the screened lawyer from participating in the fee if such participation was impliedly or explicitly offered as an inducement to the lawyer to become associated with the firm.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the client, a reasonable delay may be justified.

RULE 1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating

to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act ~~in~~ on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when ~~it is apparent~~ the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. ~~[2]~~ Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this ~~rule~~ Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] ~~[3]~~ When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] ~~[4]~~ When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

[4] ~~[5] In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the~~ The organization's highest authority~~. Ordinarily, that is~~ to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the

highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[5] ~~[6]~~ The authority and responsibility provided in ~~paragraph (b)~~ this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

Government Agency

[6] ~~[7]~~ The duty defined in this Rule applies to governmental organizations. ~~However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining~~ Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it ~~is generally~~ may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government ~~as a whole~~ may be the client for ~~purpose~~ purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See ~~note on~~ Scope.

Clarifying the Lawyer's Role

[7] ~~[8]~~ There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose

interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[8] ~~[9]~~ Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[9] ~~[10]~~ Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder, director, employee, member, or other constituent.

Derivative Actions

[10] ~~[11]~~ Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[11] ~~[12]~~ The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

RULE 1.14: CLIENT ~~UNDER A DISABILITY~~ WITH DIMINISHED CAPACITY

(a) When a client's ~~ability~~ capacity to make adequately considered decisions in connection with ~~the~~ a representation is ~~impaired~~ diminished, whether because of minority, mental ~~disability~~ impairment or for some other reason, the lawyer shall, as

far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) ~~A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when~~ When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity ~~disorder or disability~~, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, ~~an~~ a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client ~~lacking legal competence~~ with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. ~~Furthermore, to an increasing extent the law recognizes intermediate degrees of competence.~~ For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. ~~If the person has no guardian or legal representative, the lawyer often must act as de facto guardian.~~ Even if the person ~~does have~~ has a legal representative, the lawyer should as far as possible accord the

represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

~~[3]~~ [4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. ~~If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.~~ In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. ~~[4]~~ If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the

wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

~~[5]~~ [8] ~~Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure~~ Disclosure of the client's ~~disability can~~ diminished capacity could adversely affect the client's interests. For example, raising the question of ~~disability~~ diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what

the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one. ~~The lawyer may seek guidance from an appropriate diagnostician.~~

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.

RULE 1.15: ~~PRESERVING THE~~ SAFEKEEPING PROPERTY ~~OF OTHERS~~

Rule 1.15-1 Definitions

For purposes of this Rule 1.15, the following definitions apply:

(a) "Bank" denotes a bank, savings and loan association, or credit union chartered under North Carolina or federal law.

(b) "Client" denotes a person, firm, or other entity for whom a lawyer performs, or is engaged to perform, any legal services.

(c) "Dedicated trust account" denotes a trust account that is maintained for the sole benefit of a single client or with respect to a single transaction or series of integrated transactions.

(d) "Entrusted property" denotes trust funds, fiduciary funds and other property belonging to someone other than the lawyer which is in the lawyer's possession or control in connection with the performance of legal services or professional fiduciary services.

(e) "Fiduciary account" denotes an account, designated as such, maintained by a lawyer solely for the deposit of fiduciary funds or other entrusted property of a particular person or entity.

(f) "Fiduciary funds" denotes funds belonging to someone other than the lawyer that are received by or placed under the control of the lawyer in connection with the performance of professional fiduciary services.

(g) "Funds" denotes any form of money, including cash, payment instruments such as checks, money orders, or sales drafts, and receipts from electronic fund transfers.

(h) "General trust account" denotes any trust account other than a dedicated trust account.

(i) "Instrument" denotes an instrument under the Uniform Commercial Code, a payment item or advice accepted for credit by a bank, or a requisition or order for the electronic transfer of funds.

(j) "Legal services" denotes services rendered by a lawyer in a client-lawyer relationship.

(k) "Professional fiduciary services" denotes compensated services (other than legal services) rendered by a lawyer as a trustee, guardian, personal representative of an estate, attorney-in-fact, or escrow agent, or in any other fiduciary role customary to the practice of law.

(l) "Trust account" denotes an account, designated as such, maintained by a lawyer for the deposit of trust funds.

(m) "Trust funds" denotes funds belonging to someone other than the lawyer that are received by or placed under the control of the lawyer in connection with the performance of legal services.

Rule 1.15-2 General Rules

(a) Entrusted Property. All entrusted property shall be identified, held, and maintained separate from the property of the lawyer,

and shall be deposited, disbursed, and distributed only in accordance with this Rule 1.15.

(b) Deposit of Trust Funds. All trust funds received by or placed under the control of a lawyer shall be promptly deposited in either a general trust account or a dedicated trust account of the lawyer.

(c) Deposit of Fiduciary Funds. All fiduciary funds received by or placed under the control of a lawyer shall be promptly deposited in a fiduciary account or a general trust account of the lawyer.

(d) Safekeeping of Other Entrusted Property. A lawyer may also hold entrusted property other than fiduciary funds (such as securities) in a fiduciary account. All entrusted property received by a lawyer that is not deposited in a trust account or fiduciary account (such as a stock certificate) shall be promptly identified, labeled as property of the person or entity for whom it is to be held, and placed in a safe deposit box or other suitable place of safekeeping. The lawyer shall disclose the location of the property to the client or other person for whom it is held. Any safe deposit box or other place of safekeeping shall be located in this state, unless the lawyer has been otherwise authorized in writing by the client or other person for whom it is held.

(e) Location of Accounts. All trust accounts shall be maintained at a bank in North Carolina or a bank with branch offices in North Carolina except that, with the written consent of the client, a dedicated trust account may be maintained at a bank ~~outside of~~ that does not have offices in North Carolina or ~~in~~ at a financial institution other than a bank in or outside of North Carolina. A lawyer may maintain a fiduciary account at any bank or other financial institution in or outside of North Carolina selected by the lawyer in the exercise of the lawyer's fiduciary responsibility.

(f) Segregation of Lawyer's Funds. No funds belonging to a lawyer shall be deposited in a trust account or fiduciary account of the lawyer except:

(1) funds sufficient to open or maintain an account, pay any bank service charges, or pay any tax levied on the account; or

(2) funds belonging in part to a client or other third party and in currently or conditionally to the lawyer.

(g) Mixed Funds Deposited Intact. When funds belonging to the lawyer are received in combination with funds belonging to the client or other persons, all of the funds shall be deposited intact. The

amounts currently or conditionally belonging to the lawyer shall be identified on the deposit slip or other record. After the deposit has been finally credited to the account, the lawyer may withdraw the amounts to which the lawyer is or becomes entitled. If the lawyer's entitlement is disputed, the disputed amounts shall remain in the trust account or fiduciary account until the dispute is resolved.

(h) Instruments Payable to Lawyer. An instrument drawn on a trust account or fiduciary account for the payment of the lawyer's fees or expenses shall be made payable to the lawyer and shall indicate the client balance on which instrument is drawn.

(i) No Bearer Instruments. No instrument shall be drawn on a trust account or fiduciary account made payable to cash or bearer.

(j) No Personal Benefit. A lawyer shall not use or pledge any entrusted property to obtain credit or other personal benefit for the lawyer or any person other than the legal or beneficial owner of that property.

(k) Bank Directive. Every lawyer maintaining a trust account or fiduciary account at a bank shall file with the bank a written directive requiring the bank to report to the executive director of the North Carolina State Bar when an instrument drawn on the account is presented for payment against insufficient funds. No trust account or fiduciary account shall be maintained in a bank that does not agree to make such reports.

(l) Notification of Receipt. A lawyer shall promptly notify his or her client of the receipt of any entrusted property belonging in whole or in part to the client.

(m) Delivery of Client Property. A lawyer shall promptly pay or deliver to the client, or to third persons as directed by the client, any entrusted property belonging to the client and to which the client is currently entitled.

(n) Property Received as Security. Any entrusted property or document of title delivered to a lawyer as security for the payment of a fee or other obligation to the lawyer shall be held in trust in accordance with this Rule 1.15 and shall be clearly identified as property held as security and not as a completed transfer of beneficial ownership to the lawyer. This provision does not apply to property received by a lawyer on account of fees or other amounts owed to the lawyer at the time of receipt; however, such transfers are subject to the rules governing legal fees or business transactions between a lawyer and client.

(o) Duty to Report Misappropriation. A lawyer who discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the North Carolina State Bar.

(p) Interest on Deposited Funds. Except as authorized by Rule 1.15-4, any interest earned on a trust account or fiduciary account, less any amounts deducted for bank service charges and taxes, shall belong to the client or other person or entity entitled to the corresponding principal amount. Under no circumstances shall the lawyer be entitled to any interest earned on funds deposited in a trust account or fiduciary account.

(q) Abandoned Property. If entrusted property is unclaimed, the lawyer shall make due inquiry of his or her personnel, records and other sources of information in an effort to determine the identity and location of the owner of the property. If that effort is successful, the entrusted property shall be promptly transferred to the person or entity to whom it belongs. If the effort is unsuccessful and the provisions of G.S. 116B-18 are satisfied, the property shall be deemed abandoned, and the lawyer shall comply with the requirements of Chapter 116B of the General Statutes concerning the escheat of abandoned property.

Rule 1.15-3 Records and Accountings

(a) Minimum Records for Accounts at Banks. The minimum records required for general trust accounts, dedicated trust accounts and fiduciary accounts maintained at a bank shall consist of the following:

(1) all bank receipts or deposit slips listing the source and date of receipt of all funds deposited in the account, and, in the case of a general trust account, also the name of the client or other person to whom the funds belong;

(2) all canceled checks or other instruments drawn on the account, or printed digital images thereof furnished by the bank, showing the amount, date, and recipient of the disbursement, and, in the case of a general trust account, the client balance against which each instrument is drawn, provided, that:

(A) digital images must be legible reproductions of the front and back of the original instruments with no more than six instruments per page and no images smaller than 1-3/16 x 3 inches; and

(B) the bank must maintain, for at least six years, the capacity to reproduce electronically additional or enlarged images of the original instruments upon request within a reasonable time;

(3) all instructions or authorizations to transfer, disburse, or withdraw funds from the trust account;

(4) all bank statements and other documents received from the bank with respect to the trust account, including, but not limited to notices of return or dishonor of any instrument drawn on the account against insufficient funds;

(5) in the case of a general trust account, a ledger containing a record of receipts and disbursements for each person or entity from whom and for whom funds are received and showing the current balance of funds held in the trust account for each such person or entity; and

(6) any other records required by law to be maintained for the trust account.

(b) Minimum Records for Accounts at Other Financial Institutions. The minimum records required for dedicated trust accounts and fiduciary accounts at financial institutions other than a bank shall consist of the following:

(1) all depository receipts or deposit slips listing the source and date of receipt of all property deposited in the account;

(2) a copy of all checks or other instruments drawn on the account, or printed digital images thereof furnished by the depository, showing the amount, date, and recipient of the disbursement, provided, that the images satisfy the requirements set forth in Rule 1.15-3(b)(2);

(3) all instructions or authorizations to transfer, disburse, or withdraw funds from the account;

(4) all statements and other documents received from the depository with respect to the account, including, but not limited to notices of return or dishonor of any instrument drawn on the account for insufficient funds; and

(5) any other records required by law to be maintained for the account.

(c) Quarterly Reconciliations of General Trust Accounts. At least quarterly, the individual client balances shown on the ledger of

a general trust account must be totaled and reconciled with the current bank balance for the trust account as a whole.

(d) Accountings for Trust Funds. The lawyer shall render to the client a written accounting of the receipts and disbursements of all trust funds (i) upon the complete disbursement of the trust funds, (ii) at such other times as may be reasonably requested by the client, and (iii) at least annually if the funds are retained for a period of more than one year.

(e) Accountings for Fiduciary Property. Inventories and accountings of fiduciary funds and other entrusted property received in connection with professional fiduciary services shall be rendered to judicial officials or other persons as required by law. If an annual or more frequent accounting is not required by law, a written accounting of all transactions concerning the fiduciary funds and other entrusted property shall be rendered to the beneficial owners, or their representatives, at least annually and upon the termination of the lawyer's professional fiduciary services.

(f) Minimum Record Keeping Period. A lawyer shall maintain, in accordance with this Rule 1.15, complete and accurate records of all entrusted property received by the lawyer, which records shall be maintained for a period of at least six (6) years from the last transaction to which the records pertain.

(g) Audit by State Bar. The financial records required by this Rule 1.15 shall be subject to audit for cause and to random audit by the North Carolina State Bar; and such records shall be produced for inspection and copying in North Carolina upon request by the State Bar.

Comment

[1] The purpose of a lawyer's trust account or fiduciary account is to segregate the funds belonging to others from those belonging to the lawyer. Money received by a lawyer while providing legal services or otherwise serving as a fiduciary should never be used for personal purposes. Failure to place the funds of others in a trust or fiduciary account can subject the funds to claims of the lawyer's creditors or place the funds in the lawyer's estate in the event of the lawyer's death or disability.

Property Subject to these Rules

[2] Any property belonging to a client or other person or entity that is received by or placed under the control of a lawyer in con-

nection with the lawyer's furnishing of legal services or professional fiduciary services must be handled and maintained in accordance with this Rule 1.15. The minimum records to be maintained for accounts in banks differ from the minimum records to be maintained for accounts in other financial institutions (where permitted), to accommodate brokerage accounts and other accounts with differing reporting practices.

Client Property

[3] Every lawyer who receives funds belonging to a client must maintain a trust account. The general rule is that every receipt of money from a client or for a client, which will be used or delivered on the client's behalf, is held in trust and should be placed in the trust account. All client money received by a lawyer, except that to which the lawyer is immediately entitled, must be deposited in a trust account, including funds for payment of future fees and expenses. Client funds must be promptly deposited into the trust account. A law firm with offices in another state may send a North Carolina client's funds to a firm office in another state for centralized processing provided, however, the funds are promptly deposited into a trust account with a bank that has branch offices in North Carolina, and further provided, the funds are transported and held in a safe place until deposited into the trust account. If this procedure is followed, client consent to the transfer of the funds to an out-of-state office of the firm is not required. However, all such client funds are subject to the requirements of these rules. Funds delivered to the lawyer by the client for payment of future fees or expenses should never be used by the lawyer for personal purposes or subjected to the potential claims of the lawyer's creditors.

[4] This rule does not prohibit a lawyer who receives an instrument belonging wholly to a client or a third party from delivering the instrument to the appropriate recipient without first depositing the instrument in the lawyer's trust account.

Property from Professional Fiduciary Service

[5] The phrase "professional fiduciary service," as used in this rule, is service by a lawyer in any one of the various fiduciary roles undertaken by a lawyer that is not, of itself, the practice of law, but is frequently undertaken in conjunction with the practice of law. This includes service as a trustee, guardian, personal representative of an estate, attorney-in-fact, and escrow agent, as well as service in other fiduciary roles "customary to the practice of law."

[6] Property held by a lawyer performing a professional fiduciary service must also be segregated from the lawyer's personal property, properly labeled, and maintained in accordance with the applicable provisions of this rule.

[7] When property is entrusted to a lawyer in connection with a lawyer's representation of a client, this rule applies whether or not the lawyer is compensated for the representation. However, the rule does not apply to property received in connection with a lawyer's uncompensated service as a fiduciary such as a trustee or personal representative of an estate. (Of course, the lawyer's conduct may be governed by the law applicable to fiduciary obligations in general, including a fiduciary's obligation to keep the principal's funds or property separate from the fiduciary's personal funds or property, to avoid self-dealing, and to account for the funds or property accurately and promptly).

[8] Compensation distinguishes professional fiduciary service from a fiduciary role that a lawyer undertakes as a family responsibility, as a courtesy to friends, or for charitable, religious or civic purposes. As used in this rule, "compensated services" means services for which the lawyer obtains or expects to obtain money or any other valuable consideration. The term does not refer to or include reimbursement for actual out-of-pocket expenses.

Property Excluded from Coverage of Rules

[9] This rule also does not apply when a lawyer is handling money for a business or for a religious, civic, or charitable organization as an officer, employee, or other official regardless of whether the lawyer is compensated for this service. Handling funds while serving in one of these roles does not constitute "professional fiduciary service," and such service is not "customary to the practice of law."

Burden of Proof

[10] When a lawyer is entrusted with property belonging to others and does not comply with these rules, the burden of proof is on the lawyer to establish the capacity in which the lawyer holds the funds and to demonstrate why these rules should not apply.

Prepaid Legal Fees

[11] Whether a fee that is prepaid by the client should be placed in the trust account depends upon the fee arrangement with the

client. A retainer fee in its truest sense is a payment by the client for the reservation of the exclusive services of the lawyer, which is not used to pay for the legal services provided by the lawyer and, by agreement of the parties, is nonrefundable upon discharge of the lawyer. It is a payment to which the lawyer is immediately entitled and, therefore, should not be placed in the trust account. A "retainer," which is actually a deposit by the client of an advance payment of a fee to be billed on an hourly or some other basis, is not a payment to which the lawyer is immediately entitled. This is really a security deposit and should be placed in the trust account. As the lawyer earns the fee or bills against the deposit, the funds should be withdrawn from the account. Rule 1.16(d) requires the refund to the client of any part of a fee that is not earned by the lawyer at the time that the representation is terminated.

Abandoned Property

[12] Should a lawyer need technical assistance concerning the escheat of property to the State of North Carolina, the lawyer should contact the escheat officer at the Office of the North Carolina State Treasurer in Raleigh, North Carolina.

Disputed Funds

[13] A lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as the State Bar's program for fee dispute resolution. See Rule 1.5(f). The undisputed portion of the funds shall be promptly distributed.

[14] Third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claim is resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

Responsibility for Records and Accountings

~~[13]~~ [15] It is the lawyer's responsibility to assure that complete and accurate records of the receipt and disbursement of entrusted property are maintained in accordance with this rule.

~~[14]~~ [16] The lawyer is responsible for keeping a client, or any other person to whom the lawyer is accountable, advised of the status of entrusted property held by the lawyer. Therefore, it is essential that the lawyer regularly reconcile a general trust account. This means that, at least once a quarter, the lawyer must reconcile the balance shown for the account in the lawyer's records with the current bank balance. The current bank balance is the balance obtained when subtracting outstanding checks and other withdrawals from the bank statement balance and adding outstanding deposits to the bank statement balance. With regard to trust funds held in any trust account, there is also an affirmative duty to produce a written accounting for the client and to deliver it to the client, either at the conclusion of the transaction or periodically if funds are held for an appreciable period. Such accountings must be made at least annually or at more frequent intervals if reasonably requested by the client.

Bank Notice of Overdrafts

~~[15]~~ [17] A properly maintained trust account should not have any instruments presented against insufficient funds. However, even the best-maintained accounts are subject to inadvertent errors by the bank or the lawyer, which may be easily explained. The reporting requirement should not be burdensome and may help avoid a more serious problem.

Rule 1.15-4 Interest On Lawyers' Trust Accounts

(a) Pursuant to a plan promulgated by the North Carolina State Bar and approved by the North Carolina Supreme Court, a lawyer may elect to create or maintain an interest-bearing general trust account for those funds of clients which, in the lawyer's good-faith judgment, are nominal in amount or are expected to be held for a short period of time. Funds deposited in a permitted interest-bearing general trust account under the plan must be available for withdrawal upon request and without delay. The account shall be maintained in a bank. The North Carolina State Bar shall furnish to each lawyer or firm that elects to participate in the Interest on Lawyers' Trust Account (IOLTA) plan, a suitable plaque or scroll indicating participation in the program, which plaque or scroll shall be exhibited in the office of the participating lawyer or firm.

(b) Lawyers or law firms electing to deposit client funds in a general trust account under the plan shall direct the depository institution:

(1) to remit interest or dividends, as the case may be (less any deduction for bank service charges, fees of the depository institution, and taxes collected with respect to the deposited funds) at least quarterly to the North Carolina State Bar;

(2) to transmit with each remittance to the North Carolina State Bar a statement showing the name of the lawyer or law firm maintaining the account with respect to which the remittance is sent and the rate of interest applied in computing the remittance; and

(3) to transmit to the depository lawyer or law firm at the same time a report showing the amount remitted to the North Carolina State Bar and the rate of interest applied in computing the remittance.

(c) The North Carolina State Bar shall periodically deliver to each nonparticipating lawyer a form whereby the lawyer may elect not to participate in the IOLTA plan. If a lawyer does not so elect within the time provided, the lawyer shall be deemed to have opted to participate in the plan and shall provide to the North Carolina State Bar such information as is required to participate in IOLTA.

(d) A lawyer or law firm participating in the IOLTA plan may terminate participation at any time by notifying the North Carolina State Bar or the IOLTA Board of Trustees. Participation will be terminated as soon as practicable after receipt of written notification from a participating lawyer or firm.

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of law or the Rules of Professional Conduct;

~~(2) in representing a client before a tribunal, the lawyer reasonably believes that the client is bringing the legal action, conducting the defense, or asserting a position for the purpose of harassing or maliciously injuring any person~~;

~~(3)~~(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

~~(4)~~(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client~~, or if:~~ ; or

~~(1)~~ (2) the client knowingly and freely assents to the termination of the representation; or

~~(2)~~ (3) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; or

~~(3)~~ (4) the client insists upon ~~pursuing an objective~~ taking action that the lawyer considers repugnant, ~~or~~ imprudent~~,~~ or contrary to the advice and judgment of the lawyer, or with which the lawyer has a fundamental disagreement; or

~~(4)~~ (5) the client has used the lawyer's services to perpetrate a crime or fraud; or

~~(5)~~ (6) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; or

~~(6)~~ (7) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

~~(7)~~ (8) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; or

~~(8)~~ (9) other good cause for withdrawal exists.

(c) ~~When permission for withdrawal from representation of a client is required by the rules of a tribunal, a lawyer shall not withdraw from the representation of a client in a proceeding before that tribunal without the permission of the tribunal.~~ A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a

tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may ~~wish~~ request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's

services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client ~~to represent himself~~.

[6] If the client ~~is mentally incompetent~~ has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and~~, in an extreme case,~~ may ~~initiate proceedings for a conservatorship or similar protection of the client. See~~ take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Forfeiture by the client of a substantial financial investment in the representation may have such effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on ~~a~~ taking action that the lawyer considers repugnant or imprudent~~ objective~~ or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences

to the client. ~~[10] Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.~~

~~[11]~~ [10] The lawyer may never retain papers to secure a fee. Generally, anything in the file ~~which~~ that would be helpful to successor counsel should be turned over. This includes papers and other things delivered to the discharged lawyer by the client such as original instruments, correspondence, and canceled checks. Copies of all correspondence received and generated by the withdrawing or discharged lawyer should be released as well as legal instruments, pleadings, and briefs submitted by either side or prepared and ready for submission. The lawyer's personal notes and incomplete work product need not be released.

~~[12]~~[11] A lawyer who represented an indigent on an appeal which has been concluded and who obtained a trial transcript furnished by the state for use in preparing the appeal, must turn over the transcript to the former client upon request, the transcript being property to which the former client is entitled.

RULE 1.17: SALE OF LAW PRACTICE

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

(a) ~~Upon transferring the law practice to the purchaser, the~~ The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in North Carolina;

(b) The entire practice, or the entire area of practice, is sold ~~as an entirety~~ to ~~a single purchaser, which is another lawyer or law firm licensed to practice law in North Carolina~~ one or more lawyers or law ~~firm~~ firms ~~Without violating this provision, the seller may agree to transfer matters in one legal field to one purchaser, while transferring matters in another legal field to another purchaser, provided that such purchasers concentrate in those legal fields~~;

(c) Written notice is sent to each of the seller's clients regarding:

(1) the proposed sale, including the identity of the purchaser;

~~(2) the terms of any proposed change in the fee arrangement authorized by paragraph (f);~~

~~(3)~~ (2) the client's right to retain other counsel and to take possession of the client's files prior to the sale or at any time thereafter; and

~~(4)~~ (3) the fact that the client's consent to the transfer of the client's files and legal representation to the purchaser will be presumed if the client does not take any action or does not otherwise object within thirty (30) days of receipt of the notice.

(d) If the seller or the purchaser identifies a conflict of interest that prohibits the purchaser from representing the client, the seller's notice to the client shall advise the client to retain substitute counsel ~~to assume the client's representation and to arrange to have the substitute counsel contact the seller;~~.

(e) If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file. In the event the court fails to grant a substitution of counsel in a matter, that matter shall not be included in the sale and the sale otherwise shall be unaffected~~;~~.

(f) The fees charged clients shall not be increased by reason of the sale. ~~The purchaser may, however, refuse to undertake the representation unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations.~~

(g) The seller and purchaser may agree that the purchaser does not have to pay the entire sales price for the seller's law practice in one lump sum. The seller and purchaser may enter into reasonable arrangements to finance the purchaser's acquisition of the seller's law practice without violating Rules 1.5(e) and 5.4(a). The seller, however, shall have no say regarding the purchaser's conduct of the law practice.

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice and ~~another lawyer~~ other lawyers or ~~firm takes~~ firms take over the representation, the selling lawyer or firm may obtain compensa-

tion for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to the ~~purchaser~~ purchasers. The fact that a number of the seller's clients decide not to be represented by the ~~purchaser~~ purchasers but take their matters elsewhere, therefore, does not result in a violation. ~~Neither does a return~~ Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] The Rule permits a sale attendant upon retirement from the private practice of law in North Carolina. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state.

~~Single Purchaser~~ Sale of Entire Practice or Entire Area of Practice

[5] The Rule requires ~~a single purchaser~~ that the seller's entire practice, or an entire area of practice, be sold. The prohibition against ~~piecemeal~~ sale of ~~a~~ less than the entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The ~~purchaser is~~ purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. ~~If~~ This requirement is satisfied, however, ~~the~~ even if a purchaser is unable to undertake ~~all~~ a particular client ~~matters~~ matter because of a conflict of interest ~~in a specific matter respecting which the purchaser is not permitted by Rule 1.7 or another rule to represent the client, the requirement that there be a single purchaser is nevertheless satisfied~~.

Client Confidences, Consent and Notice

[6] Written notice of the proposed sale must be sent to all clients who are currently represented by the seller and to all former clients whose files will be transferred to the purchaser. Although it is not required by this rule, the placement of a notice of the proposed sale in a local newspaper of general circulation would supplement the effort to provide notice to clients as required by paragraph (c) of the rule.

[7] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera.

[8] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual ~~sent~~ written notice of the contemplated sale, including the identity of the purchaser ~~and any proposed change in the terms of future representation~~, and must be told that the decision to consent or make other arrangements must be made within 30 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[9] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice. The notice to clients must advise clients that they have a right to retain a lawyer other than the purchaser. In addition, the notice must inform clients that their right to counsel of their choice continues after the sale even though they consent to the transfer of the representation to the purchaser.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser~~, unless the client consents after consultation. The purchaser may, however, advise the client that the purchaser will not undertake the representation unless the client consents to pay the higher fees the purchaser usually charges. To prevent client financing of the sale, the higher fee the purchaser may charge must not exceed the fees charged by the purchaser for substantially similar service rendered prior to the initiation of the purchase negotiations~~.

~~[11] The purchaser may not intentionally fragment the practice which is the subject of the sale by charging significantly different fees in substantially similar matters. Doing so would make it possible for the purchaser to avoid the obligation to take over the entire practice by charging arbitrarily higher fees for less lucrative matters, thereby increasing the likelihood that those clients would not consent to the new representation.~~

Other Applicable Ethical Standards

~~[12]~~ [11] Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure ~~client~~ the client's informed consent ~~after consultation~~ for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

~~[13]~~ [12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

~~[14]~~ [13] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this

Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

~~[15]~~ [14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

~~[16]~~ [15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(1) the disqualified lawyer is timely screened from any participation in the matter; and

(2) written notice is promptly given to the prospective client.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to

proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, nor does it specifically prohibit the receipt of a part of the fee from the screened matter. However, Rule 8.4(c) prohibits the screened lawyer from participating in the fee if such participation was impliedly or explicitly offered as an inducement to the lawyer to become associated with the firm.

[8] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the client, a reasonable delay may be justified.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15. For the special considerations when a prospective client has diminished capacity, see Rule 1.14.

Rule ~~1.18~~ 1.19 SEXUAL RELATIONS WITH CLIENTS PROHIBITED

(a) A lawyer shall not have sexual relations with a current client of the lawyer.

(b) Paragraph (a) shall not apply if a consensual sexual relationship existed between the lawyer and the client before the legal representation commenced.

(c) A lawyer shall not require or demand sexual relations with a client incident to or as a condition of any professional representation.

(d) For purposes of this rule, "sexual relations" means:

(1) Sexual intercourse; or

(2) Any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate

parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.

(e) For purposes of this rule, "lawyer" means any lawyer who assists in the representation of the client but does not include other lawyers in a firm who provide no such assistance.

Comment

[1] Rule 1.7, the general rule on conflict of interest, has always prohibited a lawyer from representing a client when the lawyer's ability ~~to~~ competently to represent the client may be impaired by the lawyer's other personal or professional commitments. Under the general rule on conflicts and the rule on prohibited transactions (Rule 1.8), relationships with clients, whether personal or financial, that affect a lawyer's ability to exercise his or her independent professional judgment on behalf of a client are closely scrutinized. The rules on conflict of interest have always prohibited the representation of a client if a sexual relationship with the client presents a significant danger to the lawyer's ability to represent the client adequately. The present rule clarifies that a sexual relationship with a client is damaging to the client-lawyer relationship and creates an impermissible conflict of interest ~~which~~ that cannot be ameliorated by the consent of the client.

Exploitation of the Lawyer's Fiduciary Position

[2] The relationship between a lawyer and client is a fiduciary relationship in which the lawyer occupies the highest position of trust and confidence. The relationship is also inherently unequal. The client comes to a lawyer with a problem and puts his or her faith in the lawyer's special knowledge, skills, and ability to solve the client's problem. The same factors that led the client to place his or her trust and reliance in the lawyer also have the potential to place the lawyer in a position of dominance and the client in a position of vulnerability.

[3] A sexual relationship between a lawyer and a client may involve unfair exploitation of the lawyer's fiduciary position. Because of the dependence that so often characterizes the attorney-client relationship, there is a significant possibility that a sexual relationship with a client resulted from the exploitation of the lawyer's dominant position and influence. Moreover, if a lawyer permits the otherwise benign and even recommended client reliance and trust to become the catalyst for a sexual relationship with a client, the

lawyer violates one of the most basic ethical obligations; i.e., not to use the trust of the client to the client's disadvantage. This same principle underlies the rules prohibiting the use of client confidences to the disadvantage of the client and the rules that seek to ensure that lawyers do not take financial advantage of their clients. *See* Rules 1.6 and 1.8.

Impairment of the Ability to Represent the Client Competently

[4] A lawyer must maintain his or her ability to represent a client dispassionately and without impairment to the exercise of independent professional judgment on behalf of the client. The existence of a sexual relationship between lawyer and client, under the circumstances proscribed by this rule, presents a significant danger that the lawyer's ability to represent the client competently may be adversely affected because of the lawyer's emotional involvement. This emotional involvement has the potential to undercut the objective detachment that is demanded for adequate representation. A sexual relationship also creates the risk that the lawyer will be subject to a conflict of interest. For example, a lawyer who is sexually involved with his or her client risks becoming an adverse witness to his or her own client in a divorce action where there are issues of adultery and child custody to resolve. Finally, a blurred line between the professional and personal relationship may make it difficult to predict to what extent client confidences will be protected by the attorney-client privilege in the law of evidence since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship.

No Prejudice to Client

[5] The prohibition upon representing a client with whom a sexual relationship develops applies–regardless of the absence of a showing of prejudice to the client and regardless of whether the relationship is consensual.

Prior Consensual Relationship

[6] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are not present when the sexual relationship exists prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should be confident that his or her ability to represent the client competently will not be impaired.

No Imputed Disqualification

[7] The other lawyers in a firm are not disqualified from representing a client with whom the lawyer has become intimate. The potential impairment of the lawyer's ability to exercise independent professional judgment on behalf of the client with whom he or she is having a sexual relationship is specific to that lawyer's representation of the client and is unlikely to affect the ability of other members of the firm to competently and dispassionately represent the client.

Rule 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent, professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but also to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations such as cost or effects on other people are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve prob-

lems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer ~~act~~ offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

RULE 2.2 ~~Intermediary~~ Reserved

~~(a) A lawyer may act as intermediary between clients if:~~

~~(1) the lawyer adequately discloses to each client the implication of the common representation, including the advantages and risks involved and the effect on the attorney client privileges and confidentiality, and obtains each client's consent to the common representation;~~

~~(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter, and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and~~

~~(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.~~

~~(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considera-~~

~~tions relevant in making them so that each client can make adequately informed decisions.~~

~~(c) A lawyer shall withdraw as intermediary if any of the clients so requests or if any of the conditions stated in paragraph (a) are no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.~~

~~**Comment**~~

~~[1] A lawyer acts as intermediary under this rule when the lawyer represents two or more parties with potentially conflicting interests. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship.~~

~~[2] The rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role, the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association.~~

~~[3] A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate, or mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication, or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.~~

~~[4] In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails, the result an be additional cost, embarrassment, and recrimination.~~

~~In some situations, the risk of failure is so great that intermediation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.~~

~~[5] The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.~~

~~Confidentiality and Privilege~~

~~[6] A particularly important factor in determining the appropriateness of intermediation is the effect on client lawyer confidentiality and the attorney client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. *See* Rules 1.4 and 1.6. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney client privilege, the prevailing rule is that as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.~~

~~[7] Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.~~

~~Consultation~~

~~[8] In acting as intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so~~

~~and proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances. The lawyer should explain to the clients the effect of the common representation upon the lawyer's duty of confidentiality and the attorney-client privilege. The lawyer should also disclose that the lawyer must withdraw from the representation of both clients in the event that their interests prove to be in irreconcilable conflict.~~

~~[9] Paragraph (b) is an application of the principle expressed in Rule 1.4. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.~~

~~Withdrawal Client~~

~~[10] Common representation does not diminish the rights of each client in the client-lawyer relationship. Each has the right to loyal and diligent representation, the right to discharge the lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning obligations to a former client.~~

RULE 2.3: EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) the client so requests or the client consents after consultation

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Comment

Definition

[1] An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion

concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

~~[2] Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client but for the purpose of establishing the limits of the agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.~~

~~[3]~~ [2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duty to Third Person

~~[4]~~ [3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation,

particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

~~[5]~~ [4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

Financial Auditors' Requests for Information

~~[6]~~ [5] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

RULE 2.4: LAWYER SERVING AS THIRD-PARTY NEUTRAL

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Rules of the North Carolina Supreme Court for the Dispute Resolution Commission and the North Carolina Canons of Ethics for Arbitrators.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

RULE 3.1: MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the ~~client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or, if the~~ lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a crim-

inal matter to the assistance of counsel in presenting a claim that otherwise would be prohibited by this Rule.

RULE 3.2: EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Comment

[1] Dilatory practices bring the administration of justice into disrepute. ~~Delay should not be indulged merely for the convenience of the advocates, or~~ Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

~~(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;~~

(3) (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

~~(4)~~ (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

~~(b)~~ (c) The duties stated in ~~paragraph~~ paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

~~(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.~~

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

~~[1]~~ [2] ~~The advocate's task is~~ This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. ~~However~~ Consequently, ~~an advocate does~~ although a lawyer in an adjudicative proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause~~;~~, the lawyer must not allow the tribunal ~~is responsible for assessing its probative value~~ to be misled by false statements of material fact or law or evidence that the lawyer knows to be false.

Representations by a Lawyer

~~[2]~~ [3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have per-

sonal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

~~Misleading~~ Legal Argument

~~[3]~~ [4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)~~(3)~~(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction ~~which~~ that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

~~False~~ Offering Evidence

~~[4] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes. A lawyer who receives information clearly establishing that a person other than the client has perpetrated fraud upon a tribunal, shall promptly reveal the fraud to the tribunal.~~

~~[5] When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.~~

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's

wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. See Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

~~Refusing to Offer Proof Believed to Be False~~

~~[13]~~ [9] ~~Generally speaking,~~ Although paragraph (a)(3) only prohibits a lawyer ~~has authority~~ from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is ~~untrustworthy~~ false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. ~~In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.~~ Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

~~Perjury by a Criminal Defendant~~

[6] ~~Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, the confrontation with the client does not take place until the trial itself, or no other counsel is available.~~

[7] ~~The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.~~

~~[8] Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.~~

[9] ~~The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).~~

Remedial Measures

[10] ~~If perjured testimony or false~~ Having offered material evidence ~~has been offered~~ in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called

by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The lawyer's action must also be seasonable: depending upon the circumstances, reasonable remedial measures do not have to be undertaken immediately, however, the lawyer must act before a third party relies to his or her detriment upon the false testimony or evidence. The advocate's proper course ~~ordinarily~~ is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal from the representation is not permitted or will not ~~remedy the situation or is impossible~~ undo the effect of the false evidence, the ~~advocate may~~ advocate's only option may be to make such disclosure to the ~~court~~ tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. ~~In the event of such disclosure,~~ It is for the ~~court~~ tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. ~~If the false testimony was that of the client, the client may controvert the lawyer's version of their communication if the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.~~

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Constitutional Requirements

[13] ~~[11]~~ The general rule that an advocate must reveal the existence of perjury with respect to a material fact—even that of a client—applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation ~~when serving as defense counsel in a criminal case~~ may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. These provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Duration of Obligation

[14] ~~[12]~~ A practical time limit on the obligation to rectify ~~the presentation of~~ false evidence or false statements of material fact or law has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when no matters in the proceeding are still pending before the tribunal or the proceeding has concluded pursuant to the rules of the tribunal such as when a final judgment in the proceeding is affirmed on appeal, a bankruptcy case is closed, or the time for review has passed.

Ex Parte Proceedings

[15] ~~[14]~~ Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding,

such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[16] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, counsel or assist a witness to hide or leave the jurisdiction for the purpose of being unavailable as a witness, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey or advise a client to disobey ~~a rule or ruling~~ an obligation under the rules of a tribunal, except a lawyer acting in good faith may take appropriate steps to test the validity of such ~~a rule or ruling~~ an obligation;

(d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, ask an irrelevant question that is intended to degrade a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or a managerial employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms per-

mitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Paragraph (c) permits a lawyer to take steps in good faith and within the framework of the law to test the validity of rules; however, the lawyer is not justified in consciously violating such rules and the lawyer should be diligent in the effort to guard against the unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that the lawyer believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless the lawyer believes that the statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing the witness; and a lawyer should not, by subterfuge, put before a jury matters which it cannot properly consider.

[5] ~~In order~~ To bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, and as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact and is prohibited by paragraph (e). However, a lawyer may argue, on an analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

[6] Paragraph (f) permits a lawyer to advise managerial employees of a client to refrain from giving information to another party because the statements of employees with managerial responsibility may be imputed to the client. See also Rule 4.2.

RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(a) A lawyer shall not:

(1) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;

(2) communicate *ex parte* with a juror or prospective juror except as permitted by law;

(3) communicate *ex parte* with a judge or other official except:

(A) in the course of official proceedings;

(B) in writing, if a copy of the writing is furnished simultaneously to the opposing party;

(C) orally, upon adequate notice to opposing party; or

(D) as otherwise permitted by law;

(4) engage in conduct intended to disrupt a tribunal, including:

(A) failing to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving opposing counsel timely notice of the intent not to comply;

(B) engaging in undignified or discourteous conduct that is degrading to a tribunal; or

(C) intentionally or habitually violating any established rule of procedure or evidence; or

(5) communicate with a juror or prospective juror after discharge of the jury if:

(A) the communication is prohibited by law or court order;

(B) the juror has made known to the lawyer a desire not to communicate; or

(C) the communication involves misrepresentation, coercion, duress or harassment.

~~after discharge of the jury, ask questions of or make comments to a juror that are calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service.~~

(b) All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a ~~venireman or~~ a juror or a prospective juror.

(c) A lawyer shall reveal promptly to the court improper conduct by a ~~venireman or a~~ juror or a prospective juror, or by another toward ~~a venireman,~~ a juror, a prospective juror or a member of a juror or a prospective juror's ~~his or her~~ family ~~of which the lawyer has knowledge~~.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the North Carolina Code of Judicial Conduct, with which an advocate should be famil-

iar. A lawyer is required to avoid contributing to a violation of provisions. This rule also prohibits gifts of substantial value to judges or other officials of a tribunal and stating or implying an ability to influence improperly a public official.

[2] To safeguard the impartiality that is essential to the judicial process, ~~veniremen and~~ jurors and prospective jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with prospective jurors ~~veniremen~~ prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with ~~a venireman or~~ a juror or a prospective juror about the case.

[3] After the jury has been discharged ~~the trial~~, a lawyer may communicate with a juror unless the communication is prohibited by law or court order. ~~communication by a lawyer with a juror is permitted so long as~~ The lawyer must refrain~~s~~ from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases, and must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication. ~~Were a lawyer to be prohibited from communicating after trial with a juror, the lawyer could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.~~

[4] ~~[3]~~ Vexatious or harassing investigations of ~~veniremen or~~ jurors or prospective jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on the lawyer's behalf who conducts an investigation of ~~veniremen or~~ jurors or prospective jurors should act with circumspection and restraint.

[5] ~~[4]~~ Communications with, or investigations of, members of families of ~~veniremen or~~ jurors or prospective jurors by a lawyer or by anyone on the lawyer's behalf are subject to the restrictions imposed upon the lawyer with respect to the lawyer's communications with, or investigations of, ~~veniremen and~~ jurors or prospective jurors.

[6] ~~[5]~~ Because of the duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or

towards ~~a venireman,~~ a juror, a prospective juror, or a member of the family of either should make a prompt report to the court regarding such conduct.

[7] ~~[6]~~ The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal.

[8] ~~[7]~~ All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if unrepresented. Ordinarily, an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel or, if there is none, to the opposing party. A lawyer should not condone or lend himself or herself to private importunities by another with a judge or hearing officer on behalf of the lawyer or the client.

[9] ~~[8]~~ The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[10] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

RULE 3.6: TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that ~~a reasonable person would expect to~~ the lawyer knows or reasonably should know will be disseminated by means of public communication ~~if there is a reasonable likelihood that the statement~~ and will have a substantial likelihood of materially ~~prejudice~~ prejudicing an adjudicative proceeding in the matter.

~~(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:~~

~~(1) the character, credibility, or reputation of a party, suspect in a criminal investigation, or witness, or the identity of a witness, or the expected testimony of a party or witness;~~

~~(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense, or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;~~

~~(3) the performance or results of any examination or test, the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;~~

~~(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or~~

~~(5) information the lawyer knows, or reasonably should know, is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial.~~

(b) ~~(c)~~ Notwithstanding paragraph (a) ~~and (b)(1-5)~~, a lawyer ~~involved in the investigation or litigation of a matter~~ may state ~~without elaboration~~:

(1) the ~~general nature of the~~ claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of a matter is in progress~~, including the general scope of the investigation, the offense or claim, or defense involved and, except when prohibited by law, the identity of the persons involved~~;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(A) the identity, residence, occupation and family status of the accused;

(B) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(C) the fact, time and place of arrest; and

(D) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is reasonably necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

(e) ~~(d)~~The foregoing provisions of Rule 3.6 do not preclude a lawyer from replying to charges of misconduct publicly made against the lawyer or from participating in the proceedings of legislative, administrative, or other investigative bodies.

~~(e) A lawyer shall exercise reasonable care to prevent the lawyer's employees from making an extrajudicial statement that the lawyer would be prohibited from making under this rule.~~

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by

the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

RULE 3.7: LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness ~~except where~~ unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the

lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The ~~principle of imputed disqualification~~ conflict of interest principles stated in ~~Rule~~ Rules 1.7, 1.9 and 1.10 ~~has~~ have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

~~[5]~~ [6] ~~Whether the combination of roles involves an improper~~ In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest ~~with respect to the client is determined by Rule~~ that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer ~~or a member of the lawyer's firm~~, the representation ~~is improper~~ involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See ~~Comment to~~ Rule 1.7. ~~If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.~~ See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is

associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

~~(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.~~

~~(f)~~ (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client, or participate in the application for the issuance of a search warrant to a lawyer for the seizure of information of a past or present client in connection with an investigation of someone other than the lawyer, unless:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information~~;~~ ~~and~~

~~(g)~~ (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. *See* the ABA Standards of Criminal Justice Relating to the Prosecution Function. A systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] The prosecutor represents the sovereign and, therefore, should use restraint in the discretionary exercise of government powers, such as in the selection of cases to prosecute. During trial, the prosecutor is not only an advocate, but he or she also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all. In our system of criminal justice, the accused is to be given the benefit of all reasonable doubt. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence known to him or her that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused.

[3] Paragraph (c) does not apply, however, to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of ~~a~~ an uncharged suspect who has knowingly waived the rights to counsel and silence.

[4] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[5] Paragraph ~~(f)~~ (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings, and search warrants for client information, to those situations in which there is a genuine need to intrude into the client-lawyer relationship. The provision applies only when someone other than the lawyer is the target of a criminal investigation.

[6] Paragraph ~~(g)~~ (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[7] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law- enforcement personnel and other relevant individuals.

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by ~~failure to act~~ partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. Rule 1.6(b)(1) permits a lawyer to disclose information when required by law. Similarly, Rule 1.6(b)(4) permits a lawyer to disclose information when necessary to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used.

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) During the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law ~~to do so~~ or a court order. It is not a violation of this rule for a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good-faith attempt to resolve the controversy.

(b) Notwithstanding section (a) above, in representing a client who has a dispute with a government agency or body, a lawyer may communicate about the subject of the representation with the elected officials who have authority over such government agency or body even if the lawyer knows that the government agency or body is represented by another lawyer in the matter, but such communications may only occur under the following circumstances:

(1) in writing, if a copy of the writing is promptly delivered to opposing counsel;

(2) orally, upon adequate notice to opposing counsel; or

(3) in the course of official proceedings.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

~~[1]~~ [2] This Rule does not prohibit a lawyer who does not have a client relative to a particular matter from consulting with a person or entity who, though represented concerning the matter, seeks another opinion as to his or her legal situation. A lawyer from whom such an opinion is sought should, but is not required to, inform the first lawyer of his or her participation and advice.

~~[2]~~ [3] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either

from communicating with nonlawyer representatives of the other regarding a separate matter. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[4] A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). However, parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client or, in the case of a government lawyer, investigatory personnel, concerning a communication that the client, or such investigatory personnel, is legally entitled to make. ~~The purpose of this Rule is to prohibit a lawyer, or the lawyer's agents, from undermining an opponent's client lawyer relationship through direct contact with a client in the absence of opposing counsel. Nothing herein~~ The Rule is not intended to discourage good faith efforts by individual parties to resolve their differences. Nor does the Rule prohibit a lawyer from encouraging a client to communicate with the opposing party with a view toward the resolution of ~~their~~ the dispute.

~~[3]~~ [5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. ~~This rule does not prohibit a lawyer from lobbying elected officials on behalf of a client where the government body upon which the elected official serves is not an opposing party in the particular matter. Communications authorized by law include the right of a party to a controversy with a government agency to speak with government officials about the matter. Even~~ When ~~the~~ a government agency or body is represented ~~by a lawyer~~ with regard to a particular matter, a lawyer may communicate with the elected government officials who have authority over that agency under the circumstances set forth in paragraph (b).

[6] Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[7] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer

may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

~~[6]~~ [8] This Rule ~~also~~ applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates. The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

~~[5]~~ [9] ~~After a lawyer for another person or entity has been notified that an organization is represented by counsel in a particular matter~~, In the case of a represented organization, this Rule ~~would~~ prohibits communications ~~by the lawyer concerning the matter~~ with ~~persons having managerial responsibility on behalf~~ a constituent of the organization ~~and with any other person~~ who supervises, directs or consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability ~~or whose statement may constitute an admission on the part of the organization~~. It also prohibits communications with any constituent of the organization, regardless of position or level of authority, who is participating or participated substantially in the legal representation of the organization in a particular matter. Consent of the organization's lawyer is not required for communication with a former constituent unless the former constituent participated substantially in the legal representation of the organization in the matter. If an employee or agent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication would be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4, Comment [2].

[10] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the repre-

sentation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[11] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

RULE 4.3: DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

(a) give legal advice to the person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client; and

(b) state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. ~~During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.~~ To avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that

the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a writing and knows or reasonably should know that the writing was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] This Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. See Rule 1.0(o) for the definition of "writing."

RULE 5.1: RESPONSIBILITIES OF ~~A PARTNER OR~~ PARTNERS, MANAGERS, AND SUPERVISORY ~~LAWYER~~ LAWYERS

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority, shall make reasonable efforts to ensure that the firm or the organization has in effect measures giving reasonable assurance that all lawyers in the firm or the organization conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A ~~partner or supervisory~~ lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

Comment

[1] ~~Paragraphs~~ Paragraph (a) ~~and (b) refer~~ applies to lawyers who have ~~supervisory~~ managerial authority over the professional work of a firm or legal department of an organization ~~a government agency~~. See Rule 1.0(c). This includes members of a partnership ~~and~~, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having ~~supervisory~~ comparable managerial authority in ~~the~~ a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm or organization.

[2] Paragraph (a) requires lawyers with managerial authority within a firm or organization to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm or organization will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

~~[2]~~ [3] ~~The~~ Other measures that may be required to fulfill the responsibility prescribed in ~~paragraphs~~ paragraph (a) ~~and (b)~~ can depend on the firm's or organization's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and ~~occasional admonition~~ periodic review of compliance with the required systems ordinarily ~~might be sufficient~~ will suffice. In a large firm or organization, or in practice situations in which ~~intensely~~ difficult ethical problems frequently arise, more elaborate ~~proce-~~

~~dures~~ measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms and organizations, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm or organization can influence the conduct of all its members and ~~a lawyer having authority over the work of another~~ the partners and managing lawyers may not assume that ~~the subordinate lawyer~~ all lawyers associated with the firm or organization will inevitably conform to the Rules.

~~[3]~~ [4] Paragraph (c)~~(1)~~ expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

~~[4]~~ [5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners ~~of a private firm~~ and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has ~~direct authority over~~ supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of ~~the partner's~~ that lawyer's involvement and the seriousness of the misconduct. ~~The~~ A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

~~[5]~~ [6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

~~[6]~~ [7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Moreover, this Rule is not intended to establish a standard for vicarious criminal or civil liability for the acts of another lawyer. Whether a lawyer may be liable civilly or criminally for

another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

RULE 5.2: RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or organization shall make reasonable efforts to ensure that the firm or organization has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm or organization in which the person is employed, or has direct supervisory authority over the nonlawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

Comment

[1] Lawyers generally employ assistants ~~nonlawyers~~ in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants ~~nonlawyers~~, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer ~~should~~ must give such assistants ~~nonlawyers~~ appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm or organization to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority

over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[3] ~~[2]~~ A lawyer who discovers that a nonlawyer has wrongfully misappropriated money from the lawyer's trust account must inform the North Carolina State Bar pursuant to Rule 1.15-2~~(l)~~(o)

RULE 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, ~~or~~ disabled, or disappeared lawyer ~~who had disappeared~~ may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; ~~and~~

(3) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer or a disbarred lawyer may pay to the estate of the deceased lawyer or to the disbarred lawyer that ~~pro~~portion of the total compensation ~~which~~ that fairly represents the services rendered by the deceased lawyer or the disbarred lawyer; ~~and~~

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, ~~employs~~, engages, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; or

(2) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

~~[2]~~ [3] Although a nonlawyer may serve as a director or officer of a professional corporation organized to practice law if permitted by law, such a nonlawyer director or officer may not have the authority to direct or control the conduct of the lawyers who practice with the firm.

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction if the lawyer's conduct is in accordance with these Rules and:

(1) the lawyer is authorized by law or order to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; or

(2) other than engaging in conduct governed by paragraph (1):

(A) the lawyer provides legal services to the lawyer's employer or its organizational affiliates and the services are not services for which pro hac vice admission is required; a lawyer acting pursuant to this paragraph is not subject to the prohibition in Paragraph (b)(1);

(B) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice;

(C) the lawyer acts with respect to a matter that is in or is reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission is required;

(D) the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation; or

(E) the lawyer is providing services limited to federal , international law, the law of a foreign jurisdiction or the law of the jurisdiction in which the lawyer is admitted to practice.

~~(b)~~ (d) A lawyer shall not assist ~~a~~ another person ~~who is not a member of the bar~~ in ~~the performance of activity that constitutes~~ the unauthorized practice of law.

~~(c)~~ (e) A lawyer or law firm shall not employ a disbarred or suspended lawyer as a law clerk or legal assistant if that individual was associated with such lawyer or law firm at any time on or after the

date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

~~(d)~~ (f) A lawyer or law firm employing a disbarred or suspended lawyer as a law clerk or legal assistant shall not represent any client represented by the disbarred or suspended lawyer or by any lawyer with whom the disbarred or suspended lawyer practiced during the period on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

Comment

[1] A lawyer may regularly practice law only in a jurisdiction in which the lawyer is admitted to practice. The practice of law in violation of lawyer-licensing standards of another jurisdiction constitutes a violation of these Rules. This Rule does not restrict the ability of lawyers authorized by federal statute or other federal law to represent the interests of the United States or other persons in any jurisdiction.

[2] There are occasions in which lawyers admitted to practice in another jurisdiction, but not in this jurisdiction, will engage in conduct in this jurisdiction under circumstances that do not create significant risk to the interests of their clients, the courts or the public. Paragraph (c) identifies five situations in which the lawyer may engage in such conduct without fear of violating this Rule. All such conduct is subject to the duty of competent representation. See Rule 1.1. Rule 5.5 does not address the question of whether other conduct constitutes the unauthorized practice of law. The fact that conduct is not included or described in this Rule is not intended to imply that such conduct is the unauthorized practice of law. With the exception of paragraph (c)(2)(A), nothing in this Rule is intended to authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice here. Presence may be systematic and continuous even if the lawyer is not physically present in this jurisdiction. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b). However, a lawyer admitted to practice in another jurisdiction who is a partner, shareholder or employee of an interstate or international law firm that is registered with the North Carolina State Bar pursuant to 27 NCAC 1E, Section .0200, may practice, subject to the limitations of this Rule, in the North Carolina offices of such law firm.

[3] Lawyers not admitted to practice generally in the jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before a the tribunal or agency. Such authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(1), a lawyer does not violate this Rule when the lawyer appears before such a tribunal or agency. Nor does a lawyer violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing, such as factual investigations and discovery conducted in connection with a litigation or administrative proceeding, in which an out-of-state lawyer has been admitted or in which the lawyer reasonably expects to be admitted. Nothing in paragraph (c)(1) is intended to authorize a lawyer not licensed in this jurisdiction to solicit clients in this jurisdiction.

[4] When lawyers appear or anticipate appearing before a tribunal or administrative agency with authority to admit the lawyer to practice pro hac vice, their conduct is governed by paragraphs (a) and (c)(1) and not by (c)(2). Paragraph (c)(2) authorizes a lawyer to engage in certain conduct other than making or preparing for appearances before such a tribunal. For example, paragraph (c)(2)(A) recognizes that some clients hire a lawyer as an employee in circumstances that may make it impractical for the lawyer to become admitted to practice in this jurisdiction. Given that these clients are unlikely to be deceived about the training and expertise of these lawyers, lawyers may act on behalf of such a client without violating this Rule. The lawyer may also act on behalf of the client's commonly owned organizational affiliates but only in connection with the client's matters.

[5] Paragraph (c)(2)(B) recognizes that the complexity of many matters requires that a lawyer whose representation of a client consists primarily of conduct in a jurisdiction in which the lawyer is admitted to practice, also be permitted to act on the client's behalf in other jurisdictions in matters arising out of or otherwise reasonably related to the lawyer's representation of the client. This conduct may involve negotiations with private parties, as well as negotiations with government officers or employees, and participation in alternative dispute-resolution procedures. This provision also applies when a lawyer is conducting witness interviews or other activities in this jurisdiction in preparation for a litigation or other proceeding that will occur in another jurisdiction where the lawyer is either admitted generally or expects to be admitted pro hac vice.

[6] Paragraph (c)(2)(C) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[7] Paragraph (c)(2)(D) recognizes that association with a lawyer licensed to practice in this jurisdiction is likely to protect the interests of both clients and the public. The lawyer admitted to practice in this jurisdiction, however, may not serve merely as a conduit for an out-of-state lawyer but must actively participate in and share actual responsibility for the representation of the client. If the admitted lawyer's involvement is merely pro forma, then both lawyers are subject to discipline under this Rule.

~~[1]~~ [8] The definition of the practice of law is established by G.S. § 84-2.1. Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph ~~(b)~~ (d) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[9] ~~Likewise, it does not prohibit lawyers from providing~~ Lawyers may also provide professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

~~[2]~~ [10] In the absence of statutory prohibitions or specific conditions placed on a disbarred or suspended attorney in the order revoking or suspending the license, such individual may be hired to perform the services of a law clerk or legal assistant by a law firm with which he or she was not affiliated at the time of or after the acts resulting in discipline. Such employment is, however, subject to certain restrictions. A licensed attorney in the firm must take full responsibility for, and employ independent judgment in, adopting any research, investigative results, briefs, pleadings, or other documents or instruments drafted by such individual. The individual may

not directly advise clients or communicate in person or in writing in such a way as to imply that he or she is acting as an attorney or in any way in which he or she seems to assume responsibility for a client's legal matters. The disbarred or suspended attorney should have no communications or dealings with, or on behalf of, clients represented by such disbarred or suspended attorneys or by any individual or group of individuals with whom he or she practiced during the period on or after the date of the acts which resulted in discipline through and including the effective date of the discipline. Further, the employing attorney or law firm should perform no services for clients represented by the disbarred or suspended attorney during such period. Care should be taken to ensure that clients fully understand that the disbarred or suspended attorney is not acting as an attorney, but merely as a law clerk or lay employee. Under some circumstances, as where the individual may be known to clients or in the community, it may be necessary to make an affirmative statement or disclosure concerning the disbarred or suspended attorney's status with the law firm. Additionally, a disbarred or suspended attorney should be paid on some fixed basis, such as a straight salary or hourly rate, rather than on the basis of fees generated or received in connection with particular matters on which he or she works. Under these circumstances, a law firm employing a disbarred or suspended attorney would not be acting unethically and would not be assisting a nonlawyer in the unauthorized practice of law.

~~[3]~~ [11] An attorney or law firm should not employ a disbarred or suspended attorney who was associated with such attorney or firm at any time on or after the date of the acts which resulted in the disbarment or suspension through and including the time of the disbarment or suspension. Such employment would show disrespect for the court or body which disbarred or suspended the attorney. Such employment would also be likely to be prejudicial to the administration of justice and would create an appearance of impropriety. It would also be practically impossible for the disciplined lawyer to confine himself or herself to activities not involving the actual practice of law if he or she were employed in his or her former office setting and obliged to deal with the same staff and clientele.

RULE 5.6: RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not ~~be a party to, or~~ participate in offering or making:

(a) a partnership ~~or~~, shareholders, operating, employment, or other similar type of agreement ~~with another lawyer or law firm~~ that

restricts the right of a lawyer to practice after termination of the relationship ~~created by the agreement~~, except ~~as a condition to payment of retirement benefits~~ an agreement concerning benefits upon retirement; or

(b) ~~In connection with the settlement of a controversy or suit, a lawyer shall not enter into~~ an agreement ~~that restricts his or her~~ in which a restriction on the lawyer's right to practice ~~law~~ is part of the settlement of a controversy between private parties.

Comment

[1] An agreement restricting the right of ~~partners or associates~~ lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

RULE 5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Comment

[1] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[2] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[3] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[4] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in Rule 5.7(a)(1).

[5] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-

lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[6] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[7] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[8] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[9] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7~~(b)~~(a)(2) and 1.8(a), (b) and (f)), and scrupulously to adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

RULE 6.1: Reserved

RULE 6.2: Reserved

RULE 6.3: MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services orga-

nization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

RULE 6.4: LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration not withstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Comment

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer ~~specializing~~ concentrating in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefited.

RULE 6.5: LIMITED LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Comment

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services—such as advice or the completion of legal forms—that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participat-

ing lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

RULE ~~6.5~~ 6.6: ACTION AS A PUBLIC OFFICIAL

A lawyer who holds public office shall not:

(a) use his or her public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or herself or for a client under circumstances where the lawyer knows, or it is obvious, that such action is not in the public interest;

(b) use his or her public position to influence, or attempt to influence, a tribunal to act in favor of himself or herself or his or her client; or

(c) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

Comment

[1] Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part time, should not engage in activities in which the lawyer's personal or professional interests are or foreseeably may be in conflict with his or her official duties.

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

(a) 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:

(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;

(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

(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.

Comment

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them ~~should~~ must be truthful. ~~The prohibition in paragraph (b) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.~~

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated

comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

RULE 7.2: ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through ~~public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or other~~ written ~~or,~~ recorded or electronic communication, including public media.

~~(b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.~~

~~(d)~~ (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule; or

(2) pay the usual charges of a not-for-profit lawyer referral service that complies with Rule 7.2(d), or a prepaid or group legal services plan that complies with Rule 7.3(d); and

~~(2)~~ (3) pay for a law practice in accordance with Rule 1.17.

(c) Any communication made pursuant to this rule, other than that of a lawyer referral service as described in paragraph ~~(e)~~ (d), shall include the name and office address of at least one lawyer or law firm responsible for its content.

(e) (d) A lawyer may participate in a lawyer referral service subject to the following conditions:

(1) the lawyer is professionally responsible for its operation including the use of a false, deceptive, or misleading name by the referral service;

(2) the referral service is not operated for a profit;

(3) the lawyer may pay to the lawyer referral service only a reasonable sum which represents a proportionate share of the referral service's administrative and advertising costs;

(4) the lawyer does not directly or indirectly receive anything of value other than legal fees earned from representation of clients referred by the service;

(5) employees of the referral service do not initiate contact with prospective clients and do not engage in live telephone or in-person solicitation of clients;

(6) the referral service does not collect any sums from clients or potential clients for use of the service; and

(7) all advertisements by the lawyer referral service shall:

(A) state that a list of all participating lawyers will be mailed free of charge to members of the public upon request and state where such information may be obtained; and

(B) explain the method by which the needs of the prospective client are matched with the qualifications of the recommended lawyer.

Comment

[1] To assist the public in obtaining legal services, lawyers are permitted to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, ~~lawyers should be aware that~~ advertising by lawyers may entails the risk of practices that are misleading or overreaching~~, deceptive, coercive, intimidating, or vexatious~~.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign

language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.1(b) for the disclaimer required in any advertisement that contains a dramatization. Electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

~~[3]~~ [4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

~~Record of Advertising~~

~~[5] Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination.~~

Paying Others to Recommend a Lawyer

[5] ~~A lawyer is allowed to pay for advertising permitted by this Rule and for the purchase of a law practice in accordance with the provisions of Rule 1.17, but otherwise is~~ Lawyers are not permitted to pay ~~another person~~ others for channeling professional work. ~~This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not for profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (d) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.~~ Paragraph (b)(1), however, allows a lawyer to pay for advertising and commu-

nications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] A lawyer may ~~participate in~~ pay the usual charges of a prepaid or group legal services plan or a not-for-profit ~~a~~ lawyer referral service ~~that is not operated for a profit and pay the usual fees charged by such programs~~. A legal services plan is defined in Rule 7.3(d). Such a plan assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit lawyer referral service.

[7] A lawyer who accepts assignments or referrals from a prepaid or group legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Any lawyer who participates in a legal services plan or lawyer referral service is professionally responsible for the operation of the service in accordance with these rules regardless of the lawyer's knowledge, or lack of knowledge, of the activities of the service. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. ~~The service may not charge potential clients a fee and employees of the service may not engage in telephone or in person solicitation of clients.~~ The term "referral" implies that some attempt is made to match the needs of the prospective client with the qualifications of the recommended

lawyer. To avoid misrepresentation, paragraph ~~(c)~~ (d)(7)(B) requires that every advertisement for the service must include an explanation of the method by which a prospective client is matched with the lawyer to whom he or she is referred. In addition, the lawyer may not allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

RULE 7.3: DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not by in-person ~~or,~~ live telephone or real-time electronic contact solicit professional employment from a prospective client ~~with whom the lawyer has no family or prior professional relationship~~ when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written ~~or,~~ recorded or electronic communication or by in-person ~~or,~~ telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress, harassment, compulsion, intimidation, or threats.

(c) Every written ~~or,~~ recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter~~, and with whom the lawyer has no family or prior professional relationship,~~ shall include the words "This is an advertisement for legal services" on the outside envelope, if a written communication sent by mail, and at the beginning of the body of the written or electronic communication in print as large or larger than the lawyer's or law firm's name, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan subject to the following:

(1) Definition. A prepaid legal services plan or a group legal services plan ("a plan") is any arrangement by which a person, firm, or corporation, not otherwise authorized to engage in the practice of law, in exchange for any valuable consideration, offers to provide or arranges the provision of legal services that are paid for in advance of the need for the service ("covered services"). In addition to covered services, a plan may provide specified legal services at fees that are less than what a non-member of the plan would normally pay. The legal services offered by a plan must be provided by a licensed lawyer who is not an employee, director or owner of the plan. A plan does not include the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee.

(2) Conditions for Participation.

(A) The plan must be operated by an organization that is not owned or directed by the lawyer;

(B) The plan must be registered with the North Carolina State Bar and comply with all applicable rules regarding such plans;

(C) The lawyer must notify the State Bar in writing before participating in a plan and must notify the State Bar no later than 30 days after the lawyer discontinues participation in the plan;

(D) After reasonable investigation, the lawyer must have a good faith belief that the plan is being operated in compliance with the Revised Rules of Professional Conduct and other pertinent rules of the State Bar;

(E) All advertisements by the plan representing that it is registered with the State Bar shall also explain that registration does not constitute approval by the State Bar; and

(F) Notwithstanding the prohibitions in paragraph (a), the plan may use in-person or telephone contact to solicit memberships or subscriptions provided:

(i) The solicited person is not known to need legal services in a particular matter covered by the plan; and

(ii) The contact does not involve coercion, duress, or harassment and the communication with the solicited person is not false, deceptive or misleading.

Comment

[1] There is a potential for abuse inherent in direct in-person ~~or,~~ live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to ~~fully~~ evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[2] This potential for abuse inherent in direct in-person ~~or,~~ live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person ~~or,~~ telephone or real-time electronic persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written ~~and,~~ recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person ~~or,~~ live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 ~~are~~ can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person ~~or,~~ live telephone or real-time electronic conversations between a lawyer ~~to~~ and a prospective client can be disputed and ~~are~~ may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a ~~prior~~ close personal or ~~professional~~ family relationship, or ~~where~~ in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal- service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress, harassment, compulsion, intimidation, or threats within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[7] Paragraph (c) of this rule requires that all direct mail solicitations of prospective clients must be mailed in an envelope on which the statement, "This is an advertisement for legal services,"

appears. Postcards may not be used for direct mail solicitations. The advertising disclosure statement must also appear at the beginning of ~~the~~ an enclosed letter or electronic communication in print at least as large as the print used for the ~~letterhead~~ lawyer's or law firm's name in the letterhead or masthead. The requirement that certain communications be marked, "This is an advertisement for legal services," does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Paragraph (d) of this Rule ~~would permit~~ permits a lawyer ~~an attorney~~ to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization ~~referred to in paragraph (d)~~ must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rule 7.3(d) as well as Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer ~~may~~ shall not ~~communicate~~ state or imply that the lawyer is ~~a certified specialist or~~ certified as a specialist in a field of practice ~~except as provided in this rule~~ unless ~~(c) A lawyer may communicate that the lawyer is certified as a specialist or certified in a field of practice when the communication states the name of the certifying organization and is not false or misleading,~~ :

(1) the certification ~~is~~ was granted by the North Carolina State Bar;

(2) the certification ~~is~~ was granted by an organization ~~which has been approved~~ that is accredited by the North Carolina State Bar; or

(3) the certification ~~is~~ was granted by an organization ~~which has been approved~~ that is accredited by the American Bar Association under procedures and criteria ~~which have been approved by the American Bar Association and which have been~~ endorsed by the North Carolina State Bar; and

(4) the name of the certifying organization is clearly identified in the communication.

Comment

[1] The use of the word "specialize" in any of its variant forms connotes to the public a particular expertise often subject to recognition by the state. Indeed, the North Carolina State Bar has instituted programs providing for official certification of specialists in certain areas of practice. Certification ~~procedures imply~~ signifies that an objective entity has recognized ~~a lawyer's higher~~ an advanced degree of ~~specialized ability~~ knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. ~~Those objective entities should~~ Certifying organizations are expected to apply standards of ~~competence,~~ experience, ~~and~~ knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. To avoid misrepresentation and deception, a lawyer may not communicate that the lawyer has been recognized or certified as a specialist in a particular field of law, except as provided by this rule. The rule requires that ~~any~~ a representation of specialty may be made only if the certifying organization is the North Carolina State Bar, an organization ~~approved~~ accredited by the North Carolina State Bar, or an organization ~~approved~~ accredited by the American Bar Association under procedures approved by the North Carolina State Bar. To insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization or agency must be included in any communication regarding the certification.

[2] A lawyer may, however, describe his or her practice without using the term "specialize" in any manner which is truthful and not misleading. This rule specifically permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a

lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. The lawyer may, for instance, indicate a "concentration" or an "interest" or a "limitation."

[3] Recognition of expertise in patent matters is a matter of long-established policy of the Patent and Trademark Office. A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

RULE 7.5: FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1. A trade name may ~~not~~ be used by a lawyer in private practice if it does not imply ~~implies~~ a connection with a government agency or with a public or charitable legal services organization ~~or~~ and is not false or misleading in violation of Rule 7.1. Every trade name used by a law firm shall be registered with the North Carolina State Bar ~~and, upon~~ for a determination ~~by the council that such~~ of whether the name is ~~potentially~~ misleading.~~, a remedial disclaimer or an appropriate identification of the firm's composition or connection may be required. For purposes of this paragraph, the use of the name of a deceased or retired former member of a firm shall not render the firm name a trade name nor shall the use of such designations as "Law Offices of John Doe," "Smith and Associates," "Jones Law Firm," and the like.~~

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) A law firm maintaining offices only in North Carolina may not list any person not licensed to practice law in North Carolina as a lawyer affiliated with the firm unless the listing properly identifies the jurisdiction in which the lawyer is licensed and states that the lawyer is not licensed in North Carolina.

(d) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm, whether or not the lawyer is precluded from practicing law.

(e) Lawyers may state or imply that they practice in a partnership or other professional organization only when that is the fact.

~~(f) No lawyer may practice in a partnership or other professional organization in which any lawyer not licensed to practice law in North Carolina owns an interest as a partner, shareholder, member, or other similar designation unless law offices are maintained in North Carolina and in a state where such other lawyer is licensed, and a certificate of registration authorizing said professional relationship is first obtained from the secretary of the North Carolina State Bar.~~

Comment

[1] A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity, or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Use of trade names in law practice is acceptable so long as they are not misleading and are otherwise in conformance with the rules and regulations of the State Bar. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. ~~It may be observed that any~~ A firm name ~~including~~ that includes the surname of a deceased or retired partner is, strictly speaking, a trade name. However, the use of such names, as well as ~~such names~~ designations such as "Law Offices of John Doe," ~~and~~ "Smith and Associates," and "Jones Law Firm" ~~to designate law firms, has proven a~~ are useful means of identification and are permissible without registration with the State Bar. However, it is misleading to use the surname of a lawyer not associated with the firm or a predecessor of the firm. It is also misleading to use a designation such as "Smith and Associates" for a solo practice. The name of a retired partner may be used in the name of a law firm only if the partner has ceased the practice of law.

~~[2] It is unlawful for a person trained as an attorney to practice North Carolina law without a North Carolina law license. It is, therefore, misleading for such a person to be listed in the firm letterhead as having any continuing affiliation with the firm unless the law firm actively maintains a law office in a jurisdiction where the lawyer is licensed. If law offices are maintained in another jurisdiction, the law firm is an interstate law firm and must register with the North Carolina State Bar as required by 27 N.C.A.C. 1E, Section .0200.~~

~~[3]~~ [2] This rule does not prohibit the employment by a law firm of a lawyer who is licensed to practice in another jurisdiction, but not in North Carolina, provided the lawyer's practice is limited to areas that do not require a North Carolina law license such as immigration law, federal tort claims, military law, and the like. The lawyer's name may be included in the firm letterhead, provided all communications by such lawyer on behalf of the firm indicate the jurisdiction in which the lawyer is licensed as well as the fact that the lawyer is not licensed in North Carolina. If law offices are maintained in another jurisdiction, the law firm is an interstate law firm and must register with the North Carolina State Bar as required by 27 N.C.A.C. 1E, Section .0200.

~~[4]~~ [3] Nothing in these rules shall be construed to confer the right to practice North Carolina law upon any lawyer not licensed to practice law in North Carolina.

~~[5]~~ [4] With regard to paragraph ~~(c)~~ (d), lawyers sharing office facilities, but who are not in fact ~~partners~~ associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests ~~partnership in the practice of~~ that they are practicing law together in a firm.

RULE 7.6: Reserved

RULE 8.1: BAR ADMISSION AND DISCIPLINARY MATTERS

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Comment

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others.

Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. ~~This~~ Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware. It should also be noted that G.S. Sect. 84-28(b)(3) defines failure to answer a formal inquiry of the North Carolina State Bar as misconduct for which discipline is appropriate.

[2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of the North Carolina Constitution. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

RULE 8.2: JUDICIAL AND ~~OTHER ADJUDICATORY OFFICERS~~ LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, or other adjudicatory officer or of a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Comment

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against such unjust criticism. ~~A lawyer should come to the defense of a member of the judiciary who the lawyer knows is being unjustly attacked.~~

[4] While a lawyer as a citizen has a right to criticize such officials publicly, the lawyer should be certain of the merit of the complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer ~~having knowledge~~ who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the North Carolina State Bar or the court having jurisdiction over the matter.

(b) A lawyer ~~having knowledge~~ who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the North Carolina Judicial Standards Commission or other appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

(d) A lawyer who ~~has been~~ is disciplined in any state or federal court for a violation of the Rules of Professional Conduct in effect in such state or federal court ~~will~~ shall inform the secretary of the North Carolina State Bar of such action in writing no later than 30 days after entry of the order of discipline.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] Although the North Carolina State Bar is always an appropriate place to report a violation of the Rules of Professional Conduct, the courts of North Carolina have concurrent jurisdiction over the conduct of the lawyers who appear before them. Therefore, a lawyer's duty to report may be satisfied by reporting to the presiding judge the misconduct of any lawyer who is representing a client before the court. The court's authority to impose discipline on a lawyer found to have engaged in misconduct extends beyond the usual sanctions imposed in an order entered pursuant to Rule 11 of the North Carolina Rules of Civil Procedure.

[3] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[4] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the ~~bar disciplinary agency~~ North Carolina State Bar unless some other agency~~, such as a peer review agency,~~ or court is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[5] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[6] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers' or judges' assistance program. In that circumstance, providing for ~~the confidentiality of such information~~ an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such ~~confidentiality~~ an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients

and the public. For this reason, Rule 1.6~~(b)~~ (c) includes in the definition of confidential information any information regarding a lawyer or judge seeking assistance that is received by a lawyer acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court. Because such information is protected from disclosure by Rule 1.6, a lawyer is exempt from the reporting requirements of paragraphs (a) and (b) with respect to such information. On the other hand, a lawyer who receives such information would nevertheless be required to comply with the Rule 8.3 reporting provisions to report misconduct if the impaired lawyer or judge indicates an intent to engage in illegal activity; for example, conversion of client funds to his or her use.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule 3.3.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer-behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client or, in the case of a government lawyer, investigato-

ry personnel, of action the client, or such investigatory personnel, is lawfully entitled to take.

~~[1]~~ [2] Many kinds of illegal conduct reflect adversely on a lawyer's fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation. A lawyer's dishonesty, fraud, deceit, or misrepresentation is not mitigated by virtue of the fact that the victim may be the lawyer's partner or law firm. A lawyer who steals funds, for instance, is guilty of the most serious disciplinary violation regardless of whether the victim is the lawyer's employer, partner, law firm, client, or a third party.

[3] ~~[2]~~ The purpose of professional discipline for misconduct is not punishment, but to protect the public, the courts, and the legal profession. Lawyer discipline affects only the lawyer's license to practice law. It does not result in incarceration. For this reason, to establish a violation of paragraph (b), the burden of proof is the same as for any other violation of the Rules of Professional Conduct: it must be shown by clear, cogent, and convincing evidence that the lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. Conviction of a crime is conclusive evidence that the lawyer committed a criminal act although, to establish a violation of paragraph (b), it must be shown that the criminal act reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. If it is established by clear, cogent, and convincing evidence that a lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, the lawyer may be disciplined for a violation of paragraph (b) although the lawyer is never prosecuted or is acquitted or pardoned for the underlying criminal act.

[4] ~~[3]~~ A showing of actual prejudice to the administration of justice is not required to establish a violation of paragraph (d). Rather, it must only be shown that the act had a reasonable likelihood of prejudicing the administration of justice. For example, in *State Bar v. DuMont*, 52 N.C. App. 1, 277 S.E.2d 827 (1981), *modified on other grounds*, 304 N.C. 627, 286 S.E.2d 89 (1982), the defendant was dis-

ciplined for advising a witness to give false testimony in a deposition even though the witness corrected his statement prior to trial. The phrase "conduct prejudicial to the administration of justice" in paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings. In *State Bar v. Jerry Wilson*, 82 DHC 1, for example, a lawyer was disciplined for conduct prejudicial to the administration of justice after forging another individual's name to a guarantee agreement, inducing his wife to notarize the forged agreement, and using the agreement to obtain funds.

[5] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[6] ~~[4]~~ Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

RULE 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) Disciplinary Authority. A lawyer admitted to practice in North Carolina is subject to the disciplinary authority of North Carolina, regardless of where the lawyer's conduct occurs. A lawyer not admitted in North Carolina is also subject to the disciplinary authority of North Carolina if the lawyer renders or offers to render any legal services in North Carolina. A lawyer may be subject to the disciplinary authority of both North Carolina and another jurisdiction ~~where the lawyer is admitted~~ for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of North Carolina, the rules of professional conduct ~~Rules of Professional Conduct~~ to be applied shall be as follows:

(1) for conduct in connection with a ~~proceeding in~~ matter pending before a ~~court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding)~~ tribunal, the rules ~~to be applied shall be the rules~~ of the jurisdiction in which the ~~court~~ tribunal sits, unless the rules of the ~~court~~ tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer is not subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

~~(A) if the lawyer is licensed to practice only North Carolina, the rules to be applied shall be the rules of North Carolina, and~~

(B) ~~if the lawyer is licensed to practice in North Carolina and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct~~.

Comment

Disciplinary Authority

[1] ~~Paragraph (a) restates~~ It is longstanding law that conduct of a lawyer admitted to practice in North Carolina is subject to the disciplinary authority of North Carolina. Extension of the disciplinary authority of North Carolina to other lawyers who render or offer to render legal services in North Carolina is for the protection of the citizens of North Carolina.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. ~~In the past, decisions have not developed clear or consistent guidance as to which rules apply in such circumstances.~~ Additionally, the lawyer's conduct might involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i)

providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, ~~and~~ (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing a safe harbor for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding ~~in~~ pending before a ~~court before which the lawyer is admitted to practice (either generally or pro hac vice)~~ tribunal, the lawyer shall be subject only to the rules of ~~professional conduct of that court~~ the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer ~~licensed to practice only in North Carolina shall be subject to the Rules of Professional Conduct of the North Carolina State Bar, and that a lawyer licensed in multiple jurisdictions shall be subject only to the rules of the jurisdiction where he or she (as an individual, not his or her firm) principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another, similar such company. The exception would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B~~ shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's

conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer is not subject to discipline under this Rule.

~~[5]~~ [6] If North Carolina and another admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

~~[6]~~ [7] The choice of law provision ~~is not intended to apply to~~ applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise. ~~Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law.~~

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 of Professional Conduct of the North Carolina State Bar were duly adopoted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of February, 2003.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules of Professional Conduct of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 27th day of February, 2003.

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 of Professional Conduct of the North Car-

olina 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 27th day of February, 2003.

Brady, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE FAMILY LAW SPECIALTY

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 24, 2003.

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 family law specialty, as particularly set forth in 27 N.C.A.C. 1D, Section .2400, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .2400 Certification Standards for the Family Law Specialty

Rule .2405, Standards for Certification as a Specialist in Family Law

(c) Continuing Legal Education—During the three calendar years prior to the year of application and the portion of the calendar year immediately prior to application, ~~An~~ an applicant must have earned no less than 45 hours of accredited continuing legal education (CLE) credits in family law, 9 of which may be in related fields~~, during the three years preceding application, with not less than 9 credits in any one year~~. Related fields shall include taxation, trial advocacy, evidence, negotiation (including training in mediation, arbitration and collaborative law), and juvenile law. Only 9 hours of CLE credit will be recognized for attendance at an extended negotiation or mediation training course although designated as a family law course. At least 9 hours of CLE in family law or related fields must be taken during each of the three calendar years preceding application.

Rule .2406, Standards for Continued Certification as a Specialist

(b) Continuing Legal Education—Since last certified, a specialist must have earned no less than 60 hours of accredited continuing legal education credits in family law or related fields. Not less than nine credits may be earned in any one year, and no more than twelve credits may be in related fields. Related fields shall include taxation, trial advocacy, evidence, negotiations (including training in mediation, arbitration and collaborative law), and juvenile law. Only 9 hours of CLE credit will be recognized for

attendance at an extended negotiation or mediation training course although designated as a family law course.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of February, 2003.

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 27th day of February, 2003.

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 27th day of February, 2003.

Brady, J.
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 October 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

.1725 Areas of Specialty

There are hereby recognized the following specialties:

(1) bankruptcy law
  (a) consumer bankruptcy law
  (b) business bankruptcy law

(2) estate planning and probate law

(3) real property law
  (a) real property—residential
  (b) real property—business, commercial, and industrial

(4) family law

(5) criminal law
  (a) criminal appellate practice
  (b) state criminal law

(6) immigration law

(7) workers' compensation law.

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 October 18, 2002.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of February, 2003.

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 27th day of February, 2003.

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 27th day of February, 2003.

Brady, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

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 July 19, 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 administration of the continuing legal education program, as particularly set forth in 27 N.C.A.C. 1D, Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1500 Rules Governing the Administration of the Continuing Legal Education Program

.1520 Accreditation of Sponsors and Programs

(a) Accreditation of Sponsors. An organization desiring accreditation as an accredited sponsor of courses, programs, or other continuing legal education activities may apply for accredited sponsor status to the board. The board shall approve a sponsor as an accredited sponsor if it is satisfied that the sponsor's programs have met the standards set forth in Rule .1519 of this subchapter and regulations established by the board.

(b) Presumptive Approval for Accredited Sponsors.

(1) Once an organization ~~has been accredited~~ is approved as an accredited sponsor, ~~then~~ the continuing legal education programs sponsored by that organization are presumptively approved for credit and no application must be made to the board for approval. ~~provided, that the standards set out in Rule .1519 of this subchapter and the provisions of Rule .1512 of this subchapter are met~~. The board may at any time ~~reevaluate and grant or~~ revoke the ~~presumptive approval status~~ accreditation of an accredited sponsor for failure to satisfy the requirements of Rule .1512 and Rule .1519 of this subchapter, and for failure to satisfy the Regulations Governing the Administration of the Continuing Legal Education Program set forth in Section .1600 of this subchapter.

(2) The board may evaluate a program presented by an accredited sponsor and, upon a determination that the pro-

gram does not satisfy the requirements of Rule .1519, notify the accredited sponsor that any presentation of the same program, the date for which was not included in the announcement required by Rule .1520(e) below, is not approved for credit. Such notice shall be sent by the board to the accredited sponsor within 30 days after the receipt of the announcement. The accredited sponsor may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of receipt of the notice of disapproval. The decision by the board on an appeal is final.

(c) Unaccredited Sponsor Request for Program Approval. Any organization not accredited as an accredited sponsor ~~which~~ that desires approval of a course or program shall apply to the board. The board ~~which~~ shall adopt regulations to administer the accreditation of such programs consistent with the provisions of Rule .1519 of this subchapter. Applicants denied approval of a program may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of receipt of the notice of disapproval. The decision by the board on an appeal is final.

(d) Member Request for Program Approval. An active member desiring approval of a course or program ~~which~~ that has not otherwise been approved shall apply to the board. The board ~~which~~ shall adopt regulations to administer approval requests consistent with the requirements Rule .1519 of this subchapter. Applicants denied approval of a program may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of the receipt of the notice of disapproval. The decision by the board on an appeal is final.

(e) Program Announcements of Accredited Sponsors. At least 30 days prior to the presentation of a program, an accredited sponsor shall file an announcement, on a form prescribed by the board, notifying the board of the dates and locations of presentations of the program and the sponsor's calculation of the CLE credit hours for the program. ~~The board may provide by regulation for an announcement of accreditation for an approved continuing legal education program.~~

(f) Records. The board may provide by regulation for the accredited sponsor, unaccredited sponsor, or active member for whom a continuing legal education program has been approved to maintain and provide such records as required by the board.

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 October 18, 2002.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of February, 2003.

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 27th day of February, 2003.

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 27th day of February, 2003.

Brady, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

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 July 19, 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 administration of the continuing legal education program, as particularly set forth in 27 N.C.A.C. 1D, Section .1600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1600 Regulations Governing the Administration of the Continuing Legal Education Program

.1611 Accreditation of Computer-Based CLE

(a) Effective for courses attended on or after July 1, 2001, a member may receive up to four (4) hours of credit annually for participation in a course on CD-ROM or on-line. A CD-ROM course is an educational seminar on a compact disk that is accessed through the CD-ROM drive of the user's personal computer. An on-line course is an educational seminar available on a provider's website reached via the Internet.

(b) A member may apply up to four credit hours of computer-based CLE to a CLE deficit from a preceding calendar year. Any computer-based CLE credit hours applied to a deficit from a preceding year will be included in calculating the maximum of four (4) hours of computer-based CLE allowed in the preceding calendar year. A member may carry over to the next calendar year no more than four credit hours of computer-based CLE pursuant to Rule .1518(c) of this subchapter. Any credit hours carried-over ~~from one calendar year to another~~ pursuant to Rule .1518(c) of this subchapter will not be included in calculating the four (4) hours of computer-based CLE allowed in any one calendar year.

(c) To be accredited, a computer-based CLE course must meet all of the conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, except where otherwise noted, and be interactive, permitting the participant to communicate, via telephone, electronic mail, or a website bulletin board, with the presenter and/or other participants.

(d) The sponsor of an on-line course must have a reliable method for recording and verifying attendance. The sponsor of a CD-ROM course must demonstrate that there is a reliable method for the user or the sponsor to record and verify participation in the course. A participant may periodically log on and off of a computer-based CLE course provided the total time spent participating in the course is equal to or exceeds the credit hours assigned to the program. A copy of the record of attendance must be forwarded to the board within 30 days after a member completes his or her participation in the course.

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 October 18, 2002.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of February, 2003.

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 27th day of February, 2003.

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 27th day of February, 2003.

Brady, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ADMINISTRATION OF 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 24, 2003.

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 administration of the Administrative Committee, 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:

(1) that the member has provided all information requested in an application form prescribed by the council and has signed the form under oath;

(2) unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter, that the member satisfied the minimum continuing legal education requirements, as set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the year in which the member was transferred to inactive status (the "subject year"), including any deficit from a prior year that was carried forward and recorded in the member's CLE record for the subject year, ~~unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter~~;

(3) that the member has the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and that the member's

resumption of the practice of law within this state will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest;

(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~~ within one year prior to filing the petition, 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 of instruction devoted exclusively to~~ courses in the areas of professional responsibility and/or professionalism; and

(5) that the member has paid all of the following:

(A) a $125.00 reinstatement fee;

(B) the membership fee and Client Security Fund assessment for the year in which the application is filed;

(C) the annual membership fee, if any, of the member's district bar for the year in which the application is filed and any past due annual membership fees for any district bar with which the member was affiliated prior to transferring to inactive status;

(D) all attendee fees owed the Board of Continuing Legal Education for CLE courses taken to satisfy the requirements of Rule .0902(b)(2) and (4) above;

(E) any costs previously assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission; and/or the secretary or council of the North Carolina State Bar; and

(F) all costs incurred by the North Carolina State Bar in investigating and processing the application for reinstatement.

The reinstatement fee, costs, and any past due district bar annual membership fees shall be retained; however, the State Bar and district bar membership fees assessed for the year in

which the application is filed shall be refunded if the petition is denied.

.0904 Reinstatement After Suspension for Failure to Pay Fees or Assessed Costs

. . .

(c) Contents of Reinstatement Petition

The petition shall set out facts showing the following:

(1) that the member has provided all information requested in a form to be prescribed by the council and has signed the form under oath;

(2) unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter, that the member satisfied the minimum continuing legal education (CLE) requirements, as set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the year in which the member was suspended (the "subject year"), including any deficit from a prior year that was carried forward and recorded in the member's CLE record for the subject year and, ~~for any calendar year which has elapsed since the date of entry of the order of suspension~~ if two or more years have elapsed between the effective date of the suspension order and the date upon which the reinstatement petition is filed, that within one year prior to filing the petition, the member completed 15 hours of CLE accredited pursuant to Rule .1519 of this subchapter, including at least 3 hours of instruction in the areas of professional responsibility and/or professionalism ~~unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter~~;

(3) that the member has the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and that the member's resumption of the practice of law will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest; and

(4) that the member has paid all of the following:

(A) a $125.00 reinstatement fee;

(B) ~~all past and current membership fees and late fees~~ all membership fees, Client Security Fund assessments,

and late fees owed at the time of suspension and owed for the year in which the reinstatement petition is filed;

~~(C) all annual Client Security Fund assessments;~~

(C) ~~(D)~~ all ~~past and current~~ district bar annual membership fees owed at the time of suspension;-

(D) ~~(E)~~ all attendee fees, fines and penalties owed the Board of Continuing Legal Education at the time of suspension and~~, including~~ attendee fees for CLE courses taken to satisfy the requirements of Rule .0904(c)(2) above;

(E) ~~(F)~~ any costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar; and

(F) ~~(G)~~ all costs incurred by the North Carolina State Bar in suspending the member, including the costs of service, and in investigating and processing the application for reinstatement.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing 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 October 18, 2002.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of February, 2003.

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 27th day of February, 2003.

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 27th day of February, 2003.

Brady, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE BOARD OF LAW EXAMINERS AND THE 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 24, 2003.

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 Board of Law Examiners and the training of law students, as particularly set forth in 27 N.C.A.C. 1C, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1C, Section .0100 Board of Law Examiners

Rule .0105, Approval Of Law Schools

Every applicant for admission to the N.C. State Bar ~~bar of North Carolina~~ must meet the requirements set out in at least one of the numbered paragraphs below:

(1) The applicant holds an LL.B or J.D.~~, LL.M., or S.J.D.~~ degree from a law school that was approved by the American Bar Association at the time the degree was conferred; or

(2) Prior to August 1995, the applicant received an LL.B., J.D., LL.M., or S.J.D. degree from a law school that was approved by the council of the N.C. State Bar at the time the degree was conferred; or

~~(3) The applicant holds a professional degree from a foreign law school and an LL.B., J.D., LL.M., or S.J.D. degree from a law school that was approved by the council of the North Carolina State Bar at the time the degree was conferred or a law school which was approved by the American Bar Association at the time the degree was conferred.~~

(3) Prior to August 2005, the applicant received an LL.M or S.J.D. degree from a law school that was approved by the American Bar Association at the time the degree was conferred.

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 October 18, 2002.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of February, 2003.

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 27th day of February, 2003.

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 27th day of February, 2003.

Brady, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE 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 24, 2003.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability 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

.0125 Reinstatement

. . .

(b) After suspension

. . .

(3) Any suspended attorney seeking reinstatement must file a verified petition with the secretary, a copy of which the secretary will transmit to the counsel. The petitioner will have the burden of proving the following by clear, cogent, and convincing evidence:

. . .

(H) satisfaction of the minimum continuing legal education requirements, as set forth in Rule .1517 of Subchapter 1D of these rules, for the two calendar years immediately preceding the year in which the petitioner was suspended, which shall include the satisfaction of any deficit recorded in the petitioner's State Bar CLE transcript for such period; provided that the petitioner may attend CLE programs after the effective date of the suspension to make up any unsatisfied requirement. These requirements shall be in addition to any continuing legal education requirements imposed by the Disciplinary Hearing Commission;

(I) [effective for petitioners suspended on or after January 1, 1997] if two or more years have elapsed between

the effective date of the suspension order and the date on which the reinstatement petition is filed with the secretary, the petitioner must, within one year prior to filing the petition, complete 15 hours of CLE approved by the Board of Continuing Legal Education pursuant to Subchapter 1D, Rule .1519 of these rules. Three hours of the 15 hours must be earned by attending ~~a three hour block~~ courses of instruction devoted exclusively to professional responsibility and/or professionalism. These requirements shall be in addition to any continuing legal education requirements imposed by the Disciplinary Hearing Commission;

(J) payment of all ~~dues~~ membership fees, Client Security Fund assessments, and late fees due and owing to the North Carolina State Bar as well as all attendee fees and late penalties due and owing to the Board of Continuing Legal Education at the time of suspension.

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 October 18, 2002.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of February, 2003.

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 27th day of February, 2003.

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 27th day of February, 2003.

Brady, J.
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 July 19, 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

.1013 Selection of Nominees for District Court Judge

Unless otherwise required by law, the following procedures shall be used to determine the nominees to be recommended to the Governor pursuant to N.C. Gen. Stat. §7A-142 for vacant district court judgeships in the judicial district.

(a) Meeting for Nominations: The nominees shall be selected by secret, written ballot of those members present at a meeting of the district bar called for this purpose. Fifteen (15) days notice of the meeting shall be given, by mail, to the last known address of each district bar member. Alternatively, if a bylaw permitting elections by mail is adopted by the district bar, the procedures set forth in the bylaw and in Rule .0804 of Subchapter 1A of the Rules of the North Carolina State Bar (27 N.C.A.C. 1A, .0804), shall be followed.

(b) Candidates: Persons who want to be considered for the vacancy shall notify the President in writing five (5) days prior to the meeting at which the election will be conducted or, if the election is by mail, five (5) days prior to the mailing of the ballots.

(c) Voting: Each district bar member may vote for three candidates. Cumulative voting is prohibited.

(d) Submission to Governor: The three candidates receiving the highest number of votes shall be the nominees to fill the vacancy on the district court and their names, and vote totals, shall be transmitted to the Governor. In the event of a

tie for third place, the names of those candidates involved in the tie shall be transmitted to the Governor together with the names of the two candidates receiving the highest number of votes.

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 October 18, 2002.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of February, 2003.

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 27th day of February, 2003.

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 27th day of February, 2003.

Brady, J.
For the Court

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CONSTITUTIONAL LAW—Continued

guilty of anything. Defendant took counsel's statements out of context and failed to note the consistent theory of the defense that defendant was not guilty. **State v. Gainey, 73.**

Confrontation Clause—nonhearsay—Nonhearsay raises no Confrontation Clause concern. **State v. Gainey, 73.**

Effective assistance of counsel—concession of guilt—A first-degree murder defendant did not have ineffective assistance of counsel where his counsel conceded guilt to some degree of homicide but continued to adhere to the plea of not guilty. **State v. Anderson, 136.**

Effective assistance of counsel—failure to object—The defendant in a capital sentencing proceeding did not demonstrate that his counsel was ineffective in failing to object to alleged errors regarding the admission of statements, jury instructions, and verdict sheets where the alleged errors were without merit, defense counsel's failure to object cannot be said to fall below an objective standard of reasonableness, and the evidence of guilt was overwhelming. **State v. Gainey, 73.**

Effective assistance of counsel—failure to object—A defendant in a first-degree murder, first-degree burglary, and first-degree sexual offense prosecution did not receive ineffective assistance of counsel based on defense counsel's failure to object when the trial court excused two prospective jurors over sixty-five based on their age. **State v. Rogers, 420.**

Effective assistance of counsel—position to develop issue—A first-degree murder defendant was not in a position to adequately develop an ineffective assistance of counsel (IAC) issue concerning the failure to procure certain records to impeach witnesses, and his IAC claim was dismissed without prejudice to his right to reassert the claim during a subsequent motion for appropriate relief. Defendant could develop a second IAC claim regarding failure to rehabilitate jurors who expressed equivocal views on the death penalty, but could not direct the Supreme Court's attention toward a juror worthy of rehabilitation. **State v. Hyatt, 642.**

Effective assistance of counsel—reference in opening argument to physical evidence—not an admission—A capital first-degree murder defendant was not denied effective assistance of counsel where his attorney in her opening statement may have signaled that physical evidence would link defendant to the victim's car, but she made it clear that such evidence was of dubious validity. In context, her statements hardly constitute an admission; moreover, admitting a fact is not equivalent to an admission of guilt. **State v. Wiley, 592.**

Ex post facto prohibition—use of juvenile plea in capital sentencing—The submission of a prior juvenile adjudication in a capital sentencing proceeding did not violate the ex post facto prohibition, even though defendant's delinquency plea came before the amendment to N.C.G.S. § 15A-2000(e)(3) allowing juvenile adjudications to be submitted as aggravating circumstances. **State v. Wiley, 592.**

Fifth Amendment right to counsel—insufficient request—A capital first-degree murder defendant did not sufficiently invoke his Fifth Amendment right to counsel where defendant allegedly asked his father at the father's residence to

CRIMINAL LAW—Continued

EVIDENCE—Continued

examination and by overruling defendant's motion to strike certain testimony that the detective gave on redirect examination. **State v. Williams, 501.**

Defendant's frustrations—absence of prejudice—The trial court did not err in a first-degree rape and assault with a deadly weapon with intent to kill inflicting serious injury case by allowing the testimony of defendant's case manager regarding defendant's frustrations. **State v. Williams, 501.**

Demonstration—jury view of crime scene—failure to allow defendant to raise door—changed circumstances—The trial court did not err in a first-degree murder case by failing to permit defendant to raise a bay roll-up door at the Old Pine State building during the jury view of the crime scene even though defendant contends he witnessed the murder through the window since the circumstances at the time of the jury view were not the same as at the time of the offenses. **State v. Williams, 501.**

Denial of opportunity to cross-examine—impeachment—motive—The trial court erred in a double first-degree murder case by denying defendant the opportunity to fully cross-examine a detective concerning portions of his testimony concerning information he received from a prison inmate that the inmate was told by another prison inmate about the murders. **State v. Canady, 242.**

Detective's testimony—use of term "sexual assault"—Even assuming arguendo that the trial court erred in a first-degree murder case by overruling defendant's objection to a detective's testimony using the term "sexual assault" when referring to another of defendant's victims in an assault with a deadly weapon with intent to kill and attempted first-degree rape case, defendant has failed to show prejudice. **State v. Williams, 501.**

Detective's testimony—victim's knowledge of where defendant ran after attack—what victim told friend about attack—Even assuming arguendo that the trial court erred in an attempted first-degree rape and assault with a deadly weapon with intent to kill inflicting serious injury case by allowing a portion of a detective's testimony to be admitted over defendant's objections regarding the victim's knowledge of where defendant ran after the attack and how a friend acted when the victim told the friend about the incident with defendant, defendant has failed to show prejudice. **State v. Williams, 501.**

DNA testimony—witness not qualified as expert—allowed—The trial court did not err in a first-degree murder prosecution by allowing testimony concerning DNA analysis where the witness was never qualified as an expert but defendant made only a general objection, defendant engaged in extensive cross-examination regarding the source of the DNA evidence, and defendant did not demonstrate the basis for the objection or the grounds upon which the testimony should have been excluded. **State v. Robinson, 320.**

Double hearsay—admission of statement harmless error—Although defendant contends the trial court violated his right of confrontation in a first-degree murder and attempted first-degree murder sentencing proceeding by overruling defendant's objection to an SBI agent's double-hearsay testimony that one coparticipant told the agent that another coparticipant said defendant was the shooter, any alleged violation was harmless because the jury had determined

EVIDENCE—Continued

at the guilt-innocence phase that defendant fired the rifle, and the jury had earlier heard similar testimony. **State v. Holmes, 719.**

Examination of witnesses—inconsistencies—The trial court did not err in a capital prosecution for first-degree murder where defendant was not allowed to ask questions in a form which called for a witness to vouch for the veracity of another witness. Defendant was free to ask about inconsistencies, and did so. **State v. Robinson, 320.**

Exhibits—diagram—photographs—The trial court did not err in a first-degree murder case by admitting into evidence two exhibits that were used during the interview of defendant on 25 February 1997 including a diagram and some photographs because defendant's statement was ruled admissible, and the exhibits were a part of that statement. **State v. Williams, 501.**

Expert opinion—DNA testing—The trial court did not err in a first-degree rape, first-degree sexual offense, and assault with a deadly weapon with intent to kill inflicting serious injury case by denying defendant's objections and motions to strike the testimony of an expert witness concerning DNA profiles and the expert's conclusions because the testimony was not based upon an inaccurate premise. **State v. Williams, 501.**

Expert testimony—firearms identification—admissible—The trial court did not err in a first-degree murder prosecution by admitting the testimony of an SBI agent regarding two bullets found in the victim, despite defendant's contention that the testimony was based on speculation, where the agent was received without objection as an expert in firearms identification and the agent tested the bullets about which he provided an opinion. **State v. Gainey, 73.**

Expert testimony—whether ammunition caused injuries—The trial court did not err in a first-degree murder, attempted first-degree murder, and robbery with a dangerous weapon case by overruling defendant's objection to testimony from the State's firearm analysis and identification expert regarding whether the ammunition he examined could have caused the murder victim's injuries. **State v. Holmes, 719.**

Failure of another to identify mug-shots—hearsay—The trial court did not err in a capital first-degree murder prosecution by sustaining the State's objection to a question as to whether someone who didn't testify had identified anyone from mug-shot books. Any response would have been hearsay and defendant did not identify any exception which would have allowed a response. **State v. Robinson, 320.**

Hearsay—excited utterance—state of mind exception—The trial court did not abuse its discretion in a double capital first-degree murder prosecution by allowing statements of the victim wife through the victim's mother including that the victim told her stepfather that defendant had a gun and said he was going to kill her, and that the victim told her mother that defendant said on the day of the killing that he did not want anyone else at the house when he came to pick up his clothes but the victim was going to have the police serve defendant with a warrant when he came to her house. **State v. Nicholson, 1.**

Hearsay—explanation of subsequent actions—The trial court did not err in a capital prosecution for first-degree murder by admitting testimony from the vic-

EVIDENCE—Continued

tim's father that someone had telephoned him to say that his son's car would be in a particular place at a particular time where the testimony was admitted not for the truth of the matter asserted, but to explain the action of the witness and the deputies in staking out that location the next morning. **State v. Gainey, 73.**

Hearsay—statements defendant made while in jail—admission by party exception—The trial court did not err in a prosecution for two first-degree murders by allowing a witness inmate to testify concerning statements he overheard defendant make while in jail admitting that he killed the murder victims since Rule 801(d) allows a statement to be admissible as an exception to the hearsay rule if it is offered against a party and is his own statement. **State v. Williams, 501.**

Hearsay—testimony of detective—information received from prison inmate told by another inmate—The trial court erred in a double first-degree murder case by allowing hearsay testimony from a detective concerning information he received from a prison inmate that the inmate was told by another prison inmate about the murders. **State v. Canady, 242.**

Hearsay—unavailable declarant—The trial court did not err in a first-degree murder case by excluding hearsay testimony of a detective regarding his interview of an unavailable witness who told the detective that he had seen the victim alive the day before the discovery of her body because the unavailable witness's testimony did not possess equivalent guarantees of trustworthiness. **State v. Williams, 501.**

Letter written by juvenile—from law enforcement files—admissible—The trial court did not err in a capital sentencing proceeding by admitting a letter written by defendant when he was fourteen that formed the basis of his juvenile adjudication for solicitation to commit murder where the letter was introduced from Sheriff's Department files through the testimony of the investigating officer. Although there was statutory protection for juvenile court records, there is no prohibition against the use of law enforcement records and the State properly introduced the evidence to illustrate the circumstances surrounding the prior adjudication. **State v. Wiley, 592.**

Limitation on ability to show self-defense—gratuitous self-defense instruction—The trial court did not abuse its discretion in a double capital first-degree murder prosecution by excluding the testimony of two psychiatrists tending to show defendant's perception of the need to use deadly force to defendant himself. **State v. Nicholson, 1.**

Motion in limine—statement about electric chair—bias—reference to beating—failure to preserve issue—The trial court did not abuse its discretion in a prosecution for two first-degree murders and other crimes involving seven different victims over a fifteen-month span by denying defendant's pretrial motion in limine to redact that part of his statement from 25 February 1997 which referred to the electric chair, and a reference to defendant allegedly being beaten up by men hired by a girl who knew the defendant since the statement referring to the electric chair was relevant to show defendant's bias against his former girlfriend, and defendant failed to preserve his hearsay argument concerning the second statement. **State v. Williams, 501.**

EVIDENCE—Continued

Records of victims—motion for in camera inspection—The trial court did not err in a first-degree murder, first-degree rape, first-degree sexual offense, assault with a deadly weapon, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree rape, and assault with a deadly weapon with intent to kill case involving seven different victims over a fifteen-month span by denying defendant's broad motion for an in camera inspection of any county or state agency records relating to the rape/sexual assault victims. **State v. Williams, 501.**

Sexual assault—child victim—expert opinion—not plain error—Although the State failed to lay an adequate foundation for the admission of a pediatrician's statement of opinion that a child victim was in fact sexually assaulted under N.C.G.S. § 8C-1, Rule 702, the admission of this testimony did not constitute plain error because the error did not cause the jury to reach a different verdict than it otherwise would have reached in light of the overwhelming evidence against defendant. **State v. Stancil, 266.**

Similar crimes—motive, intent, identity, common plan—The trial court did not err in a first-degree murder prosecution by admitting testimony from a kidnapping victim who was released and who identified defendant as her attacker. **State v. Hyatt, 642.**

Testimony about lost rape kit—no bad faith—The trial court did not err in a prosecution for two first-degree murders and other crimes which were twenty years old by admitting testimony about a rape kit which was lost prior to trial where the kit was lost during one of three moves by the Sheriff's Department in the intervening years. There was no showing of bad faith by the Sheriff's Department; an SBI serologist testified that it was unlikely that a DNA test could have been performed because there were so few sperm in the sample; defendant admitted participating in the kidnapping and robbery of the victim; and defendant had ample opportunity to cross-examine each of the State's witnesses and to impeach probativeness of the rape kit. **State v. Hyatt, 642.**

Testimony about other testimony—The trial court did not err in a capital first-degree murder prosecution by sustaining the State's objection when defendant asked a witness if he had heard another's testimony, the witness replied that he had, and defendant asked, "And, do you recall her stating that . . . ." **State v. Robinson, 320.**

Testimony—corroboration—The trial court did not err in a first-degree murder, first-degree rape, first-degree sexual offense, assault with a deadly weapon, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree rape, and assault with a deadly weapon with intent to kill case involving seven different victims over a fifteen-month span by allegedly allowing the jury to decide whether certain testimony from a detective was admissible as corroborative evidence of the testimony of defendant's ex-girlfriend because the court, not the jury, decided the admissibility of this evidence, and the court gave the jury a limiting instruction. **State v. Williams, 501.**

Testimony—corroboration—The trial court did not err by allowing certain testimony of a detective to be admitted as corroborative evidence of a witness's testimony pertaining to one of the first-degree murder charges against defendant. **State v. Williams, 501.**

HOMICIDE—Continued

First-degree murder—acting in concert instruction—The trial court did not err by submitting to the jury an acting in concert instruction with respect to the charge of first-degree murder because there was evidence that defendant and his wife acted in concert to perpetrate the chain of offenses against the victim. **State v. Mann, 294.**

First-degree murder—felony 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 under the theory of felony murder where defendant kidnapped, robbed and killed his coworker victim as part of a single continuous transaction. **State v. Mann, 294.**

First-degree murder—felony murder—sufficiency of evidence—attempted rape—The trial court did not err by denying defendant's motion to dismiss one of the first-degree murder charges based on the felony murder rule using attempted rape as the underlying felony even though defendant contends there was insufficient evidence that defendant attempted to rape the victim. **State v. Williams, 501.**

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 regarding one of defendant's victims. **State v. Williams, 501.**

First-degree murder—premeditation and deliberation—sufficiency of evidence—The trial court did not abuse its discretion by denying defendant's motion to dismiss the two first-degree murder charges even though defendant contends there was insufficient evidence of premeditation and deliberation. **State v. Nicholson, 1.**

First-degree murder—premeditation and deliberation—sufficiency of evidence—There was substantial circumstantial evidence for the jury to conclude that defendant intentionally killed the victim with premeditation and deliberation where defendant carefully planned a robbery of a restaurant with an accomplice, stashed clothing to change into after the robbery, pointed his weapon at the victim after entering the restaurant, shot the victim in the head after an exchange, told the accomplice that the victim had killed himself by trying to grab him, and told his cousin that the victim had refused to give defendant the money and that defendant had shot him. **State v. Robinson, 320.**

First-degree murder—requested instruction on second-degree—denied—The trial court properly refused a requested instruction on second-degree murder in a capital first-degree murder prosecution where the evidence was that defendant kidnapped both victims, accompanied them into the woods with a knife, and returned alone. This was sufficient to establish premeditation and deliberation and the defendant presented only his denial to negate the State's evidence. **State v. Hyatt, 642.**

First-degree murder—second-degree not submitted—evidence of premeditation and deliberation—The trial court did not err in a first-degree murder prosecution by denying defendant's request for submission of second-degree murder as a possible verdict where defendant presented no evidence and the State's evidence showed premeditation and deliberation. **State v. Gainey, 73.**

JURY—Continued

views, and defendant did not proffer any arguments suggesting that his questions might produce different answers. **State v. Jones, 117.**

Selection—capital trial—individual voir dire denied—There was no abuse of discretion in a capital prosecution for first-degree murder where the trial court denied defendant' pretrial motion for individual voir dire and sequestration and defendant did not renew his request after the responses which he contends tainted the venire. Moreover, a similar argument was rejected in a prior case. **State v. Anderson, 136.**

Selection—capital trial—instructions—personal views—The trial court neither erred nor abused its discretion during jury selection in a first-degree murder prosecution by denying defendant's request for a preselection instruction advising prospective jurors that it was their duty to reflect upon their personal views when deliberating the issue of punishment. Defendant waived review of constitutional challenges by not asserting them at trial, similar instructions have previously been rejected, and the court properly instructed the jury that its duty was to apply the law as given to it by the trial court. **State v. Anderson, 136.**

Selection—capital trial—peremptory challenges—racial discrimination—The trial court did not abuse its discretion in a double capital first-degree murder prosecution by allowing the State to exercise its peremptory challenges against four African-American prospective jurors even though defendant contends the challenges were used in a racially discriminatory manner. **State v. Nicholson, 1.**

Selection—capital trial—prosecutor's questions—duty to vote for death penalty—There was no plain error during jury selection in a first-degree murder prosecution where defendant alleged that the prosecutor was permitted to stake out and indoctrinate prospective jurors by suggesting that they would have a duty to vote for the death penalty and by asking if they would vote to impose the sentence if they were satisfied that it was appropriate. **State v. Anderson, 136.**

Selection—capital trial—prosecutor's questions—no structural error—There was no structural error in a first-degree murder prosecution from the prosecutor's comments and questions during jury selection. Structural error is a defect affecting the framework in which the trial proceeds rather than simply an error in the trial process. The error asserted here does not fit within that limited class of cases. **State v. Anderson, 136.**

Selection—capital trial—rehabilitation questions—excusal of prospective juror—The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by sustaining the State's objections to three questions during defendant's attempted rehabilitation of a prospective juror or by excusing that juror. The three questions did not address the issue of whether the prospective juror would be able to return a death verdict under any circumstances and the court properly excused her when she stated unequivocally that she could never return a death sentence. **State v. Gainey, 73.**

Selection—capital trial—request for individual voir dire—The trial court did not abuse its discretion in a double capital first-degree murder prosecution by denying defendant's request for individual voir dire pursuant to N.C.G.S. § 15A-1214(j) during jury selection based on pretrial publicity. **State v. Nicholson, 1.**

MEDICAL MALPRACTICE—Continued

complaint which failed to allege that review of the medical care took place before the filing of the original complaint did not satisfy the certification requirements of N.C.G.S. § 1A-1, Rule 9(j). Allowing a plaintiff to file a medical malpractice complaint and then wait until after the filing to have the allegations reviewed by an expert would pervert the purpose of Rule 9(j). **Thigpen v. Ngo, 198.**

Certification—interplay of Rules 9(j) and 15—It was not necessary to discuss the interplay between N.C.G.S. § 1A-1, Rules 9(j) and 15 in an action involving the required certification for filing a medical malpractice action where the trial court dismissed the action for failure to comply with Rule 9(j) and did not base its ruling on the interaction of the two rules. *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, is distinguished. **Thigpen v. Ngo, 198.**

PREMISES LIABILITY

Contributory negligence—injury from contact with power line—directed verdict—judgment notwithstanding the verdict—The trial court did not err by denying defendant motion-picture studio owner's motions for directed verdict and judgment notwithstanding the verdict on the issue of plaintiff carpenter's contributory negligence in a case where plaintiff came into contact with uninsulated energized power lines while working on defendant's premises to build a film set. **Martishius v. Carolco Studios, Inc., 465.**

Injury from contact with power line—directed verdict—judgment notwithstanding the verdict—The trial court did not err by denying defendant motion-picture studio owner's motions for directed verdict and judgment notwithstanding the verdict on the issue of defendant's negligence in a case where plaintiff carpenter came into contact with uninsulated energized power lines while working on defendant's premises to build a film set. **Martishius v. Carolco Studios, Inc., 465.**

PRODUCTS LIABILITY

Implied warranty of merchantability—circumstantial evidence of breach—A plaintiff does not need to prove a specific defect to carry his or her burden of proof in a products liability action based upon a breach of implied warranty of merchantability and the burden sufficient to raise a genuine issue of material fact in such a case may be met if the plaintiff produces adequate circumstantial evidence of a defect. This evidence may include certain enumerated factors, and, when a plaintiff seeks to establish a case by means of circumstantial evidence, the trial judge is to consider these factors initially and determine whether they are sufficient as a matter of law to support a finding of breach of warranty. The plaintiff does not have to satisfy all of the factors and, if the judge determines that the case may be submitted to the jury, the weighing of the factors should be left to the finder of fact. **DeWitt v. Eveready Battery Co., 672.**

Implied warranty of merchantability—circumstantial factors—elimination of other possibilities—In an action arising from a burn allegedly received from leaking D batteries, defendant's suggestion that an error plaintiff may have committed led to the injury did not rise to a level requiring the trial court to conclude as a matter of law that plaintiff failed to negate a reasonable secondary cause. A plaintiff is required to present a case-in-chief that either contains no evi-

SENTENCING—Continued

Capital—aggravating circumstances—capital felony committed against law enforcement officer engaged in official duties—The trial court did not err in a double capital first-degree murder sentencing proceeding by submitting the N.C.G.S. § 15A-2000(e)(8) aggravating circumstance that the capital felony was committed against a law enforcement officer while engaged in the performance of his official duties in the case involving the chief of police victim. **State v. Nicholson, 1.**

Capital—aggravating circumstances—especially heinous, atrocious, or cruel—defendant's satanic beliefs—The trial court did not err in a capital sentencing proceeding by admitting evidence of defendant's satanic beliefs where the State requested submission of the especially heinous, atrocious, or cruel aggravating circumstance, N.C.G.S. § 15A-2000(e)(9). Defendant's statements that the murder was satanically motivated may show depravity of mind which may be considered in determining if the killing was especially heinous, atrocious, or cruel. **State v. White, 696.**

Capital—aggravating circumstances—especially heinous, atrocious, or cruel murder—The trial court did not err in a capital first-degree murder case by submitting the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel because the jury could have inferred that the victim was conscious while trapped in the trunk of her car and that she desparately tried to free herself as she anticipated the moment when defendant would end her life. **State v. Mann, 294.**

Capital—aggravating circumstances—evidence—double counting—limiting instruction—separate evidence—The trial court did not permit the jury in a capital sentencing proceeding to rely upon the same evidence in finding the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious or cruel that it used to find either of the two aggravating circumstances submitted under N.C.G.S. § 15A-2000(e)(5) that the murder occurred during the commission of an armed robbery or a first-degree kidnapping where the court instructed the jury that the same evidence could not be used as a basis for finding more than one aggravating circumstance, and there was substantial evidence of the especially heinous, atrocious, or cruel nature of the killing apart from the evidence that the murder was committed during the commission of a kidnapping or an armed robbery. **State v. Wiley, 592.**

Capital—aggravating circumstance—murder committed during course of armed robbery—The trial court did not err in a capital first-degree murder case by submitting the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the murder was committed during the course of an armed robbery even though defendant contends that proof of the armed robbery was necessary to establish the offense of kidnapping, which was the felony underlying defendant's first-degree murder conviction, because the crime alleged to be the purpose for which defendant confines or restrains the victim is not on element of kidnapping. **State v. Mann, 294.**

Capital—aggravating circumstances—murder committed during kidnapping—murder committed for pecuniary gain—independent evidence—The trial court did not err in a capital sentencing proceeding by submitting the aggravating circumstances that the murder was committed during a kidnapping and that the murder was committed for pecuniary gain where defendant argued that

SENTENCING—Continued

SENTENCING—Continued

that defendant had been previously convicted of three separate crimes of common law robbery where defendant stipulated to the judgments and commitments for three prior common law robbery convictions. Although defendant contended that he never stipulated to the existence of the use of violence in those convictions, common law robbery is a crime involving the use or threat of violence. **State v. Robinson, 320.**

Capital—aggravating circumstances—prior violent felony—juvenile tried as adult—The trial court did not err in a capital sentencing proceeding by submitting the aggravating circumstances of a prior felony conviction involving violence where defendant had been tried as an adult when he was 16 for a felonious assault committed when he was 15. The age of the perpetrator is irrelevant if the previous conviction meets the criteria for an (e)(3) aggravating circumstance. **State v. White, 696.**

Capital—aggravating circumstance—underlying felony—conviction based on felony murder and premeditation—The trial court did not err in a capital sentencing proceeding by submitting the aggravating circumstance that the murder was committed during an attempted armed robbery. There was sufficient evidence to support the robbery conviction, and the underlying felony may be submitted as an aggravating circumstance when a defendant is convicted of felony murder and murder with premeditation and deliberation. **State v. Robinson, 320.**

Capital—autopsy and crime scene photos—admissible—The trial court did not err in a capital sentencing proceeding by denying defendant's pretrial motion to exclude autopsy and crime scene photos which defendant contended were gruesome and inflammatory. Each of the photos represented different aspects of the victim and the autopsy, the number was not unduly repetitious, the photographs were not aimed merely at arousing the passions of the jury, and each had illustrative and probative value. **State v. White, 696.**

Capital—combined mitigating circumstances—There was no error in a capital sentencing proceeding where defendant contended that the court's combination of requested mitigating circumstances excluded some of the submitted circumstances, but a careful review of the record revealed that the court's final list of mitigating circumstances subsumed the proposed circumstances and omitted none. **State v. Robinson, 320.**

Capital—curative instruction not given—not requested—The trial court did not err in a capital sentencing proceeding by not giving a curative instruction after sustaining an objection where defendant did not request a curative instruction or ask that the witness's testimony be stricken. **State v. Robinson, 320.**

Capital—death penalty—International Covenant on Civil and Political Rights—Although defendant contends his execution for two counts of first-degree murder would violate provisions of the International Covenant on Civil and Political Rights based on long delays between sentencing and execution and the conditions in which death row inmates are kept, our Supreme Court has previously decided this issue against defendant. **State v. Williams, 501.**

Capital—death penalty—not disproportionate—A death penalty was proportionate where the record fully supports the aggravating circumstances found

SENTENCING—*Continued*

SENTENCING—Continued

Capital—death penalty—not disproportionate—A death sentence was proportionate where the record fully supported the aggravating circumstances found by the jury, there was no indication that the sentence was imposed under the influence of passion, prejudice, or other arbitrary factors, this case is distinguishable from those cases in which the North Carolina Supreme Court concluded that the death penalty was disproportionate, and defendant's case is more similar to certain cases in which a death sentence was found proportionate than to those in which it was found disproportionate or to those in which juries have consistently recommended life imprisonment. Moreover, it was noted that similarity is not the last word on proportionality. **State v. Gainey, 73.**

Capital—death penalty—not disproportionate—The trial court did not err in a double capital first-degree murder trial by sentencing defendant to the death penalty. **State v. Nicholson, 1.**

Capital—defendant's death—family impact evidence—The trial court did not abuse its discretion in a double capital first-degree murder sentencing proceeding by denying defendant's request to present family impact evidence. **State v. Nicholson, 1.**

Capital—defendant's fascination with movie—properly admitted—The trial court did not err in a capital sentencing proceeding by allowing a detective to testify about of statements from a man incarcerated with defendant (Nash) concerning defendant's fascination with the movie "Natural Born Killers." The detective's testimony corroborated Nash's testimony, and, as to statements related by the detective to which Nash did not testify, defendant lost the benefit of his earlier objection when others testified to the same effect without objection. **State v. White, 696.**

Capital—evidence that defendant "sick-minded"—There was no prejudice in a capital sentencing proceeding where the State was allowed to elicit testimony from defendant's girlfriend that defendant was a "sick-minded person." Defendant presented substantial evidence that he suffered from severe psychological disturbance and the jury found the mental disturbance mitigator. **State v. White, 696.**

Capital—instructions—life imprisonment without parole—The trial court's instructions in a capital sentencing proceeding, in conjunction with the trial court's response to a jury question, were both clear and consistent with the statutory requirement for the meaning of the term "life imprisonment." Furthermore, the plain meaning of the term suggests that defendant will spend the rest of his life in prison, and the jurors heard "life imprisonment without parole" numerous times. Finally, defendant made no objection at trial and, in a discussion with the court, confirmed that the court had informed the jurors that "life imprisonment means life imprisonment without parole." **State v. Gainey, 73.**

Capital—instructions—life imprisonment without parole—The trial court did not err in a capital sentencing proceeding in its instructions on life imprisonment. Nothing in N.C.G.S. § 15A-2002 requires the judges to say "life imprisonment without parole" every time they allude to or mention the alternative sentence and the court's instruction in this case met the statutory instruction. **State v. Wiley, 592.**

SENTENCING—Continued

Capital—instructions—statutory and nonstatutory mitigating circumstances—The oral instructions given by the trial court, in conjunction with the distinction between the statutory and nonstatutory mitigating circumstances on the Issues and Recommendation as to Punishment form, were sufficient to provide proper instruction for the jurors. **State v. Gainey, 73.**

Capital—introduction of disputed evidence—The trial court did not err in a capital sentencing proceeding by allowing the State to introduce a newspaper allegedly found on the victim's chest, even though the evidence was in conflict. Whether and when the newspaper was placed on the victim's chest was for the jury to decide and, even if the State did not lay a proper foundation, defendant did not meet his burden of showing prejudice. **State v. White, 696.**

Capital—merging jury instructions—not an unrecorded charge conference—There was no prejudicial error in an alleged unrecorded charge conference in a capital sentencing proceeding where, at the end of one day, the trial court directed the parties to submit their proposed aggravating and mitigating circumstances by the next morning, court resumed the next afternoon, and the court apologized for keeping the jury waiting and explained that they had been worked all morning on trying to merge two versions of word processing. **State v. Wiley, 592.**

Capital—mitigating circumstances—defendant acted under duress or domination of another person—The trial court did not err in a double capital first-degree murder sentencing proceeding by failing to submit the N.C.G.S. § 15A-2000(f)(5) mitigating circumstance that defendant acted under duress or the domination of another person. **State v. Nicholson, 1.**

Capital—mitigating circumstances—defendant's age—sufficiency of evidence—The trial court did not err in a capital sentencing proceeding by denying defendant's request for submission of the mitigating circumstance of defendant's age where defendant cited no evidence to support his assertion and there was testimony that defendant had graduated from high school without repeating grades, that he had a stable work history, and that he was the father of five children. **State v. Gainey, 73.**

Capital—mitigating circumstances—failure to appreciate criminality of conduct—The trial court did not err in a first-degree murder capital sentencing proceeding by failing to submit the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance that defendant did not appreciate the criminality of his conduct or could not conform his conduct to the requirements of law. **State v. Holmes, 719.**

Capital—mitigating circumstances—impaired capacity—sufficiency of evidence—The trial court did not err in a capital sentencing proceeding by denying defendant's request to submit the mitigating circumstance of impaired capacity where defendant's expert testified that defendant suffered from mixed personality disorder but knew what the act of murder was, and further testified that his evaluation was not reliable because defendant would not tell him anything about the date of the murder. Defendant's statements to officers, his actions in organizing the crime, and his actions after the killing indicate that he was aware that his actions were criminal. **State v. Gainey, 73.**

Capital—mitigating circumstances—initial idea by coparticipant—amendment by trial court—In a capital sentencing proceeding for a first-

SENTENCING—Continued

SENTENCING—*Continued*

activity when the trial court added the additional phrase "before the date of the murder." **State v. Nicholson, 1.**

Capital—mitigating circumstance—no significant history of prior criminal activity—evidence insufficient—The trial court did not err in a capital sentencing proceeding by denying defendant's request to submit the mitigating circumstance that defendant had no significant history of prior criminal activity where some of defendant's witnesses indicated that defendant had not been in "bad trouble" and had not been involved with illegal drugs, but defendant offered no evidence of his criminal record. Defendant had the burden of establishing that he had no significant criminal history and did not do so. **State v. Gainey, 73.**

Capital—mitigating circumstances—no significant history of prior criminal activity—rebuttal evidence of prior incidents—The trial court did not commit plain error during a capital first-degree murder sentencing proceeding by instructing the jury on the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance of no significant history of prior criminal activity and thereby allowing the State to introduce rebuttal evidence of prior incidents committed by defendant. **State v. Williams, 501.**

Capital—mitigating circumstances—peremptory instruction—The trial court did not err in a double capital first-degree murder sentencing proceeding by failing to give a peremptory instruction on four statutory mitigating circumstances including the N.C.G.S. § 15A-2000(f)(1) mitigator of no significant prior criminal history, the N.C.G.S. § 15A-2000(f)(2) mitigator that the capital felony was committed while defendant was under the influence of mental or emotional disturbance, the N.C.G.S. § 15A-2000(f)(6) mitigator that the impaired capacity of defendant made him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, and the N.C.G.S. § 15A-2000(f)(7) mitigator concerning the age of defendant at the time of the crime. **State v. Nicholson, 1.**

Capital—mitigating circumstances—wording of catchall mitigator on punishment form—The trial court did not commit plain error in a double capital first-degree murder sentencing proceeding by its wording of the catchall mitigating circumstance under N.C.G.S. § 15A-2000(f)(9) on the punishment forms which omitted the final phrase "one or more of us finds this circumstance to exist." **State v. Nicholson, 1.**

Capital—motion for appropriate relief—mental retardation—A first-degree murder defendant's motion in the Supreme Court seeking relief from his death sentence on the ground that he is mentally retarded was remanded to superior court where the materials before the Supreme Court were not sufficient to determine the motion. **State v. Anderson, 136.**

Capital—nonstatutory mitigating circumstances—limitations on defendant's intellectual functioning—The trial court did not err in a double capital first-degree murder sentencing proceeding by failing to submit defendant's requested nonstatutory mitigating circumstance that defendant had limitations on his intellectual functioning. **State v. Nicholson, 1.**

Capital—nonstatutory mitigating circumstances—peremptory instruction—The trial court did not err in a double capital first-degree murder sentenc-

SENTENCING—Continued

WARRANTIES

Implied warranty of merchantability—circumstantial evidence of breach—sufficient—A plaintiff does not need to prove a specific defect to carry his or her burden of proof in a products liability action based upon a breach of implied warranty of merchantability, and the burden sufficient to raise a genuine issue of material fact in such a case may be met if the plaintiff produces adequate circumstantial evidence of a defect. This evidence may include certain enumerated factors, and, when a plaintiff seeks to establish a case by means of circumstantial evidence, the trial judge is to consider these factors initially and determine whether they are sufficient as a matter of law to support a finding of breach of warranty. The plaintiff does not have to satisfy all of the factors and, if the judge determines that the case may be submitted to the jury, the weighing of the factors should be left to the finder of fact. **DeWitt v. Eveready Battery Co., 672.**

Implied warranty of merchantability—circumstantial factors—elimination of other possibilities—In an action arising from a burn allegedly received from leaking D batteries, defendant's suggestion that an error plaintiff may have committed led to the injury did not rise to a level requiring the trial court to conclude as a matter of law that plaintiff failed to negate a reasonable secondary cause. A plaintiff is required to present a case-in-chief that either contains no evidence of reasonable secondary causes or negates any such evidence that was initially present and need not actively eliminate the possibility of reasonable secondary causes. **DeWitt v. Eveready Battery Co., 672.**

Implied warranty of merchantability—circumstantial factors—expert testimony—In an action arising from a burn allegedly received from leaking D batteries, plaintiff's expert's testimony was sufficient to raise a genuine issue of material fact regarding defendant manufacturer's responsibility for defects which were possible causes of the leakage. **DeWitt v. Eveready Battery Co., 672.**

Implied warranty of merchantability—circumstantial factors—malfunction of product—In an action arising from a burn allegedly received from leaking D batteries, plaintiff presented a genuine issue of material fact concerning whether the batteries malfunctioned. **DeWitt v. Eveready Battery Co., 672.**

Implied warranty of merchantability—circumstantial factors—similar accidents—In an action arising from a burn allegedly received from leaking D batteries, there was sufficient evidence to raise a genuine issue of material fact regarding the possibility of other similar incidents. **DeWitt v. Eveready Battery Co., 672.**

Implied warranty of merchantability—circumstantial factors—use of product and timing of malfunction—In an action arising from a burn allegedly received from leaking D batteries, there was evidence presenting a genuine issue of material of fact that plaintiff put the batteries to their ordinary use when he was injured. **DeWitt v. Eveready Battery Co., 672.**

Implied warranty of merchantability—circumstantial factors—whether accident occurs without manufacturing defect—There was evidence of a genuine issue of material fact in an action arising from a burn allegedly received

ZONING

WORD AND PHRASE INDEX