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SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
NORTH CAROLINA

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6B	Cy A. Grant, Sr.	Windsor
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14	Orlando F. Hudson, Jr.	Durham
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	JACK A. THOMPSON	Fayetteville
	JAMES F. AMMONS, JR.	Fayetteville
13	WILLIAM C. GORE, JR.	Whiteville
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16A	B. CRAIG ELLIS	Laurinburg
16B	ROBERT F. FLOYD, JR.	Lumberton
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21	JUDSON D. DERAMUS, JR.	Winston-Salem
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DONALD L. SMITH	Raleigh

1. Appointed and sworn in 22 December 2003 to replace Wiley F. Bowen who retired 27 August 2003.
2. Reappointed and sworn in 16 April 2004.
3. Deceased 17 September 2003.
4. Resigned 19 August 2003.
5. Resigned 1 January 2004.

DISTRICT COURT DIVISION

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1	GRAFTON G. BEAMAN (Chief)	Elizabeth City
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	BUFORD A. CHERRY	Hickory
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	MONICA HAYES LESLIE[5]	Waynesville

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RODNEY R. GOODMAN	Kinston

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	PATTIE S. HARRISON	Roxboro
	ROLAND H. HAYES	Winston-Salem
	ROBERT E. HODGES[9]	Morganton
	ROBERT W. JOHNSON	Statesville
	WILLIAM G. JONES	Charlotte
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	ROBERT K. KEIGER	Winston-Salem
	JACK E. KLASS	Lexington
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	STANLEY PEELE	Chapel Hill
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	CATHERINE C. STEVENS	Gastonia

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HARLEY B. GASTON, JR.	Gastonia
WALTER P. HENDERSON	Trenton
ELTON C. PRIDGEN	Smithfield
SAMUEL M. TATE	Morganton

1. Appointed and sworn in 12 March 2004 to replace Franklin F. Lanier who was appointed to the Suprior Court.
2. Appointed Chief Judge effective 1 October 2003 to replace William L. Daisy who resigned as Chief Judge.
3. Resigned 31 January 2004 and appointed and sworn in as an Emergency District Court Judge 3 February 2004.
4. Appointed Chief Judge 27 February 2004 to replace John J. Snow, Jr. who retired 27 February 2004.
5. Appointed and sworn in 20 April 2004.
6. Appointed and sworn in 15 September 2003.
7. Appointed and sworn in 3 February 2004.
8. Deceased 23 February 2004.
9. Appointed and sworn in 28 April 2004.

ATTORNEY GENERAL OF NORTH CAROLINA

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JULIA S. WHITE

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

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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 duly passed the examinations of the Board of Law Examiners as of the 9th day of May, 2003 and said persons have been issued license certificates.

FEBRUARY 2003 NORTH CAROLINA BAR EXAMINATION

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Given over my hand and seal of the Board of Law Examiners this the 15th day of May, 2003.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
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Katy K. Strait ..... Raleigh
Lydia Owen Boesch ..... Pinehurst

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 27th day of June 2003, and said person has been issued a certificate of this Board:

Gregg M. Illikainen ..... Applied from the State of West Virginia

Given over my hand and seal of the Board of Law Examiners on this the 10th day of July 2003.

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Board of Law Examiners of the
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Kathryn Carlton Setzer ..... Raleigh

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

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John James Pavey, Jr. ..... Sylva
Susan Louise Peacock ..... Chapel Hill
Brian Thomas Pearce ..... Charlotte
Walter M. Pence, III ..... Oriental
Mark Lynn Penny ..... Lillington
Kelly Anne Perry ..... Morrisville
Andrew Lee Peterson ..... Creedmoor

Drew Henry Peterson ..... Matthews
Jeffrey Warren Phillips ..... Rocky Mount
John C. Phillips ..... Clayton
Michael David Phillips ..... Pfafftown
Jason O. Piche ..... Gastonia
Susan Margaret Pike ..... Winston-Salem
Diane B. Pinsker ..... Raleigh
Ebony Jeanelle Pittman ..... Raleigh
Creath Louise Moore Pollak ..... Belmont
Elizabeth Hayes Poremba ..... Holly Springs
Lindsay Page Pratt, III ..... Winston-Salem
Eric Edward Pridgen ..... Gainesville, Florida
James Brian Pridgen ..... Sims
Edward S. Prince ..... Charlotte
Polly Elizabeth Proctor ..... Charlotte
Christy Dee Pruitt ..... Chapel Hill
Stacy Marie Race ..... Knightdale
Demetrius Gennaro Rainer ..... Charlotte
Neal Andrew Ramee ..... Raleigh
Anne Jordan Randall ..... Charlotte
William Walter Rapp ..... Wilmington
Ashby Thackston Ray ..... Raleigh
Cory Andrew Rayborn ..... Jamestown
Rhoda Lynn Raymond ..... Richmond, Virginia
Forrest Godfrey Read, IV ..... Chapel Hill
Takeisha Renee Redd ..... Durham
Terrica LaShun Redfield ..... Durham
Christopher B. Reinhardt ..... Durham
Adam Hailey Reynolds ..... Charlotte
Jamal A. Rhinehardt ..... Morrisville
Allyn Burchfield Rhodes ..... Charlotte
Cindy Marie Rice ..... Asheville
Addie K. S. Ries ..... Raleigh
Heather Faye Riley ..... Raleigh
John L. Roberts ..... Cary
Kristin Nicole Robinson ..... Charlotte
John William Roebuck, Jr. ..... Raleigh
Ted Owen Rogers, Jr. ..... Morganton
Kimberly B. Rosenberg ..... Apex
Adam Lewis Ross ..... Charlotte
Rodrick A. Rouse ..... Kinston
Stephen Edward Ryan ..... Montgomery, Alabama
Rohan George Sabapathypillai ..... Durham
Craigie D. Sanders ..... Durham
Micah John Sanderson ..... Lincolnton
David Michael Saravitz ..... Apex
Connie Wildred Sawyer, III ..... Charlotte
Amirah Raushanah Scarborough ..... Morrisville
Camilla Catherine Schupp ..... Hillsborough
Ashleigh Caroline Seiber ..... Raleigh
Allison Serafin ..... Raleigh

John Robert Seymour ..... Charlotte
Samuel Jonathan Shames ..... Hickory
Bryan A. Shang ..... Raleigh
Jessica Russak Sharpe ..... Raleigh
Karl Dean Shatley, II ..... Asheville
Shannon Stacy Sheldon ..... Wrightsville Beach
James Marshall Shelton ..... Salisbury
Kristoffer B. Shepard ..... Charlotte
Christina Maria Sheppard ..... Virginia Beach, Virginia
Dana Kay Sherrill ..... Belmont
Tamara Lee Shields ..... Apex
David T. Shin ..... Charlotte
Jason Ray Shoemaker ..... Gastonia
Chris Shumate ..... Rock Hill, South Carolina
Jennifer Carol Sikes ..... Durham
Gary L. Simmons ..... Benson
Edward Bardin Simmons, Jr. ..... Winston-Salem
Patra Allison Sinner-Floyd ..... Charlotte
Amie Sloane ..... Wilmington
Adam Ryan Smart ..... Rockingham
Adam Smith ..... Raleigh
Addie Marie Smith ..... Winston-Salem
Bradley Horace Smith ..... Thomasville
Brian D. Smith ..... Raleigh
M. Riana Smith ..... Sugar Grove
Thomas Edgar Snell ..... Sanford
William Robert Solomon, Jr. ..... Rocky Mount
Adam Palmer Soltys ..... Charlotte
Martha Evangeline Soule ..... Raleigh
Brian Cory Spence ..... Raleigh
Holly M. Spencer ..... Lincolnton
Shanna R. Spencer ..... Raleigh
John Michael Sperati ..... Raleigh
Sewell-Grae Haynes Spradlin ..... Chapel Hill
Jeanette Marion Stark ..... Winston-Salem
William Michael Starr ..... Charlotte
Elton Bryson Stephens, III ..... Winston-Salem
Steven R. Storch ..... Hillsborough
Kristal Lyn Stovall ..... Houston, Texas
Jennifer Stuart ..... Chapel Hill
John Patrick Stutts ..... Mooresville
Jimmy R. Summerlin, Jr. ..... Polkville
Michael Charles Surles ..... Hillsborough
Jacob H. Sussman ..... Charlotte
Deanna Faye Swain ..... Chocowinity
Kristin Marjorie Swainey ..... Raleigh
Philip B. Sweigart ..... Durham
Cynthia Munk Swindlehurst ..... Durham
Nikiann Tarantino ..... Mnomonee Falls, Wisconsin
Andrew William James Tarr ..... Matthews
Anne Durant Taylor ..... Charlotte

Jennifer D. Chrisohon Taylor ..... Raleigh
Kevin Scott Tewes ..... Greensboro
Jennifer Kristin Thill ..... Winston-Salem
Catherine Elizabeth Thomas ..... Wilson
Catherine Louise Thomas ..... Washington, District of Columbia
Christopher Melck Thomas ..... Durham
Samantha L. Thomas ..... Raeford
Laura Michelle Thuotte ..... Chapel Hill
Daniel James Thurston ..... Chapel Hill
Helena Maria Overton Toft ..... Cary
Peggy Adela Toro ..... Hertford
Dannette De Weese Toth ..... Chapel Hill
King F. Tower ..... Richmond, Virginia
Kelly McBrayer Townsend ..... Greensboro
Slade Culli Trabucco ..... Indianapolis, Indiana
Joel Kent Turner ..... Raleigh
Laurie Beth Vanden Bos ..... Durham
Olga Vysotskaya de Brito ..... Minsk, Belarus
Amy S. Wallace ..... Cary
Gena Elizabeth Walling-McCray ..... Raleigh
Nicholas Glen Walter ..... Rock Hill, South Carolina
Markus Lee Walters ..... Arlington, Virginia
Alexis Keating Wasowski ..... Charlotte
Jennifer Catherine Wasson ..... Greensboro
Cheryl Renee Watkins ..... Oklahoma City, Oklahoma
Natalie C. Watson ..... Rocky Mount
Brandon Todd Wells ..... Raleigh
Mary H. Wells ..... Clayton
Sarah Pronovost Wenzel ..... Waynesville
Christopher M. Whelchel ..... Rock Hill, South Carolina
Joshua Michael Whitaker ..... Raleigh
James C. White ..... Chapel Hill
Robert Jason White ..... Lexington
Roger Carl White ..... Greensboro
Sarah McCall White ..... Lexington
Benjamin H. White, III ..... Greensboro
Maranda Kate Whitener ..... Taylorsville
Adam Emerson Whitten ..... Charlotte
Julia Renee Wicker ..... Sanford
Jeffrey J. Wiebe ..... Hillsborough
Stacey Stanley Wiggins ..... Kinston
Christopher Michel Wilkie ..... Winston-Salem
Benjamin Douglas Williams ..... Charlotte
M. Elizabeth Farr Williams ..... Hickory
Suzanne Cress Williams ..... Raleigh
James Madison Wilson ..... Raleigh
Jennifer Renee Wilson ..... Asheville
Jeremy S. Wilson ..... Lincolnton
Patricia Latham Wilson ..... Raleigh
Thomas R. Wilson ..... Raleigh
Tiffany Nichel Wilson ..... Monroe

John Clinton Wimbish ..... Charlotte
Robert Andrew Wirth ..... Chapel Hill
Jennifer Lynn Wondracek ..... Morrisville
Karla M. Wood ..... Maggie Valley
Zaneta Moore Wood ..... Winston Salem
Misty Elizabeth Woodard ..... Fremont
Justin Brant Wraight ..... Winston-Salem
Camila J. Wright ..... Franklin
Christine Belle Wunsche ..... Durham
Matthew Dale Wunsche ..... Durham
Edward Avery Wyatt, VI ..... Greensboro
James Ramage Wyche ..... Charlotte
Bradley Trent Zimmer ..... Wilmington

Given over my hand and seal of the Board of Law Examiners on this the 24th day of September 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 19th day of September 2003, and said persons have been issued a certificate of this Board:

Benjamin Hogarth Whitley ..... Raleigh
Charles Shawn Christenbury ..... Raleigh
Clarence Andrew McGuffin ..... Raleigh
Michael Thomas Cecka ..... Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 30th day of September 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 19th day of September, 2003, and said persons have been issued a certificate of this Board:

Margaret Folz Keating ..... Applying from Missouri
Paul Blakely Keating, Jr. ..... Applying from Missouri
Brian Steed Tatum ..... Applying from Georgia
Jody Michelle Tawfik ..... Applying from New York
Mary Hart Zemp ..... Applying from Arkansas

Given over my hand and seal of the Board of Law Examiners on this the 1st day of October 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 was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 5th day of September 2003, and said person has been issued a certificate of this Board:

W. Russell Congleton ..... Durham

Given over my hand and seal of the Board of Law Examiners on this the 23rd day of October 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 was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 10th day of October 2003, and said person has been issued a certificate of this Board:

Kathleen A. Gleason ..... Chapel Hill

Given over my hand and seal of the Board of Law Examiners on this the 23rd day of October 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 was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 26th day of August 2003, and said person has been issued a certificate of this Board:

Marie Summerlin Hamm ..... Virginia Beach, Virginia

Given over my hand and seal of the Board of Law Examiners on this the 23rd day of October 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 was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 24th day of October 2003, and said person has been issued a certificate of this Board:

Steven Dana Dyer ..... Applied from the State of Pennsylvania

Given over my hand and seal of the Board of Law Examiners on this the 4th day of November 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 26th day of November, 2003, and said persons have been issued a certificate of this Board:

Lori Herndon Beck ..... Applied from the State of Georgia
Allen L. Broughton ..... Applied from the State of Georgia
Goran P. Stojkovick ..... Applied from the District of Columbia
W. Swain Wood ..... Applied from the State of Georgia
Charlene Danielle Moody ..... Applied from the State of Georgia
Adam Howard Charnes ..... Applied from the District of Columbia
Peter Santos ..... Applied from the State of Pennsylvania
Stephen J. Antal ..... Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 6th day of January, 2004.

Fred P. Parker III
Executive Director
Board of Law Examiners
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 examination of the Board of Law Examiners as of the 8th day of December, 2003 and said persons have been issued license certificates.

Russell Gable Alion, Jr. ..... Charlotte
Terresa Ann English ..... Mount Holly
Paul B. Ferrara, III ..... Walterboro, South Carolina
Henry W. Gerock, II ..... Jacksonville
Quentin Huff ..... Winston-Salem
Catherine Lynne MacLean ..... Virginia Beach, Virginia
David Paul Stitzel ..... Morrisville
Richard Kyle Tate ..... Lexington, Kentucky
Jonathan James Taylor ..... Raleigh
Bret Thomas Winterle ..... Winston-Salem

Given over my hand and seal of the Board of Law Examiners this the 6th day of January, 2004.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 26th day of November 2003, and said person has been issued a certificate of this Board:

Payton Dwight Hoover ..... Kinston

Given over my hand and seal of the Board of Law Examiners on this the 22nd day of January, 2004.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 2nd day of January, 2004, and said person has been issued a certificate of this Board:

Cheryl Renee Watkins ..... Oklahoma City, Oklahoma

Given over my hand and seal of the Board of Law Examiners on this the 22nd day of January, 2004.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 30th day of January, 2004, and said person has been issued a certificate of this Board:

Joseph Lee Levinson ..... Benson

Given over my hand and seal of the Board of Law Examiners on this the 12th day of March, 2004.

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 3rd day of February, 2004, and said persons have been issued a certificate of this Board:

Jeremy Regan Sayre ..... Applied from the State of Ohio
Katherine Connolly Galvin ..... Applied from the State of Michigan

Given over my hand and seal of the Board of Law Examiners this the 12th day of March, 2004.

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 27th day of February, 2004, and said persons have been issued a certificate of this Board:

Debra Ann Kelly ..... Applied from the State of New York
Michele L. Ledo ..... Applied from the State Pennsylvania
Jan R. Paul ..... Applied from the State of Vermont
Joshua Reed Van Kampen ..... Applied from the State of Illinois
David K. Schwirian ..... Applied from the State of West Virginia
David Kennon Moody ..... Applied from the State of New York
Gary S. Sideracker ..... Applied from the State of Massachusetts
Aimee Elizabeth Cain ..... Applied from the State of New York
Yale L. Hollander ..... Applied from the State of Missouri
Emily Haycock Fournier ..... Applied from the State of Massachusetts
John S. Sansone ..... Applied from the State of New York
Sherry L. Powell ..... Applied from the State of Missouri
Richard F. Treacy, Jr. ..... Applied from the State of Connecticut
Thomas A. Gray ..... Applied from the State of Massachusetts
Alvin William Keller, Jr. ..... Applied from the District of Columbia
Sheldon Maurice Francis ..... Applied from the State of Tennessee
Lee Stanford Sherrill, Jr. ..... Applied from the State of Georgia
Bryan Lee Tyson ..... Applied from the State of Georgia
Jennifer M. Techman ..... Applied from the State of Georgia
Michael J. Kelly ..... Applied from the State of Ohio

Given over my hand and seal of the Board of Law Examiners this the 12th day of March, 2004.

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

MANN MEDIA, INC., DOING BUSINESS AS OUR STATE NORTH CAROLINA; AND BERNARD MANN, PETITIONERS V. RANDOLPH COUNTY PLANNING BOARD, RESPONDENT

No. 116A01

(Filed 28 June 2002)

Zoning— special use permit—broadcast tower—whole record test

An application of the whole record test reveals that the trial court erred by reversing respondent planning board's decision to deny petitioners' special use permit application to construct a broadcast tower, because: (1) petitioners failed to meet their burden of proving that the proposed use would not materially endanger public safety; and (2) petitioners failed to establish that the use would not substantially injure the value of adjoining or abutting property.

Justice BUTTERFIELD dissenting.

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. 137, 542 S.E.2d 253 (2001), affirming a judgment entered 17 August 1999 by Spainhour, J., in Superior Court, Randolph County. Heard in the Supreme Court 16 May 2001.

Keziah, Gates & Samet, L.L.P., by Andrew S. Lasine, for petitioner-appellees.

Gavin Cox Pugh Etheridge and Wilhoit, LLP, by Alan V. Pugh and Robert E. Wilhoit, for respondent-appellant.

EDMUNDS, Justice.

Petitioners Mann Media, Inc. and Bernard Mann (Mann) instituted this action against respondent Randolph County Planning Board to review respondent's denial of petitioners' application for a special use permit to construct a 1,500-foot broadcast tower in Randolph County, North Carolina. In this appeal, we must consider both whether the superior court correctly concluded that there was no competent, material, and substantial evidence to support respondent's decision to deny petitioners' special use permit application and whether the Court of Appeals properly affirmed the superior court's decision. For the reasons that follow, we hold that the superior court erred in reversing respondent's decision to deny petitioners' special use permit application to construct the broadcast tower, and therefore we reverse the Court of Appeals.

Petitioners initially applied for a special use permit to construct a 1,879-foot broadcast tower on an approximately 119.52-acre tract of land in northeast Randolph County zoned for residential/agricultural use. On 10 November 1998, respondent held a public hearing on petitioners' application and thereafter voted to deny petitioners' request.

On 17 December 1998, petitioners filed a petition for writ of certiorari with the Superior Court, Randolph County, pursuant to N.C.G.S. § 153A-345, requesting review of the denial of their application. The petition was allowed, and after a hearing in the matter, a superior court judge entered an order on 17 February 1999 vacating respondent's decision to deny the permit and remanding the case to respondent for a hearing *de novo* on the ground that respondent "did not specify the reasons for the denial of the Special Use Permit in the minutes of the meeting at which the action was taken."

On 20 May 1999, petitioners filed a second application for a special use permit. In this application, petitioners modified their original plans and sought to construct a shorter, 1,500-foot tower in the same location. Respondent held a second public hearing in the matter on 10 June 1999, during which petitioner Mann and Ron Crowder, a North

Carolina real estate appraiser, testified on behalf of petitioners. Mann's testimony addressed safety issues, particularly whether the tower could collapse and whether ice could build up on the tower and fall off, while Crowder's testimony was directed toward whether the proposed use would substantially injure the value of adjoining or abutting properties and whether the proposed use would be in harmony with the general area. John Burkett, Rita Mintmier, Terry Davis, and Julia Davis, landowners and residents near the proposed site; Grace Steed, a North Carolina realtor; and Danny Frazier, a North Carolina building contractor, testified in opposition to petitioners' application.

At the conclusion of the hearing, respondent unanimously voted to deny the special use permit, and in a subsequent written order dated 24 June 1999, respondent denied petitioners' application. This order listed as findings of fact:

> 1. The applicant applied for a special use permit to allow the construction of [a] 1500' broadcast tower on a 119.52 acres tract located at the Northwest side of the intersection of Lewis Davis Road and Davis Country Road, New Market Township. Said tract is zoned Residential Agricultural.
>
> 2. The applicant does not own the land for which the permit is requested.
>
> 3. The proposed tower is to be constructed for speculative purposes, there being no contracts or leases for the use of the proposed tower, all in direct contravention of the applicant's testimony at the first public hearing. The Board therefore finds that the proposed use is not a public necessity nor required to provide broadcast service for the Piedmont-Triad area.
>
> 4. The proposed tower is located within 1500 feet of 21 established residences and there are numerous other residences located in proximity to the proposed tower.
>
> 5. Conflicting evidence was presented concerning the probability of ice forming on and falling from the proposed tower, but the Board finds that ice has formed and fallen from the other towers within the county's zoning jurisdiction causing damage and is likely to do so from the proposed tower, and would therefore materially endanger the public safety where located because of the number and density of adjoining residences.

6. Evidence was presented showing that the site for the proposed tower was approved by the Federal Aviation Agency, but opposed by the Aviation Division of the North Carolina Department of Transportation. The Board finds that the construction of this tower could therefore constitute a hazard to general aviation operating from Johnson Air Field, and thus endangers the public safety.

7. The population density of the area immediately adjacent to and in the proximity of the site for the proposed tower is substantially greater than that of areas surrounding sites for towers which have been previously approved by this Board for Special Use Permits.

8. The population density of the Residential Agricultural zoning district within Randolph County varies widely in general, but is of lower density in areas adjacent to tall telecommunication towers constructed after the adoption of the Unified Development Ordinance, and therefore this proposed site being in a high density RA district because of its size, visual impact and lighting and further because the required conditions and specifications set out in the ordinance are insufficient to harmonize this particular site (emphasis added) with the area, it is therefore not in harmony with the area.

9. Conflicting testimony was presented as to whether the issuance of the permit and the construction of the tower would substantially diminish the value of adjacent properties. The Board finds that the value of adjacent properties to the proposed site would substantially diminish and would be injured if the special use permit were issued.

10. The applicant met the required conditions and specifications for such use as set out in the Unified Development Ordinance, pursuant to General Standard No. 2 but such conditions and specifications are not dispositive as to a proposed site in an area of higher residential population density in a[n] RA District.

Respondent then concluded:

1. The [proposed] use will material[ly] endanger the public safety if located where proposed, and developed according to the plan as submitted and approved. . . .

2. The proposed use will substantially injure the value of adjoining or abutting property, and the use is not a public necessity. . . .

3. The location and character of the use if developed according to the plan as submitted and approved will not be in harmony with the area in which it is to be located.

On 14 July 1999, petitioners filed a second petition for writ of certiorari, requesting the superior court "to review the record de novo for errors of law, to determine if competent, material, and substantial evidence exists, based on the whole record, to support the decision, and to determine whether the decision was arbitrary and capricious." The writ of certiorari was allowed on the same day, 14 July 1999, and following a hearing, a superior court judge entered a judgment on 17 August 1999 that vacated respondent's 24 June 1999 order and remanded the matter for entry of an order granting petitioners a special use permit. The court listed as findings of fact:

1. Petitioners[] applied for a Special Use Permit to locate a 1,500[-]foot broadcast tower in Randolph County, North Carolina.

2. Petitioners' proposed use is a permitted use in the zoning district in which the broadcast tower is proposed to be located. The decision to allow a broadcast tower as a permitted use in the zoning district in question was made by the Randolph County Board of County Commissioners in enacting the zoning ordinance for Randolph County.

3. Petitioners' proposed use meets all required conditions and specifications of the Randolph County Zoning Ordinance and the Planning Board.

4. The location and height of the proposed broadcast tower was approved by the Federal Aviation Administration which concluded that the proposed tower would not have any substantial adverse effect upon the safe and efficient utilization of the navigable air space by aircraft or on the operation of navigational facilities and would not be a hazard to air navigation.

5. The North Carolina Department of Transportation comments objecting to Petitioners' proposed tower did not relate to a hazard resulting from Petitioners' proposed tower, but to a proposed tower in a different location.

6. Petitioners' proposed broadcast tower does not constitute a hazard to air traffic.

7. Petitioners' proposed broadcast tower incorporates mechanisms to prevent the formation of ice on the tower itself.

8. Ice which may form on the support wires of the proposed tower will tend to slide down the support wires to the tower anchors but, in any event would not detach and land at a distance from the tower any greater than the distance from the tower base to the anchors, which is a distance of 900 feet.

9. No residences, structures, or property are located within 900 feet of the tower base.

10. An existing television broadcast tower is presently located in the immediate vicinity of Petitioners' proposed tower. This existing tower exceeds 2,000 feet in height.

11. The location of Petitioners' proposed tower and the surrounding area is zoned residential/agricultural.

12. The area surrounding Petitioners' proposed tower is largely agricultural.

13. No market evidence exists to support a substantial injury to adjoining or abutting property values as a result of existing broadcast towers in the vicinity of Petitioners' proposed broadcast tower.

14. Petitioners' proposed tower would have no substantial adverse effect on the value of adjoining or abutting properties.

15. Although residential housing exists in the vicinity of Petitioners' proposed tower, based on the presence of other broadcast towers in the area, the agricultural nature of the area, and the zoning, Petitioners' proposed use will be in harmony with the area in which it is to be located and in general conformity with the land development plan for Randolph County and the Randolph County Zoning Ordinance.

Based on these findings of fact, the superior court made the following conclusions of law:

1. This Court's review of the Randolph County Planning Board's Order of June 24, 1999, and the record of its proceeding was pursuant to a Writ of Certiorari issued by this Court and pur-

suant to the statutory authority set forth in N.C. General Statute §153A-345[.]

2. Petitioners[] presented competent, material, and substantial evidence establishing the conditions required by the Randolph County Zoning Ordinance for the issuance of the Special Use Permit for which Petitioners applied and demonstrating that the proposed use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved, that the proposed use meets all required conditions and specifications, that the use will not substantially injure the value of adjoining or abutting property, and that the location and character of the use if developed according to the plan as submitted and approved will be in harmony with the area in which it is to be located and in general conformity with the land development plan for Randolph County.

3. The Randolph County Planning Board's determination and reliance on the number of residences within 1,500 feet of the Petitioners' proposed tower does not relate to any standard in the Randolph Zoning Ordinance and is therefore arbitrary and capricious as a matter of law.

4. No competent, material, or substantial evidence was presented to the Randolph County Planning Board establishing or tending to establish any relevancy of a 1,500[-]foot zone measured from the base of Petitioners' proposed tower.

5. The Planning Board's reliance on density comparisons between the location of Petitioners' proposed tower and existing towers in the vicinity of Petitioners' proposed tower which are not specified in the Randolph County Zoning Ordinance was arbitrary and capricious and constituted error as a matter of law.

6. Testimony presented to the Planning Board concerning alleged incidents at other towers involving ice damage was not based on personal knowledge, but was based on hearsay, to which Petitioners objected, and was therefore incompetent.

7. Testimony presented to the Planning Board concerning alleged incidents at other towers involving ice damage did not establish the distance from those towers at which ice allegedly fell, causing damage, or whether ice allegedly causing damage fell from towers which incorporated mechanisms to prevent the for-

mation of ice, such as those which would be incorporated into Petitioners' tower, and was therefore incompetent.

8. The Planning Board's reliance on the foregoing testimony concerning alleged incidents at other towers involving ice damage was therefore arbitrary and capricious and constituted error, as a matter of law.

9. No competent, material, or substantial evidence was presented that Petitioners' proposed broadcast tower constitutes a hazard to air traffic.

10. Testimony in opposition to Petitioners' proposed tower from property owners whose property did not adjoin or abut the location of the proposed tower regarding the perceived impact on property values as a result of the proposed tower was incompetent, and the Planning Board's reliance on this testimony was therefore arbitrary and capricious and constituted error as a matter of law.

11. The Planning Board's reliance on testimony in opposition to Petitioners' proposed tower concerning property values for property in the vicinity of existing towers which did not identify the properties to which it referred, any material aspect of those properties, the alleged impact on those property values, and which did not relate the testimony to property values of property adjoining or abutting Petitioners' proposed tower location was arbitrary and capricious and constituted error as a matter of law.

12. Because Petitioners' proposed use is a permitted use within the zoning district in which it is proposed to be located, it is in harmony with the area in which it is to be located as a matter of law.

13. Petitioners[] presented competent, material, and substantial evidence satisfying the requirements of the Randolph County Zoning Ordinance.

14. The Randolph County Planning Board failed to act based on competent, substantial, and material evidence in denying Petitioners' Special Use Permit Application and therefore acted arbitrarily and capriciously.

15. Petitioners' Application for a Special Use Permit should have been allowed by the Randolph County Planning Board.

Respondent appealed to the North Carolina Court of Appeals. In a split decision, that court, focusing on whether the proposed use was in harmony with the area in which it was to be located and whether the proposed use would substantially injure the value of property adjoining or abutting the proposed site, held that petitioners met their burden for approval of the special use permit application and that respondent's order denying the special use permit was not supported by competent, material, and substantial evidence. Accordingly, the Court of Appeals affirmed the superior court's judgment that vacated respondent's order and remanded the matter to respondent for entry of an order allowing petitioners' special use permit application. The dissenting judge disagreed, arguing:

> From a review of the record and the findings of the Board, I conclude there was competent material and substantial evidence to support the denial of the special use permit and I would reverse the order of the trial court and remand the case for entry of an order affirming the decision of the Board.

Mann Media, Inc. v. Randolph Cty. Planning Bd., 142 N.C. App. 137, 144, 542 S.E.2d 253, 258 (2001) (Walker, J., dissenting). Respondent appeals to this Court from the decision of the Court of Appeals on the basis of the dissent.

SPECIAL USE PERMITS

A county has the authority to regulate and restrict the use of property pursuant to section 153A-340 of the North Carolina General Statues, which provides in pertinent part:

> (a) For the purpose of promoting health, safety, morals, or the general welfare, a county may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes, and to provide density credits or severable development rights for dedicated rights-of-way pursuant to G.S. 136-66.10 or G.S. 136-66.11.
>
> . . . .
>
> (c) The regulations may provide that a board of adjustment may determine and vary their application in harmony with their general purpose and intent and in accordance with general or

> specific rules therein contained. The regulations may also provide that the board of adjustment or the board of commissioners may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits. Where appropriate, the conditions may include requirements that street and utility rights-of-way be dedicated to the public and that recreational space be provided. When issuing or denying special use permits or conditional use permits, the board of commissioners shall follow the procedures for boards of adjustment except that no vote greater than a majority vote shall be required for the board of commissioners to issue such permits, and every such decision of the board of commissioners shall be subject to review by the superior court by proceedings in the nature of certiorari.

N.C.G.S. § 153A-340(a), (c) (2001). A county may create a planning agency to perform the zoning duties of a board of adjustment, N.C.G.S. § 153A-344(a) (2001); N.C.G.S. § 153A-345(a) (2001), including issuing special use permits to "permit special exceptions to the zoning regulations in classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified in the ordinance," N.C.G.S. § 153A-345(c).

A special use permit is "one which is expressly permitted in a given zone upon proof that certain facts and conditions detailed in the ordinance exist." *Application of Ellis*, 277 N.C. 419, 425, 178 S.E.2d 77, 80 (1970). " 'It does not entail making an exception to the ordinance but rather permitting certain uses which the ordinance authorizes under stated conditions.' " *Woodhouse v. Board of Comm'rs of Nags Head*, 299 N.C. 211, 218, 261 S.E.2d 882, 887 (1980) (quoting with approval *Syosset Holding Corp. v. Schlimm*, 15 Misc. 2d 10, 11, 159 N.Y.S.2d 88, 89 (N.Y. Sup. Ct. 1956), *modified on other grounds*, 4 A.D.2d 766, 164 N.Y.S.2d 890 (1957)). "It is granted or denied after compliance with the procedures prescribed in the ordinance." *Humble Oil & Ref. Co. v. Board of Aldermen of Chapel Hill*, 284 N.C. 458, 467, 202 S.E.2d 129, 135 (1974).

Respondent is a planning agency appointed by the Randolph County Board of Commissioners, performing the functions of the board of adjustment in accordance with N.C.G.S. § 153A-345(a). "The Zoning Ordinance of Randolph County, North Carolina" (the Ordinance)

> is designed to encourage the protection and development of the various physical elements of the county in accordance with a comprehensive plan of land use and population density and for the purpose of promoting the public health, safety, morals and general welfare; promoting the orderly development of the county, preventing the overcrowding of land; and regulating the location and use of structures and land for trade, industry, residences or other purposes except farming.

It provides that a special use permit may be granted by respondent, noting that:

> Permitting Special Uses adds flexibility to the Zoning Ordinance. Subject to high standards of planning and design, certain property uses are allowed in the several districts where these uses would not otherwise be acceptable. By means of controls exercised through the Special Use Permit procedures, property uses which would otherwise be undesirable in certain districts can be developed to minimize any bad effects they might have on surrounding properties.

One special use set out in the Ordinance is for "Public Utilities[] (Substations, Transformers, Radio or T.V. Towers, etc.)," which may be located in an area zoned residential/agricultural.

Pursuant to section 4.2 of the Ordinance, respondent must find four factors before granting a special use permit. These factors are:

(1) that the use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved;

(2) that the use meets all required conditions and specifications;

(3) that the use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity; and

(4) that the location and character of the use if developed according to the plan as submitted and approved will be in harmony with the area in which it is to be located and in general conformity with the Land Development Plan for Randolph County.

The Ordinance further provides that if respondent fails to find any factor and "denies the Special Use Permit, it shall enter the

reason for its action in the minutes of the meeting at which the action is taken."

STANDARD OF REVIEW

A county planning board must follow a two-step decision-making process in granting or denying an application for a special use permit. If "an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it." *Humble Oil & Ref. Co. v. Board of Aldermen of Chapel Hill*, 284 N.C. at 468, 202 S.E.2d at 136. If a *prima facie* case is established, "[a] denial of the permit [then] should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record." *Id.*

The county planning board sits in a quasi-judicial capacity when determining whether to grant or deny a special use permit and

> must insure that an applicant is afforded a right to cross-examine witnesses, is given a right to present evidence, is provided a right to inspect documentary evidence presented against him and is afforded all the procedural steps set out in the pertinent ordinance or statute. Any decision of the town board has to be based on competent, material, and substantial evidence that is introduced at a public hearing.

Coastal Ready-Mix Concrete Co. v. Board of Comm'rs of Nags Head, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980). "Its findings of fact and decisions based thereon are final, subject to the right of the courts to review the record for errors in law and to give relief against its orders which are arbitrary, oppressive or attended with manifest abuse of authority." *Humble Oil & Ref. Co. v. Board of Aldermen of Chapel Hill*, 284 N.C. at 469, 202 S.E.2d at 137. The board, however, "is 'without power to deny a permit on grounds not expressly stated in the ordinance' and it must employ specific statutory criteria which are relevant." *Woodhouse v. Board of Comm'rs of Nags Head*, 299 N.C. at 218-19, 261 S.E.2d at 887 (quoting 3 Robert M. Anderson, *American Law of Zoning 2d* § 19.19, at 425 (1977)).

While the county board operates as the finder of fact, a reviewing superior court "sits in the posture of an appellate court" and "does not review the sufficiency of evidence presented to it but reviews that evidence presented to the town board." *Coastal Ready-Mix Concrete*

Co. v. Board of Comm'rs of Nags Head, 299 N.C. at 626-27, 265 S.E.2d at 383. In general, the superior court's task when reviewing the grant or denial by a county board of a special use permit includes:

> (1) Reviewing the record for errors in law,
>
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
>
> (5) Insuring that decisions are not arbitrary and capricious.

Id. at 626, 265 S.E.2d at 383. "The proper standard for the superior court's judicial review 'depends upon the particular issues presented on appeal.' " *ACT-UP Triangle v. Commission for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *Amanini v. N.C. Dep't of Human Res.*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994)). "When the petitioner 'questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the "whole record" test.' " *Id.* (quoting *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993)). However, " '[i]f a petitioner contends the [b]oard's decision was based on an error of law, "de novo" review is proper.' " *Sun Suites Holdings, LLC v. Board of Aldermen of Garner*, 139 N.C. App. 269, 272, 533 S.E.2d 525, 527-28 (quoting *JWL Invs., Inc. v. Guilford Cty. Bd. of Adjust.*, 133 N.C. App. 426, 429, 515 S.E.2d 715, 717, *disc. rev. denied*, 351 N.C. 357, 540 S.E.2d 349 (1999)), *disc. rev. denied*, 353 N.C. 280, 546 S.E.2d 397 (2000). "Moreover, '[t]he trial court, when sitting as an appellate court to review a [decision of a quasi-judicial body], must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review.' " *Id.* at 272, 533 S.E.2d at 528 (quoting *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 342 (1999)) (alterations in original).

These standards of review are distinct. Under a *de novo* review, the superior court "consider[s] the matter anew[] and freely substitut[es] its own judgment for the agency's judgment." *Sutton v. N.C.*

Dep't of Labor, 132 N.C. App. at 389, 511 S.E.2d at 341. When utilizing the whole record test, however, the reviewing court must " 'examine all competent evidence (the "whole record") in order to determine whether the agency decision is supported by "substantial evidence." ' " *ACT-UP Triangle v. Commission for Health Servs.*, 345 N.C. at 706, 483 S.E.2d at 392 (quoting *Amanini v. N.C. Dep't of Human Res.*, 114 N.C. App. at 674, 443 S.E.2d at 118). "The 'whole record' test does not allow the reviewing court to replace the [b]oard's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

Finally, when an appellate court reviews

> a superior court order regarding an agency decision, "the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly."

ACT-UP Triangle v. Commission for Health Servs., 345 N.C. at 706, 483 S.E.2d at 392 (quoting *Amanini v. N.C. Dep't of Human Res.*, 114 N.C. App. at 675, 443 S.E.2d at 118-19) (citation omitted in original). Accordingly, we now consider whether the superior court exercised the appropriate standard of review and, if so, whether it employed that standard properly. We also review decisions of the Court of Appeals for error of law, N.C. R. App. P. 16(a), and in addition must determine if the Court of Appeals correctly applied the standards set forth above.

ANALYSIS

In their petition for writ of certiorari to the superior court, petitioners contended that

> [t]he decision of the Planning Board is therefore unsupported by competent, material, and substantial evidence, based on the whole record, is arbitrary and capricious, and is subject to errors of law[].
>
> WHEREFORE, Petitioner[s] respectfully pray that this Court issue a Writ of Certiorari to the Randolph County Planning Board

> requiring that the record pertaining to its decision be certified to the Court for de novo review; reverse the decision of the Planning Board as (i) erroneous as a matter of law, (ii) unsupported by competent, material, and substantial evidence, and (iii) arbitrary and capricious . . . .

Petitioners' incorporation of the language of both standards of review in its petition was not improper because "[a] court may properly employ both standards of review in a specific case." *Sun Suites Holdings, LLC v. Board of Aldermen of Garner*, 139 N.C. App. at 273, 533 S.E.2d at 528. However, "the standards are to be applied separately to discrete issues," *id.* at 274, 533 S.E.2d at 528, and the reviewing superior court must identify which standard(s) it applied to which issues, *id.* at 272, 533 S.E.2d at 528. Here, the superior court stated in its judgment that it reviewed the matter

> pursuant to a Writ of Certiorari entered in this cause to determine if there were errors of law and if the Order was supported by competent, material, or substantial evidence or was arbitrary and capricious, based on the whole record; and after reviewing de novo the record of the Randolph County Planning Board certified to this Court, the verbatim transcript of the proceedings, and considering the arguments of counsel and legal authority submitted, this Court makes the following FINDINGS OF FACT . . . .

Although this statement indicates that the superior court employed a *de novo* standard of review, many of the court's conclusions of law state that respondent's determinations were "arbitrary and capricious and constituted error as a matter of law," language that is consistent with both *de novo* and whole record review. *See Amanini v. N.C. Dep't of Human Res.*, 114 N.C. App. at 674, 443 S.E.2d at 118. Such wording suggests that the superior court applied both standards simultaneously in several instances, leaving us unable to conclude that the superior court consistently exercised the appropriate scope of review. We do not believe a remand is necessary, however, because the central issue presented by respondent and argued by both parties on appeal is whether there was competent, material, and substantial evidence to support respondent's denial of a special use permit. Resolution of this issue involves evaluation of evidence used by respondent to deny the application, and the entire record of the hearing is before us. *See Sun Suites Holdings, LLC v. Board of Aldermen of Garner*, 139 N.C. App. at 274, 533 S.E.2d at 528-29 ("petitioners raise only the issue of whether the [b]oard's denial of the application

was supported by the record, the entirety of which is before us"; therefore, remand was unnecessary). Accordingly, and in the interests of judicial economy, we apply the "whole record" test as we review the matter.

As set out above, section 4.2 of the Ordinance sets out four criteria that must be satisfied before a special use permit can be issued. The first of these is "that the use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved." One of respondent's findings was that

> [c]onflicting evidence was presented concerning the probability of ice forming on and falling from the proposed tower, but the Board finds that ice has formed and fallen from the other towers within the county's zoning jurisdiction causing damage and is likely to do so from the proposed tower, and would therefore materially endanger the public safety where located because of the number and density of adjoining residences.

Under the whole record test, this finding must stand unless it is arbitrary and capricious.

> [I]n determining whether an agency decision is arbitrary or capricious,
>
> > the reviewing court does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law.
> >
> > The "arbitrary or capricious" standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are "patently in bad faith," [*Burton v. City of Reidsville*, 243 N.C. 405, 407, 90 S.E.2d 700, 702 (1956),] or "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate []any course of reasoning and the exercise of judgment.[]" *[State ex rel.] Comm'r of Ins. v. [N.C.] Rate Bureau*, 300 N.C. [381,] 420, 269 S.E.2d [547,] 573 [(1980)].
>
> *Lewis v. N.C. Dep't of Human Resources*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989).

ACT-UP Triangle v. Commission for Health Servs., 345 N.C. at 707, 483 S.E.2d at 393.

In this finding, respondent cited evidence of ice building up and falling from other towers. Our review of the record indicates that this evidence, consisting principally of ice brought before respondent in a cooler and anecdotal hearsay, was not competent. Even so, the record also indicates that petitioners failed to carry their burden of proving that the potential of ice falling from support wires of the proposed tower was not a safety risk. Petitioner Mann testified that while the tower itself would have deicing equipment, the support wires would not. Although he opined that any ice forming on the wires would slide down the wires, he candidly acknowledged his inability to state with certainty that ice would not travel a greater distance in the event of wind or storm. While Mann argued that the prevailing winds at the site are from a direction that would blow any ice away from nearby buildings and dwellings, he could not guarantee that falling ice would not be a risk. Other evidence in the record shows that numerous permanent structures lie in close proximity to the proposed tower site.

Respondent's finding that petitioners failed to establish that there would be no danger to the public from falling ice is neither whimsical, nor patently in bad faith, and it is not indicative of a lack of any course of reasoning or exercise of judgment. The burden is on petitioners to meet the four requirements of the Ordinance before finding that a *prima facie* case has been established, and respondent did not state in its written order that petitioners made a *prima facie* case. Under the whole record test, in light of petitioners' inability satisfactorily to prove that the proposed use would not materially endanger public safety, we are not permitted to substitute our judgment for that of respondent. Accordingly, we hold that petitioners failed to meet their burden of proving this first requirement and did not establish a *prima facie* case.

Because of this holding, we are not obligated to address the remaining three requirements under the Ordinance. *See Coastal Ready-Mix Concrete Co. v. Board of Comm'rs of Nags Head*, 299 N.C. at 632-33, 265 S.E.2d at 386 ("[i]n light of this holding [that the petitioner's proposed concrete plant violated the height requirements of the Nags Head zoning ordinance], it is unnecessary to reach [the respondents'] remaining two contentions" that the petitioner failed to provide public access to the proposed plant in violation of the ordinance and that the petitioner could not meet the spirit and intent requirements of the ordinance). Nonetheless, in the interests of completeness, we briefly consider the remaining requirements under the Ordinance.

Although the parties do not contest that petitioners have satisfied the second requirement that the use "meet[] all required conditions and specifications," the third requirement provides "that the use will not substantially injure the value of adjoining or abutting property." As to this requirement, petitioners presented the testimony of North Carolina real estate appraiser Ron Crowder. Like the superior court, the Court of Appeals accepted petitioners' evidence as substantial and competent, while rejecting the testimony of North Carolina realtor Grace Steed and North Carolina building contractor Danny Frazier, both of whom testified in opposition to petitioners' application. As to Steed and Frazier, the Court of Appeals concluded that neither was able to provide examples of adverse affect on property adjoining or abutting the proposed tower site and thus provided only speculative opinions. However, even though Crowder acknowledged at the public hearing that property was not frequently sold in the vicinity, and as a result he also did not review any actual comparable property adjoining or abutting the proposed tower, the Court of Appeals held that "because petitioners' appraiser is a professional appraiser whose skill was acknowledged even by the opponent realtor described above, we hold that his expert opinion will satisfy the requirement for competent, material and substantial evidence despite our holding in *Sun Suites*." *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 142 N.C. App. at 142, 542 S.E.2d at 257. In *Sun Suites*, the Court of Appeals held that the testimony of two speakers at the public hearing failed to constitute substantial evidence because neither "presented any 'factual data or background,' such as certified appraisals or market studies, supporting their naked opinions." *Sun Suites Holdings, LLC v. Board of Aldermen of Garner*, 139 N.C. App. at 278, 533 S.E.2d at 531 (quoting *Humble Oil & Ref. Co. v. Board of Aldermen of Chapel Hill*, 284 N.C. at 469, 202 S.E.2d at 136). Although the Court of Appeals here correctly noted that Steed and Frazier failed to address *adjoining or abutting* properties, the testimony of Crowder was similarly deficient. Because none of this testimony addressed the specific requirement of the Ordinance as to "adjoining or abutting property," we find that the Court of Appeals erred in accepting Crowder's testimony while rejecting that of Steed and Frazier. Consequently, under the whole record test, we hold that petitioners failed to meet the Ordinance's third requirement.

The fourth requirement under the Ordinance provides "that the location and character of the use if developed according to the plan as submitted and approved will be in harmony with the area in which it is to be located and in general conformity with the Land

Development Plan for Randolph County." The superior court properly applied *de novo* review to this issue, and the Court of Appeals discussed this requirement in some detail. We agree with the Court of Appeals that " '[t]he inclusion of a use as a conditional use in a particular zoning district establishes a prima facie case that the permitted use is in harmony with the general zoning plan.' " *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 142 N.C. App. at 139, 542 S.E.2d at 255 (quoting *Vulcan Materials Co. v. Guilford Cty. Bd. of Cty. Comm'rs*, 115 N.C. App. 319, 324, 444 S.E.2d 639, 643, *disc. rev. denied*, 337 N.C. 807, 449 S.E.2d 758 (1994)). However, in the case at bar, because we have determined that petitioners failed to establish a *prima facie* case as to requirements one and three as required by the Ordinance, we need not address whether sufficient evidence was presented to rebut petitioners' *prima facie* showing that the plan was in harmony with the surrounding area.

Based upon the foregoing, we reverse the decision of the Court of Appeals and remand this case to the Court of Appeals, which shall remand to the Superior Court, Randolph County, with directions to that court to enter judgment affirming respondent's denial of the special use permit.

REVERSED AND REMANDED.

Justice BUTTERFIELD dissenting.

This case is before this Court solely on the basis of the dissenting opinion in the Court of Appeals. Challenging the majority's holding with regard to the issue of harmony, the dissenting judge in the Court of Appeals concluded, "There was plenary evidence before the Board that [the proposed] tower would be located adjacent to an existing mixed suburban/agricultural area and would not be in harmony with this area." *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 142 N.C. App. 137, 144, 542 S.E.2d 253, 258 (2001) (Walker, J., dissenting). Because the dissent did not specifically address the issues regarding public safety or property values, the only issues squarely before us are (1) whether petitioners presented competent, material, and substantial evidence that the proposed use would be in harmony with the area in which it is to be located; and (2) if so, whether there existed in the record competent, material, and substantial evidence contrary to petitioners' showing of harmony to support the Board's denial of petitioners' permit application. I agree with the holding of the majority of the Court of Appeals that petitioners made a *prima*

facie showing of harmony and that the record contained insufficient evidence to sustain the Board's adverse conclusion. Therefore, I respectfully dissent.

As this Court recognized in *Woodhouse v. Board of Comm'rs of Nags Head*, 299 N.C. 211, 261 S.E.2d 882 (1980):

> "The inclusion of the particular use in the ordinance as one which is permitted under certain conditions[] is equivalent to a legislative finding that the prescribed use is one which is in harmony with the other uses permitted in the district' "
>
> A. Rathkopf, 3 *Law of Zoning and Planning*, 54-5 (1979).

Woodhouse, 299 N.C. at 216, 261 S.E.2d at 886. In other words, "[a] conditional use is a permitted use when allowed under a special permit. Thus, there has been a local legislative determination that the use, as such, is neither inconsistent with the public health, safety, morals, or general welfare, nor out of harmony with the [county's] general zoning plan." 3 Arden H. Rathkopf & Daren A. Rathkopf, *Rathkopf's The Law of Zoning and Planning* § 61:20, at 61-42 (Edward H. Zeigler, Jr., ed., 2001).

> Furthermore, the denial of an application on grounds that the proposed plan "does not meet the tests of suitability" as outlined in the intent section of a particular ordinance is no different from refusing a permit because the proposed use would "adversely affect the public interest." A [county planning board] "cannot deny applicants a permit in their unguided discretion or, stated differently, refuse it solely because, in their view, [it] would " 'adversely affect the public interest.' " *In re Application of Ellis*, 277 N.C. [419,] 425, 178 S.E.2d [77,] 81 [(1970)].

Woodhouse, 299 N.C. at 216-17, 261 S.E.2d at 886 (second alteration in original).

Notably, the majority accepts the Court of Appeals' pronouncement that " '[t]he inclusion of a use as a conditional use in a particular zoning district establishes a prima facie case that the permitted use is in harmony with the general zoning plan.' " *Mann Media, Inc.*, 142 N.C. App. at 139, 542 S.E.2d at 255 (quoting *Vulcan Materials Co. v. Guilford Cty. Bd. of Cty. Comm'rs*, 115 N.C. App. 319, 324, 444 S.E.2d 639, 643, *disc. rev. denied*, 337 N.C. 807, 449 S.E.2d 758 (1994)). Therefore, by showing that the Randolph County ordinance

denominates radio and television broadcast towers as special uses within Residential-Agricultural districts, petitioners have made a *prima facie* showing that their proposed use would be in harmony with the surrounding area. Nonetheless, in denying petitioners' application, the Board concluded that "[t]he location and character of the use if developed according to the plan as submitted and approved [would] not be in harmony with the area in which it is to be located." Specifically, the Board found that the proposed tower would be inharmonious with the surrounding properties because the population density of the area adjacent to the proposed site was "substantially greater" than that of areas surrounding "previously approved" towers. Aerial maps of the proposed tower and the Channel 2 television tower comprised the evidence supporting this conclusion. A comparison of the two maps showed that a residential subdivision was under construction in an area bordering the proposed site and that the area surrounding the Channel 2 tower was predominantly rural. The transcript of the hearing further reveals concerns that an additional tower would result in "over-saturation" and, thereby, upset the existing harmony of property uses within the area.

However, under the *Woodhouse* standard, the Randolph County ordinance's designation of broadcast towers as permitted uses within residential-agricultural districts is equal in effect to a "legislative finding" that such towers are compatible with residential communities. *See Woodhouse*, 299 N.C. at 216, 261 S.E.2d at 886. Therefore, to conclude that the proposed tower would be incompatible with the area solely because of its proximity to a densely populated residential subdivision is at odds with the intent expressed in the ordinance. Because I believe that the Board's determination as to harmony was not supported by competent, material, and substantial evidence, I vote to affirm the decision of the Court of Appeals.

STATE OF NORTH CAROLINA v. MARION EDWARD PEARSON, JR.

No. 541A01

(Filed 28 June 2002)

1. Search and Seizure— nontestimonial identification order—affidavit—reasonable grounds for suspicion

A rape defendant's motion to suppress evidence gained from a nontestimonial identification order was properly denied where the affidavit sufficiently established reasonable grounds to suspect that defendant had committed the rapes. Defendant was a suspect based on more than a minimal amount of objective justification and more than a particularized hunch.

2. Search and Seizure— nontestimonial identification order—supporting affidavit—reliance on information from another officer

A rape defendant failed to produce evidence that a statement in an affidavit supporting a nontestimonial identification order was made in bad faith such that it was knowingly false or in reckless disregard of the truth where the affidavit alleged that defendant had been seen peeping into an apartment but defendant argued that the report did not show that defendant was actually seen peeping. A police officer making an affidavit for issuance of a warrant may do so in reliance upon information reported to him by other officers in the performance of their duties, and the officer making the affidavit from a report in this case had every reason to conclude that defendant had been secretly peeping.

3. Search and Seizure— nontestimonial identification order—procedures following collection of samples

The trial court properly concluded that violations of statutory nontestimonial identification statutes were not substantial and correctly refused to suppress the seized evidence where a return was not made to the issuing judge within 90 days and defendant was not provided with a copy of the results in a timely manner. N.C.G.S. § 15A-974(2) mandates suppression when the evidence is obtained as a result of the violation, but these violations involved procedures to be followed after the samples are taken and the deviation was a mere unintentional oversight. The defense interests protected by the statutes are the requirement of an inventory of what was seized and the opportunity to move for

the destruction of that evidence, but the defendant in this case was alert during the procedure, knew what was taken, and did not move for destruction of the evidence. Finally, a subsequent search warrant obtained as the result of an SBI agent's tenacity over ten years provided more conclusive DNA and factual evidence, and it is unlikely that defendant would have avoided prosecution if this evidence was destroyed. N.C.G.S. §§ 15A-280, -282.

4. Search and Seizure— nontestimonial identification order—attorney not present

There was no prejudicial error in failing to provide a rape suspect with an attorney during the execution of a nontestimonial identification order where defendant moved to suppress the evidence produced by the order rather than statements made during the procedure, and, although defendant maintained that the lack of an attorney impaired his ability to obtain an order to destroy the evidence, it is clear that defendant would have remained a suspect whether or not this evidence was destroyed.

5. Search and Seizure— nontestimonial identification order—constitutional requirement

There was no constitutional error in the denial of a motion to suppress evidence seized with a nontestimonial identification order where the supporting affidavit provided reasonable grounds to suspect that defendant committed two rapes. Collection procedures such as these require only reasonable suspicion to be constitutionally permissible.

6. Search and Seizure— nontestimonial identification order—not tainted by earlier order

The trial court did not err in a rape prosecution by denying a motion to suppress a second nontestimonial identification order issued in 1998 where defendant argued that the 1998 warrant was tainted by an illegal 1986 nontestimonial identification order, but the evidence obtained in 1986 was properly seized and investigators were led back to defendant in 1998 due to the perseverance of an SBI agent rather than the results of the 1986 order, which had merely concluded that defendant was not excluded as a suspect.

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. 506, 551 S.E.2d 471 (2001), finding no error in judgments entered 11 January 2000 by

Boner, J., in Superior Court, Burke County, after the trial court's 21 January 2000 order denying in pertinent part defendant's motions to suppress evidence. Heard in the Supreme Court 13 February 2002.

Roy Cooper, Attorney General, by Robert C. Montgomery, Assistant Attorney General, for the State.

Robert C. Ervin for defendant-appellant.

WAINWRIGHT, Justice.

On 21 September 1998, Marion Edward Pearson (defendant) was indicted for four counts of first-degree rape, two counts of first-degree sexual offense, two counts of first-degree burglary, and one count of robbery with a dangerous weapon. On 12 April 1999, defendant was also indicted for additional counts of first-degree rape, first-degree burglary, and robbery with a dangerous weapon.

On 11 January 2000, defendant tendered an *Alford* plea to two counts of second-degree rape as part of a plea agreement. Defendant reserved the right to appeal from the trial court's denial of his motions to suppress, and the State dismissed the remaining charges. The trial court sentenced defendant to consecutive prison terms of twenty-five years. The Court of Appeals, with one judge dissenting, found no error. Defendant appeals to this Court from the decision of the Court of Appeals on the basis of the dissent.

Our review of the record reveals the following relevant facts: On 7 March 1985, the Morganton Police Department received a report of a Peeping Tom in the Village Creek Apartments complex. When Lieutenant James Buchanan responded to the call, he saw a black male wearing a light gray or blue windbreaker and blue jeans, squatting beside an air-conditioning unit directly behind an apartment building. The suspect ran when he saw Buchanan. Buchanan lost the suspect and notified other officers to stop two cars that were leaving the complex. Defendant was driving one of the cars and was wearing a light blue windbreaker and blue jeans. When interviewed later about this incident, defendant claimed he was going to a friend's apartment in the complex, but he could not remember the friend's name.

At 1:15 a.m. on 14 July 1985, Kathy Richards reported to the Morganton Police that while she was asleep on her couch a man entered her apartment, held a knife to her throat, and raped her. Richards had been asleep on her couch when she was attacked. The

man also took thirty-eight dollars from her wallet. Richards could not see the man but believed he was a twenty-five to thirty-five-year-old white male who was over six feet tall. Police found the screen to Richards' bathroom window had been partially removed, and it appeared someone had crawled through the window. The State Bureau of Investigation (SBI) obtained from the apartment a partial Negroid hair that was not suitable for scientific comparison. A sexual assault examination was completed on Richards at the hospital.

At 1:10 a.m. on 23 November 1985, Arlene Holden called the Morganton Police and reported that a man broke into her apartment at Village Creek Apartments, disabled the lights in her bedroom, hid in her bedroom, and raped her. Before raping Holden, the man struck her in the head, tied her up with pantyhose, and covered her face, using pinking shears to threaten her. The man performed oral sex on Holden and raped her twice. After raping Holden the first time, the man made sure her face was covered, turned on the lights, and looked for money. Holden described the man as having a dark complexion and being five feet eight inches tall, with a lean or medium build. The screen had been removed from an unlocked window in Holden's bedroom. Negroid pubic and body hairs were found in trace evidence examined by the state crime lab. A sexual assault examination was done on Holden at the hospital.

Investigators developed defendant as a suspect in the Holden rape at the Village Creek Apartments based on the Peeping Tom incident in March 1985 at the apartment complex. Investigators interviewed defendant on 26 November 1985. Defendant denied any involvement in the Holden rape and left the interview with a cooperative attitude.

Between 11:30 and 11:40 p.m. on 17 February 1986, Ernestine Kyes was attacked in her bedroom. After showering, Kyes attempted to turn on her bedroom light, but it would not work. Kyes' attacker threatened her with something that felt like a knife, covered her head with a towel, performed oral sex on her, forced her to perform oral sex on him, and then raped her. The attacker took approximately forty dollars from Kyes' purse and then raped her again. The man knew the names of Kyes' children and where they went to school. Defendant's son attended the day care that Kyes directed, and defendant sometimes brought his son to and from the day care. Kyes described her attacker as a black man between five feet eight inches and five feet ten inches tall, with an average build. Evidence found on Kyes' clothing and bed covers included Negroid hairs. A sexual

assault examination was completed on Kyes at the hospital. Pubic combings of the victim contained two Negroid hairs.

Both Holden and Kyes described their attacker as someone of medium height. Holden said he was five feet eight inches tall, and Kyes said he was between five feet eight and five feet ten inches tall. Additionally, Holden and Kyes said he was of medium build. Holden said he had a lean, medium build, and Kyes described him as having an average build. Further, both women described their attacker as dark-skinned. Holden described her attacker as having a dark complexion, and Kyes said her attacker was a black male. At the scenes of both the Holden and Kyes rapes, Negroid hairs were found. Defendant is a black male, slender and muscular, and stands approximately five feet eight inches tall.

After the report of Kyes' rape, investigators intensified the focus of the investigation on defendant. At 1:30 a.m. on 18 February 1986, after learning of the Kyes rape, SBI Agent John Suttle drove directly to defendant's house and noted that the hood of defendant's car was warmer than others in the lot, as if it had been recently driven. Police interviewed defendant again on 18 February 1986. Defendant claimed he did not leave home after 11:00 p.m. on the night of this rape, 17 February 1986.

On 28 March 1986, Agent Suttle completed an application for a nontestimonial identification order (NIO) to get head and pubic hair samples, a blood sample, and a saliva sample from defendant. In his affidavit, Agent Suttle stated:

> During the early hours of 11-23-86, a white female [Holden] age 26, living at Village Creek Apartments was raped twice by a male subject that entered her apartment via an unlocked window. The subject was described by the victim as being approx. 5'8" tall, lean medium build with a dark complexion speaking with a fake accent. On the night of 2-17-86, a white female [Kyes] age 34, living at Woodbridge Apts was raped twice by a male subject that had entered her apartment via an unlocked window. The victim described her assailant as being 5'8" to 5'10", medium build, "not light and not heavy". Two [N]egroid pubic hairs were found at the scene of the second rape.
>
> . . . .
>
> . . . Marion Pearson [defendant] is a black male, slender and muscular, approx. 5'8" tall. Pearson was caught by Lt. James

Buchanan secretly peeping into apartments at Village Creek Apartments on March 7, 1985 around 9:00 pm.

Later that day, Judge Claude Sitton signed an NIO requiring defendant to appear at the Morganton Police Department on 8 April 1986 and submit to the nontestimonial identification procedures. The order was served on defendant on 1 April 1986. At the time the order was served, defendant was "belligerent and antagonistic" and refused to sign and acknowledge his receipt of the order. Defendant testified on *voir dire* at a motions hearing that he went to the office of the Clerk of Superior Court to request appointment of counsel and was told that no attorney could be appointed until he was charged with a crime.

On 8 April 1986, defendant went to the Morganton Police Department. Defendant testified he asked for an attorney again at this time but was not given one. Pursuant to the NIO, head and pubic hair samples, a saliva sample, and a blood sample were taken from defendant. Subsequent testing of the evidence showed that defendant's blood type would not be detectible from the semen left by the rapist. The testing also showed that a pubic hair found on victim Holden's sweater had similarities and dissimilarities to defendant's hairs and that two pubic hairs found on victim Kyes were microscopically consistent with defendant's hairs and could have come from him. Defendant was therefore not excluded as a suspect.

On 15 May 1986, after crawling into an occupied women's rest room stall in Morganton, defendant was arrested and sentenced to two years in prison for secret peeping. Defendant was arrested in June 1991 for a Peeping Tom offense in Maryland. Defendant was subsequently arrested in Maryland five more times for secret peeping offenses.

In March 1998, when DNA technology became available, Agent Suttle submitted to SBI Agent Brenda Bissette the sexual assault kits from victims Holden and Kyes and the samples taken from defendant pursuant to the 1986 NIO. Agent Bissette, a DNA analyst in the Molecular Genetics Section of the SBI, determined that defendant's DNA was present in both the Kyes kit and the Holden kit and concluded that only one African-American in 34 million would have the same DNA match found in the Holden kit. Bissette also said that a new blood sample from defendant could produce more definitive results.

On 23 November 1998, Agent Suttle was granted a search warrant to obtain a new blood sample from defendant. The warrant application was based on all the information concerning the crimes, including Agent Suttle's notation that defendant's car felt warm to the touch immediately after the Kyes rape was reported, defendant's arrest and conviction for entering an occupied rest room on 15 May 1986, the results of the DNA analysis of the samples obtained in 1986, and other information including defendant's multiple arrests for Peeping Tom offenses in Maryland. The search warrant was issued and served on defendant. SBI tests on the new blood revealed more definitive results identifying defendant as the perpetrator. From the new blood sample, Agent Bissette determined that only one African-American in 280 million would have the same DNA match found in both the Holden kit and the Richards kit.

[1] After his indictment, defendant filed three separate motions to suppress on 6 January 2000. Defendant first argues the trial court erred by denying his motion to suppress evidence based on violations of the nontestimonial identification statutes. He argues that Agent Suttle's affidavit submitted in support of the application for the 1986 NIO did not set forth sufficient facts to establish reasonable grounds to suspect that defendant committed the offenses.

N.C.G.S § 15A-273 provides that a nontestimonial identification order

> may issue only on an affidavit . . . sworn to before the judge and establishing the following grounds for the order:
>
> (1) That there is probable cause to believe that a felony offense . . . has been committed;
>
> (2) That there are reasonable grounds to suspect that the person named or described in the affidavit committed the offense; and
>
> (3) That the results . . . will be of material aid in determining whether the person named in the affidavit committed the offense.

N.C.G.S § 15A-273 (1999).

The reasonable grounds standard is similar to the reasonable suspicion standard applied to brief detentions. *See Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968). The sole requirement is a minimal amount of objective justification, something more than an

"unparticularized suspicion or 'hunch.' " *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989) (quoting *Terry*, 392 U.S. at 27, 20 L. Ed. 2d at 909); *accord State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994). The reasonable grounds standard required for an NIO is significantly lower than a probable cause standard. *State v. Grooms*, 353 N.C. 50, 73, 540 S.E.2d 713, 728 (2000), *cert. denied*, —— U.S. ——, 151 L. Ed. 2d 54 (2001). An NIO "is an investigative tool requiring a lower standard of suspicion that is available for the limited purpose of identifying the perpetrator of a crime." *Id.*

Here, it was reasonable to infer that defendant was someone who met the physical description of the perpetrator given by two of the rape victims. Further, the following facts provide reasonable suspicion that defendant committed the rapes: a Peeping Tom was reported at the location of one of the rapes; a police officer spotted a man squatting next to an air-conditioning unit directly behind an apartment building wearing a light gray or blue windbreaker and blue jeans; the man ran when he saw the officer; shortly thereafter, defendant was stopped near the location where the Peeping Tom was spotted; and defendant was wearing blue jeans and a light blue windbreaker at the time. Defendant was a suspect based on more than a minimal amount of objective justification and more than an unparticularized hunch. The affidavit sufficiently established reasonable grounds to suspect defendant committed the rapes.

[2] Defendant further argues the second sentence in the paragraph of Agent Suttle's affidavit that contains the facts establishing reasonable grounds is false and was made intentionally or with a reckless disregard for its truth. That sentence reads: "Pearson was caught by Lt. James Buchanan secretly peeping into apartments at Village Creek Apartments on March 7, 1985 around 9:00 pm." Defendant argues the police report of the incident did not show that the suspect was seen peeping into apartments, but rather that he was seen "squatting next to a[n] air conditioner unit."

As with an affidavit to procure a search warrant, evidence obtained from an NIO should be suppressed if it is the product of an affidavit that contains deliberate falsehoods or shows a reckless disregard for the truth. *See Franks v. Delaware*, 438 U.S. 154, 155-56, 57 L. Ed. 2d 667, 672 (1978) (holding that where a defendant shows that a search warrant affidavit includes false statements necessary to the finding of probable cause, the search warrant is void). Because "[t]here is a presumption of validity with respect to [an] affidavit supporting [a] search warrant," *State v. Fernandez*, 346 N.C. 1, 14, 484

S.E.2d 350, 358 (1997), there must also be a presumption of validity with respect to an affidavit supporting an NIO. A defendant contesting an NIO has the burden of presenting evidence to "establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith." *Id.*

There is no evidence in the record that Agent Suttle intentionally misstated a fact to deceive anyone. Police had received a report that a Peeping Tom was at an apartment complex, a man was seen squatting next to an air-conditioning unit directly behind an apartment building, and the man ran when approached by a police officer. Police stopped defendant as he was leaving the complex, and defendant matched the description of the man seen behind the apartments. Agent Suttle had every reason to conclude defendant had been secretly peeping. He did not misrepresent the activity seen behind the apartments.

"[A] police officer making the affidavit for issuance of a warrant may do so in reliance upon information reported to him by other officers in the performance of their duties." *State v. Harvey*, 281 N.C. 1, 8, 187 S.E.2d 706, 711 (1972).

Here, Agent Suttle testified that he did not have personal knowledge of these events but that he had reviewed the report of the investigation and had talked with Lt. Buchanan and other officers who were familiar with the incident. Agent Suttle further testified that "in retrospect, [he] should have worded [the affidavit] to explain in greater length the circumstances." The trial court found that "[t]he affidavit statement that '*Pearson was caught by Lt. James Buchanan secretly peeping into apartments*' is an opinion reasonably drawn from the facts stated in Lt. Buchanan's incident report." Defendant failed to produce evidence that Agent Suttle made his allegations in bad faith such that they were knowingly false or in reckless disregard of the truth. The trial court correctly issued the NIO.

[3] Defendant also argues that N.C.G.S. §§ 15A-280 and -282 were substantially violated as defined by N.C.G.S. § 15A-974(2), which requires that evidence must be suppressed if "[i]t is obtained as a result of a *substantial* violation of the provisions of this Chapter." N.C.G.S. § 15A-280 provides:

> Within 90 days after the nontestimonial identification procedure, a return must be made to the judge who issued the order or to a judge designated in the order setting forth an inventory of

> the products of the nontestimonial identification procedures obtained from the person named in the affidavit. If, at the time of the return, probable cause does not exist to believe that the person has committed the offense named in the affidavit or any other offense, the person named in the affidavit is entitled to move that the authorized judge issue an order directing that the products and reports of the nontestimonial identification procedures, and all copies thereof, be destroyed. The motion must, except for good cause shown, be granted.

N.C.G.S. § 15A-280 (1999).

N.C.G.S. § 15A-282 provides:

> A person who has been the subject of nontestimonial identification procedures or his attorney must be provided with a copy of any reports of test results as soon as the reports are available.

N.C.G.S. § 15A-282 (1999).

The trial court concluded that "[t]he failure of Agent Suttle to return the non-testimonial identification order to [the trial judge] within ninety days . . . violated the provisions of G.S. 15A-280" and that "[t]he failure of Agent Suttle to provide the defendant a copy of the results of the test performed in 1986 . . . in a timely manner violated the requirements of G.S. 15A-282." The trial court further concluded that both of these violations were not substantial under N.C.G.S § 15A-974(2). We agree.

N.C.G.S. § 15A-974(2) provides that evidence must be suppressed if

> [i]t is obtained as a result of a *substantial* violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:
>
> a. The importance of the particular interest violated;
>
> b. The extent of the deviation from lawful conduct;
>
> c. The extent to which the violation was willful;
>
> d. The extent to which exclusion will tend to deter future violations of this Chapter.

N.C.G.S. § 15A-974(2) (1999) (emphasis added).

When making a motion to suppress evidence upon a ground specified in N.C.G.S. § 15A-974, a "defendant has the burden of establishing that his motion to suppress is timely and proper in form." *State v. Satterfield*, 300 N.C. 621, 624-25, 268 S.E.2d 510, 513-14 (1980). Further, defendant "bears the burden of presenting facts in support of his motion to suppress." *Id.* at 626, 268 S.E.2d at 514.

The statute mandates that evidence must be suppressed if it is obtained as a *result* of a violation, meaning that "a causal relationship must exist between the violation and the acquisition of the evidence sought to be suppressed." *State v. Richardson*, 295 N.C. 309, 322, 245 S.E.2d 754, 763 (1978). "[E]vidence will not be suppressed unless it has been obtained *as a consequence* of the officer's unlawful conduct . . . . The evidence must be such that it would not have been obtained *but for* the unlawful conduct of the investigating officer." *Id.* at 323, 245 S.E.2d at 763.

Here, the collection of the evidence obtained from the 1986 NIO was not causally related to the statutory violations of N.C.G.S. §§ 15A-280 and -282 because §§ 15A-280 and -282 focus on policies to be followed *after* samples are taken. These policies are not related to *obtaining* the samples.

Further, examination of the first three statutory circumstances outlined in N.C.G.S. § 15A-974(2) shows the evidence was not obtained in substantial violation of chapter 15A. Regarding the particular interest violated, N.C.G.S. § 15A-280's purposes are twofold: (1) it requires a return to the judge who issued the NIO setting forth a product inventory, and (2) it allows the subject of the NIO the opportunity to make a motion to have the NIO products destroyed. N.C.G.S. § 15A-280. In the case at bar, only insignificant interests were violated by Agent Suttle's failure to provide a return to the judge. Defendant was present at his NIO procedure and was aware of what was taken. Further, defendant had no right to the destruction of the material, but only the right to move for its destruction after the ninety day period if there was not probable cause to believe he committed the offenses. Upon hearing such a motion, the trial court could have denied the request upon a finding of good cause. Defendant failed to move for the destruction of the NIO products. Because defendant failed to move for destruction of the evidence (as discussed below), he cannot now show that the judge would have granted such a motion because he was not excluded as a suspect. Thus, defendant cannot show a significant interest was violated.

Next, the extent of the deviation from lawful conduct here was minimal. Agent Suttle's failure to provide the trial court with an inventory of what products were taken at the NIO procedure was a mere oversight, causing no prejudice to defendant. As noted above, defendant was alert at the procedure and aware of what was taken from him.

Regarding the willfulness of the violation of N.C.G.S. § 15A-280, Agent Suttle testified that he was not aware of the requirement of that subsection. Agent Suttle stated, "if I had any knowledge that a return was to be made, I would have. I've never had a judge or a District Attorney . . . say that—after ninety days a report and return has to be filed to the issuing judge." Based on our conclusions concerning these first three statutory factors, we find no substantial statutory violation.

Similarly, turning to the violation of N.C.G.S. § 15A-282, which mandates that a copy of any reports of results from NIO procedures be made available to the subject of an NIO, the same analysis given to N.C.G.S. § 15A-280 applies. The interest protected was insignificant because the samples had already been taken and the deviation was an unintentional oversight. Accordingly, N.C.G.S. § 15A-282 was not substantially violated. Further, defendant specifically contends that "[t]he violations of [these statutes] directly affected Pearson's ability to move for destruction of the samples and the test results" and that the "destruction of these test results and the samples would have eliminated the State's identification evidence in this case and ended the potential for prosecution." Based on our thorough review of the record in this case, we conclude that defendant's contentions are without merit because any statutory violation was insignificant and non prejudicial.

Agent Suttle testified that he "called [the supervisor of the DNA section] maybe every year or every two or three years and I even was to the point of putting it on my next year[']s calendar to call to check to see if they felt like the technology was there" to further test evidence obtained as a result of the NIO and from the sexual assault kits. Eventually, in 1998, the kits were resubmitted.

In all likelihood, Agent Suttle would have kept defendant as a suspect for over ten years regardless of the maintenance of the NIO products and would have obtained the 1998 search warrant regardless of the 1986 NIO. The products of the 1986 NIO procedures did not affirmatively pinpoint defendant as the perpetrator, nor did they

exclude him as a suspect. The 1998 search warrant provided more conclusive DNA and factual evidence, and this evidence was obtained as a result of Agent Suttle's determination and tenacity.

In sum, while obtaining the evidence violated chapter 15A, the violation was not substantial, and therefore the evidence was not inadmissible under N.C.G.S. § 15A-974(2). Moreover, the statutory violations were not unfairly prejudicial as defendant would have been maintained as a suspect even if the 1986 NIO evidence had been destroyed. Further, there is very little likelihood defendant would not have been prosecuted even if the 1986 NIO evidence had been destroyed. Defendant's argument is without merit.

[4] Next, defendant argues that the failure to provide him an attorney was a substantial violation of N.C.G.S. § 15A-279(d), which provides that a defendant

> is entitled to have counsel present and must be advised prior to being subjected to any nontestimonial identification procedures of his right to have counsel present during any nontestimonial identification procedure and to the appointment of counsel if he cannot afford to retain counsel. No statement made during nontestimonial identification procedures by the subject of the procedures shall be admissible in any criminal proceeding against him, unless his counsel was present at the time the statement was made.

N.C.G.S. § 15A-279(d) (1999).

On 26 March 1986, during an interview with police officer Ronnie Hudson, defendant told Hudson that he had been "screwed" by the police enough and that he thought it was time he get an attorney. Defendant testified that after being served with the NIO in April 1986, he

> came down here to the courthouse and went to the front window and told them that I wanted to apply for a court-appointed lawyer and they sent me to a room off to the side. . . . I don't know who it was but that's the—I went to the office that they sent me to and requested for an attorney and the person behind the desk said basically that if you're—if this makes it to court, then we can assign you a lawyer and I said, well, you know, it says here I have a right to an attorney and they said, well, yeah, but this office can't issue a lawyer unless you have a trial—I mean unless you have a case here and so I went to—I believe it was upstairs to a

> judge's chambers and asked and basically the notion I got was that I couldn't get one until I was—you know, I was arrested on a crime or something.

Defendant further testified that he called the ACLU to request a lawyer and asked his father for help getting a lawyer. Defendant testified that at the NIO procedure, Agent Suttle said defendant would be provided an attorney, but that Agent Suttle later said no attorney was available. Defendant claimed that he then underlined a form where it said that he had a right to an attorney.

Agent Suttle testified that he did not recall defendant requesting an attorney. Agent Suttle said that if defendant had asked for an attorney, "I would have stopped and we[] [would have] made arrangements to get him a lawyer. . . . [we would have] had to call the Clerk's office to get him a lawyer appointed." Agent Suttle said, "he [defendant] obviously was not saying he wanted a lawyer because, if he had, I would have gotten him one." In addition, after a review of the record, we find no form that contains underlining as defendant claimed. Defendant was not provided an attorney, and the NIO procedures were performed without an attorney present.

The trial court concluded that this was a substantial violation of the statute but that defendant was "not entitled to suppression of the physical evidence seized from him because the evidence was not obtained as a result of the violation. The physical evidence would have been seized from the defendant even if counsel had been present since it was being obtained pursuant to a court order." We agree.

The transcript and records contain conflicting information as to what defendant specifically requested, how and to whom he articulated such requests, and when such requests were made. By calling the ACLU, approaching his father for help to get an attorney, and telling Officer Hudson that he thought it was time he get an attorney, defendant appeared to be getting his own attorney. However, assuming, *arguendo*, that defendant's account of his requests for an attorney is accurate, he fails to demonstrate how the presence of counsel when the evidence was taken would have further protected his rights, and we hold that the failure to provide an attorney, while error, was not prejudicial.

"[A]ccording to the plain language of section 15A-279(d), the provision protects the defendant from having statements made during

the nontestimonial identification procedure used against [him] at trial where counsel was not present during the procedure." *State v. Coplen*, 138 N.C. App. 48, 58, 530 S.E.2d 313, 320, *cert. denied*, 352 N.C. 677, 545 S.E.2d 438 (2000). Here, defendant did not seek to suppress any statements made during the procedure, only to suppress the actual evidence procured.

Defendant also argues that the failure to provide him an attorney impaired his ability to obtain an order for the destruction of the evidence, which meant the SBI could preserve the evidence and later test it with more sophisticated DNA technology. We disagree. Whether defendant had an attorney to advise him to seek to have the evidence destroyed is not determinative. Based on a plethora of evidence other than the products of the 1986 NIO, Agent Suttle and the SBI would have had probable cause to obtain the 1998 search warrant. In the application for the 1998 search warrant, in addition to the details of the three rapes and the investigations, Agent Suttle outlined the following evidence in a seven page affidavit:

> After Pearson was released from the North Carolina Department of Corrections, Investigators did not have any contact or knowledge of Pearson being in the Morganton area. There have not been any other similar reported burglary/rapes reported in the Morganton area since the February rape of Victim Kyes in 1986 and the intense focusing by investigators on Pearson as a suspect.
>
> This affiant in 1993 upon reviewing the serial rapes that occurred in Morganton located through various sources Marion E. Pearson, Jr. in Landham, Maryland. S/A Suttle contacted a Sergeant Paul Evans of the Sex Crimes Unit for Prince Georges County Police in February of 1993 to determine if they were having any burglary/rapes with a similar modus operandi. Evans indicated they had not. A local record check then of Pearson revealed Pearson was arrested on February 28, 1980 for a peeping tom offense and again for the same offense on June 28, 1991 in Maryland. The record also revealed parking citations issued to Pearson in 1991 at the University of Maryland.
>
> Affiant recontacted the Sex Crimes Unit of Prince Georges County Police on October 14, 1997 to review Pearson's status in Maryland. Affiant also had [] been communicating with the Molecular Genetics Division of the North Carolina Crime Lab for several years with the intentions of waiting for DNA technology

to improve before reinitiating some contact with Marion E. Pearson, Jr.

Affiant talked with Investigator Candice Santos on October 14, 1997 and learned she has two similar unsolved burglary/rapes that she is working on without any suspects. She noted the suspect in both cases did not leave any DNA evidence behind by using a condom and or ejaculating on something that he took from the crime scene with him.

An updated check of Pearson's record in Maryland revealed he had been arrested five times for "peeping tom" related offenses since his record was examined in 1993 by Sergeant Evans and S/A Suttle.

This affiant upon reviewing and examining the three Morganton rape cases notes the following similarities and conclusions:

1. All three Morganton rapes were committed by the same suspect because of the similarities of the three crimes: time, fake accent, Negroid hairs, disabled bedroom lights in the last two cases, moistening of the vagina before first sex act by performing cunninglingus [sic], second rape of second and third victims from behind, taking of money from all three victims, close proximity to town permitting suspect to get away before being caught, use of an edged weapon to gain control of victim.

2. The FBI Behavioral Science Unit review of the cases concluded in all probability that the same suspect committed all three rapes.

3. Marion Pearson's connection to the Village Creek Apartments and his unusual activity there near where the second victim lived.

4. The contact Pearson had with the third victim at the daycare and his ability to surveil victim Kyes and learn her address and facts about her single parent family.

5. Pearson's lack of cooperativeness after the investigation focused on him.

6. Pearson's bizarre behavior such as the bathroom incident at the college which resulted in his getting two years in prison.

7. Pearson's continued bizarre nighttime activity in Maryland where he had been charged with peeping tom offenses twice prior to 1993 and his being arrested five times since 1993 in the Maryland area for similar offenses.

8. All three victims were assaulted in the privacy of their own home [sic] and approached from behind by an assailant that entered through unlocked windows. All victims lived in apartments.

9. All three [victims] maintained quiet lifestyles, all were divorced and none of them had promiscuous tendencies or careless attitudes that would classify them at a high risk as a victim of a violent crime.

10. In all three cases the suspect maintained control over the victims by verbalizing continued threats.

It is this affiant's professional opinion based on years of training and dealing with criminal activity and criminal minds that the so called "peeping tom" activity of Marion Pearson is the proverbial "tip of the iceberg". With the multiple arrests for "peeping" related offenses, common sense would lead a reasonable person to conclude he had to be committing the act many more times than he was caught at. No reasonable person would believe that he was apprehended by police every time he committed the act.

In furtherance of this opinion, this suspect is not out being a "peeping tom" for voyeuristic pleasures but he is stalking his unwitting victims many of whom would never report their rape for fear of the embarrassment and life complications reporting same would involve. If the suspect committing these rapes would beat, injure or maim the external body of the victim's [sic] they would be forced to report these violations. This suspect committing these crimes is smart enough to know if he does not hurt his victims physically they in a high probability might not report the incident. Marion Pearson is a very intelligent individual with collegiate level education and has represented himself in court before. Pearson is also educated to the point of being able to research the "information age" to learn about how DNA is used in forensic labs to identify rapists and how to easily avoid leaving that evidence behind in or on a victim.

This affiant based on many years of experience has the opinion that "[p]eeping tom" activity is not necessarily behavior

> always consistent with voyeurism. This is a method of selection and evaluation process for a serial rapist to select his victims. In this investigation a suspect in three rapes in a small town in North Carolina is eight years later actively searching and stalking future victims in the State of Maryland.

Although it was error to deny defendant counsel at the NIO procedure, such error was not prejudicial under these circumstances. After a thorough review of the record, it is clear that defendant would have remained a suspect in this case whether the evidence from the 1986 NIO was destroyed or not.

"The test for prejudicial error is whether there is a reasonable possibility that the evidence complained of contributed to the conviction." *State v. Milby*, 302 N.C. 137, 142, 273 S.E.2d 716, 720 (1981). In view of the overwhelming evidence that Agent Suttle and investigators accumulated, as well as Agent Suttle's perseverance in maintaining defendant as a suspect until DNA testing evolved, we conclude there is no reasonable possibility that the result here was affected by the failure to provide defendant counsel at the NIO procedure.

[5] In his next argument, defendant contends the trial court committed constitutional error in denying his motion to suppress evidence obtained from the NIO. Specifically, defendant argues the affidavit used to obtain the NIO failed to provide reasonable grounds for suspicion and relied on false and misleading information. We have already addressed these arguments in the statutory setting, and the result is the same under a constitutional analysis. This argument is without merit.

Collection procedures like those involved in the present case require only reasonable suspicion to be constitutionally permissible. *See Hayes v. Florida*, 470 U.S. 811, 817, 84 L. Ed. 2d 705, 711 (1985) (holding that "[t]here is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act"). As established above, the affidavit in the present case supporting the NIO application established reasonable grounds to suspect that defendant committed the Holden and Kyes rapes. Further, as also discussed above, defendant fails to provide sufficient evidence that the affidavit relied on false or misleading information.

[6] In his final argument, defendant contends the trial court erred by denying his motion to suppress a blood sample obtained as a result of the 23 November 1998 search warrant as well as DNA testing of that blood sample. According to defendant, Agent Suttle's decision to seek the search warrant in 1998 was prompted by testing on evidence illegally obtained in 1986. Moreover, results of the tests done on this illegally obtained evidence were presented to the judge who issued the 1998 search warrant. Thus, defendant contends the evidence obtained via the 1998 search warrant was fruit of the poisonous tree because the search warrant was tainted by the illegality of the 1986 NIO.

As previously discussed, it is apparent from the record that Agent Suttle persevered in maintaining defendant as a suspect for over ten years until DNA testing was more advanced. It was this perseverance rather than the results of the 1986 NIO that led investigators back to defendant. In short, because the evidence obtained in 1986 was properly seized, the evidence obtained in 1998 could not be tainted by the 1986 evidence, especially when viewed in light of the abundant evidence obtained prior to the procurement of the 1998 search warrant. Accordingly, defendant's argument is without merit.

In conclusion, we conclude that the trial court committed no prejudicial error, and we therefore affirm the decision of the Court of Appeals.

AFFIRMED.

TIMOTHY H. CRAIG, AND THE CHATHAM COUNTY AGRIBUSINESS COUNCIL v. COUNTY OF CHATHAM, CHATHAM COUNTY HEALTH DEPARTMENT AND THE CHATHAM COUNTY BOARD OF HEALTH

No. 270PA01

(Filed 28 June 2002)

1. Counties; Public Health— local ordinance—swine farms—health rules—preemption by state law

The Court of Appeals did not err by concluding that state law preempts the regulation of swine farms and thus prevents county commissioners and a local board of health from adopting an ordinance and rules regulating swine farms, because: (1) North Carolina's swine farm regulations, the Swine Farm Siting Act, and

the Animal Waste Management Systems statutes, are so comprehensive in scope that the General Assembly must have intended that they comprise a complete and integrated regulatory scheme on a statewide basis leaving no room for further local regulation; and (2) county commissioners and local boards of health have no authority under N.C.G.S. § 130A-39(b) to superimpose additional regulations without specific reasons clearly applicable to a local health need.

2. Zoning— local ordinance—swine farms—validity

The Court of Appeals erred by upholding a local zoning ordinance relating to swine farms, because: (1) the ordinance seeks to impose regulations on swine farms where the State has shown an intent to cover the field of swine farm regulation; and (2) the zoning ordinance's attempt to incorporate the invalid county swine ordinance prevents it from being valid.

3. Zoning— local ordinance—regulation of swine farms

The Board of Health may not regulate swine farms under N.C.G.S. § 130A-39 upon considerations other than health.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 143 N.C. App. 30, 545 S.E.2d 455 (2001), affirming in part and reversing and remanding in part an order for summary judgment entered 25 October 1999 by Allen (J.B., Jr.), J., in Superior Court, Chatham County. On 16 August 2001, the Supreme Court allowed plaintiffs' conditional petition for discretionary review as to an additional issue. Heard in the Supreme Court 14 November 2001.

Ward and Smith, P.A., by Kenneth R. Wooten and Frank H. Sheffield, Jr., for plaintiff-appellants and -appellees.

The Brough Law Firm, by G. Nicholas Herman and Michael B. Brough, for defendant-appellants and -appellees.

Southern Environmental Law Center, by Donnell Van Noppen III and Michelle B. Nowlin; and Environmental Defense, by Daniel J. Whittle, on behalf of North Carolina Association of Health Board Directors; Environmental Defense; and Conservation Council of North Carolina, Inc., amici curiae.

Carlton Law Firm, by J. Phil Carlton on behalf of North Carolina Agribusiness Council, North Carolina Pork Producers

Council, North Carolina Cattlemen, North Carolina Farm Bureau, North Carolina Poultry Federation, North Carolina State Grange, and the North Carolina Citizens for Business and Industry, amici curiae.

Nicolette G. Hahn on behalf of Waterkeeper Alliance, Cape Fear Riverkeeper, Neuse Riverkeeper, Neuse River Foundation, New Riverkeeper, Winyah Rivers Foundation, and the Alliance for a Responsible Swine Industry, amici curiae.

LAKE, Chief Justice.

The issues raised here on review require the interpretation of the North Carolina General Statutes and application of North Carolina case law governing the question of preemption of county ordinances by the State. Specifically, the primary issues presented, defendants' first and second issues, relate to the validity of two Chatham County ordinances passed by the Chatham County Board of Commissioners and certain rules passed by the Chatham County Board of Health, all regulating swine farms.

On 6 April 1998, the Chatham County Board of Commissioners enacted the "Chatham County Ordinance Regulating Swine Farms" (the Swine Ordinance) and "An Ordinance to Amend the Chatham County Zoning Ordinance to Provide for Regulation of Swine Farms" (the Zoning Ordinance). The Swine Ordinance regulates swine farms "raising 250 or more animals of the porcine species," through a permitting system which affects currently existing farms and those which expand in the future. The Swine Ordinance is applicable to all such swine farms without regard to whether the farm is served by an animal waste management system having a design capacity of 600,000 pounds "steady state live weight"[1] or greater. Under the Swine Ordinance, the owners of swine farms are assigned the financial responsibility for future contaminations that might occur, which responsibility is ensured through both a written agreement with the Chatham County Health Department and some form of financial security. The Swine Ordinance also provides requirements for setback[2]

1. Steady State Live Weight (SSLW) is the "average day to day total live weight of any animal on the farm during their growth cycle." 2 Ted Feitshans et al., *Swine Farm Zoning Notebook* 726 glossary (2000) [hereinafter Feitshans, *Zoning Notebook*].

2. Setbacks are "[s]pecific distances that a structure or area must be located away, from other defined areas or structures." Feitshans, *Zoning Notebook*, at 726.

distances and buffer[3] zones for farms and sprayfields,[4] and semiannual testing of wells on the farm.

The Zoning Ordinance is applicable only to swine farms that are "served by an animal waste management system having a design capacity of 600,000 pounds steady state live weight (SSLW) or greater." The Zoning Ordinance limits swine farms to areas of the county which are zoned either "Light Industrial" or "Heavy Industrial." The Zoning Ordinance further requires the swine farmer to obtain a conditional use permit, with issuance contingent upon a showing of compliance with the Swine Ordinance.

On 28 April 1998, the Chatham County Board of Health enacted the "Chatham County Board of Health Swine Farm Operation Rules" (Health Board Rules), which apply to all swine farms[5] raising "250 or more animals of the porcine species," without regard to the design capacity of the farm's animal waste management system. The Health Board Rules are virtually identical to the Swine Ordinance.

On 2 September 1998, Timothy H. Craig and the Chatham County Agribusiness Council (CCAC) filed a complaint against defendants in superior court seeking a declaration that the Swine Ordinance, Zoning Ordinance and Health Board Rules were not legally valid. On 2 September 1999, CCAC filed a motion for partial summary judgment, and in September 1999, defendants filed an answer and a motion for summary judgment. The trial court granted defendants' motion for summary judgment and denied CCAC's motion for partial summary judgment. Plaintiffs appealed to the Court of Appeals, which affirmed in part and reversed in part the ruling of the trial court, holding that the Health Board Rules and the Swine Ordinance are preempted by state law but holding that the trial court was correct in granting summary judgment to defendants as to the Zoning Ordinance. This Court subsequently allowed defendants' petition for discretionary review and plaintiffs' conditional petition for discretionary review as to an additional issue.

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3. Buffers are "[d]esignated areas of land around which agricultural activities may be prohibited or subject to restrictions." Feitshans, *Zoning Notebook*, at 721.

4. A sprayfield is an "[a]rea of land over which liquid animal wastes may be sprayed for disposal of those wastes." Feitshans, *Zoning Notebook*, at 726.

5. The Health Board Rules apply to a "swine farm" and the rules define a "swine farm" as "any tract or contiguous tracts of land in Chatham County under common ownership or control which is devoted to raising 250 or more animals of the porcine species."

[1] Defendants first contend that the Court of Appeals erred in concluding that state law preempts the regulation of swine farms and thus prevents county commissioners and a local board of health from adopting an ordinance and rules regulating swine farms.

The enactment and operation of a general, statewide law does not necessarily prevent a county from regulating in the same field. However, preemption issues arise when it is shown that the legislature intended to implement statewide regulation in the area, to the exclusion of local regulation. *See* N.C.G.S. § 160A-174(b)(5) (2001). " '[M]unicipal by-laws and ordinances must be in harmony with the general laws of the State, and whenever they come in conflict with the general laws, the by-laws and ordinances must give way.' " *State v. Williams*, 283 N.C. 550, 552, 196 S.E.2d 756, 757 (1973) (quoting *Town of Washington v. Hammond*, 76 N.C. 33, 36 (1877)). The law of preemption is grounded in the need to avoid dual regulation. *See, e.g., id.* at 554, 196 S.E.2d at 759.

Counties are creatures of the General Assembly and have no inherent legislative powers. *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). They are instrumentalities of state government and possess only those powers the General Assembly has conferred upon them. *Harris v. Board of Comm'rs of Washington Cty.*, 274 N.C. 343, 346, 163 S.E.2d 387, 390 (1968); *High Point Surplus*, 264 N.C. at 654, 142 S.E.2d at 701. Hence, we look to the North Carolina General Statutes to see what powers the General Assembly has delegated broadly to counties on a statewide basis or more specifically to counties such as Chatham in the area of swine farm regulation.

The General Assembly, in N.C.G.S. § 153A-121, has delegated to counties the power and authority to enact ordinances. That statute provides in part:

> (a) A county may by ordinance define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens.

N.C.G.S. § 153A-121(a) (2001). However, N.C.G.S. § 160A-174, as interpreted and applied by our case law, provides limitations on the exercise of this power. The relevant portions of N.C.G.S. § 160A-174 state:

> (b) A city ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States. An ordi-

nance is not consistent with State or federal law when:

. . . .

(5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation.

This Court has held that N.C.G.S. § 160A-174 is applicable to counties as well as cities. *State v. Tenore*, 280 N.C. 238, 185 S.E.2d 644 (1972).

N.C.G.S. § 130A-39 delegates power to the local board of health to

> adopt a more stringent rule in an area regulated by the Commission for Health Services or the Environmental Management Commission where, in the opinion of the local board of health, a more stringent rule is required to protect the public health.

N.C.G.S. § 130A-39(b) (2001). The Commission for Health Services and the Environmental Management Commission (EMC) are state agencies. The governor appoints all members serving on the EMC and a majority of the members serving on the Commission for Health Services. N.C.G.S. § 143B-283(a) (1999) (amended in 2001); N.C.G.S. § 130A-30(a) (2001). A local board of health is limited in its rule-making powers in that the regulation must be "related to the promotion or protection of health." *City of Roanoke Rapids v. Peedin*, 124 N.C. App. 578, 587, 478 S.E.2d 528, 533 (1996).

In holding that the Swine Ordinance and the Health Board Rules were preempted by state law, the Court of Appeals reasoned that the Chatham County Board of Commissioners and the Chatham County Board of Health sought to regulate an area in which the General Assembly had provided a "complete and integrated regulatory scheme" of swine farm regulations. *Craig v. County of Chatham*, 143 N.C. App. 30, 545 S.E.2d 455 (2001); *see also* N.C.G.S. § 160A-174(b)(5). We concur in this assessment.

In determining if the General Assembly intended to provide statewide regulation to the exclusion of local regulation, we must decide if it has shown a clear legislative intent to provide such a "complete and integrated regulatory scheme."

Defendants argue that when the General Assembly intends to preempt the field, it will do so through an express statement of intent.

Furthermore, they argue that without such an expression of intent, this Court would be merely imposing its own judgment for that of the General Assembly in finding that the General Assembly preempted the field. We disagree.

If the General Assembly were required to provide an express statement of intent, N.C.G.S. § 160A-174(b)(5) would be meaningless. The General Assembly can create a regulatory scheme which, though not expressly exclusory, is so complete in covering the field that it is clear any regulation on the county level would be contrary to the statewide regulatory purpose.

In determining the purpose and intent of the General Assembly in adopting the swine regulation statutes, we must primarily look to " 'the spirit of the act[] and what the act seeks to accomplish.' " *State v. Anthony*, 351 N.C. 611, 615, 528 S.E.2d 321, 323 (2000) (quoting *Taylor v. Taylor*, 343 N.C. 50, 56, 468 S.E.2d 33, 37 (1996)). Where legislative intent is not readily apparent from the act, it is appropriate to look at various related statutes *in pari materia* so as to determine and effectuate the legislative intent. *Brown v. Flowe*, 349 N.C. 520, 523-24, 507 S.E.2d 894, 896 (1998).

In *State v. Williams*, this Court relied on a stated purpose similar to the one in the instant case to find that state law preempted local regulation in the Town of Mount Airy. 283 N.C. at 553, 196 S.E.2d at 758. In that case, defendants were arrested for the possession of an open beer, a violation of a Mount Airy city ordinance. *Id.* at 550, 196 S.E.2d at 756-57. Defendants' motion to quash the warrants was allowed because the town ordinance which prohibited the possession of an open beer in public places was in conflict with the general statutory laws of North Carolina, which allowed possession of malt beverages and unfortified wine by eighteen-year-old consumers "without restriction or regulation." *Id.* at 554, 196 S.E.2d at 758-59. When the issue came before this Court, it looked to the "purpose" and "intent" of the pertinent statute:

> "to establish a *uniform system of control* over the sale, purchase . . . of intoxicating liquors . . . to insure, as far as possible, the proper administration of this Chapter under a *uniform system throughout the State.*"

Id. at 553, 196 S.E.2d at 758 (quoting N.C.G.S. § 18A-1 (1975)) (emphasis added). This Court concluded that the General Assembly had shown by this language an intent to prevent local governments from

enacting ordinances regulating malt beverages. *Id.* at 554, 196 S.E.2d at 759. The ordinance at issue was determined to be inconsistent with state law because (1) it made unlawful something that state law held to be lawful, and (2) the ordinance purported to regulate within a field where the General Assembly had provided a "complete and integrated regulatory scheme." *Id.*

Similarly, in *Greene v. City of Winston-Salem*, 287 N.C. 66, 213 S.E.2d 231 (1975), this Court found upon review of an ordinance enacted by the City of Winston-Salem that there was a legislative intent to preempt. The City of Winston-Salem enacted an ordinance which required sprinkler systems in high-rise buildings. *Id.* at 67, 213 S.E.2d at 232. The City referred to a state law which required sprinkler systems in certain buildings in support of its argument that state law did not give the State Building Code Council sole regulatory authority in the area. *Id.* at 75, 213 S.E.2d at 237. This Court noted that the General Assembly does not have to delegate all or sole authority in the particular regulatory field to one state agency in order to establish that there is a "complete and integrated regulatory scheme." *Id.*

There are two components to the statewide swine farm regulations found in the North Carolina General Statutes, the "Swine Farm Siting Act" and the "Animal Waste Management Systems." In examining each of these, we will look to any statement of "purpose" and "intent" in an effort to determine if the General Assembly has created a "complete and integrated system" for swine farm regulation in the state.

The Swine Farm Siting Act, N.C.G.S. §§ 106-800 to -805 (2001), governs the placement of swine farms and lagoons, and provides in its section designated "Purpose" the following:

> [C]ertain limitations on the siting of swine houses and lagoons for swine farms can assist in the development of pork production, which contributes to the economic development of the State, by lessening the interference with the use and enjoyment of adjoining property.

N.C.G.S. § 106-801. This expression of intent is significant in that it notes pork production is important to the economic stability of the state, yet recognizes that adjoining landowners have a right to the use and enjoyment of their land. This stated intent also shows that the General Assembly was trying to reach a balance between two very

important interests, the economy of North Carolina and the right of a landowner to enjoy his land with minimal interference. If each of North Carolina's one hundred counties is free to create its own particularized regulations for swine farms, the overall balance which the General Assembly has reached within a uniform plan for the entire state will be lost. The result could well be that the rights of adjacent landowners in each individual county would be substantially elevated above the rights of swine farmers to workable, nonexcessive regulations. Swine farms would be forced to comply with both state and county regulations. Furthermore, a swine farmer with a large farm that crossed the boundaries of one or more counties in North Carolina conceivably would have to conform the farm to the regulations established by various counties and those established by the state. Ultimately, such farms could be forced to adapt to differing, even conflicting, regulations. Any such dual regulation would present an excessive burden on swine farmers and the pork production industry as a whole.

The Animal Waste Management Systems component of the statewide regulations, N.C.G.S. §§ 143-215.10A to -215.10M (2001) (§ 143-215.10C altered in 1999; § 143-215.10B altered in 2001), provides in pertinent part: "It is the *intention* of the State to *promote a cooperative and coordinated approach* to animal waste management among the *agencies of the State*." N.C.G.S. § 143-215.10A (emphasis added). This unequivocal statement makes it clear that the purpose for creating these statutes was to regulate animal waste management at the state level. If each county were allowed to enact its own waste management guidelines, there could be no statewide "coordinated approach." Notably also, the agencies designated to implement the Animal Waste Management Systems statutes are exclusively state agencies. N.C.G.S. §§ 143-215.10A to -215.10M (permitting, inspection, and enforcement are vested in the Division of Water Quality, while the Soil and Water Conservation Commission is in charge of designating the technical specialists responsible for inspecting the waste management plans). The expression of intent further provides that one of the goals of the Act is "minimizing the regulatory burden." N.C.G.S. § 143-215.10A. Certainly, the stated goal of limiting or minimizing the burden of the regulatory scheme for waste management systems on swine farms would not be attainable if counties could impose additional burdens on swine farmers to comply with varying regulations.

Thus, from our review of the expressed "purpose" and "intent" of the Swine Farm Siting Act and the Animal Waste Management

statutes, we conclude that these two components of North Carolina's swine farm regulations show an intention to cover the entire field of swine farm regulation in North Carolina.

In addition to the General Assembly's express statements of "purpose" and provisions reflecting "intent" in enacting North Carolina's swine farm regulations, we consider the breadth and scope of the applicable general statutes in determining whether the overall regulatory scheme was designed to be preemptive.

The General Assembly has provided for extensive regulation of swine farms in North Carolina. The Swine Farm Siting Act is applicable to tracts of land raising 250 or more swine[6] and establishes siting requirements for swine houses[7] and lagoons[8] in relation to surrounding areas. N.C.G.S. § 106-803(a). Swine houses and lagoons must be located at least 1,500 feet away from an occupied residence; 2,500 feet away from a school, hospital, or church; and 500 feet away from "any property boundary" or "well supplying water to a public water system." N.C.G.S. § 106-803(a)(1) -(4). The setback requirements where waste has been applied to the land on the farm provide that the land must be at least 75 feet away from perennial streams, rivers, or any property boundary containing an occupied residence. N.C.G.S. § 106-803(a1).

The Swine Farm Siting Act provides for enforcement of its requirements by establishing who is in a position to enforce the Act; what kinds of relief are available; and the possibility of obtaining court costs, attorneys' fees, and expert witnesses' costs. N.C.G.S. § 106-804. The Swine Farm Siting Act's setback distances from any occupied residence, school, hospital, or church can be avoided completely if the farm owner gets the written permission of the adjacent landowner and records it with the county Register of Deeds. N.C.G.S. § 106-803(b). The Swine Farm Siting Act also requires that before locating or constructing a swine farm with 250 or more swine, proper notice must be given to any county where the farm is to be located; adjoining property owners; owners of property across a street, road,

6. The Swine Farm Siting Act applies to a "swine farm," and N.C.G.S. § 106-802(5) defines a swine farm as "a tract of land devoted to raising 250 or more animals of the porcine species."

7. "[A] building that shelters porcine animals on a continuous basis." N.C.G.S. § 106-802(6).

8. "[A] confined body of water to hold animal byproducts including bodily waste from animals or a mixture of waste with feed, bedding, litter or other agricultural materials." N.C.G.S. § 106-802(1).

or highway from the farm; and the local health department. N.C.G.S. § 106-805. Proper notice requires service by certified mail and must include, in part: the address of the local Soil and Water Conservation District office, the name and address of the technical specialist that prepared the farm's proposed waste management plan, and the proposed design capacity of the animal waste management system. *Id.*

The Animal Waste Management Systems component regulates swine farms even more extensively than the Swine Farm Siting Act. The Animal Waste Management Systems component creates a "permitting program" which requires swine farm owners to obtain a permit before constructing or operating any waste management system. N.C.G.S. § 143-215.10C(a). An "animal waste management system" is defined as practices "that provide for the collection, treatment, storage, or land application of animal waste." N.C.G.S. § 143-215.10B(3). To obtain the necessary permit, swine farm owners must submit to the EMC their waste management system plan, which has been approved by a technical specialist. N.C.G.S. § 143-215.10C(d). The Animal Waste Management Systems has detailed specifications as to how each farm's animal waste management system shall be designed, constructed and operated so as to prevent pollution. N.C.G.S. § 143-215.10C. It also provides a time limit upon which the EMC must approve or deny the permit after a new permit has been applied for or a renewal permit is sought. N.C.G.S. § 143-215.10C(c). In the event the EMC does not act in the required ninety days, the permit is considered to be approved. *Id.* The Animal Waste Management Systems component provides an extensive list of necessary parts for all animal waste management plans, such as provisions regarding periodic testing of waste products used on the farm as nutrient sources and a checklist of potential odor sources and management practices which are designed to minimize the source of the odor. N.C.G.S. § 143-125.10C(e). Any established swine farm waste management plan must require at least annual testing of the soil at crop sites where the waste has been applied to the land. N.C.G.S. § 143-215.10C(e)(6).

We conclude from the foregoing specifications that North Carolina's swine farm regulations, the Swine Farm Siting Act and the Animal Waste Management Systems statutes are so comprehensive in scope that the General Assembly must have intended that they comprise a "complete and integrated regulatory scheme" on a statewide basis, thus leaving no room for further local regulation.

Turning now to the Health Board Rules enacted by the Chatham County Board of Health, we note that they contain more stringent rules than those established in the EMC regulations. However, N.C.G.S. § 130A-39 specifically grants local boards of health the power to enact rules which are more strict when they are "required to protect the public health." N.C.G.S. § 130A-39(b). In an effort to protect the environment, the EMC has created a system of permitting and inspection which regulates waste management systems on farms, including swine farms of more than 250 swine. *See* 15A NCAC 2H .0217(a)(1)(A) (Sept. 2001).

The pertinent EMC regulation, 15 NCAC 2H .0217 (Rule .0217), outlines the procedure for the proper development of an approved waste management plan. The procedure requires the plan to be certified by a technical specialist certifying that the practices established in the plan meet the applicable minimal standards for a waste management plan. Rule .0217(a)(1)(H)(i)-(ii). Rule .0217(a)(1)(H)(vii) provides the time when approval of the waste management system must be obtained for new farms, before any animals are stocked, and for expanding farms, before any of the additional animals are added. Rule .0217 also contains established buffers, such as the requirement that ponds or lagoons must be located at least one-hundred feet from perennial waters. 15A NCAC 2H .0217(a)(1)(H)(vi).

The EMC permitting regulation also has an established set of guidelines which must be followed when a farm has a change in ownership. 15A NCAC 2H .0217(a)(1)(H)(xii). The new owner must provide written notification to the Division of Environmental Management (DEM) of the Department of Environment, Health, and Natural Resources within sixty days of obtaining ownership. *Id.* The new owner must also assure the DEM that he has read the waste management plan established for the farm, that he understands it, and that he will continue to ensure that it is implemented. *Id.* Rule .0217 also provides for its enforcement. 15A NCAC 2H .0217(e). When there is a willful failure to comply with the EMC permitting regulation, Rule .0217, the Secretary of the Environment, Health, and Natural Resources can assess both fines and penalties. *Id.*

The General Assembly may provide directly for specific statewide regulation, as noted above, and it may delegate regulatory authority to local agencies under sufficient guidelines, as provided in N.C.G.S. § 130A-39(b). However, county commissioners and local boards of health have no authority under the provisions of N.C.G.S. § 130A-39(b) to superimpose additional regulations without specific

reasons clearly applicable to a local health need. The Health Board Rules make the bare assertion that "in some areas, rules more stringent than those of the Environmental Management Commission are required in order to protect the public health." The Health Board, however, does not provide any rationale or basis for making the restrictions in Chatham County more rigorous than those applicable to and followed by the rest of the state.

The Health Board Rules require that "[n]o person shall construct or expand a swine farm in Chatham County without having a swine farm Construction/Expansion permit" for 250 or more swine. However, the EMC permitting regulation already requires that swine farms with waste management facilities supporting 250 or more swine get "permits for construction or operation." 15A NCAC 2H .0217(a). The Health Board Rules provide procedures for handling a change in ownership of the swine farm, while the EMC already addresses this issue, as above set forth. In fact, the EMC rule is very specific and thorough on the issue of a change in ownership. The Health Board Rules establish setbacks which establish minimal distances for new, existing or expanding swine farms in relation to "residences that are either occupied or listed for rent or sale, nursing homes, child care centers, [and] office buildings." The setback distances are imposed according to the size of the swine farm's "animal waste management system," increasing the setback distance with larger systems ranging from 2,500 to 5,500 feet.[9] The setback distances incorporated into the EMC rule require 1,500 feet from an occupied residence and 2,500 feet from any school, hospital, national or state park, or church.[10] The difference between the setback distances established by the Health Board Rules and those set by the EMC is that the Health Board Rules are more stringent. It is apparent that Chatham County enacted its Health Board Rules in an effort to place more stringent regulations on swine farmers and has done so without any showing that such regulations are "required to protect the public health," as specified by N.C.G.S. § 130A-39(b). This we hold is impermissible.

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9. These buffer distances are not the applicable standard when the building or home has "come to the nuisance," wherein the swine farm existed before the building or home.

10. The EMC incorporates provisions of the Field Office Technical Guide. The Field Office Technical Guide refers to N.C.G.S. §§ 106-801 to -805, a portion of the Swine Farm Siting Act, as establishing the proper standard for setback distances. *See* Natural Resources Service Conservation Practice Standard, Code 425, at 3 (Sept. 1996).

When we look at the Swine Farm Siting Act, the Animal Waste Management Systems statutes, and the EMC's regulation together, as parts of an overall scheme, we conclude that the Swine Ordinance and the Health Board Rules are incompatible with state law in that they purport to regulate a field in which the State has provided a "complete and integrated regulatory scheme" to the exclusion of local regulation. We therefore affirm the Court of Appeals in this regard.

[2] We next address the issue of the ordinance to amend the Zoning Ordinance, which is before us upon plaintiffs' petition for discretionary review as to an additional issue. Plaintiffs contend the Court of Appeals erred in upholding the Zoning Ordinance. We agree.

"Counties have no inherent authority to enact zoning ordinances." *Jackson v. Guilford Cty. Bd. of Adjust.*, 275 N.C. 155, 162, 166 S.E.2d 78, 83 (1969). N.C.G.S. § 153A-340 is the statutory grant of power which provides counties with the authority to zone. There is, however, a specific limitation on this grant of power as it relates to swine farms:

> A county may adopt zoning regulations governing swine farms served by animal waste management systems having a design capacity of 600,000 pounds steady state live weight (SSLW) or greater provided that the zoning regulations may not have the effect of excluding swine farms served by an animal waste management system having a design capacity of 600,000 pounds SSLW or greater from the entire zoning jurisdiction.

N.C.G.S. § 153A-340(b)(3) (2001).

The Zoning Ordinance, as amended, enacted by Chatham County requires all swine farms served by an animal waste management system having a design capacity of 600,000 pounds SSLW or greater, regardless of the actual number of swine, to be located in either a "Light" or "Heavy Industrial" district. The Zoning Ordinance further compels applicants to obtain a Construction/Expansion permit "as required by the [Swine Ordinance]."

Plaintiffs contend that in light of the Court of Appeals' determination that the Swine Ordinance is invalid, the Zoning Ordinance's express incorporation of the Swine Ordinance causes the Zoning Ordinance to fail as well. Specifically, plaintiffs argue that state preemption of the Swine Ordinance, as it is incorporated in the Zoning Ordinance, invalidates the Zoning Ordinance.

The Zoning Ordinance is not *per se* invalid. However, in this case, as written, the Zoning Ordinance cannot stand.

The sole restriction on zoning swine farms is that they "may not have the effect of excluding swine farms served by an animal waste management system having a design capacity of 600,000 pounds SSLW or greater from the entire zoning jurisdiction." N.C.G.S. § 153A-340(b)(3). Chatham County's Zoning Ordinance does not exclude all farms with an animal waste management system of 600,000 SSLW or greater, but merely restricts these farms to "Light" or "Heavy Industrial" districts within the county. The Zoning Ordinance complies with the restrictions established in section 153A-340(b)(3).

However, the requirement in the Zoning Ordinance that the applicant must have a Construction/Expansion permit obtained through compliance with the Swine Ordinance proves to be fatal. The Zoning Ordinance requires compliance with only a portion of the Swine Ordinance; however, that specific portion of the Swine Ordinance requires compliance with *all* other sections of the Swine Ordinance, to the extent the other sections are applicable to swine farms.

As we noted above, the Swine Ordinance cannot stand because it seeks to impose regulations on swine farmers where the State has shown an intent to cover the field of swine farm regulation. The Zoning Ordinance's attempt to incorporate the Swine Ordinance prevents us from sustaining its validity. Accordingly, we conclude that the Zoning Ordinance's incorporation of the Swine Ordinance invalidates the Zoning Ordinance.

[3] As to defendants' third issue, whether the Board of Health may regulate swine farms under N.C.G.S. § 130A-39 upon considerations other than health, we hold it may not for the reasons hereinabove set forth.

Upon the foregoing, the decision of the Court of Appeals is affirmed in part and reversed in part.

AFFIRMED IN PART; REVERSED IN PART.

STATE OF NORTH CAROLINA v. JONATHAN EARL LEEPER

No. 256A00

(Filed 28 June 2002)

1. Evidence— character—reference to previous experience with Miranda warnings—not prejudicial

There was no prejudice in a first-degree murder and armed robbery prosecution from a reference in an officer's testimony to defendant's previous experience with Miranda warnings because defendant acknowledged shooting both victims.

2. Homicide— short-form indictments—firearms enhancement holding

The firearms enhancement holding in *State v. Lucas*, 353 N.C. 568, does not conflict with the North Carolina Supreme Court's holdings on short-form murder indictments.

3. Sentencing— capital—use of juvenile adjudications—effective date

A 1992 juvenile adjudication could be used as an aggravating circumstance for first-degree murder even though defendant contended that the amendments concerning confidentiality of juvenile records and allowing the use of juvenile adjudications pertained only to offenses committed on or after 1 May 1994. The effective date of the amendments pertain to sentencing for crimes committed on or after that date, not to the date of the prior adjudications. N.C.G.S. § 15A-2000(e)(3).

4. Sentencing— capital—evidence—circumstances of prior conviction

There was no error in the sentencing phase of a capital prosecution for first-degree murder in the introduction of evidence that defendant had obtained a gun used in a prior robbery from a purse stolen two days before the prior robbery. Although defendant contended that this evidence was beyond the scope of N.C.G.S. § 7B-3000(f), the State in a capital sentencing proceeding is entitled to prove the circumstances of prior convictions and is not limited to the record of the conviction.

5. Sentencing— capital—aggravating circumstances—instructions—course of conduct

The trial court did not err in a capital sentencing proceeding for a 1996 murder in its instruction on the course of conduct aggravating circumstance where defendant contended that the instruction permitted the jury to consider a 1992 juvenile adjudication and a 1992 purse snatching. One may not reasonably infer that a juror would stretch "on or about" to encompass a span of over four years. Moreover, the court instructed the jurors that the juvenile acts introduced to support the prior violent felony circumstance could not be used as the basis for the course of conduct circumstance.

6. Constitutional Law— ex post facto prohibition—use of juvenile adjudication in capital sentencing

The use of juvenile adjudications as an aggravating circumstance does not violate ex post facto prohibitions.

7. Sentencing— capital—death sentences not disproportionate

Sentences of death imposed upon defendant for two first-degree murders were not disproportionate where defendant was convicted on the basis of premeditation and deliberation and under the felony murder rule; the jury found as aggravating circumstances that defendant had previously been adjudicated delinquent in a juvenile proceeding for an offense that would have been a felony involving violence to the person had defendant been an adult, N.C.G.S. § 15A-2000(e)(5), and that the murders were part of a violent course of conduct, N.C.G.S. § 15A-2000(e)(11); either of the statutory aggravating circumstances, standing alone, have been held sufficient to support a sentence of death; defendant planned to rob the first victim, shot the victim as he was driving his vehicle and immediately fled the scene; only a short time later, defendant targeted the second victim, shot him and robbed him of a large amount of cash; and defendant offered no help to the victims.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of death entered by Caldwell, J., on 22 February 2000 in Superior Court, Mecklenburg County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. On 30 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 11 February 2002.

Roy Cooper, Attorney General, by Ellen B. Scouten, Special Deputy Attorney General, for the State.

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

BUTTERFIELD, Justice.

On 30 March 1998, defendant was indicted for the first-degree murders of Travis James Flowe and Clayton Eugene Foster, robbery with a dangerous weapon, and attempted robbery with a dangerous weapon. On 25 April 1998, defendant was also indicted for conspiracy to commit robbery with a dangerous weapon. Defendant was tried capitally before a jury at the 19 January 2000 session of Superior Court, Mecklenburg County. The jury found defendant guilty of both murders on the basis of premeditation and deliberation and under the felony murder rule. The jury also found defendant guilty of conspiracy to commit robbery with a dangerous weapon, robbery with a dangerous weapon, and attempted robbery with a dangerous weapon. Following a capital sentencing proceeding, the jury recommended a sentence of death for each of the first-degree murder convictions. On 22 February 2000, the trial court sentenced defendant accordingly. The trial court also sentenced defendant to terms of imprisonment to be served concurrent with the sentences of death but consecutive to each other as follows: 77 to 102 months' imprisonment for the robbery with a dangerous weapon conviction, 77 to 102 months' imprisonment for the attempted robbery with a dangerous weapon conviction, and 29 to 44 months' imprisonment for the conspiracy to commit robbery with a dangerous weapon conviction. Defendant appealed his sentence of death to this Court as of right. On 30 May 2001, this Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of the noncapital convictions and judgments.

At trial, the State's evidence tended to show that in the early morning hours of 18 April 1996, defendant was driving around Charlotte, North Carolina, with two men, defendant's cousin Laquette Kelly and a man Lamont (last name unknown), and two women, Shakena Billings and Krashana Davis. Billings drove the group to a Bi-Lo grocery on Freedom Drive. The group had previously discussed robbing someone. Defendant went over to a taxi and asked the driver, Travis Flowe, for a ride. Defendant was armed with a .380-caliber Lorcin pistol. As agreed upon earlier, the other individuals followed the cab in which defendant was traveling. Defendant pointed the pis-

tol at Flowe and told him to "[g]ive up the goods." Defendant stated that Flowe "flinched" or "jumped." Defendant fired his pistol at Flowe multiple times and jumped out of the taxi while the taxi was still moving. The taxi crashed into a tree. Defendant joined the others in the other vehicle. He did not take anything from Flowe. Flowe died as a result of gunshot wounds to his lung and aorta.

As the group drove back to the Springfield neighborhood, where defendant then lived, they spotted a known drug dealer, Clayton Foster, at a car wash pay phone. Billings stated, "That's a lick [robbery]." Defendant told Billings to turn around and return to the car wash. Billings parked the car at a bank across the street. Defendant left the car and walked up to Foster, gesturing that he wanted to buy some marijuana from Foster. Foster shook his head, indicating he had none to sell or did not want to sell defendant marijuana. Defendant turned and shouted Foster's name. Foster began to run. Defendant fired his pistol at Foster several times. Foster died of multiple gunshot wounds.

Defendant drove Foster's vehicle across the street to the bank. Kelly joined defendant in Foster's vehicle, and the others followed them to Clanton Park. Defendant removed a pistol and rifle from Foster's vehicle and put them in the other vehicle. Defendant also took Foster's jacket. The group then returned to the area of the car wash. Defendant found Foster lying on his stomach in one of the car wash bays. Defendant removed Foster's wallet from his back right pocket and found a large sum of cash. The wallet, which defendant took with him, was later determined to contain ten thousand dollars. Defendant gave the two females three to four hundred dollars each and told them not to tell anyone about the shootings and robbery. Defendant hid the rifle and sold the pistols.

More than a year later, in May 1997, Charlotte-Mecklenburg law enforcement officers received information about the shootings. In December 1997, law enforcement officers spoke with the two females involved. On 16 March 1998, defendant confessed to both murders while being interviewed by law enforcement officers.

GUILT-INNOCENCE

[1] In his first assignment of error, defendant contends that the trial court erred in overruling his objection to a portion of a law enforcement officer's testimony in which the officer referred to defendant's previous experience with *Miranda* warnings. The record reveals

the following colloquy between Charlotte-Mecklenburg Police Department Investigator R.G. Buening and the prosecutor:

> Q. At that point did you start to basically talk to him about what you had him there for at the police department?
>
> A. That's correct.
>
> Q. Explain to us how you started that procedure with him.
>
> A. I informed Mr. Leeper that myself and Investigator Jackson wanted to talk to him about some crimes that had occurred in Charlotte that we believed he was involved in.
>
> Q. And—go ahead; I'm sorry.
>
> A. And at that point I advised Mr. Leeper that I needed to advise him of his Miranda Rights, at which time I began advising Mr. Leeper of his Miranda Rights according to the U.S. Constitution. And I asked Mr. Leeper if he had ever been advised of his Miranda Rights in the past.
>
> Q. And what if any response did you get?
>
> A. In response to that question Mr. Leeper indicated that he estimated that he had been advised of his rights—
>
> MS. ATKINS: Objection.
>
> THE COURT: Overruled.
>
> Q. Go ahead.
>
> A. Mr. Leeper in response, again, indicated that he estimated that he had been advised of his rights six times prior to this date.
>
> Q. Did you have any form at the time that the police department used to advise a suspect of their rights?
>
> A. Yes, ma'am. There's a standard Miranda, a waiver of rights form that the Charlotte-Mecklenburg Police Department uses.

Very similar testimony had been given earlier during *voir dire* when the prosecutor was establishing the voluntariness of the confession for purposes of admissibility. Defendant argues that the testimony given by Investigator Buening regarding defendant having previously been given *Miranda* warnings was an attempt by the prosecutor to introduce evidence of defendant's character. The State argues that the evidence was offered for the purpose of proving the credibility of the

confession. Defendant contends that this evidence amounted to prejudicial error for which he is entitled to a new trial.

"The ultimate test of the admissibility of a confession is whether the statement was in fact voluntarily and understandingly made." *State v. Davis*, 305 N.C. 400, 419, 290 S.E.2d 574, 586 (1982), *quoted in State v. Fernandez*, 346 N.C. 1, 10, 484 S.E.2d 350, 356 (1997). This Court has established that "[t]he State has the burden of showing by a preponderance of the evidence that the defendant made a knowing and intelligent waiver of his rights and that his statement was voluntary." *State v. Thibodeaux*, 341 N.C. 53, 58, 459 S.E.2d 501, 505 (1995). Whether the confession was voluntarily made is a question of law, and the trial judge is not required to submit the issue of voluntariness to the jury. *State v. Barnett*, 307 N.C. 608, 622-23, 300 S.E.2d 340, 347-48 (1983).

In *State v. Walker*, 266 N.C. 269, 145 S.E.2d 833 (1966), this Court stated, "If admitted in evidence, it is for the jury to determine whether the statements referred to in the testimony of the witness were in fact made by the defendant and the weight, if any, to be given such statements if made." *Id.* at 273, 145 S.E.2d at 836. The United States Supreme Court has stated that "the circumstances surrounding the taking of a confession can be highly relevant to two separate inquires, one legal and one factual. *Crane v. Kentucky*, 476 U.S. 683, 688, 90 L. Ed. 2d 636, 644 (1986). In addition to the legal issue of voluntariness to be decided by a trial judge, the Supreme Court has stated that "the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence." *Id.* at 689, 90 L. Ed. 2d at 644. Therefore, the factual issue of credibility for a jury's consideration stands apart from the issue of voluntariness that is decided as a question of law by a trial judge.

We note that defendant acknowledged shooting both victims and did so consistent with this Court's requirements under *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). Assuming *arguendo* that defendant is correct in his contentions and that the prosecutor's question was not relevant, any error was harmless error beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (2001). Therefore, we overrule this assignment of error.

[2] In another assignment of error, defendant raises the short-form indictment issue and acknowledges that this Court has previously

held contrary to his position on this issue. Defendant suggests that *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001), may conflict with our prior holdings on this issue. We do not believe that the portion of the *Lucas* holding addressing sentencing pursuant to a firearm enhancement statute, upon which defendant relies, is pertinent to a first-degree murder case that is tried capitally. Therefore, we find no compelling reason to depart from our prior holdings and overrule this assignment of error.

SENTENCING

By another assignment of error, defendant contends that the trial court erred by: (1) allowing the State to introduce a large amount of evidence about defendant's juvenile criminal activity in 1992; (2) by submitting the aggravating circumstance contained in N.C.G.S. § 15A-2000(e)(3) based on defendant's juvenile adjudication for armed robbery in 1992; and (3) by giving instructions on N.C.G.S. § 15A-2000(e)(11), which permitted the jury to base its finding of the course of conduct aggravation circumstance on defendant's 1992 juvenile adjudication. We disagree.

[3] Defendant argues that the 1992 juvenile adjudication for armed robbery could not be used to submit the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance because the 1994 amendment to N.C.G.S. § 15A-2000(e)(3) pertains only to "offenses" committed on or after 1 May 1994. Defendant's reading of the amending Act's effective date provision is incorrect. N.C.G.S. § 15A-2000(e)(3) provides as follows:

> 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) (2001). Section 7 of the amending Act reads as follows:

> Section 6 of this act becomes effective on the date that G.S. 15A-1340.16 becomes effective and applies to offenses committed on or after that date. The remainder of this act becomes effective May 1, 1994. Sections 1, 2, 4, and 5 of this act apply to offenses committed on or after that date. Section 3 of this act applies to trials begun on or after that date.

Act of Mar. 8, 1994, ch. 7, sec. 7, 1993 N.C. Sess. Laws (Extra Sess. 1994) 10, 14. Defendant contends that the term "offenses" is ambiguous and could refer to the offense for which a defendant is being sentenced, the prior offense to be used as an aggravating circumstance under N.C.G.S. § 15A-2000(e)(3), or both the murder and the prior offense.

Defendant's arguments concerning ambiguity and statutory construction are unpersuasive. There is no ambiguity in section 7 of the Act. Section 7 sets the effective date for the various sections within the Act. Section 5, which amended N.C.G.S. § 15A-2000(e)(3), became effective on 1 May 1994 and applied to all capital offenses committed on or after that date. Defendant questions the legislature's use of the word "offenses" rather than a more specific word such as "murder." In addition to amending N.C.G.S. § 15A-2000(e)(3), the Act amended statutes dealing with the sentencing of other crimes. By using the word "offenses," the legislature referred to all crimes subject to sentencing under the Act. The effective date pertains to the use of the prior adjudications in sentencing for crimes committed on or after 1 May 1994 and not to the date of the prior adjudications themselves.

Defendant also contends, in this same assignment of error, that the trial court erred in allowing evidence surrounding defendant's 1992 juvenile adjudication for armed robbery. Defendant argues that the same ambiguity applies to the confidentiality of juvenile records. The predecessor to N.C.G.S. § 7B-3000, which deals with the confidentiality of juvenile records, was N.C.G.S. § 7A-675. In the same act that amended N.C.G.S. § 15A-2000(e)(3), the legislature amended N.C.G.S. § 7A-675 to allow juvenile records to be examined and used in subsequent criminal proceedings. Applying the same analysis as used above, the use of juvenile records pertains to the use of the prior adjudications in sentencing for crimes committed on or after 1 May 1994 and not to the date of the prior adjudications themselves.

[4] In this same assignment of error, defendant contends that evidence, indicating that defendant had obtained the gun he used in the 1992 armed robbery by taking it from a purse he stole two days prior to the robbery was beyond the scope of N.C.G.S. § 7B-3000(f). Defendant has cited no authority for this argument other than to contend that introducing the evidence violated N.C.G.S. § 7B-3000(f) and was highly prejudicial. This Court has held 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." *State v. Roper*, 328 N.C. 337, 365, 402 S.E.2d 600, 616, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991). We find defendant's argument unpersuasive.

[5] Defendant, in this same assignment of error, contends that the trial court erred in instructing the jury on the N.C.G.S. § 15A-2000(e)(11) aggravating circumstance. Defendant argues that the instruction permitted the jury to consider defendant's 1992 juvenile adjudication and defendant's 1992 purse snatching as evidence to support this course of conduct aggravating circumstance. We do not agree. The trial court gave virtually the identical instruction regarding the course of conduct aggravating circumstance as to each murder:

> Now, Members of the Jury, a murder is a part of such course of conduct if you find from the evidence beyond a reasonable doubt that in addition to killing the victim, in this case the victim Clayton Eugene Foster, the defendant on or about the alleged date was engaged in a course of conduct which involved the commission of another crime of violence against another person, and that this or these other crimes were included in the same course of conduct in which the killing of the victim Clayton Eugene Foster was also a part, 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.

One may not reasonably infer that a juror would stretch the phrase "on or about" to encompass a span of over four years in order to find this aggravator.

Additionally, after setting out the aggravators as to each case, the trial court instructed the jurors that they could not use the same evidence as a basis for finding more than one aggravating circumstance. This instruction clarified that the juvenile acts introduced in support of the (e)(3) aggravating circumstance could not be used as a basis for finding the (e)(11) aggravating circumstance. There is no merit in defendant's argument.

[6] Defendant also contends that the use of juvenile adjudications as an aggravating circumstance violates the *ex post facto* prohibitions of the United States and North Carolina Constitutions. For the reasons set forth in *State v. Wiley*, 355 N.C. 592, 624-27, 565 S.E.2d 22, 44-46 (2002), we find these arguments to be without merit. The trial court

properly admitted defendant's juvenile adjudication records and related evidence in support of the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance, properly submitted the circumstance to the jury, and properly instructed the jury on N.C.G.S. § 15A-2000(e)(11). This entire assignment of error is overruled.

PRESERVATION

Defendant raises six additional issues for the purpose of permitting this Court to reexamine its prior holdings and also for the purpose of preserving these issues for possible further judicial review: (1) the trial court erred by denying defendant's motion to permit *voir dire* of prospective jurors regarding parole eligibility; (2) the trial court's instructions defining the burden of proof applicable to mitigating circumstances violated defendant's constitutional rights because they used the vague term "satisfies"; (3) the trial court committed reversible error in its instructions that permitted jurors to reject a submitted mitigating circumstance because it had no mitigating value; (4) the trial court committed reversible error in its instructions as to the mitigating value of statutory and nonstatutory mitigating circumstances; (5) the trial court erred in instructing that each juror "may," rather than "must," consider any mitigating circumstances the juror determined to exist when deciding sentencing Issues Three and Four; and (6) the North Carolina death penalty statute is unconstitutional. 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

[7] 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.

In the present case, the jury found defendant guilty of two counts 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 three aggravating circumstances submitted for its consideration as to each murder: that defendant had been previously adjudicated delinquent in a juvenile proceeding for an offense that would have been a felony involving the use of or threat of violence to the person had defendant been an adult, N.C.G.S. § 15A-2000(e)(3); that the murders were committed while defendant was engaged in the commission of attempted robbery with a firearm (as to victim Flowe) or robbery with a firearm (as to victim Foster), N.C.G.S. § 15A-2000(e)(5); and that the murders were part of a violent course of conduct, N.C.G.S. § 15A-2000(e)(11).

Three statutory mitigating circumstances, including the catchall, were submitted as to each murder for the jury's consideration: 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)(9) mitigator for each murder. Of the thirty-two identical nonstatutory mitigating circumstances submitted by the trial court for consideration in each murder, one or more jurors found twenty-nine to exist and have mitigating value.

The purpose of proportionality review is to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Proportionality review also acts "[a]s a check against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). "In our proportionality review, we must compare the present case with other cases in which this Court has ruled upon the proportionality issue." *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

We have determined the death penalty to be disproportionate on seven occasions. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139

L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). We conclude that this case is not substantially similar to any case in which this Court has found the death penalty disproportionate.

Several characteristics of this case support this conclusion. Defendant was convicted of two counts of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. 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 several accomplices who helped defendant only by driving him from location to location and handling the property stolen from one of the victims.

The (e)(11) aggravating circumstance found here by the jury was also found in *Bondurant* and *Rogers*. In *Bondurant*, this Court weighed the fact that the defendant expressed concern for the victim's life and remorse for his action by accompanying the victim to the hospital. *Bondurant*, 309 N.C. at 694, 309 S.E.2d at 182-83. In the present case, defendant shot both victims and immediately fled the scenes. Defendant did return to victim Foster, but only to rob him of the approximate ten thousand dollars in cash Foster was carrying. After the killings, defendant went to a drug house and slept. In *Rogers*, this Court held that it was not error for the trial court to submit the (e)(11) aggravating circumstances where after the defendant killed one person, he fired at another person with the intent to kill that person. *Rogers*, 316 N.C. at 234, 341 S.E.2d at 731. Although *Rogers* was found disproportionate, in that case only the (e)(11)

aggravating circumstance was submitted. *Id.* at 236, 341 S.E.2d at 732. Here, the (e)(3), (e)(5), and (e)(11) aggravating circumstances were submitted to and found by the jury.

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 has "consistently held the death penalty proportionate in cases in which the defendant was convicted of killing more than one person." *State v. McNeill*, 349 N.C. 634, 655, 509 S.E.2d 415, 428 (1998), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999). Further, there are four statutory aggravating circumstances that, standing alone, this Court has held sufficient to support a sentence of death; the (e)(3), (e)(5), and (e)(11) 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 planned to rob victim Flowe, shot the victim as he was driving his vehicle, and then immediately fled the scene. Only a short while later, defendant targeted victim Foster, shot him, and robbed him of a large amount of cash. Defendant offered no help to the victims. The crimes of which defendant was convicted and the circumstances under which they occurred manifest an egregious disregard for human life. Accordingly, we conclude that the sentences of death recommended by the jury for the murders and ordered by the trial court are not disproportionate.

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

NO ERROR.

IN RE PIERCE

[356 N.C. 68 (2002)]

IN THE MATTER OF: KRISTINA TAYLOR LINDSEY PIERCE

No. 647A01

(Filed 28 June 2002)

Termination of Parental Rights— adjudicatory phase—reasonable progress within twelve months

The trial court abused its discretion in a termination of parental rights case when it concluded the adjudicatory phase of the proceeding by deciding that there were adequate grounds to support the DSS petition for termination of a mother's parental rights based on the mother's alleged failure to make reasonable progress within twelve months in correcting those conditions which led to the removal of her child as required by N.C.G.S. § 7A-289.32, because: (1) N.C.G.S. § 7A-289.32(3) does not require a trial court to limit relevant evidence of parental progress to that which occurs in the initial twelve months of separation, and the twelve-month increment envisioned by our lawmakers was within twelve months from the time the petition for termination of parental rights is filed with the trial court; (2) the evidence tending to show that the mother used drugs and/or failed to obtain substance abuse treatment is irrelevant for purposes of establishing the mother's reasonable progress in correcting those conditions that led to the removal of her child since the events took place or evolved outside the twelve-month period preceding the petition for termination; and (3) the relevant evidence pertaining to the time frame designated in the statute demonstrates, if anything, that the mother had indeed made reasonable progress under the circumstances in correcting the conditions that led to the removal of her child.

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. 641, 554 S.E.2d 25 (2001), reversing an order entered 28 December 1999 by Smith (John W.), J., in District Court, New Hanover County. Heard in the Supreme Court 16 April 2002.

Julia Talbutt for petitioner-appellant New Hanover County Department of Social Services.

R. Clarke Speaks for respondent-appellee Dawn A. Cole.

Ruthanne Southworth, Guardian ad Litem, by Attorney Advocate Regina Floyd-Davis, appellant.

ORR, Justice.

The New Hanover County Department of Social Services, petitioner, appeals from a Court of Appeals decision concluding that Dawn A. Cole, respondent, had made reasonable progress in correcting the conditions that led to the removal of her minor child from the family home. We affirm.

This appeal arises out of a dispute between DSS and Ms. Cole over the custody of Ms. Cole's daughter, Kristina Taylor Lindsay Pierce. At the time of her birth, on 28 June 1997, Kristina tested positive for cocaine. As a result, she was initially placed in the care of her paternal grandmother, Linda Weeks. Less than a month later, Ms. Weeks informed DSS that because of her advanced age, she could not properly care for the child. Kristina was then placed back in the care of her natural parents, Ms. Cole and James Pierce. At the time, Ms. Cole was participating in a substance treatment program. However, just two weeks later, DSS discovered that she had tested positive for cocaine at least three times since Kristina was born.

In August of 1997, a trial court awarded custody of the child to DSS, and she was placed in foster care. In October of that same year, Mr. Pierce was arrested and imprisoned. Shortly thereafter, Ms. Cole moved to Maryland to live with her mother. In June of 1998, Mr. Pierce was released from prison. Then, on 4 December 1998, Kristina was placed in the custody of Pierce's first cousin, Wendy Sellers, and her husband, Jesse Sellers, in Charlotte, North Carolina.

In the summer of 1999, DSS petitioned the trial court to terminate Ms. Cole's parental rights to the child. At the time of the hearing, which commenced in late October of 1999, Kristina was two and a half years old and continued to live with Mr. and Mrs. Sellers. Following a two-day inquiry, the trial court ultimately entered an order on 28 December 1999 terminating Ms. Cole's parental rights. On appeal by Ms. Cole, the majority of a split panel of the Court of Appeals concluded that the trial court had erred in its order. DSS, in conjunction with the child's Guardian ad Litem, then filed an appeal of right, based on the dissent, with this Court. Other facts and circumstances necessary for the discussion of the issues raised by the parties will be provided as needed.

The sole issue on appeal to this Court is whether the evidence presented at trial was sufficient to support the trial court's conclusion that Ms. Cole's parental rights with regard to her daughter, Kristina,

should be terminated. In its order, the trial court determined that Ms. Cole had failed to satisfy the State's statutory requirements for maintaining ties with her child. More specifically, the trial court determined that DSS had presented ample evidence showing that Ms. Cole had failed to make reasonable progress in correcting the adverse conditions that led to Kristina's removal from the home. We disagree, for the reasons outlined below, and thus affirm the majority holding from the Court of Appeals.

At the time DSS originally petitioned the trial court for custody of the child, in August of 1997, the relevant portion of the controlling statute provided:

> The court may terminate the parental rights upon a finding of one or more of the following:
>
> . . . .
>
> (3) The parent has willfully left the child in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made within 12 months in correcting those conditions which led to the removal of the child.

N.C.G.S. § 7A-289.32 (1998) (repealed effective 1 July 1999 and recodified in N.C.G.S. ch. 7B, art. 11).

The burden is on the petitioner, in this case, DSS, to prove the facts justifying the termination of parental rights, *see In re Nolen*, 117 N.C. App. 693, 453 S.E.2d 220 (1995), and the trial court's findings with regard to such facts must be based on clear, cogent and convincing evidence, *In re Oghenekevebe*, 123 N.C. App. 434, 473 S.E.2d 393 (1996). Thus, in order to prevail in a termination of parental rights proceeding held pursuant to N.C.G.S. § 7A-289.32(3a), the petitioner must: (1) allege and prove all facts and circumstances supporting the termination of the parent's rights; and (2) demonstrate that all proven facts and circumstances amount to clear, cogent, and convincing evidence that the termination of such rights is warranted.

In the instant case, there are numerous undisputed facts and circumstances showing that Ms. Cole willfully left the child in foster care or in placement outside the home for more than twelve months. DSS was originally granted custody of Kristina in August of 1997, and the child remained in foster care until December of 1998, when she

was placed in the care of Mr. and Mrs. Sellers. At the time of the termination hearing, which began in October of 1999, Kristina was still living with the couple. Thus, for a span of over two years, the child was living either in foster care or with Mr. and Mrs. Sellers. During this period, Ms. Cole went to live with her mother in Maryland, where she participated in a substance abuse program until June of 1998. Ms. Cole was still residing with her mother at the time of the termination proceeding. During the interim, she had procured a nursing position at a local hospital and visited her daughter only sporadically. No evidence was presented that Ms. Cole had at any time during the two-year period sought to permanently reunite herself with Kristina. As a result, in our view, DSS presented clear, cogent, and convincing facts and circumstances evidencing that Ms. Cole had willfully left the child in foster care or in placement outside the home for more than twelve months. We next examine whether there is also ample evidence showing that Ms. Cole did so without making "reasonable progress . . . within 12 months[,] in correcting those conditions which led to the removal of [her] child." N.C.G.S. § 7A-289.32(3).

In order to assess whether the evidence at trial demonstrated "reasonable progress" on the part of Ms. Cole, we must first determine what constitutes the twelve-month period within which she was expected to exhibit such progress. The dissenting opinion filed at the Court of Appeals is premised on the assumption that the twelve-month period of demonstrable reasonable progress on the part of the natural parent coincides with the initial twelve-month period of separation from the child. In other words, the parent in question must show reasonable progress in correcting the adverse conditions during the first year of separation, as measured from the time the child was placed outside the home. Thus, in the dissent's view, any evidence of facts and circumstances that transpire outside the designated twelve-month span is not directly relevant to the inquiry into reasonable progress. *In re Pierce*, 146 N.C. App. 641, 653, 554 S.E.2d 25, 32 (2001) (Hunter, J., dissenting) (concluding that the evidence [of reasonable progress] at issue falls outside of the twelve-month time frame enumerated in the statute); *see also id.* at 656-57, 554 S.E.2d at 34-35 (Hunter, J., dissenting) (stating that his conclusion is premised solely on evidence confined to the twelve-month period as established in his opinion). However, the dissent also concedes, somewhat paradoxically, that evidence of a parent's reasonable progress following the statutory twelve-month period is admissible and relevant *to a degree*. *Id.* at 654, 554 S.E.2d at 33 (Hunter, J., dissenting) ("[e]vidence heard or introduced throughout the adjudicatory stage, as well as any addi-

tional evidence, may be considered by the court [in a termination of parental rights hearing],") (quoting *In re Blackburn*, 142 N.C. App. 607, 613, 543 S.E.2d 906, 910) (2001) (first alteration in original). Yet to what degree or extent such evidence may be considered draws no further elaboration. Furthermore, although the dissent acknowledges the existence of evidence of progress or lack thereof in the case *sub judice*, it lent such evidence no credence at all, ostensibly because it fell outside the statutory period. Thus, two questions emerge: (1) What constitutes the twelve-month period prescribed in the statute ("within 12 months"), and (2) to what extent may a court consider evidence of reasonable progress that occurs outside the twelve-month period?

From a practical standpoint, one may easily define the twelve-month period in question when a petitioner files for termination of parental rights on the 366th day following the removal of the child from the home. Under such circumstances, a child has been in foster care or placed outside the home for "more than 12 months," and the measure for determining whether there has been reasonable progress "within 12 months" in correcting the conditions that led to the child's removal can only be the same twelve-month span. However, the measure for defining the parameters of "within 12 months" is not always so straightforward. For example, how is "within 12 months" to be defined in cases, as here, when a child is removed from the home and DSS does not petition the court for termination of parental rights until two years or more hence? The dissenting opinion at the Court of Appeals interprets the statute to mean "*within twelve months* of the child's placement outside the home or in foster care." *Id.* at 653, 554 S.E.2d at 32 (Hunter, J., dissenting). However, the cases cited by the dissent in support of its proposition, *id.* at 653-54, 554 S.E.2d at 32-33, are seemingly more ambiguous than they are definitive. For example, in *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175, *disc. rev. denied*, 354 N.C. 218, 554 S.E.2d 341 (2001), the court held that the "evidence demonstrated that [respondent] had left [the child] in foster care for over twelve months without making reasonable progress toward reconciliation." However, a review of the facts and circumstances of the case reveals only that the trial court determined that the child had been outside the home for over twelve months. Notably, the court made no reference as to whether or not the parent at issue had shown the requisite progress within the initial twelve-month period of the child's absence. To the contrary, the trial court considered evidence of progress or lack thereof from the time the child was removed from the home, in March of 1996, until DSS peti-

tioned to terminate parental rights, in April of 1998—a span of over two years. *Id.* at 404-07, 546 S.E.2d at 171-73. Thus, the case fails to even address, no less establish, that the "within 12 months" period is one that commences at the time the child is removed from the home and ends twelve months thereafter. Other cases cited by the dissent appear equally ambiguous as far as establishing that the "within 12 months" period has been restrictively construed to include only evidence of reasonable progress that occurred during the immediate twelve months following the time a child has been placed in foster care or placed outside the home. In fact, all three cases suggest that the respective trial courts considered evidence of reasonable progress by the parent during the entire period of separation, not for *any* identifiable twelve-month span in particular. *See Oghenekevebe*, 123 N.C. App. at 440, 473 S.E.2d at 398 (respondent left child in foster care for *over* twelve months without showing reasonable progress); *In re Taylor*, 97 N.C. App. 57, 63, 387 S.E.2d 230, 233 (1990) (respondents failed to exhibit progress toward improving home conditions *during the period* in which their children were in foster care); *In re Bishop*, 92 N.C. App. 662, 670, 375 S.E.2d 676, 681-82 (1989) (trial court considered evidence of progress during entire interlude of separation, from 29 October 1984, the date the children were placed in foster care, through 5 February 1987, the date the petition was filed for termination of parental rights—a span of two years, four months).

The aforementioned span of inquiry as to "reasonable progress" on the part of the parent—from the time a child is placed outside the home until a petition for termination of parental rights is filed or, in the alternative, until the actual termination proceeding—was also imposed by the trial judge in the instant case. The expanded span of inquiry was also used by the majority at the Court of Appeals. Kristina was placed outside the home in late July or early August of 1997, DSS petitioned the trial court for termination of Ms. Cole's parental rights in June of 1999, and the termination proceeding was held in October and November of 1999. During the proceeding, the trial court allowed evidence concerning Ms. Cole's "reasonable progress" without regard to any specified twelve-month period. In fact, from a time-frame perspective, the evidence admitted ran the gamut from the time of Kristina's placement until the termination hearing. For example, in its findings of fact, the trial court found that Ms. Cole's *current* employment "required drug screening . . . [that] did not detect any illegal substance or usage." Similarly, documents were submitted indicating Ms. Cole's attendance in a counseling

program *through May of 1999*. Other evidence regarding Ms. Cole's progress dated back as far as the time the child was removed from the home, in August of *1997*. Thus, both the trial court and Court of Appeals majority considered progress evidence drawn not from a twelve-month period, as the statute would require, but rather from a two-and-a-half year span. As a consequence, neither this case nor its predecessors bring us any closer to deciphering what the legislature intended when it imposed the "within 12 months" limitation on evidence proffered to support or refute a parent's progress in correcting those conditions that led to the removal of her child.

From the outset, we reiterate our view that the cases cited by the dissent fail to establish that the "within 12 months" period is measured from the day a child is placed outside the home until 366 days thereafter. Moreover, as the very same cases aptly demonstrate, it would make little sense to impose such a time frame because important evidence of reasonable progress on the part of the parent might well be arbitrarily excluded by such an interpretation. Consider a case in which a child is removed from the home and placed in foster care due to his parent's drug use. After two years pass, Social Services petitions the court to terminate the parent's right to care for the child. During the termination proceeding, proffered evidence would show that in the first twelve months, the parent did little or nothing to abate her drug use and attended none of the counseling sessions urged by Social Services. However, other proffered evidence would show that during the second year of separation from her child, the parent successfully completed drug therapy, attended good parenting classes, procured a steady and good-paying job, and purchased a new home. Under such circumstances and their attendant time frame, which case law exhibits as commonplace, the question looms: Would it make any sense at all to consider only the progress made by the parent in the initial twelve-month period? Trial courts, by virtue of allowing expanded evidentiary windows on the issue of parental progress, certainly have rejected approaches that have interpreted the "within 12 months" edict to mean that admissible evidence must pertain to the first twelve months, as measured from the time a child is placed outside the home. Appellate courts have done likewise, and we concur with their view that N.C.G.S. § 7A-289.32(3) does not require a trial court to limit relevant evidence of parental progress to that which occurs in the initial twelve months of separation. As a consequence, we also disavow cases, if any, that may suggest otherwise.

However, at the same time, and despite the contrary view exhibited throughout our case law, we note that the "within 12 months" limitation cannot be construed in such fashion that it would allow the admission of progress evidence without regard to its specified time frame. The legislature specifically delineated that the "reasonable progress" evidentiary standard be measured in a twelve-month increment, and in our view, the twelve-month standard envisioned by lawmakers was "within 12 months" from the time the petition for termination of parental rights is filed with the trial court.[1] In support of our position, we note that evidence gleaned from the twelve-month period immediately preceding the petition would provide the trial court with the most recent facts and circumstances exhibiting a parent's progress or lack thereof. Thus, in the instant case, the trial court would consider all evidence pertaining to reasonable progress on the part of Ms. Cole during the twelve months prior to 24 June 1999, the date DSS petitioned the court to terminate her parental rights.

As to the dissenting opinion's conclusion that evidence of a parent's progress that falls outside the designated twelve-month period is admissible and relevant to a degree, *see Blackburn*, 142 N.C. App. at 613, 543 S.E.2d at 910 (2001), we agree. In a termination of parental rights proceeding, the trial court faces a two-fold task. In the so-called "adjudication stage" of the hearing, the trial court hears evidence in order to determine if grounds for termination exist. The petitioner has the burden of proving by clear, cogent and convincing evidence that at least one of the grounds set forth in N.C.G.S. § 7A-289.32 has been established. If such grounds for termination are so established, the trial court then moves to the so-called "disposition stage" in order to determine whether it is in the best interests of the child to terminate the parental rights. The controlling statute of the disposition stage provides as follows:

> Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the child *unless the court shall further determine* that the best interests of the child require that the parental rights of such parent not be terminated.

1. The Court notes that during the 2001 session of the General Assembly, the legislature struck the "within 12 months" limitation from the existing statute detailing the requirements for establishing grounds for the termination of parental rights. *See* Act of June 15, 2001, ch. 208, sec. 6, 2001 Sess. Laws 111, 113. Thus, under current law, there is no specified time frame that limits the admission of relevant evidence pertaining to a parent's "reasonable progress" or lack thereof. *Id.*

N.C.G.S. § 7A-289.31(a) (1995) (emphasis added) (repealed effective 1 July 1999 and recodified in N.C.G.S. ch. 7B, art. 11). Thus, upon finding adequate grounds for termination of parental rights, the trial court is empowered to terminate such rights, but it is not obligated to do so if it further determines that it is not in the child's best interests to do so. This determination of best interests is more in the nature of an inquisition, with the trial court having the obligation to secure whatever evidence, if any, it deems necessary to make this decision. *Blackburn*, 142 N.C. App. at 613, 543 S.E.2d at 910. Either party may offer relevant evidence as to the child's best interests. *Id.* Such evidence may therefore include facts or circumstances demonstrating either: (1) the reasonable progress of the parent, or (2) the parent's lack of reasonable progress that occurred before or after the twelve-month period leading up to the filing of the petition for termination of parental rights.

Thus, in order to decide the instant case, we must first examine whether the trial court properly determined that there was ample evidence, gleaned from facts and circumstances occurring in the twelve months immediately preceding DSS' petition for terminating Ms. Cole's parental rights, to support its conclusion that she had failed to show that "reasonable progress under the circumstances ha[d] been made . . . in correcting those conditions which led to the removal of the child" (the adjudication stage evidence). Next, but only if we affirm the trial court's findings and conclusions with regard to Ms. Cole's progress, we must examine whether evidence of her actions outside the designated twelve-month period was properly considered by the trial court in deciding whether it was in the child's best interests to terminate her parental rights (the disposition stage evidence).

Because we agree with the Court of Appeals majority's conclusion that the trial court lacked adequate evidence supporting its conclusion that Ms. Cole had failed to show reasonable progress in correcting conditions during the allotted time frame, we need not address whether any additional evidence was given its proper due at the disposition stage. Thus, we confine our analysis to the factual findings and conclusions made by the trial court during the adjudication stage of the termination proceeding.

In the year leading up to DSS' petition to terminate Ms. Cole's parental rights, the undisputed facts and circumstances evidencing her progress towards correcting the conditions that led to Kristina's

removal included the following: (1) evidence that between November of 1998 and May of 1999, Ms. Cole attended a 26-week, drug abuse-related counseling program; (2) evidence that Ms. Cole successfully completed the treatment program; (3) evidence that Ms. Cole tested negative for drug use throughout her attendance at the program; (4) evidence that at the time of the termination hearing, Ms. Cole was attending meetings at Narcotics Anonymous; (5) testimony from a DSS caseworker that to the best of his knowledge, Ms. Cole had not tested positive for drugs in the twelve months prior to the hearing; (6) testimony from Kristina's Guardian ad Litem that she had interviewed Ms. Cole's substance abuse counselor, who said Ms. Cole had done very well and gave no indication Ms. Cole had any positive drug tests; (7) testimony showing that Ms. Cole resided with, and helped care for, her mother in Maryland throughout the period in question; (8) testimony showing that Ms. Cole is a registered nurse who worked regularly and successively for two employers in the home health field throughout the period in question; (9) testimony showing that in order to work for her current employer, Ms. Cole was subject to a prehiring drug test (which she apparently passed since she was hired by the employer). Other evidence indicating that Ms. Cole was subject to random drug screenings while working with her current employer is not relevant to our inquiry since she began such employment outside the twelve-month period in question.

Amid this evidence, the trial court peppered its findings of fact with the following subjective assessments (pertaining to circumstances within the relevant twelve months): (1) Ms. Cole had "clearly made herculean progress in overcoming her addictions"; (2) she "has made substantial progress in getting her own life back together"; (3) "in light of the progress made by . . . the Respondent. . ."; (4) Ms. Cole's decision to move to Maryland was "a wise decision for her"; and (5) "[t]he mother of the child is a fit and proper person for visitation."

Our study of the record and briefs reveals that any relevant evidence indicating that Ms. Cole had failed to show reasonable progress in correcting the conditions that led to the removal of Kristina—the legal standard for establishing grounds for the termination of her parental rights—included testimony regarding the concerns of DSS and Kristina's Guardian ad Litem that Ms. Cole had not definitively demonstrated success in her battle with drugs. DSS and the Guardian ad Litem also expressed their view that circumstances dictated it would be in the best interests of Kristina to remain with Mr. and

Mrs. Sellers, with whom she had developed strong ties. Ms. Cole's failure to maintain a consistent visitation schedule with Kristina was also discussed by witnesses during the proceeding, although the actual number and extent of her visits for the period in question remain unclear. Other evidence used by the trial court to demonstrate that Ms. Cole had failed to make reasonable progress included events and circumstances that took place or evolved outside the twelve-month period preceding the petition for termination. Thus, such evidence—including any that tended to show Ms. Cole used drugs and/or failed to obtain substance abuse treatment from August of 1997 through July of 1998—is irrelevant for purposes of establishing Ms. Cole's reasonable progress in correcting those conditions that led to the removal of her child.

In a termination proceeding, the appellate court should affirm the trial court where "the trial court's findings of fact are based upon clear[, cogent,] and convincing evidence and the findings support the conclusions of law." *In re Small*, 138 N.C. App. 474, 477, 530 S.E.2d 104, 106 (2000). In our view, there can be no such affirmation here because the relevant findings of fact do not support the trial court's conclusion that grounds for termination, as provided for in N.C.G.S. § 7A-289.32, have been established. In fact, we agree with the majority of the Court of Appeals and conclude that the relevant evidence pertaining to the time frame designated in the statute demonstrates, if anything, that Ms. Cole had indeed made "reasonable progress under the circumstances" in correcting the conditions that led to the removal of her child, Kristina.

Therefore, we affirm the Court of Appeals and hold that the trial court abused its discretion when it concluded the adjudicatory phase of the proceeding by deciding that there were adequate grounds to support the DSS petition for termination of Ms. Cole's parental rights. As a consequence of so holding, the trial court's decision in the disposition stage—to terminate Ms. Cole's parental rights—is hereby vacated.

AFFIRMED.

STATE OF NORTH CAROLINA v. LEE ISAAC BLUE

No. 304A01

(Filed 28 June 2002)

Homicide— voluntary manslaughter—defense of habitation—porch part of dwelling—unlawful expression of opinion by trial court

The trial court erred in a voluntary manslaughter case arising out of a deadly affray which took place on the porch of a dwelling by answering the jury's inquiry by instructing that a porch is not inside the home, because: (1) the trial court's answer expressed an opinion on the evidence, thereby invading the fact-finding province of the jury; (2) whether defendant was within the home or whether the victim was attempting or had made an unlawful entry into defendant's home were questions to be answered by the jury; and (3) the trial court's instruction was tantamount to instructing the jury that the porch could not as a matter of law be inside the home for purposes of the statutory defense of habitation under N.C.G.S. § 14-51.1.

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. 478, 550 S.E.2d 6 (2001), finding no error in a judgment entered 16 September 1999 by Ellis, J., in Superior Court, Forsyth County. Heard in the Supreme Court 13 November 2001.

Roy Cooper, Attorney General, by James P. Longest, Jr., Special Deputy Attorney General, for the State.

Donald K. Tisdale, Sr., and Christopher R. Clifton for defendant-appellant.

PARKER, Justice.

Defendant was charged with second-degree murder for the stabbing death of James Hilton on 10 July 1998. A jury found defendant guilty of voluntary manslaughter, and the trial court sentenced defendant to a term of 77 to 102 months' imprisonment. In a split decision, the Court of Appeals' majority found no error. Defendant appealed to this Court based on the dissenting opinion; and for the reasons stated herein, we reverse the Court of Appeals and remand for a new trial.

For ease of presentation we address defendant's evidence first. At trial defendant's evidence tended to show that on a previous occasion Hilton had gone to defendant's residence with another man named Nudie. When the men parked in front of defendant's residence, Hilton was observed with a sawed-off shotgun. Both men exited the vehicle, but only Nudie entered the house to talk to defendant. In that conversation Nudie indicated to defendant, "If you start anything, my man on the porch out here gonna blow your head off." Hilton stood on the porch and looked in the screen door at some point. Defendant told Nudie to leave and that defendant did not want any trouble. Nudie and Hilton left.

On 10 July 1998, Hilton went back to defendant's home looking for Deidre Shuler. After being told that Shuler lived next door, Hilton left to find Shuler. Defendant saw Shuler and told Hilton, "There she is." Hilton and Shuler met in the yard and spoke to each other, and then Hilton came back onto defendant's front porch. Hilton "looked like he was mad at the world." While this was taking place, defendant's housemate, Spencer Wilson, was standing on the front porch. Defendant and Wilson told Hilton not to walk across their freshly planted grass. When he came up onto the porch, Hilton asked defendant, "Don't you remember me? I'm the one come to kill y'all." Thereafter, defendant and Hilton struggled on the front porch, and at some point the two went head first over the bannister. During the struggle, Hilton was stabbed. Once they landed on the ground, the two got up. Defendant went back up the steps and into the house. Hilton followed defendant up the steps and collapsed onto a couch on the porch.

The State presented the testimony of Shuler, which tended to show that Shuler and defendant had been drinking at defendant's house; that Shuler had gone back into her house to take a nap; that Shuler heard defendant hollering her name; and that when she walked out onto her porch, defendant yelled, "There that bitch is right there." Hilton went up the steps at the end of defendant's porch, defendant hit him, and the deadly struggle ensued. Shuler's assessment of the fight was that Hilton was getting the best of defendant.

The State also presented the testimony of Darweshi Wilson, who lived across the street. According to Wilson, he went out onto his front porch to smoke a cigarette and observed defendant and Hilton arguing on defendant's front porch, though he could not hear their tone. Wilson saw defendant strike Hilton in the face and saw defend-

ant make an uppercut motion with a knife. After the two went over the bannister, defendant made another striking motion with his fist. Wilson may have heard defendant tell Hilton to leave before defendant made the striking motion; Hilton did not do so.

The evidence is not in dispute that defendant and Hilton struggled on the front porch, that Hilton died of an uppercut stab wound, and that the knife belonged to defendant. The evidence is in dispute, however, as to which of the two combatants struck the first blow and where they were located when that blow was struck. According to defendant's testimony, he was just inside his screen door when Hilton pulled the door open and hit defendant in the face. Spencer Wilson testified that defendant was opening the screen door to go into the house when Hilton hit defendant from behind. State's witnesses Shuler and Darweshi Wilson both testified that defendant struck the first blow. Shuler testified that Hilton was going up the steps onto the porch when defendant struck him. Wilson testified that defendant and Hilton were arguing on the porch when defendant struck Hilton.

The evidence further showed that Hilton was thirty-four or thirty-five years old; that he was five feet, nine inches tall; and that he weighed 168 pounds. Hilton had a blood alcohol level of .12; and cocaine and cocaine metabolites were also present in his blood. According to the pathologist who performed the autopsy, the wound which caused the victim's death was unlikely to have been caused by a fall, but was consistent with an uppercut motion with a knife. Defendant was forty-six years old at the time of the incident, weighed 160 pounds, and was six feet tall.

At trial, the trial court instructed the jury on self-defense; second-degree murder; voluntary manslaughter; and, pursuant to N.C.G.S. § 14-51.1, defense of the home. In instructing on voluntary manslaughter, the trial court instructed as follows:

> Voluntary manslaughter is also committed if the defendant kills in self defense but uses excessive force under the circumstances or was the aggressor without murderous intent in bringing on the fight in which the killing took place. The burden is on the State to prove beyond a reasonable doubt that the defendant did not act in self defense. However, if the State proves beyond a reasonable doubt that the defendant, though otherwise acting in self defense used excessive force or was the aggressor though he had no murderous intent when he entered the fight, the defendant would be guilty of voluntary manslaughter.

> If the defendant was not the aggressor and he was on his own premises, he could stand his ground and repel force with force regardless of the character of the assault made upon him; however, the defendant would not be excused if he used excessive force.

After giving the summary mandates on second-degree murder and voluntary manslaughter, the trial court instructed on N.C.G.S. § 14-51.1 as follows:

> If the defendant killed the victim to prevent forcible entry into his place of residence or to terminate the intruder's unlawful entry, the defendant's actions are excused and he is not guilty. The State has the burden of proving from the evidence beyond a reasonable doubt that the defendant did not act in a lawful defense of his home.
>
> The defendant was justified in using deadly force if, (1) such force was being used to prevent a forcible entry into the defendant's place of residence; and (2) the defendant reasonably believed that the intruder might kill or inflict serious bodily harm to the defendant or others in the place of residence; and (3) the defendant reasonably believed that the degree of force he used was necessary to prevent a forcible entry into his place of residence.
>
> A lawful occupant within a place of residence does not have the duty to retreat from an intruder in these circumstances. It is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to the defendant at the time.
>
> So I charge that if you find beyond a reasonable doubt that the defendant killed the victim, you may return a verdict of guilty only if the State has satisfied you beyond a reasonable doubt that the defendant did not act in the lawful defense of his home. That is, (1) the defendant did not use such force to prevent a forcible entry into the defendant's place of residence; or (2) the defendant did not reasonably believe that the intruder would kill or inflict serious bodily harm to the defendant or others in the place of residence; or (3) that the defendant did not reasonably believe that the degree of force he used was necessary to prevent a forcible entry into the defendant's residence. However, if you do not so find or have a reasonable doubt, then the defendant would be jus-

tified in defending his place of residence and it would be your duty to return a verdict of not guilty.

Shortly after retiring to deliberate, the jury requested a copy of the jury instructions and the charts the prosecutor had used in closing argument. The trial court advised the jurors that the charts were not in evidence and could not be taken to the jury room but that it would provide the jurors with a copy of the instructions. That afternoon the jury deliberated approximately three and one half hours with the exception of a short break and a brief interruption for instructions on a question. The next morning after deliberating for approximately two hours, the jury sent two questions to the trial judge. The first question read, "Is the front porch considered to be a part of the home or inside of the home?" The second question read, "Is excessive force one person with a weapon and one does not?"

After considerable discussion with counsel during which the trial judge reread the statute and made a diligent effort to locate any authority interpreting N.C.G.S. § 14-51.1, the trial court answered the questions as follows:

> Ladies and gentlemen, I've received two questions from you. The first question appears to have two parts. The first question is, "Is the front porch considered to be a part of the home" and a front porch is a part of the home. The next part of the question, "or inside the home." A front porch is not inside the home.
>
> The next question is, "Is excessive force one person with a weapon and one does not?" And the definition of excessive force is contained within the instructions which I have given to you and I'll read that portion to you again. "A defendant uses excessive force if he uses more force than reasonably appeared to him to be necessary at the time of the killing. It is for you, the jury, to determine the reasonableness of the force used by the defendant under all the circumstances as they appeared to him at the time." That is contained within the instructions that you have.

After taking the lunch recess, the jury resumed deliberations and returned a unanimous verdict approximately four and one half hours later.

In his brief to the Court of Appeals, defendant contended that the trial court erred in "responding to the jury's question as to whether a front porch is part of the house by overruling defense counsel's request that the court state that the same was curtilage and thus cov-

ered by the instructions of N.C.G.S. § [14-51.1]." Defendant argued that the curtilege was within the meaning of "home" and that the front porch and threshold are properly considered as the home and should be accorded the coverage of N.C.G.S. § 14-51.1. Defendant further contended that the trial court's response misled the jury, thereby resulting in prejudicial error. The Court of Appeals majority reviewed the instructions initially given and concluded that the "substance of the instructions read in context was clear" and that "the instruction included the curtilage in the area within which a defendant has the right to 'stand his ground.' " *State v. Blue*, 143 N.C. App. 478, 480, 481, 550 S.E.2d 6, 7, 8 (2001). The Court of Appeals further concluded that the trial court's answer that the "front porch is a part of the home" and that "a front porch is not inside the home" was sufficient when read in context in that the trial court instructed the jury "that when a person is on his own *premises* he has no duty to retreat." *Id.* at 481, 550 S.E.2d at 8. The Court of Appeals held that "[s]ince there was no instruction stating a circumstance where this defendant (a) had a duty to retreat or (b) was authorized to use force other tha[n] what was reasonably necessary to repel the assault, on this record we hold that further clarification was unnecessary." *Id.* The dissenting opinion stated that "because the trial court—at no time—explained the legal perimeters of one's home or mentioned defendant's right to defend himself within the curtilage of his home, . . . the majority has effectively removed from the jury's consideration defendant's right to defend himself on the porch of his home." *Id.* at 482, 550 S.E.2d at 8 (Hunter, J., dissenting). The dissent further opined that the jury most likely understood the law to require defendant to retreat on the porch of his home and that the trial court's response was prejudicial "because it did not clarify that the porch was part of the curtilage of the home and thus, was covered under N.C. Gen. Stat. § 14-51.1's self defense provisions." *Id.* at 483, 550 S.E.2d at 9 (Hunter, J., dissenting).

Before this Court defendant contends that the Court of Appeals erred in holding that the trial court did not commit prejudicial error in failing to instruct the jury, in response to its question, that defendant had the same rights pertaining to self-defense and defense of habitation on his front porch as he did within his home since the porch is part of the curtilage from which defendant had no duty to retreat.

The applicable statute for additional instructions after the jury has begun deliberations is N.C.G.S. § 15A-1234. The statute provides:

(a) After the jury retires for deliberation, the judge may give appropriate additional instruction to:

(1) Respond to an inquiry of the jury made in open court; . . .

. . . .

(b) At any time the judge gives additional instructions, he may also give or repeat other instructions to avoid giving undue prominence to the additional instructions.

(c) Before the judge gives additional instructions, he must inform the parties generally of the instructions he intends to give and afford them an opportunity to be heard. . . .

(d) All additional instructions must be given in open court and must be made a part of the record.

N.C.G.S. § 15A-1234 (2001).

Further, in giving jury instructions, the trial court is not "required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C.G.S. § 15A-1232 (2001). We note that when N.C.G.S. § 15A-1232 was enacted in 1977, N.C.G.S. § 1-180, which required the trial court to summarize the evidence and explain the application of the law to the facts, was repealed. Act of June 23, 1977, ch. 711, sec. 33, 1977 N.C. Sess. Laws 853, 899. As originally enacted, N.C.G.S. § 15A-1232 also required the trial court to summarize the evidence to the extent necessary to explain the application of the law to the evidence; however, in 1985 the statute was amended to its present form, which specifically states that the trial court shall not be required "to explain the application of the law to the evidence." Act of July 1, 1985, ch. 537, sec. 1, 1985 N.C. Sess. Laws 608, 608. This statute does not, however, relieve the trial court of its "burden of 'declar[ing] and explain[ing] the law arising on the evidence relating to each substantial feature of the case.' " *State v. Moore*, 339 N.C. 456, 464, 451 S.E.2d 232, 236 (1994) (quoting *State v. Everette*, 284 N.C. 81, 87, 199 S.E.2d 462, 467 (1973)).

This Court has not previously interpreted N.C.G.S. § 14-51.1, which is entitled "Use of deadly physical force against an intruder" and provides as follows:

(a) A lawful occupant within a home or other place of residence is justified in using any degree of force that the occupant

reasonably believes is necessary, including deadly force, against an intruder to prevent a forcible entry into the home or residence or to terminate the intruder's unlawful entry (i) if the occupant reasonably apprehends that the intruder may kill or inflict serious bodily harm to the occupant or others in the home or residence, or (ii) if the occupant reasonably believes that the intruder intends to commit a felony in the home or residence.

(b) A lawful occupant within a home or other place of residence does not have a duty to retreat from an intruder in the circumstances described in this section.

(c) This section is not intended to repeal, expand, or limit any other defense that may exist under the common law.

N.C.G.S. § 14-51.1 (2001).

The common law right of an individual to defend himself from death or bodily harm on his premises was stated in *State v. Johnson*:

> Ordinarily, when a person who is free from fault in bringing on a difficulty [] is attacked in his own home or on his own premises, the law imposes on him no duty to retreat before he can justify his fighting in self defense, regardless of the character of the assault, but is entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault and secure himself from all harm. This, of course, would not excuse the defendant if he used excessive force in repelling the attack and overcoming his adversary. *State v. Francis*, 252 N.C. 57, 112 S.E.2d 756 [(1960)]; *State v. Frizzelle*, 243 N.C. 49, 89 S.E.2d 725 [(1955)].

State v. Johnson, 261 N.C. 727, 729-30, 136 S.E.2d 84, 86 (1964) (per curiam). Further, defense of the person within one's premises includes not only the dwelling, but also the curtilage and buildings within the curtilage. *Frizzelle*, 243 N.C. at 51, 89 S.E.2d at 726. The curtilage includes the yard around the dwelling and the area occupied by barns, cribs, and other outbuildings. *Id.*

The common law defense of habitation was stated thusly in *State v. Miller*:

> When a trespasser enters upon a man's premises, makes an assault upon his dwelling, and attempts to force an entrance into his house in a manner such as would lead a reasonably prudent man to believe that the intruder intends to commit a felony or to

> inflict some serious personal injury upon the inmates, a lawful occupant of the dwelling may legally prevent the entry, even by the taking of the life of the intruder. Under those circumstances, "the law does not require such householder to flee or to remain in his house until his assailant is upon him, but he may open his door and shoot his assailant, if such course is apparently necessary for the protection of himself or family. . . . But the jury must be the judge of the reasonableness of defendant's apprehension." A householder will not, however, be excused if he employs excessive force in repelling the attack, whether it be upon his person or upon his habitation.

State v. Miller, 267 N.C. 409, 411, 148 S.E.2d 279, 281 (1966) (quoting with approval *State v. Gray*, 162 N.C. 608, 610-11, 77 S.E. 833, 834 (1913)) (citations omitted) (alteration in original).

In *State v. McCombs*, 297 N.C. 151, 253 S.E.2d 906 (1979), this Court made several observations about the defense of habitation. The Court noted that

> the use of deadly force in defense of the habitation is justified only to *prevent* a forcible entry into the habitation under such circumstances (e.g., attempted entry accompanied by threats) that the occupant reasonably apprehends death or great bodily harm to himself or other occupants at the hands of the assailant or believes that the assailant intends to commit a felony.

Id. at 156-57, 253 S.E.2d at 910. However, "[o]nce the assailant has gained entry, . . . the usual rules of self-defense replace the rules governing defense of habitation, with the exception that there is no duty to retreat." *Id.* at 157, 253 S.E.2d at 910. The rationale for this distinction is that once the occupant is face-to-face with the assailant, the occupant is better able to ascertain whether the assailant intends to commit a felony or has the means to inflict serious injury. *Id.* The Court, after discussing several cases, then stated:

> The previously cited cases dealing with defense of habitation are factually limited to the *prevention* of a forcible entry. Moreover, the rules governing defense of habitation, self-defense, defense of property, and eviction of trespassers are designed to allow an individual to defend his family, home and property in virtually any situation which might arise with respect to an invasion of his home while at the same time affording maximum protection of human life. To allow the distinctions between these rules to

> become blurred or to extend any of them to situations for which they were not intended would dilute the safeguards designed to protect human life.

Id. at 158, 253 S.E.2d at 911. Finally, the Court noted, without explanation, that an instruction on defense of habitation would be more favorable than would an instruction on self-defense. *Id.*

Hence, the principal distinction between the common law defense of habitation and the defense of the person on or within one's own premises is that in the former, the victim is attempting to forcibly enter the defendant's dwelling; whereas, in the latter, the victim has actually attacked or assaulted the defendant in the defendant's dwelling or on the defendant's premises. *Id.* at 156-57, 253 S.E.2d at 910. In neither case is the defendant required to retreat. The legal effect of the difference between the defenses is that under the defense of habitation, the defendant's use of force, even deadly force, before being physically attacked would be justified to prevent the victim's entry provided that the defendant's apprehension that he was about to be subjected to serious bodily harm or that the occupants of the home were about to be seriously harmed or killed was reasonable and further provided that the force used was not excessive. Whereas, under the defense of the person on one's premises, the defendant would have the benefit of perfect self-defense[1] and no duty to retreat

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1. The law of perfect self-defense excuses a killing altogether if, at the time of the killing, these four elements existed:

> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Norris, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981). However, if the defendant satisfies the first two elements but,

> although without murderous intent, was the aggressor in bringing on the difficulty, or defendant used excessive force, the defendant under those circumstances has only the *imperfect right of self-defense*, having lost the benefit of perfect self-defense, and is guilty at least of voluntary manslaughter.

Id. at 530, 279 S.E.2d at 573.

only if the defendant had first been attacked or assaulted. Prior to passage of N.C.G.S. § 14-51.1, once the victim was inside the defendant's home, the defendant would have the benefit of perfect self-defense only if the victim made the initial attack or assault on the defendant, though the defendant would have no duty to retreat, *see id.* at 158-59, 253 S.E.2d at 911; however, if the defendant made the initial attack or assault, the defendant would be entitled only to imperfect self-defense and would be guilty at least of voluntary manslaughter, *see id.* The limitation that defendant be acting to prevent forcible entry into the home for the defense of habitation to be applicable was eliminated by N.C.G.S. § 14-51.1. In enacting N.C.G.S. § 14-51.1, the General Assembly broadened the defense of habitation to make the use of deadly force justifiable whether to *prevent* unlawful entry into the home or to *terminate* an unlawful entry by an intruder. N.C.G.S. § 14-51.1.

The determinative question, then, in this case is whether the statutory defense of habitation is applicable to a deadly affray which takes place on the porch of a dwelling. Given the historical underpinnings of the defense of habitation that a person's home is his castle, *see Gray*, 162 N.C. at 613, 77 S.E. at 834, we discern no reason why the statutory defense of habitation should not be applicable to the porch of a dwelling under certain circumstances. A porch is an appurtenance to the home. Depending upon the size of the porch and weather conditions, the occupants of a home may engage in many of the same activities on the porch that they enjoy in the more protected areas during cold or inclement weather, such as eating, reading, sleeping, entertaining, and relaxing. In short, the functional use of a porch may not differ significantly from that of the interior of the living quarters. However, porches vary in description and usefulness from large, screened-in porches to small, uncovered stoops. For this reason whether a porch, deck, garage, or other appurtenance attached to a dwelling is within the home or residence for purposes of N.C.G.S. § 14-51.1 is a question of fact best left for the jury's determination based on the evidence presented at trial.

In the instant case the trial court answered the jury's inquiry by instructing that "[a] porch is not inside the home." This answer, although made in a sincere effort to give guidance to the jury, unfortunately expressed an opinion on the evidence, thereby invading the fact-finding province of the jury. *See State v. Wilson*, 354 N.C. 493, 510, 556 S.E.2d 272, 284 (2001) (holding that "[a] trial judge 'may not express during any stage of the trial, any opinion in the presence of

the jury on any question of fact to be decided by the jury' " and that how that opinion was conveyed to the jury is irrelevant) (quoting N.C.G.S. § 15A-1222 (1999)). Whether defendant was within the home or whether Hilton was attempting or had made an unlawful entry into defendant's home were questions to be answered by the jury. The judge's telling the jury that "[a] porch is not inside the home" was tantamount to instructing the jury that the porch could not as a matter of law be inside the home for purposes of N.C.G.S. § 14-51.1. The evidence was undisputed that Hilton went, uninvited, onto defendant's porch. Although the evidence was in conflict as to whether the victim opened the front door and as to who struck the first blow, the uncontradicted evidence was that the affray took place on the porch.

By convicting defendant of voluntary manslaughter, the jury, under the instructions given, necessarily found (i) that defendant was the aggressor without murderous intent; and/or (ii) that defendant, even if not the aggressor, used excessive force. We, of course, can only speculate as to what the jury found or what concerned the jury in asking its question. However, given the evidence, we cannot say as a matter of law that had the jury not been instructed that "[a] porch is not inside the home," the jury would not possibly have found defendant not guilty. *See* N.C.G.S. § 15A-1443(a). If the jury had been told that whether the porch was inside the home or part of the home was a question of fact for it to determine based upon the evidence, the jury could have determined that defendant met each of the conditions required under N.C.G.S. § 14-51.1 even if defendant struck the first blow and was, thus, not guilty. However, having been instructed that the porch was not inside the home, if the jury determined that Hilton did not open the front door and that defendant was the attacker, the statutory defense of habitation would not be applicable; and under the other two defensive theories upon which it was instructed, the jury could not have acquitted defendant.

For the foregoing reasons, we reverse the decision of the Court of Appeals and remand the case to that court for further remand to the Superior Court, Forsyth County, for a new trial.

REVERSED.

IN THE MATTER OF THE WILL OF WILLIAM ARNOLD McCAULEY, DECEASED

No. 649PA01

(Filed 28 June 2002)

1. Wills— revocation in subsequent will—production of revocatory writing—not exclusive manner of proof

Caveators to a 1984 will were not precluded as a matter of law from establishing due execution of a 1996 will (which allegedly contained a revocation clause) even though they could not produce the 1996 will where they produced the legal secretary who discussed the 1996 will with the attorney, transcribed the 1996 will, read it to decedent, and observed and notarized the signatures of the decedent and two attesting witnesses. Production of the revocatory writing is not the only method of proving its existence and validity.

2. Wills— lost—execution—proof by one witness

The testimony of one witness was sufficient to prove the due execution of a lost will. While one attesting witness to a will would not be sufficient for valid execution, one witness's testimony that the will was attested by two witnesses may be sufficient to show that the will was duly executed.

3. Wills— revocation—second will—proof of revocation required

Caveators to a 1984 will who claimed that a lost 1996 will contained a revocation clause were required to show more than the mere existence of the second will; although a subsequent will frequently revokes all prior wills, it does not do so as a matter of law. Here, the testimony of the legal secretary who transcribed the will that it contained a revocation clause and that all of her attorney's wills contained such a provision could be sufficient.

4. Wills—revocation—effective immediately

Caveators to a 1984 will who claimed that a lost 1996 will contained a revocation clause did not need to prove the reason the 1996 will was unavailable. Although there is a presumption that the testator destroyed a missing will with the intention of revoking it, a revocation clause takes effect at the time of execution as opposed to the time of death. Furthermore, a revoked will may only be revived by reexecution, not by subsequent revocation of the revoking instrument.

5. Wills—revocation in lost will—summary judgment

Summary judgment could not be granted appropriately for caveators who contended that a lost 1996 will revoked a probated 1984 will where a legal secretary recalled the 1996 will, but the attorney did not and neither did one of the alleged attesting witnesses. The burden is on the caveators to show the due execution and the contents of a lost will by clear, strong, and convincing proof. Whether that standard was met here is for the jury to decide.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a decision of the Court of Appeals, 147 N.C. App. 116, 554 S.E.2d 13 (2001), affirming an order and judgment entered by Bowen, J., on 10 May 2000 in Superior Court, Harnett County. Heard in the Supreme Court 15 May 2002.

Staton, Perkinson, Doster, Post & Silverman, P.A., by W. Woods Doster, for executor-appellant Max McCauley.

Hayes, Williams, Turner & Daughtry, P.A., by Gerald Wilton Hayes, Jr., and Parrish Hayes Daughtry, for caveator-appellees Phyllis M. Thomas, Paige Stallings, and Laurie J. McCauley.

Joseph L. Tart, P.A., by Joseph L. Tart; and Thompson, Smyth & Cioffi, L.L.P., by Theodore B. Smyth, for caveator-appellee Karen McCauley Thompson.

PARKER, Justice.

The issue before the Court in this caveat proceeding is whether the Court of Appeals properly affirmed the trial court's entry of summary judgment for the caveators. For the reasons discussed herein, we reverse the decision of the Court of Appeals.

William Arnold McCauley ("decedent"), died on 4 February 1999. On 24 February 1999, decedent's son Max Ronald McCauley ("executor") presented to the Clerk of Superior Court of Harnett County for probate a will executed by decedent on 13 June 1984. This will devised the majority of decedent's estate to his two sons, Earl Thomas McCauley and the executor, and included a clause providing that decedent "deliberately made no provision herein for the benefit of my daughters."

On 22 March 1999 two of decedent's daughters, Phyllis McCauley Thomas and Paige McCauley Stallings, filed a caveat alleging that

decedent duly executed a will in 1996 which revoked the 1984 will, although the caveators could not produce this later will. On 26 April 1999 the trial court granted a motion to intervene as a caveator filed by Karen McCauley Thompson, another of decedent's daughters. By order signed 26 April 1999, the trial court also designated Laurie J. McCauley, decedent's remaining child, as a caveator.

Following discovery, the executor[1] moved for summary judgment, arguing that he was entitled to judgment as a matter of law in that the caveators could not produce the actual revocatory writing. The caveators[2] responded with their own motions for summary judgment on the basis that the undisputed evidence shows that the 1984 will was revoked. The evidence based on depositions and affidavits is as follows.

Neill Ross, an attorney who represented decedent in numerous matters, testified that in 1996 decedent discussed with Ross his desire to write a new will that divided his estate among his children equally. Ross has no memory regarding whether such a will was ever created and executed. However, Amber Shaw, Ross' secretary at the time, testified that she transcribed the new will from Ross' taped dictation. She further testified that she remembered decedent telling her that he was creating the new will to treat all of his children equally. She also remembered receiving a copy of the 1984 will from decedent to ensure the proper spelling of names in the new will. Shaw testified that she read the will to decedent; that decedent executed the new will in front of two attesting witnesses, Beatrice Coats and another person whom Shaw could not recall; and that Shaw then notarized all of the signatures. Coats, however, stated in her deposition that she has no memory of witnessing a will for decedent. In her affidavit and deposition, Shaw stated that the 1996 will contained a provision revoking all prior wills.

Following decedent's death, two of the caveators went to Ross' office to ask Shaw for a copy of the 1996 will. Shaw was unable to locate the document as all documents of continuing importance had

1. Although both Max McCauley and his brother, Earl Thomas McCauley, are the propounders of the 1984 will, for clarity we refer to arguments supporting the 1984 will as being made by the executor.

2. Although Thompson is more properly termed an intervenor caveator and is represented by separate counsel who has submitted a separate brief, for the sake of clarity, we refer to all of decedent's daughters collectively as "the caveators." Likewise, we treat the evidence and arguments presented by any caveator as being presented by the caveators collectively.

been sent to decedent when, at some time after executing the 1996 will, decedent ended his attorney-client relationship with Ross and requested that all files be sent to decedent's home.

Based upon this evidence, the trial court denied the executor's motion for summary judgment and granted summary judgment in favor of the caveators. The executor appealed, and the Court of Appeals affirmed the trial court's judgment. *In re Will of McCauley*, 147 N.C. App. 116, 120, 554 S.E.2d 13, 16 (2001).

[1] Before this Court the executor argues that the trial court erred in granting the caveators' motion for summary judgment and in denying the executor's motion for summary judgment. In deciding whether summary judgment was appropriate, we must first consider whether the caveators can, as a matter of law, challenge the probated 1984 will without producing the alleged 1996 will and the attesting witnesses. The method for revoking a will is prescribed by N.C.G.S. § 31-5.1, which provides as follows:

> A written will, or any part thereof, may be revoked only
>
> (1) By a subsequent written will or codicil or other revocatory writing executed in the manner provided herein for the execution of written wills, or
>
> (2) By being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, by the testator himself or by another person in his presence and by his direction.

N.C.G.S. § 31-5.1 (2001). Before this Court the executor argues, as he did below, that the only evidence competent to show the due execution of a revocatory writing is the writing itself. The executor contends that without the actual written revocation, the caveators cannot show its existence and validity. We disagree.

In *In re Will of Crawford*, this Court considered testimony regarding a lost will that allegedly revoked the will offered for probate. *In re Will of Crawford*, 246 N.C. 322, 325-26, 98 S.E.2d 29, 31-32 (1957). Although the Court held that the later holographic will did not revoke the will offered for probate, *id.* at 326, 98 S.E.2d at 32, it did not do so on the basis that the actual will containing the revocation was not presented. Instead, the Court considered the testimony of the single witness and determined that the testimony was insufficient to establish all of the elements necessary to show that the later will was

duly executed. *Id.* Thus, this Court has implicitly held that production of the revocatory writing itself is not the only method to prove its existence and validity. Of note, N.C.G.S. § 31-5.1 was last amended in 1953, four years before the decision in *Crawford*, and was applicable in *Crawford*. Moreover, prior case law allows proof of the due execution and contents of a lost will by evidence other than production of the written will itself. *In re Will of Hedgepeth*, 150 N.C. 245, 251, 63 S.E. 1025, 1027 (1909).

In this case, the alleged revocatory writing is in a will that cannot be located. The party attempting to prove a lost will has the burden:

> (1) [To show t]he formal execution of the will, as prescribed by the statute. This he could do by calling the subscribing witnesses or[,] by accounting for their absence, resorting to the best competent evidence obtainable. (2) To show the contents of the will, if the original was not produced. This, as we have said, could be done by a single witness, if no other was obtainable. (3) To show that the original will was lost or had been destroyed otherwise than by the testatrix or with her consent or procurement. The will not being found, there is a presumption of fact that it was destroyed by the testator *animo revocandi*.

Id. (citations omitted). The propounder of the lost will must also show that the testator is dead, *id.* at 250, 63 S.E. at 1027, and "that the instrument cannot be found after diligent search and inquiry," *In re Will of Wood*, 240 N.C. 134, 137, 81 S.E.2d 127, 129 (1954). In the present case the parties do not dispute the testator's death or that a diligent search has been made for the 1996 will; hence, the caveators as propounders of the lost will need only prove formal execution of the alleged 1996 will, show the contents of the will, and overcome the presumption of revocation.

In an ordinary case, due execution is proven by the testimony of the attesting witnesses, *In re Will of Franks*, 231 N.C. 252, 256, 56 S.E.2d 668, 672 (1949), or by a self-proved will pursuant to N.C.G.S. § 31-11.6. Proof of the execution of a will that is not self-proved ordinarily requires the testimony of two attesting witnesses. However, if testimony of the attesting witnesses is unavailable, due execution of a will may still be proven. This Court has stated:

> "The law makes two subscribing witnesses to a will indispensable to its formal execution. But its validity does not depend solely

> upon the testimony of the subscribing witnesses. If their memory fail, so that they forget the attestation, or they be so wanting in integrity as willfully to deny it, the will ought not to be lost, but its due execution and attestation should be found on other credible evidence. And so the law provides."

In re Will of Redding, 216 N.C. 497, 498, 5 S.E.2d 544, 545 (1939) (quoting *In re Will of Kelly*, 206 N.C. 551, 553, 174 S.E. 453, 454-55 (1934)). Likewise, if the attesting witnesses to a lost will " 'are dead, or their presence cannot for any valid reason be procured, the execution of the will may be proved by substitutionary evidence.' 1 Underhill Wills, sec. 274." *Hedgepeth*, 150 N.C. at 249-50, 63 S.E. at 1027.

In this case one of the witnesses to the 1996 will has no memory of the event, and the identity of the second witness is unknown. The substitute evidence of due execution offered by the caveators is the testimony of Shaw, the secretary who discussed with the decedent the changes to be incorporated into the 1996 will, transcribed the 1996 will, read the 1996 will to the decedent, and observed and notarized the signatures of the decedent and the two attesting witnesses. Other than testimony from the attesting witnesses, the absence of which is validly accounted for, this evidence is "the best competent evidence obtainable." *Id.* at 251, 63 S.E. at 1027. Accordingly, the caveators are not precluded as a matter of law from establishing due execution of the lost 1996 will.

[2] The executor contends that since the statute requires two attesting witnesses to make a valid will or revocatory writing, the testimony of one witness is not sufficient to prove a valid revocation. This argument blurs the distinction between what is required for duly executing a will and what is required for proving that a will was duly executed. While N.C.G.S. § 31-3.3 requires the signatures of two attesting witnesses for a will to be valid, our case law demonstrates that, once the will has been duly executed, other methods are available to prove that execution by the testator before two attesting witnesses occurred. Thus, while only one attesting witness to a will would not be sufficient for valid execution, one witness' testimony that the will was attested by two witnesses may be sufficient to show that the will was duly executed.

The executor's reliance on *Crawford*, 246 N.C. 322, 98 S.E.2d 29, to support his contention that more than one witness is necessary to prove due execution of a will is misplaced. While the Court in

Crawford did hold that the evidence was insufficient to prove that the lost will was properly executed, *id.* at 326, 98 S.E.2d at 32, it did not base this decision on the fact that all of the evidence was presented by only one witness. Rather, the Court noted that the evidence presented by that witness did not establish that there was a second attesting witness or that the holographic will in question was properly lodged for safekeeping. *Id.* Thus, the Court based its holding that the second will was not duly executed, and therefore "ineffective as a revocatory instrument," *id.*, not on the basis that only one witness testified to the execution, but on the basis that the evidence presented by that witness was insufficient to show due execution.

Having determined that the testimony of one witness is sufficient to prove the due execution of a lost will, we need not address the caveators' issue of whether evidence that the lost will was self-proved pursuant to N.C.G.S. § 31-11.6 is sufficient to show due execution.

[3] The caveators contend that they seek only to prove that the 1996 will existed and was duly executed rather than the contents of that lost will and that, thus, a holding that due execution may be proven by the testimony of one witness is dispositive of this appeal. Essentially, the caveators argue that this is not a lost will case in that they are not attempting to probate the 1996 will, but seek only to show the mere existence of that will. We disagree.

Although a subsequent will frequently revokes all prior wills, a subsequent will does not as a matter of law revoke all prior wills.

> A will may be revoked by a subsequent instrument executed solely for that purpose, or by a subsequent will containing a revoking clause or provisions inconsistent with those of the previous will, or by any of the other methods prescribed by law; but the mere fact that a second will was made, although it purports to be the last, does not create a presumption that it revokes or is inconsistent with one of prior date.

In re Will of Wolfe, 185 N.C. 563, 565, 117 S.E. 804, 805-06 (1923). Thus, a mere showing that a later will existed has no legal effect, in itself, on the continued validity of the earlier will as the existence of a later will "does not create a presumption that it revokes" a prior will. *Id.* at 565, 117 S.E. at 806. To prevail on their claim the caveators must, therefore, prove that one of the provisions contained in the 1996 will was a revocation of the 1984 will. Thus, the caveators are

mistaken in arguing that they need only prove due execution of the 1996 will and not its contents.

" 'The contents of a lost will may be proved by evidence of a single witness, though interested, whose veracity and competency are unimpeached.' " *Hedgepeth*, 150 N.C. at 249, 63 S.E. at 1027 (quoting *Sugden v. Lord St. Leonards*, 1 P.D. 154 (1876)). Thus, the propounder of a lost will has the burden "[t]o show the contents of the will, if the original was not produced. This, as we have said, could be done by a single witness, if no other was obtainable." *Id.* at 251, 63 S.E. at 1027. In this case, Shaw testified that every will prepared by Ross' office contained a revocation provision and that this will was no exception. Indeed, in her affidavit, Shaw states unequivocally that the 1996 will contained a revocation provision. As no other evidence of the content of the will is obtainable, the testimony of this one witness may be sufficient to show that the lost 1996 will contained a provision revoking all prior wills.

[4] The final requirement under *Hedgepeth* is for the caveators to overcome the presumption that the testator destroyed the missing will *animo revocandi*, that is, with the intention to revoke it. The caveators make no argument in their briefs attempting to overcome this burden, and counsel concede that the caveators could not overcome such a presumption. However, given the unique status of revocation provisions in comparison to other provisions in a will, the presumption that a lost will was destroyed by the testator *animo revocandi* is immaterial with respect to a revocation provision contained in that missing will. Thus, to enforce the revocation clause in a lost will, the caveators must prove the inclusion of a revocation provision in the lost will; but they need not establish that the lost will is missing for a reason other than its destruction by the testator *animo revocandi*.

Generally, the provisions of a will are ambulatory in nature, meaning that they speak only at the death of the testator; prior to the testator's death these ambulatory provisions have no effect and can be modified by the testator at anytime. *Rape v. Lyerly*, 287 N.C. 601, 618, 215 S.E.2d 737, 748 (1975); *In re Will of Bennett*, 180 N.C. 5, 11, 103 S.E. 917, 920 (1920). At common law revocation clauses were also deemed to be ambulatory. Accordingly, as a revocation clause did not speak until the testator's death, destruction of a later will containing a revocation clause meant that the revocation clause never took effect. *Hyatt v. Hyatt*, 187 N.C. 113, 119, 120 S.E.2d 830, 833 (1924) (holding that the revocation clause in a later will was

ambulatory and of no effect until the testator's death); *see also* 1 James B. McLaughlin, Jr. & Richard T. Bowser, *Wiggins: Wills and Administration of Estates in North Carolina* § 109(a) (4th ed. 2000).

Modern jurisprudence, however, is that a revocation provision is not ambulatory; rather, a revocation clause takes effect immediately at the time of execution of the will as opposed to taking effect at the death of the testator. *See, e.g., In re Will of Mitchell*, 285 N.C. 77, 81, 203 S.E.2d 48, 50 (1974) (" 'Revocation being a "thing done and complete" is not in its nature ambulatory.' ") (quoting *In re Estate of Berger*, 198 Cal. 103, 110, 243 P. 862, 865 (1926)). In *In re Will of Farr*, 277 N.C. 86, 87, 175 S.E.2d 578, 579 (1970), the testator executed a will in 1961. The testator later executed a codicil, codicil five, revoking two articles of the 1961 will. *Id.* at 88, 175 S.E.2d at 580. Subsequent to execution of codicil five, the testator executed codicil six, which revoked codicil five. *Id.* Justice Sharp (later Chief Justice), writing for the Court, stated:

> The consequence of [the testator's] fifth codicil . . . was to revoke Articles Four and Thirteen of the original will and to substitute different provisions for them. The effect of the sixth codicil was to revoke the fifth. However, Articles Four and Thirteen of the will were not reinstated by the revocation of codicil No. 5 which had nullified them.

Id. at 91, 175 S.E.2d at 581. Further, " '[u]nder statutes making re-execution essential to revival [of a revoked will], the mere revocation of the subsequent will does not revive a prior will, even though the testator so intended.' " *Id.* at 91, 175 S.E.2d at 581-82 (quoting 95 C.J.S. *Wills* § 301(3) (1957)). This analysis demonstrates that the revocation portion of codicil five became effective immediately at execution rather than at the testator's death. Were the revocation provision in the later codicil not effective until the testator's death, revocation of codicil five would have negated the effect of the revocation provision in codicil five. Moreover, the statement that "revocation of the subsequent will does not revive a prior will," *id.* at 91, 175 S.E.2d at 582, would have been unnecessary. Thus, the law is that revocation clauses are not ambulatory and, unlike the other provisions of a will, are effective upon execution. Therefore, upon the due execution in conformity with applicable statutes of a will containing a provision revoking all prior wills, all prior wills are instantaneously revoked.

Once a will is revoked, it may not be revived by subsequent revocation of the revoking document; rather, it may be revived only by reexecution. N.C.G.S. § 31-5.8 (2001); *Farr*, 277 N.C. at 91, 175 S.E.2d at 581. Although a "layman, ignorant of [this rule], might be expected to assume that if he revoked [the revoking instrument] the revocation would revive those previously revoked provisions[,] . . . in the absence of fraud, a testator's misunderstanding of the legal effect of a will or codicil will not ordinarily affect its validity." *Farr*, 277 N.C. at 92, 175 S.E.2d at 582.

Accordingly, in this case, if the 1996 will revoked the 1984 will, the 1984 will was not resurrected or revived by the revocation of the 1996 will. Hence, as to the revocation provision, the presumption that the 1996 will was destroyed by the testator *animo revocandi* was immaterial as later revocation of the 1996 will would have no legal effect on the revoked status of the 1984 will. If the 1996 will was duly executed and contained a revocation clause, the fate of the 1984 will was sealed regardless of the testator's subsequent intentions and actions regarding the 1996 will.

Absent this presumption, the caveators need not prove why the will is unavailable. The caveators as propounders of a revocation provision in a lost will need only show that the will was validly executed and the contents of the will, namely, the revocation clause.

The caveators in this case seek only to prove the revocation provision of the 1996 will. Based upon the intrinsically unique nature of a revocation provision as the only provision of a will that speaks before death, our holding is limited to permitting proof of the revocation provision without proof of any other provisions. The question whether specific ambulatory provisions may be proven without proof of all ambulatory provisions in a lost will is not before the Court in this case and is not addressed.

[5] Having determined that the caveators are not precluded as a matter of law from challenging the 1984 probated will without producing the alleged 1996 lost will and the attesting witnesses, we must now address whether summary judgment for the caveators was appropriate in this case. Rule 56(c) of the North Carolina Rules of Civil Procedure provides that summary judgment will be granted "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) (2001). Further,

the nonmoving party may not rely on the mere allegations and denials in his pleadings but must by affidavit, or other means provided in the Rules, set forth specific facts showing a genuine issue of fact for the jury; otherwise, "summary judgment, if appropriate, shall be entered against [the nonmoving party]." N.C.G.S. § 1A-1, Rule 56(e). Interpreting the criteria for summary judgment, this Court has stated that

> [t]o be entitled to summary judgment the movant must . . . succeed on the basis of his own materials. He must show that there are no genuine issues of fact; that there are no gaps in his proof; that no inferences inconsistent with his recovery arise from his evidence; and that there is no standard that must be applied to the facts by the jury.

Kidd v. Early, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976).

In this proceeding the burden of proof is on the caveators to show the due execution and contents of a lost will by clear, strong, and convincing proof. *Williams v. Blue Ridge Bldg. & Loan Ass'n*, 207 N.C. 362, 364, 177 S.E. 176, 177 (1934) (stating that the degree of proof necessary to prove the terms of a lost will is clear, strong, and cogent proof). The phrase "clear, strong, and cogent" means such evidence as " 'should fully convince.' " *Id.* (quoting *Greenleaf-Johnson Lumber Co. v. Leonard*, 145 N.C. 339, 344, 59 S.E. 134, 135 (1907)). This standard of proof is also referred to as "clear, strong, and convincing." *McCorkle v. Beatty*, 226 N.C. 338, 342, 38 S.E.2d 102, 105 (1946).

Applying these principles to the present case, we conclude that summary judgment for the caveators could not appropriately be granted. The evidence reflects that the attorney did not recall dictating the 1996 will and that Coats, one of the alleged attesting witnesses, did not remember witnessing the will. This evidence permits inferences inconsistent with the caveators' recovery. *See Kidd*, 289 N.C. at 370, 222 S.E.2d at 410. Further, the clear, strong, and convincing standard must be applied to the evidence by a jury. *Id.* The mere fact that the executor could not produce affidavits to rebut Shaw's testimony does not require the trial court to assign credibility to the caveators' supporting affidavits and deposition testimony. *See Id.* If there is any question that can be resolved only by the weight of the evidence, summary judgment should be denied. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979). In this case one witness' testimony is pivotal in determining whether the 1996

missing will was ever made, whether two witnesses attested the will, whether decedent signed the will, and whether the will contained a revocation clause. Whether the evidence on these questions is clear, strong, and convincing is for the jury to decide.

The caveators contend that the executor stipulated that the 1996 will was validly executed and contained a revocation provision. In his motion, the executor states that the propounders of the 1984 will

> hereby move for summary judgment in that the discovery materials and pleadings in this action show that no document exists which revokes the last will of [decedent] dated June 13, 1984, and that the propounders of this will are entitled to judgment as a matter of law.

This motion, along with the entire record before us, shows that the executor argued that the only way to prove the revocation of the 1984 will was to present the written revocation itself. In this context, any stipulations made by the executor as to Shaw's testimony and the due execution and content of the 1996 will were an acknowledgment that these facts were immaterial, not that they were undisputed. Determination of the due execution and content of the 1996 will is essential to the outcome of this case. The executor's stipulation that such a determination is immaterial is, therefore, irrelevant.

We are mindful that fraud is always a concern in cases such as this one, but we believe our holding today strikes a balance between the competing interests likely to engage in fraud. Were we to adopt the rule espoused by the executor, that only the written revocation itself can prove revocation, a malfeasant devisee or beneficiary who destroyed a revoking document in order to receive benefits under the revoked will would likely not be challenged. Furthermore, such a rule would flaunt the intention of N.C.G.S. § 31-5.1 in that it would allow, *de facto*, the revival of the revoked will. Conversely, our ruling today does not foreclose the possibility of fraud by an heir at law's fabricating a revocation to create intestacy; however, the trial process with the requirement that proof be clear, strong, and convincing provides the crucible in which to test the truthfulness of the testimony and safeguard against such fraud.

For the foregoing reasons, we hold that the Court of Appeals erred in affirming the trial court's entry of summary judgment for the caveators and that the trial court properly denied the executor's

motion for summary judgment. Accordingly, we remand this case to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

MORRIS COMMUNICATIONS CORPORATION, D/B/A FAIRWAY OUTDOOR ADVERTISING; OUTDOOR COMMUNICATIONS, INC.; AND MAPLE COVE, INC. v. THE CITY OF ASHEVILLE, A NORTH CAROLINA MUNICIPAL CORPORATION

No. 558PA01

(Filed 28 June 2002)

Zoning— text amendment—off-premises signs—timeliness—sufficiency and percentage of protest petitions

Defendant city improperly adopted a text amendment to a zoning ordinance regulating the size of off-premises signs for outdoor advertising without first considering the effect of protest petitions, timely filed under state law, from specific citizens affected by and opposed to the proposed zoning change, and the city is required to answer the following questions to determine the sufficiency and percentage of the protest petitions to force the city into a three-fourths favorable vote before effecting the proposed change, including: (1) determining the aggregate acreage of lots with existing nonconforming, off-premises signs within the jurisdiction; (2) totaling the aggregate acreage of those owners who properly filed protest petitions with regard to the ordinance; and (3) determining if the percentage of those who properly filed protest petitions with regard to the ordinance constitutes twenty percent or more of the aggregate acreage with existing nonconforming off-premises signs.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 145 N.C. App. 597, 551 S.E.2d 508 (2001), affirming in part, reversing in part, and remanding in part an order for summary judgment entered 27 September 1999, by Caviness, J., in Superior Court, Buncombe County. Heard in the Supreme Court 11 March 2002.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Albert L. Sneed and Craig D. Justus, for plaintiff-appellant Morris Communications, Inc.; and Long, Parker, Warren & Jones, P.A., by Robert B. Long, Jr., and Philip S. Anderson, for plaintiff-appellants Outdoor Communications, Inc., and Maple Cove, Inc.

Roberts & Stevens, P.A., by Sarah Patterson Brison Meldrum; Hamilton Gaskins Fay & Moon, PLLC, by Robert C. Stephens; and Robert W. Oast, Jr., City Attorney, for defendant-appellee.

ORR, Justice.

This appeal arises from a dispute concerning a text amendment to a zoning ordinance enacted by defendant, the City of Asheville. Plaintiffs, whose general collective interest is in outdoor advertising signs that are directly affected by the amendment, argue that the City's actions were improper because the zoning change was approved without regard to applicable state legislative mandates. In particular, plaintiffs contend that the City improperly adopted the amendment at issue without first considering the effect of protest petitions, timely filed under state law, from specific citizens affected by and opposed to the proposed zoning change. We agree.

As introduction, a chronological overview of the City's off-premises sign regulations is instructive and reveals the following: In 1977, the City adopted zoning rules that regulated the use of off-premises signs—in essence, signs used for the purpose of advertising a business, product, or service that are located in a place other than the site of the business being advertised. The regulations permitted such signs in all commercial and industrial zoning districts, subject to area (square footage) and height limitations. The regulations also provided that any existing signs that exceeded the area and height limitations by more than ten percent would be considered "nonconforming." However, all existing, nonconforming signs were also "grandfathered" in by the regulations, allowing them to remain in place so long as they were not significantly altered.

The 1977 regulations stood until August of 1990, when the City enacted three relevant amendments. The substance of the changes included: (1) reducing the area and height limitations of all off-premises signs, (2) requiring that existing nonconforming signs either be brought into compliance or be removed (amortized) within five years, and (3) requiring that previously conforming

signs that were rendered nonconforming under the 1990 regulations either be brought into compliance or removed (amortized) within seven years.

In 1995, the City again amended its regulations by allowing off-premises signs that conformed with the 1977 rules to avoid amortization requirements. The City then extended the protection for such signs in May 1997, when it repealed its zoning laws and enacted in their stead chapter 7 of the Unified Development Ordinance.

Thus, in summary review, as of May 1997, all off-premises signs that were specifically rendered nonconforming by the 1990 regulations were free to remain in perpetuity, absent significant alteration.

However, just six months later, in November 1997, the City again changed its position on off-premises signs and adopted, by a 4 to 3 vote, a zoning amendment that effectively required all nonconforming, off-premises signs to be either brought into compliance with current regulations or removed by 25 November 2004. Asheville, N.C. Code of Ordinances § 7-13-8(d)(2) (Nov. 25, 1997) [hereinafter "Ordinance 2427"].

In response, plaintiffs filed suit, claiming that Ordinance 2427 had been enacted in violation of N.C.G.S. §§ 160A-385 and 160A-386, thereby making it invalid. Specifically, plaintiffs contended: (1) pursuant to the aforementioned statutes, the City was in timely receipt of the requisite petitions protesting Ordinance 2427 prior to its passage; (2) upon such timely receipt of an ample number of protest petitions opposing the ordinance, the city council was then required to reach a three-fourths favorable vote in order to pass Ordinance 2427; and (3) by failing to give effect to the ample number of timely filed protest petitions, the city council acted contrary to the mandates of the applicable statutes when it passed Ordinance 2427 by a simple majority vote. Plaintiffs moved for summary judgment on this issue, arguing that there was adequate documentary evidence showing that the city council's majority vote was invalid as a matter of law. The trial court ultimately granted the motion after concluding that plaintiffs had demonstrated that the timely filed protest petitions met the requirement to trigger the three-fourths favorable vote. On appeal, the Court of Appeals reversed on the issue, holding that the trial court had used improper criteria in calculating the legal effect of the protest petitions filed with the City. The Court of Appeals then remanded the case to the trial court with instructions to recalculate the effect of the

protest petitions using a provided formula. Because plaintiffs cannot prevail under the formula mandated by the Court of Appeals, they petitioned this Court for further review.

In their appeal to this Court, plaintiffs initially contend that the trial court correctly limited the class of lot owners included in the zoning change at issue to those immediately affected by any such change. Plaintiffs additionally argue that the Court of Appeals erred by expanding the trial court's class of lot owners to include those who might be affected if the City were to modify its zoning ordinances in the future. We agree with both contentions, and for the reasons outlined below, we expressly reverse those portions of the Court of Appeals' holding that may be construed to enlarge the class of lot owners included in the zoning change at issue beyond any lot owners who are subject to its immediate impact.

The issue we confront appears to be one of first impression in this jurisdiction, and the controlling law can be generally summarized as follows: Under state law, when lot owners comprising at least twenty percent of the area subject to a proposed zoning amendment file protests opposing the proposed change, local governments are then required to approve such amendments by no less than a three-fourths favorable vote. We note, however, that it is not the overall process as described that is in dispute. Rather, the two-part question we must address focuses narrowly on a particular step in the process, namely, how to determine *who*, under the facts of this case, constitutes those persons affected by a zoning change and *what* constitutes twenty percent of their ranks.

In the fall of 1997, the Asheville City Council made public a zoning amendment proposal concerning off-premises signs that did not conform to size restrictions. The amendment, Ordinance 2427, included a specific provision that would require all existing nonconforming signs to either come into compliance or be removed by 25 November 2004. At the time Ordinance 2427 was announced, numerous nonconforming, off-premises signs stood within the City's jurisdiction, having been "grandfathered" in under zoning changes enacted in the past.

Upon learning of the City's sunset proposal for the nonconforming signs, affected opponents of the ordinance (the "owners"—those lot owners within "the area of lots included in the proposed change") banded together in order to oppose its passage. Acting pursuant to N.C.G.S. § 160A-385, the group, including plaintiffs, submitted to the

City numerous petitions protesting the ordinance as proposed. Under the statute, if a certain percentage of affected property owners file protests against a proposed change, a three-fourths favorable vote by the city council is required to effect such change. Plaintiffs contend that the petitions filed represent a sufficient percentage to force a three-fourths vote. In order to assess their contention, we turn to the specific language of the statute, which reads as follows:

> Zoning regulations and restrictions and zone boundaries may from time to time be amended, supplemented, changed, modified or repealed. In case, however, of a protest against such change, signed by the owners of twenty percent (20%) or more . . . of the area of lots included in a proposed change, . . . an amendment shall not become effective except by the favorable vote of three-fourths of all the members of the city council.

N.C.G.S. § 160A-385(a) (1999). Thus, under the statutory provisions, we must ultimately determine whether the protest petitions filed with regard to Ordinance 2427 represent "owners of twenty percent (20%) or more . . . of the area of lots included in the proposed change."[1]

I.

In order to calculate a percentage of a particular group, we must first determine who comprises the group itself. Here, the statute defines the group as "owners . . . of the area of lots included in the proposed change." The group, therefore, consists of persons or entities who own lots within the areas subject to the proposed change's effects.

A careful reading of Ordinance 2427 reveals that the only immediate and actual effect of the proposed change at issue would be the elimination of existing, previously "grandfathered" signs that are also both nonconforming and off-premises. Thus, we preliminarily conclude that only lot owners who had existing signs subject to the proposal qualify as members of the group. A further inquiry as to what other lot owners might qualify for the group reveals there are none. Lot owners within the City's jurisdiction who have existing off-premises signs that comply with zoning rules fail to qualify for the

1. We observe that the subject matter at issue here, i.e., *nonconforming signs*, does not readily lend itself to the general applicability of this statute, wherein the area of the *lots* affected is a determinative factor. The area of the lots "included in a proposed change" has little, if anything, to do with a nonconforming sign, which could as easily sit on a tiny strip of land as on a five-acre lot.

group because their signs conform, rendering their respective lots unaffected by the proposed change. Likewise, lot owners within the City's jurisdiction who are eligible to erect off-premises signs but who have not yet done so fail to qualify for the group because they have no existing signs at all, and thus their lots are also not "included in the proposed change."[2] Lastly, we consider whether all lot owners within areas zoned for off-premises signs should be made eligible for the group because *unknown future actions* by the city council *may* render their once-conforming signs nonconforming. In our view, the prospect for an unspecified zoning change at some time in the future has no bearing on the circumstances here. At issue is an ordinance that, if enacted, triggers an immediate effect, namely, the required amortization of existing, off-premises signs that are nonconforming. It has no effect whatsoever on any signs that *may* be erected and subsequently become nonconforming due to future changes in the ordinance.

In *Godfrey v. Zoning Bd. of Adjust. of Union Cty.*, 317 N.C. 51, 344 S.E.2d 272 (1986), this Court concluded that a structure not in existence on the effective date of a zoning amendment does not constitute a nonconforming use, and adopted the view of the Pennsylvania Supreme Court, which said that "[b]efore a supposed nonconforming use may be protected, it must exist somewhere outside the property owner's mind." *Id.* at 57, 344 S.E.2d at 276 (quoting *Cook v. Bensalem Township Bd. of Adjustment*, 413 Pa. 175, 179, 196 A.2d 327, 330 (1963). Likewise, before a supposed nonconforming use may be eliminated, it must exist somewhere outside the zoning authority's mind. Therefore, property owners who can merely contend that their lots *may* be similarly affected in the future have no lots that are "included in the proposed change" at hand. As a result, such lot owners cannot be included in the group. To hold otherwise would require that a protest petition grouping consist of all lot owners within a zoning jurisdiction since, at any later time, a similar change affecting them *could* take place. Such an interpretation is obviously not what the General Assembly intended when it enacted

2. We note, too, that lot owners located in areas permitting off-premises signs who either (1) have no off-premises signs, or (2) have only signs that conform to zoning rules cannot claim to be group eligible by virtue of a "grandfathered" right to erect nonconforming signs in the future. No lot owner possesses such a right under the city code. Past "grandfathering" pertained exclusively to existing signs that were both off-premises and nonconforming. Moreover, no provision of the code allows lot owners to erect off-premises signs that do not conform. Thus, with no option to erect nonconforming signs, such owners are without lots "included in the proposed change."

the protest petition statutes, which specifically refer to lot owners "included in the proposed change" at issue.

A review of our tally shows then that for purposes of the statute, the group of lot owners included in the proposed change is limited to those select lot owners who had existing, *nonconforming*, off-premises signs *at the time* Ordinance 2427 was announced.

We recognize that determining the number of lot owners included in a proposed zoning change will not always necessitate such a detailed accounting of eligible protest petitioners. Simply put, the relevant portion of Ordinance 2427 deals directly with the amortization of in-place, off-premises signs that do not conform to size requirements. The only signs affected by the ordinance's reach are those that have been previously "grandfathered" in by the City's zoning authority. As a result, only those lot owners who have such signs can be considered as "included in [the] proposed change." Thus, in sum, we emphasize that this is less a complex case commanding resolution through narrow statutory constructs than it is a case of narrow circumstance.

Having determined then the formula for calculating those lot owners included in the proposed zoning change, we next turn to applying it to the appropriate owners in the instant case. However, from the outset, we note that a careful reading of the record renders this Court unable to do so based upon the evidence in the record. Most importantly, we are unable to ascertain from the record precisely which lot owners are involved in the proposed change, an omission that prevents us from calculating the requisite twenty percent of their number. At various points, the record reflects that there are seventy-eight existing signs that will be affected by the proposed change delineated in the ordinance at issue. However, the number of signs is of little practical use since the formula for calculating affected "grandfathered" owners is based on the acreage of their respective lots, not on the number of signs. As for determining the total acreage of lots "included in the proposed change," the numbers proffered by the parties and used by the Court of Appeals provide no assistance. Each of the parties and the Court of Appeals seem to agree that at the time of the proposed ordinance there were 4,928 acres zoned to permit "off-premises" signs within the jurisdiction.[3] All

3. In its decision, the Court of Appeals held that the 4,928-acre area zoned to permit off-premises signs also served as the total "area of lots included in the proposed change." The City, on appeal to this Court, concurs with the Court of Appeals

equally concur that, at the same time, there were 243.89 acres of lots on which such "off-premises" signs actually stood. However, neither figure is adequate for purposes of determining which lots were included in the proposed change because the figure needed must be drawn from those lots supporting existing "off-premises" signs *that are also nonconforming*, the only group of signs immediately affected by the relevant portions of Ordinance 2427.

Even the trial court was not immune from adding to the confusion. In its order granting partial summary judgment in favor of plaintiffs, the trial court described the area included in the proposed change as "the lots upon which off-premises signs affected by the seven (7) year amortization provisions of Ordinance 2427 were located at the time of its passage." While we recognize that the trial court's description of the areas impacted by the ordinance ostensibly encompasses the thrust of this Court's parameters, we also note that the order is silent as to a tally of the acreage of lots so qualified. Thus, despite the efforts of all involved, we are still left without the numbers necessary to apply the required formula. As a result, in order to proceed with the reenactment of the ordinance, the City would have to make the following preliminary calculations: (1) determine, first, the aggregate acreage of lots with existing nonconforming, off-premises signs within the jurisdiction; (2) total the aggregate acreage of those owners who properly filed protest petitions with regard to the ordinance;[4] and (3) determine if the percentage of those who properly filed protest petitions with regard to the ordinance constitutes twenty percent or more of the aggregate acreage with existing nonconforming, off-premises signs (as calculated in number (1), above).

The answers to the three calculations can then collectively serve to provide the City with the information it needs in order to proceed with its enactment of the proposed ordinance, namely whether: (1) plaintiffs have satisfied the requirements of the protest petition statute, and (2) the city council is required to reach a three-fourths vote in order to enact the proposed ordinance.

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holding and urges us to adopt the 4,928-acre zone as the basis for our calculations. We decline to do so, however, for the reasons cited in the remainder of part I of this opinion.

4. The guidelines for determining the accuracy, sufficiency and timeliness of protest petitions is detailed in part II of this opinion, *supra*.

II.

We next examine the issue of whether the City failed to carry out its "affirmative duty to determine the sufficiency, timeliness, and percentage of the protest [petitions] and to call forthe vote that the law required." *Unruh v. City of Asheville*, 97 N.C. App. 287, 290, 388 S.E.2d. 235, 237, *disc. rev. denied*, 326 N.C. 487, 391 S.E.2d 813 (1990). In essence, *Unruh* spells out a zoning authority's responsibilities for any petitions that may be filed in opposition to a proposed zoning change. Upon receipt of such petitions, a zoning authority, or its agents, is obliged to log them, to determine whether they were timely filed, and to make calculations aimed at determining whether the number of petitions received constitute an adequate protest group. *See generally id.*; *see also* N.C.G.S. § 160A-385(a).

In the case *sub judice*, the trial court concluded that there were lingering disputes as to "whether or not the City of Asheville carried out its duties under the protest petition law as mandated by *Unruh*." As a consequence of so finding, the trial court ordered that such disputes must be resolved at trial, and further ordered that evidence or argument "as to the validity of the protest petitions" could not be foreclosed. Upon review of the trial court's order, the Court of Appeals unanimously concluded that "we cannot hold as a matter of law that the City failed to meet its affirmative duties under *Unruh*." *Morris Communications Corp. v. City of Asheville*, 145 N.C. App. 597, 608, 551 S.E.2d 508, 516 (2001). Thus, to this point, the issue of whether the City met its *Unruh* obligations has yet to be decided.

We note from the outset that the question of whether or not the City has satisfied its affirmative duties under *Unruh* is a corollary of the primary issue in this case: Were the protest petitions filed sufficient to force the City into a three-fourths favorable vote in order to effect the proposed zoning change? We also note that the proper application of the formula outlined in part I, *supra*, will simultaneously provide the evidence needed to show whether a zoning authority has indeed met its *Unruh* obligations, which are to determine (1) the sufficiency, (2) the timeliness, and (3) the percentage of the protest petitions on file. *Unruh*, 97 N.C. App. at 290, 388 S.E.2d. at 237.

Once the City calculates the total acreage of those affected by the proposed change, using the formula as outlined in part I, *supra*, it must next determine if the protest petitions on file constitute the necessary twenty percent minimum of that total acreage. Thus, for pur-

poses of *Unruh*, the "*percentage* of the protest petitions" will then be determined, which in turn allows for a calculation as to whether that percentage is quantitatively *sufficient* to warrant a three-fourths vote in order to enact the zoning change. Moreover, the process of imposing the formula as described in part I, *supra*, simultaneously forces the City to assess "the accuracy of the petitions"—thereby fulfilling the *Unruh* requirement that all protest petitions prove qualitatively *sufficient*—by weeding out any petitions from persons who do not qualify under the protester criteria. *See id.* (holding that it is the zoning authority's statutory duty to conduct such petition evaluations); *see also* N.C.G.S. § 160A-385 (providing that qualifying protesters are expressly limited to those persons "included in the proposed change"); *and* part I of this opinion, *supra* (describing, for the purposes of this case, the process of how persons may be qualified as being "included in the proposed change" under Ordinance 2427). In general, such evaluations for qualitative *sufficiency* will also include assessing the *timeliness* of protest petitions received, but it was not necessary to conduct such an inquiry in the instant case because both parties conceded that the petitions on record were received by the City in timely fashion.

With regard to the petitions at issue, the City has heretofore satisfied only the *timeliness* prong of the *Unruh* inquiry. The formula for determining their accuracy, as supplied in part I, *supra*, has never even been applied to the petitions at issue. As a result, the City has failed to meet its affirmative duty to determine either the *sufficiency* or *percentage* of the protest petitions submitted, an abrogation that necessarily "render[s] the [enacted] ordinance invalid on its face." *See Unruh*, 97 N.C. App. at 290, 388 S.E.2d at 237 (concluding that the protest petition statute plainly provides that a comprehensive review of protest petitions shall include an assessment of their "timeliness," "sufficiency," and "percentage," and holding that a zoning entity's failure to conduct such inquiry into submitted protest petitions invalidates the ordinance as enacted). Thus, because the City here conducted both an incomplete and inaccurate review of the submitted petitions protesting the ordinance at issue, we reverse the Court of Appeals and hold that any and all portions of Ordinance 2427 that impose compliance deadlines on existing nonconforming, off-premises signs are invalid as enacted by a 4 to 3 vote of the city council.

REVERSED.

MALLOY v. COOPER

[356 N.C. 113 (2002)]

JOHN MALLOY, D/B/A THE DOGWOOD GUN CLUB v. ROY COOPER, ATTORNEY GENERAL FOR THE STATE OF NORTH CAROLINA; DAVID R. WATERS, DISTRICT ATTORNEY FOR THE 9TH PROSECUTORIAL DISTRICT; DAVID S. SMITH, SHERIFF OF GRANVILLE COUNTY; STATE OF NORTH CAROLINA

No. 595PA01

(Filed 28 June 2002)

Declaratory Judgments—constitutionality of criminal statute—jurisdiction

The trial court had jurisdiction to grant a declaratory judgment determining the constitutionality of the cruelty to animals statute, N.C.G.S. § 14-360, prior to prosecution where the district attorney notified plaintiff that he considered plaintiff's annual pigeon shoot to be a violation of the statute. The case presents an actual controversy between parties with adverse interests and plaintiff sufficiently alleged imminent prosecution and that he stands to lose fundamental human rights and property interests if the statute is enforced and is later determined to be unconstitutional.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a unanimous decision of the Court of Appeals, 146 N.C. App. 66, 551 S.E.2d 911 (2001), reversing an order entered 9 May 2000 by Spencer, J., in Superior Court, Granville County. Heard in the Supreme Court 15 April 2002.

Tharrington Smith, L.L.P., by Roger W. Smith; and Greenberg Traurig, LLP, by C. Allen Foster, for plaintiff-appellant.

Roy Cooper, Attorney General, by John J. Aldridge, III, Special Deputy Attorney General, for defendant-appellees Roy Cooper, Attorney General for the State of North Carolina; David R. Waters, District Attorney for the 9th Prosecutorial District; and the State of North Carolina.

Parker, Poe, Adams & Bernstein, L.L.P., by Cynthia L. Wittmer, on behalf of the North Carolina Network for Animals; Justice for Animals; the Fund for Animals, Inc.; and the Humane Society of the United States, amici curiae.

PARKER, Justice.

On 3 March 1999 plaintiff instituted this action for declaratory judgment against defendants Roy Cooper[1], Attorney General for the State of North Carolina; David R. Waters, District Attorney for the Ninth Prosecutorial District; David S. Smith, Sheriff of Granville County; and the State of North Carolina. The issue before this Court is whether the Court of Appeals erred in holding that the trial court lacked jurisdiction and should have dismissed plaintiff's declaratory judgment action under North Carolina Rule of Civil Procedure 12(b)(1). The uncontroverted facts are as follows.

Plaintiff is a resident of Granville County, North Carolina, and owns an unincorporated business operating under the name "Dogwood Gun Club." Twice a year plaintiff sponsors a pigeon shoot, known as "The Dogwood Invitational," on his private land in Granville County. Plaintiff has sponsored, organized, and operated the pigeon shoots since 1987. Contestants participate by invitation only, and each contestant pays $275.00 per day to participate. According to plaintiff's response to interrogatories, the pigeon shoot is conducted as follows: "Each contestant faces a ring. Inside the ring are a number of boxes which are opened on cue. An individual ferel [sic] pigeon flies from a particular box. The feral pigeon serves as a target at which the contestant shoots." The last two pigeon shoots conducted before institution of this action utilized approximately 40,000 pigeons each. Pigeons that are killed by the contestants are buried, whereas pigeons that are merely injured are "dispatched promptly" and buried. Plaintiff claims to have spent $500,000 in capital improvements to his land to further the pigeon shoots and further claims that the pigeon shoots provide approximately fifty percent of his net income.

In response to interrogatories, plaintiff answered that the District Attorney for the Ninth Prosecutorial District, which covers Granville County, "notified the Plaintiff, through counsel, that he considers the conduct at the Dogwood Invitational to be in violation of amended N.C.G.S. § 14-360 [entitled "Cruelty to animals; construction of section"] and that if given the opportunity, he will prosecute the Plaintiff." Thus, the District Attorney appears to have determined

1. The complaint names "Michael F. Easley, Attorney General for the State of North Carolina," as a defendant. However, as Michael F. Easley no longer holds that office, Roy Cooper, the current Attorney General, is automatically substituted as a party pursuant to Rule 38(c) of the North Carolina Rules of Appellate procedure.

that the 1998 amendments to the statute, *see* Act of Oct. 30, 1998, ch. 212, sec. 17.16(c), 1997 N.C. Sess. Laws 937, 1192, brought plaintiff's pigeon shoots within the purview of the statute. After receiving this threat of prosecution, plaintiff filed the complaint for declaratory judgment praying the trial court to declare that plaintiff's pigeon shoots do not violate the statute; that the statute is unconstitutional as applied to plaintiff; that the statute is unconstitutionally vague; and that defendants be enjoined from enforcing the statute against plaintiff.

On 9 May 2000 the trial court denied defendants' motion to dismiss pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6), and for summary judgment pursuant to Rule 56 as to the misdemeanor portion of N.C.G.S. § 14-360. Further, the trial court granted summary judgment in favor of plaintiff as to the misdemeanor portion of N.C.G.S. § 14-360, decreeing that portion "constitutionally deficient and void." Accordingly, the trial court permanently enjoined defendants from enforcing that portion of the statute against plaintiff.

A unanimous panel of the Court of Appeals reversed the trial court's ruling. *Malloy v. Easley*, 146 N.C. App. 66, 74, 551 S.E.2d 911, 916 (2001). The Court of Appeals held that the action was beyond the scope of the Declaratory Judgment Act, N.C.G.S. ch. 1, art. 26 (2001), and, therefore, should have been dismissed pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure. *Malloy*, 146 N.C. App. at 74, 551 S.E.2d at 916. In reaching its holding, the Court of Appeals determined that the issues raised "necessarily involve questions of fact as well as questions of law," *id.* at 72, 551 S.E.2d at 915, and that plaintiff failed to establish that prosecution would result in loss of fundamental human rights or property interests, *id.* at 73, 551 S.E.2d at 915-16. This Court allowed plaintiff's petition for writ of certiorari to review the decision of the Court of Appeals.

The sole issue before this Court is whether jurisdiction exists to grant a declaratory judgment regarding the constitutionality of the statute in question. Whether a court has jurisdiction is a question of law determinable by this Court on appeal. *See, e.g., Union Carbide Corp. v. Davis*, 253 N.C. 324, 327, 116 S.E.2d 792, 794 (1960); *see also Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986). The Declaratory Judgment Act states that courts "shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." N.C.G.S. § 1-253. Accordingly, any person "whose rights, status or other legal relations

are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." N.C.G.S. § 1-254.

However, " 'the apparent broad terms of the [Declaratory Judgment Act] do not confer upon the court unlimited jurisdiction of a merely advisory nature to construe and declare the law.' " *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 338, 323 S.E.2d 294, 303 (1984) (quoting *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 203, 22 S.E.2d 450, 452 (1942)). Thus, "jurisdiction under the Declaratory Judgment Act may be invoked only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute." *Tucker*, 312 N.C. at 338, 323 S.E.2d at 303.

> Persons directly and adversely affected by the decision may be expected to analyze and bring to the attention of the court all facets of a legal problem. Clear and sound judicial decisions may be expected when specific legal problems are tested by fire in the crucible of actual controversy. So-called friendly suits, where, regardless of form, all parties seek the same result, are "quicksands of the law."

City of Greensboro v. Wall, 247 N.C. 516, 520, 101 S.E.2d 413, 416-17 (1958).

The case before us presents an actual existing controversy between parties with adverse interests. The uncontroverted evidence shows that plaintiff conducted the pigeon shoots in a substantially identical manner twice a year for twelve years before filing this action. No question is in dispute about the birds used—how they are gathered, how the actual shooting is conducted, how the birds are killed, and how the birds are disposed of. Nor is any other material fact in dispute. Given that the uncontroverted evidence shows that plaintiff has conducted the pigeon shoots in the same manner for such an extended period of time, and with such regularity and frequency, this controversy rises above mere speculation that he will conduct the pigeon shoots in the same manner in the future. Thus, this case presents a concrete and real controversy, as opposed to mere speculation as to future conduct; therefore, plaintiff is not seeking an advisory opinion from this Court.

Likewise, the record is clear that the parties have adverse interests. Plaintiff, given the amount of money he has invested in the

pigeon shoots and the amount of income he derives therefrom, is situated to advocate strongly his position that the statute is unconstitutional. Likewise, defendants, who represent the State and are charged with enforcing its laws, are situated to advocate strongly that the statute is constitutional. Thus, the basic requirement of a real controversy between parties with adverse interests is satisfied in this case.

However, even when an actual controversy exists between adverse parties, declaratory judgment is not generally available to challenge the constitutionality of a criminal statute. *See, e.g., Tucker*, 312 N.C. at 349, 323 S.E.2d at 309 ("It is widely held that a declaratory judgment is not available to restrain enforcement of a criminal prosecution," especially where a criminal action is already pending.); *Jernigan v. State*, 279 N.C. 556, 560, 184 S.E.2d 259, 263 (1971) ("A declaratory judgment is a civil remedy which may not be resorted to to try ordinary matters of guilt or innocence."); *Chadwick v. Salter*, 254 N.C. 389, 394, 119 S.E.2d 158, 162 (1961) ("Ordinarily, the constitutionality of a statute . . . will not be determined in an action to enjoin its enforcement."). Nevertheless, a declaratory judgment action to determine the constitutionality of a criminal statute prior to prosecution is not completely barred. For example, in *Calcutt v. McGeachy*, 213 N.C. 1, 195 S.E. 49 (1938), the plaintiff, a manufacturer and distributer of amusement machines, was threatened with prosecution under a statute making possession of slot machines illegal and authorizing their seizure by authorities. *Id.* at 4, 195 S.E. at 49-50. The Court, noting that the plaintiff's action was proper under the Declaratory Judgment Act, determined that the statute in question was constitutional. *Id.* at 4, 9, 195 S.E. at 49, 54.

This Court has enunciated what a plaintiff must show in order to seek a declaratory judgment that a criminal statute is unconstitutional.

> The key to whether or not declaratory relief is available to determine the constitutionality of a criminal statute is whether the *plaintiff* can demonstrate that a criminal prosecution is imminent or threatened, and that he stands to suffer the loss of either fundamental human rights or property interests if the criminal prosecution is begun and the criminal statute is enforced.

Tucker, 312 N.C. at 350, 323 S.E.2d at 310.

We agree with the Court of Appeals' holding that "the record does establish that the State has threatened plaintiff with prosecution

under the statute if plaintiff hosts a subsequent pigeon shoot." *Malloy*, 146 N.C. App. at 72, 551 S.E.2d at 915. Plaintiff stated in response to interrogatories that the District Attorney "notified the Plaintiff, through counsel, that he considers the conduct at the Dogwood Invitational to be in violation of amended N.C.G.S. § 14-360 and that if given the opportunity, he will prosecute the Plaintiff." This unrefuted allegation clearly satisfies plaintiff's burden to allege imminent or threatened prosecution.

However, the Court of Appeals incorrectly held that plaintiff failed to show that he stands to suffer the loss of either fundamental human rights or property interests if the prosecution is begun and the criminal statute is enforced. *Id.* at 73, 551 S.E.2d at 915-16.

This Court has held that "[a]n Act will be declared unconstitutional and its enforcement will be enjoined when it clearly appears either that property or fundamental human rights are denied in violation of constitutional guarantees." *Roller v. Allen*, 245 N.C. 516, 518, 96 S.E.2d 851, 854 (1957), *quoted in Jernigan*, 279 N.C. at 562, 184 S.E.2d at 264 (applying *Roller* to declaratory judgment action regarding a penal statute). After announcing this right, the Court in *Roller* immediately explained that " '[t]he right to conduct a lawful business, or to earn a livelihood, is regarded as fundamental.' " *Roller*, 245 N.C. at 518-19, 96 S.E.2d at 854 (quoting *McCormick v. Proctor*, 217 N.C. 23, 31, 6 S.E.2d 870, 876 (1940) (Stacy, C.J., concurring)). Thus, if plaintiff can show that the statute's enforcement, if unconstitutional, will deny him his fundamental right to conduct a lawful business or to earn a livelihood, this second criterion is satisfied.

Plaintiff alleges that he receives fifty percent of his income from conducting the pigeon shoots. Furthermore, he alleges that he has expended $500,000 in capital improvements to his land in furtherance of the pigeon shoots. Based on these facts, the pigeon shoots constitute a substantial portion of plaintiff's livelihood. If the statute is, indeed, unconstitutional, then its enforcement will deny plaintiff his fundamental right to conduct a lawful business. Thus, as to plaintiff's claims that the statute is unconstitutionally vague and overbroad, that the statute permits an unconstitutional delegation of legislative power, and that the unconstitutional portions of the statute are not severable from the remainder of the statute, plaintiff has sufficiently alleged facts to establish the second criterion.

The rationale of the Court of Appeals on this issue is unpersuasive. The Court of Appeals held that, if the statute is con-

stitutional, plaintiff's fundamental rights are not violated by enforcement of the statute. Conversely, if the statute is unconstitutional, plaintiff's fundamental rights will be vindicated at trial as the statute will be held unconstitutional. This analysis is not consistent with this Court's language in *Jernigan*, where the Court acknowledged the possibility of granting declaratory judgment where an unconstitutional statute impinges upon a fundamental right. *Jernigan*, 279 N.C. at 562, 184 S.E.2d at 264. Accordingly, we reject the Court of Appeals' rationale.

Moreover, we note that plaintiff has also demonstrated that he stands to suffer the loss of property rights if the statute is enforced. In holding that no property interest is at stake, the Court of Appeals reasoned that the statute did not authorize confiscation or removal of plaintiff's property and, thus, under *Chadwick*, 254 N.C. 389, 119 S.E.2d 158, no property interests are implicated. *Malloy*, 146 N.C. App. at 73, 551 S.E.2d at 915. We disagree with the Court of Appeals' application of *Chadwick*. In *Chadwick*, the plaintiffs owned cattle that roamed unrestrained on property on the Outer Banks not owned by the plaintiffs. *Chadwick*, 254 N.C. at 394, 119 S.E.2d at 162. The plaintiffs challenged a 1957 act allowing for prosecution of the owner of freely roaming cattle and a 1959 act allowing for confiscation of freely roaming cattle. *Id.* at 390, 119 S.E.2d at 159. The Court, noting that the plaintiffs did not own the land where the cattle roamed, held that declaratory judgment as to the 1957 act was improper as that act allowed for prosecution only rather than confiscation of the cattle. *Id.* at 394-95, 119 S.E.2d at 162. The Court then held that declaratory judgment as to the constitutionality of the 1959 Act was appropriate as that act allowed for the immediate confiscation of the cattle without any judicial process. *Id.* at 396, 119 S.E.2d at 163.

Thus, the Court considered the property interest in question to be possession of the cattle. So long as possession of the cattle was not at issue, no property right was at issue. Accordingly, the Court held that declaratory judgment was not appropriate for the 1957 act (which did not authorize seizure of the cattle) but was appropriate for the 1959 act (which allowed seizure of the cattle). Assuming *arguendo* that *Chadwick* mandates that the only property interest which may sustain a declaratory judgment action is the right of possession, such a mandate is limited, upon the facts of that case, to chattel. As the rights of a landowner were not at issue in *Chadwick*, the opinion sheds no light upon whether, in a case involving land, possession of the land is the only property interest

triggering jurisdiction for declaratory judgment or whether the owner's *use* of that land is also a triggering property interest. We hold that usage of one's land is a property interest sufficient to invoke declaratory judgment.

The Court of Appeals further held that this Court's opinion in *Jernigan* mandates that declaratory judgment is appropriate only where the case presents no questions of fact. *Malloy*, 146 N.C. App. at 72, 551 S.E.2d at 915. However, the portion of *Jernigan* cited by the Court of Appeals, and relied upon by defendants in their brief, deals with the impropriety of declaratory judgment actions when prosecution has already begun. *Jernigan*, 279 N.C. at 560-61, 184 S.E.2d at 263. In that context, the Court in *Jernigan* quoted a New York case which stated that the rationale prohibiting declaratory judgment where prosecution has already begun is inapplicable where the " 'crucial question is one of law, since the question of law will be decided by the court in any event and not by the triers of the facts.' " *Id.* (quoting *Bunis v. Conway*, 17 A.D.2d 207, 208, 234 N.Y.S.2d 435, 437 (N.Y. App. Div. 1962)). Thus, while *Jernigan* stands for the proposition that declaratory judgment may be appropriate when prosecution is pending if only questions of law are at issue, it does not create a requirement that all declaratory judgment actions present only questions of law.

In summary, we hold that this case presents an actual controversy between parties with adverse interests. Furthermore, plaintiff has sufficiently alleged imminent prosecution and that he stands to lose fundamental human rights and property interests if the statute is enforced and is later determined to be unconstitutional. Accordingly, the trial court properly denied defendants' motion to dismiss pursuant to Rule 12(b)(1). We, therefore, remand this case to the Court of Appeals for decision on the merits of the underlying action.

REVERSED.

STATE OF NORTH CAROLINA v. JAMES R. WOODS

No. 667A01

(Filed 28 June 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. 686, 554 S.E.2d 383 (2001), affirming an order entered 16 May 2000 by Smith (W. Osmond, III), J., in Superior Court, Caswell County. Heard in the Supreme Court 15 May 2002.

Roy Cooper, Attorney General, by John G. Barnwell, Assistant Attorney General, for the State.

George B. Daniel, P.A. by John M. Thomas, for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. EGAN LARKE TABRON

No. 686PA01

(Filed 28 June 2002)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 147 N.C. App. 303, 556 S.E.2d 584 (2001), finding no error as to one judgment and vacating a second judgment, both judgments entered by Hight, J., on 11 May 2000 in Superior Court, Wake County. Heard in the Supreme Court 14 May 2002.

Roy Cooper, Attorney General, by Kathryn J. Thomas, Assistant Attorney General, for the State-appellant.

John T. Hall for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

CITY OF NEW BERN, A MUNICIPAL CORPORATION v. CARTERET-CRAVEN ELECTRIC MEMBERSHIP CORPORATION

No. 450PA01

(Filed 16 August 2002)

Utilities— competing electric companies—two buildings—premises—separate metering

The trial court erred by concluding that a new veterinary hospital building constructed by an electric customer remained part of an existing adjoining premises for purposes of N.C.G.S. §§ 160A-331 and 160A-332 requiring continued electric service from plaintiff original supplier, because the new building became a new premises initially requiring electric services under the terms of the Electric Territorial Act of 1965 and thus was eligible to receive electric service from a new supplier that the customer chose such as defendant based on the facts that: (1) the new hospital building throughout all relevant periods was and today remains separately metered, and the charges for its electrical service were calculated independently of charges for service to the old hospital building; (2) the question or fact of duplication of lines is irrelevant since from the outset both parties had lines well within three hundred feet of both buildings, with defendant's lines being closest to the new building, and the customer is located within a municipality without a primary supplier; (3) the use of the same address for both premises was merely a request granted by the post office, and the fact that both buildings used the same level of electric service is not material; (4) there is no evidence that the veterinarians constructed an entirely new clinic for the purpose of facilitating a change in electric service, and there is no evidence that defendant took part in any improper action to induce the hospital to switch providers; and (5) written consent under N.C.G.S. § 160A-332(a)(3) is only required for a change in service to the same premises, and there are only two secondary suppliers involved.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 145 N.C. App. 140, 548 S.E.2d 845 (2001), affirming an order for summary judgment entered by Ragan, J., on 8 March 2000 in Superior Court, Craven County. Heard in the Supreme Court 12 February 2002.

Poyner & Spruill LLP, by Nancy B. Essex and Gregory S.Camp; and J. Phil Carlton, for plaintiff-appellee.

Taylor & Taylor, by Nelson W. Taylor, III, for defendant-appellant.

Poyner & Spruill LLP, by Richard J. Rose, on behalf of ElectriCities of North Carolina, Inc., amicus curiae.

North Carolina Electric Membership Corporation, by Susan Barry, Associate General Counsel, and Robert B. Schwentker, General Counsel, amicus curiae.

Adams Kleemeier Hagan Hannah & Fouts, by R. Harper Heckman and Gregory T. Higgins, on behalf of Duke Energy Corporation, amicus curiae.

LAKE, Chief Justice.

The question presented for review in this case is whether a new building constructed by an electric customer remained part of an existing, adjoining "premises" requiring continued electric service from its original supplier, or whether such building became a "premises initially requiring electric service" under the terms of the Electric Territorial Assignment Act of 1965 (the "Electric Act"), and thus was eligible to receive electric service from a new supplier, Carteret-Craven Electric Membership Corporation. *See* N.C.G.S. § 160A-332(a)(3) (2001). The Court of Appeals affirmed the trial court, holding that the new building was part of the existing "premises" and that the existing service provider, the City of New Bern, therefore retained its exclusive right to provide electric service to the electric customer. *City of New Bern v. Carteret-Craven Elec. Membership Corp.*, 145 N.C. App. 140, 145-46, 548 S.E.2d 845, 848-49 (2001). For the reasons set forth below, we conclude otherwise and reverse the decision of the Court of Appeals.

This dispute revolves around the question of which electric service provider maintains the right to provide electric service to the Havelock Animal Hospital in Havelock, North Carolina. Havelock is a municipal corporation located in Craven County, North Carolina, which does not own or operate its own municipal electric system. Plaintiff City of New Bern is a municipal corporation in Craven County that owns and operates a municipal electric distribution system. *See* N.C.G.S. § 160A-312 (2001). Defendant Carteret-Craven Electric Membership Corporation ("CCEMC") is an electric member-

ship cooperative organized pursuant to chapter 117, article 2 of the North Carolina General Statutes, titled "Electric Membership Corporations," and authorized under N.C.G.S. § 117-18 to contract for the sale of electricity. Both plaintiff and defendant serve customers in Havelock, which is located approximately sixteen miles from New Bern.

In the late 1950s, plaintiff began providing electric service to a veterinary clinic located in Havelock at 415 Miller Boulevard and owned at that time by Dr. Rodman Lancaster, D.V.M. Sometime during the 1970s, Dr. William P. McClees, Jr., D.V.M., operated a veterinary clinic at this location and first leased and later bought the building in 1978. Thereafter, Dr. McClees formed a corporation, the Havelock Animal Hospital, with Dr. Larry S. Paul, Jr., D.V.M., to operate the veterinary practice, and a partnership, the Havelock Animal Clinic, to own the real estate used by the hospital.

In 1986, the partnership bought from Vance and Ruth Harrington property located adjacent to the existing hospital. In October 1995, the two veterinarians began construction of a new hospital building located entirely on the land purchased from the Harringtons. Workers completed construction of this building in the autumn of 1996. In order to avoid the expenses of printing new stationery and of changing their advertisements, the clinic received permission from the post office to use the old address, 415 Miller Boulevard, for the new building even though it is actually located at a different, adjoining location, at 413 Miller Boulevard.

Plaintiff City of New Bern provided electric service to the old building. After construction began on the new building, Dr. Paul contacted defendant CCEMC and asked that it provide service to the new building. In March 1996, the hospital filed a membership application with CCEMC, and CCEMC began supplying electric service to the new building. At this time, only some x-ray equipment was located in the new building. During the construction of the new building, the veterinarians continued to work out of their old building. In August 1996, the doctors moved all operations except the kennel into the new building. The doctors moved the kennel in September 1996. Plaintiff discontinued electric service to the old building on 24 September 1996, at the request of the doctors. In February 1997, the doctors demolished the older building. From March until September 1996, the two buildings were separately billed and metered, and the charges for electric power were calculated independently for each of the buildings.

At the time construction of the new clinic began in October 1995, both plaintiff and defendant had existing electric lines located so that the new building was entirely within three hundred feet of each party's lines. The municipality of Havelock has never issued a franchise to any electric company or supplier. Both parties agree that each is a "secondary supplier" for Havelock, as such term is defined under the Electric Act. "Secondary supplier" is there defined as "a person, firm, or corporation that furnishes electricity at retail to one or more consumers other than itself within the limits of a city but is not a primary supplier." N.C.G.S. § 160A-331(5) (2001).

On 20 January 1999, New Bern brought this action against CCEMC, alleging that defendant had violated plaintiff's exclusive statutory right to provide electric service to the hospital. Plaintiff requested a permanent injunction and sought damages. On 18 February 1999, defendant filed its answer to the complaint denying that plaintiff had an exclusive right to serve the hospital. On 21 December 1999, plaintiff filed a motion for summary judgment. On 8 March 2000, the trial court entered an order granting partial summary judgment for plaintiff. In its order, the trial court enjoined defendant from providing electric service to the clinic and ordered it to disconnect its service. The trial court also held that plaintiff should begin service to the clinic within fourteen days from entry of the order. The trial court ordered that plaintiff recover damages from defendant in an amount to be determined at a subsequent trial on the issue.

Defendant filed its notice of appeal on 16 March 2000. On 9 May 2000, the trial court entered an order suspending execution and enforcement of the order granting partial summary judgment until a final decision of this matter on appeal, and defendant posted a bond in the amount of $3,000 for the payment of such costs and damages as might be incurred or suffered by plaintiff if it should be found to be wrongfully injured by that order. The Court of Appeals affirmed the trial court's decision, and this Court subsequently granted defendant's petition for discretionary review.

Thus, the fact-specific question before this Court is whether plaintiff New Bern possesses the exclusive statutory right to provide electric service to the veterinary hospital now operating in its new building. Plaintiff contends that the Court of Appeals correctly determined that both the old and the new hospital buildings constitute the same "premises" for purposes of N.C.G.S. §§ 160A-331 and 160A-332, and therefore plaintiff has the exclusive right to provide electric service to the clinic. Defendant counters that the new hospital building is

part of a separate "premises," and thus, it may provide electric service to the clinic pursuant to the doctors' request. We agree with defendant and hold that under the specific facts of this case, the customer hospital, pursuant to the Electric Act, was free to choose CCEMC to provide its electric service.

Chapter 160A, article 16, part 2 of the Electric Act, entitled "Electric Service in Urban Areas," and codified at N.C.G.S. §§ 160A-331 through 160A-338, governs the provision of electric service within a municipality such as Havelock. The Electric Act was intended to resolve the disputes of electric suppliers with limited litigation. *See State ex rel. Util. Comm'n v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 258, 166 S.E.2d 663, 669 (1969). The language of the Electric Act was carefully chosen to provide certainty with respect to service rights and to promote orderly competition among electric suppliers. *See Domestic Elec. Serv., Inc. v. City of Rocky Mount*, 285 N.C. 135, 141, 203 S.E.2d 838, 842 (1974). The Electric Act, however, does not address specifically all situations—such as the one before the Court today—that may arise between suppliers. Nevertheless, given the intent of the Electric Act, a close examination of the applicable statutes provides guidance for our decision in this unique situation. Section 160A-332(a) provides, in pertinent part:

> (a) The suppliers of electric service inside the corporate limits of any city in which a secondary supplier was furnishing electric service on the determination date . . . shall have rights and be subject to restrictions as follows:
>
> (1) The secondary supplier shall have the right to serve all premises being served by it, or to which any of its facilities are attached, on the determination date.
>
> . . . .
>
> (3) Any premises initially requiring electric service after the determination date which are located wholly within 300 feet of a secondary supplier's lines and wholly within 300 feet of another secondary supplier's lines, but wholly more than 300 feet from the primary supplier's lines, as the lines of all suppliers existed on the determination date, *may be served by the secondary supplier which the consumer chooses*, and no other supplier shall thereafter furnish electric

> service to such premises, except with the written consent of the supplier then serving the premises.

N.C.G.S. § 160A-332(a)(1)(3) (emphasis added).

In the instant case, Havelock is not serviced by a "primary supplier," as defined by section 160A-331(4), because the municipality neither "owns and maintains its own electric system" nor contracts with another entity to do the same. N.C.G.S. § 160A-331(4). The parties agree, however, that they are both "secondary suppliers" for Havelock, as defined by N.C.G.S. § 160A-331(5). They also agree that the applicable "determination date" is 20 April 1965. *See* N.C.G.S. §§ 160A-331(1b), 160A-332(a)(3). As of that date, both plaintiff and defendant maintained power lines within the boundaries of Havelock, and the veterinary clinic was "wholly within 300 feet" of the lines of both electric companies. *See* N.C.G.S. § 160A-332(a)(3).

The only disagreement by the parties, and thus the dispositive question on appeal, is whether the new hospital building is a "premises initially requiring electric service." N.C.G.S. § 160A-332(a)(3). The Electric Act of 1965 defines "premises" as

> the building, structure, or facility to which electricity is being or is to be furnished. Two or more buildings, structures, or facilities that are located on one tract or contiguous tracts of land and are used by one electric consumer for commercial, industrial, institutional, or governmental purposes, shall together constitute one "premises," *except that any such building*, structure, or facility shall not, together with any other building, structure, or facility, constitute one "premises" *if the electric service to it is separately metered and the charges for such service are calculated independently of charges for service to any other building*, structure, or facility.

N.C.G.S. § 160A-331(3) (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); *see also Hlasnick v. Federated Mut. Ins. Co.*, 353 N.C. 240, 244, 539 S.E.2d 274, 277 (2000). Thus, a close examination of the language of section 160A-331(3) is required to determine the rights of the parties in the instant case.

Plaintiff correctly observes that the new hospital building is located on a tract of land contiguous to the land on which the old hospital stood and that it is used by the same electric consumer for the identical commercial purpose. While the definition of the term "premises" states that "[t]wo or more buildings . . . that are located on one tract or contiguous tracts of land and are used by one electric consumer for commercial . . . purposes, shall together constitute one 'premises,' " N.C.G.S. § 160A-331(3), these facts are not dispositive of the issue.

The definition of "premises" also contains a very specific exception: "any such building . . . shall not, together with any other building, . . . constitute one 'premises' *if the electric service to it is separately metered and the charges for such service are calculated independently of charges for service to any other building.*" *Id.* (emphasis added).

The new hospital building throughout all relevant periods was and today remains "separately metered," and the charges for its electrical service were "calculated independently of charges for service" to the old hospital building. *Id.* In March 1996, the hospital filed a membership application with CCEMC, and defendant began electric service to the new building. The veterinarians moved all hospital operations into the new building by September 1996. In February 1997, the doctors demolished the older building. Thus, from March until September 1996, the two buildings were separately metered and billed, and the charges for electric power were calculated independently for each. The hospital falls squarely within the exception to the general definition provided in section 160A-331(3), and thus the old and new hospital buildings do not constitute one "premises" for purposes of the Electric Act.

Having determined that the new hospital building is a separate "premises" under section 160A-331(3), we next examine N.C.G.S. § 160A-332(a)(3) to determine the rights of the customer to choose its electric service provider. Both plaintiff and defendant are "secondary suppliers" for the municipality of Havelock, N.C.G.S. § 160A-331(5), and competition between them for the animal hospital's business is governed by section 160A-332(a)(3).

As of the determination date, both plaintiff and defendant had existing electric lines located "wholly within 300 feet" of the original building. These lines were also in place at the time construction of the new premises began in October 1995. Section 160A-332(a)(3) speaks

in terms of the premises, not the customer, "initially requiring electric service." As the new hospital building constituted a new premises under section 160A-331(3), it "initially requir[ed] electric service" in March 1996, even if the same customer had previously used electricity for an identical commercial enterprise in the old building on the adjoining tract. The veterinarians were therefore free to choose from among competing secondary suppliers, pursuant to section 160A-332(a).

We note that generally the State strictly regulates where electric service providers may do business and which consumers they may serve. Customer choice is very limited in this context. *See, e.g.*, N.C.G.S. § 160A-332. Nevertheless, where the State has chosen to allow consumer choice, such as under section 160A-332(a)(3), " 'the right of a potential user of electric power to choose between vendors of such power seeking his patronage is not lightly to be denied.' " *Domestic Elec.*, 285 N.C. at 143, 203 S.E.2d at 843 (quoting *State ex rel. Util. Comm'n v. Woodstock Elec. Membership Corp.*, 276 N.C. 108, 118, 171 S.E.2d 406, 413 (1970)); *see also Blue Ridge Elec. Membership Corp. v. Duke Power Co.*, 258 N.C. 278, 281, 128 S.E.2d 405, 407 (1962). Here, the veterinarians believed that defendant would provide better electric service for their animal hospital, and under these particular circumstances, they were free to choose this service provider.

Plaintiff's arguments for a contrary conclusion are not persuasive. The fact that New Bern already maintained service to the same address does not change our analysis. As Justice Lake, Sr. stated for this Court soon after the General Assembly passed the Electric Act, "[i]f the Legislature has enacted a statute declaring the right of a supplier of electricity to serve, notwithstanding the availability of the service of another supplier closer to the customer, neither this Court nor the Utilities Commission may forbid service by such supplier merely because it will necessitate an uneconomic or unsightly duplication of transmission or distribution lines." *Lumbee River*, 275 N.C. at 257, 166 S.E.2d at 668. Further, under the circumstances of this case, the question or fact of duplication of lines is irrelevant because from the outset both parties had lines well within three hundred feet of both buildings, with defendant's lines being closest to the new building.

Additionally, the use of the same address, 415 Miller Boulevard, for both premises was merely a request granted by the post office and does not change our conclusion. Customers already knew of the old

address and location of the hospital, and continued use of the original street number merely allowed the veterinarians to maintain their same stationery and advertisements. This small matter of convenience should not be viewed as supportive of the clinic's two buildings being one "premises" within the meaning of the statute. Nor is the fact that both buildings used the same level of electric service material to our analysis.

There also is no evidence that the veterinarians constructed an entirely new clinic for the purpose of facilitating a change in electric service. The doctors stated that a new building was necessary because of the increased demands of their practice and the inadequacy of the old building. In fact, the construction of a new building or facility, a large and expensive project, weighs heavily in favor of defendant's position. Such a project would not be undertaken merely to gain a choice in electric service. There is no evidence that defendant took part in any improper action to induce the hospital to switch providers. In fact, Dr. Paul contacted CCEMC regarding service. Furthermore, the separate metering of Havelock Animal Hospital's two buildings cannot be considered an attempt to circumvent the Electric Act. In light of the fact that the new premises initially required service in March 1996, and that the charges for this service could be calculated separately, the customer was within its rights in this case to obtain separate metering. Important to this conclusion is the fact that all services performed in the old building were moved to the new hospital, and the old building was demolished. The new building thus required separate metering because of the old building's planned destruction after the completion of the hospital's move.

Finally, plaintiff asserts that under subsections 160A-332(a)(3) through (6), a secondary supplier has no right, without prior written consent from the existing supplier, to commence service to a customer who is already receiving service from another supplier who has the right to provide service under the Electric Act. Here, plaintiff did not give its written consent. Written consent, however, is required only for a change in service to the same premises. N.C.G.S. § 160A-332(a)(3). In the instant case, there are only two secondary suppliers involved, and section 160A-332(a)(3) clearly governs our analysis.

While it may be true that the statutes under the Electric Act of 1965 do not expressly address the exact situation before the Court today, we believe that our interpretation of the applicable provisions best preserves the overall intent of the General Assembly, as

expressed in the Electric Act, and protects the interests of electric providers as well as customers. Given the very fact-specific nature of the dispute before us, this situation will not arise often or otherwise threaten the delicate balance struck by the General Assembly when it enacted the Electric Act of 1965. Put simply, the time and expense of constructing a new building and demolishing an old one would rarely, if ever, be undertaken merely to effect a change of the electric service provider.

We therefore conclude that the Havelock Animal Hospital was entitled to choose defendant CCEMC as its electric service provider. The customer is located within a municipality without a primary supplier, and the two secondary suppliers involved have maintained distribution lines wholly within three hundred feet of the customer as of the applicable determination date. When such a customer constructs a new building that is separately metered and charges separately calculated, and then demolishes the old building, the new building must be considered a new premises under the Electric Act of 1965, and such customer is free to choose the secondary supplier that it believes will provide the best electric service to the new premises. For the foregoing reasons, the decision of the Court of Appeals is reversed, and this case is remanded to that court for further remand to the trial court for disposition in accord with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. WILLIAM ANTHONY HEARST

No. 684PA01

(Filed 16 August 2002)

Probation and Parole; Sentencing— probation revocation—activation of suspended sentence—time served credit for attending IMPACT

The trial court erred in a probation violation case activating a suspended sentence of six to eight months by refusing to credit the eighty-one days defendant spent attending the Intensive Motivational Program of Alternative Correctional Treatment (IMPACT), and the case is remanded because: (1) N.C.G.S. § 15-196.1 allows credit for commitment to or confine-

ment in a state or local correctional, mental, or other institution; (2) defendant's decision to either attend IMPACT or be sentenced to a longer period of incarceration cannot be found to be voluntary; (3) the conditions at IMPACT resembled imprisonment even though there are no locked gates or fences; and (4) trainees had no control over any daily activities while at IMPACT except for thirty minutes a day, and a defendant placed on house arrest or one required to visit a probation officer has no such restrictions.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 147 N.C. App. 298, 555 S.E.2d 357 (2001), affirming a judgment entered 10 August 2000 by Winner, J., in Superior Court, Buncombe County. Heard in the Supreme Court 15 May 2002.

Roy Cooper, Attorney General, by Christopher W. Brooks, Assistant Attorney General, for the State.

William H. Leslie, Assistant Public Defender, for defendant-appellant.

N.C. Prisoner Legal Services, Inc., by Kari L. Hamel and Susan H. Pollitt, amicus curiae.

LAKE, Chief Justice.

On 7 June 1998, defendant, William Anthony Hearst, was indicted for felony possession with intent to sell and deliver a controlled substance. He was also indicted for the misdemeanors of resisting a public officer, assault on a government official, no operator's license, and hit and run property damage. On 13 July 1999, defendant pled guilty to the charges. The trial court determined that defendant's prior record level was II and sentenced defendant in the presumptive range of six to eight months. The trial court suspended defendant's sentence, placed him on supervised probation for sixty months, and assigned him to the Intensive Supervision Program for twelve months.

On 11 August 1999, defendant's probation officer filed a probation violation report. On 26 August 1999, the trial court modified defendant's terms of probation and ordered him to attend the Intensive Motivational Program of Alternative Correctional Treatment (IMPACT). Defendant spent eighty-one days at IMPACT and successfully completed the program on 18 November 1999. Defendant's pro-

bation officer filed two more violation reports, on 21 February and 29 February 2000. On 10 August 2000, the trial court ordered that defendant's probation be revoked and that the suspended sentence of six to eight months be activated. Pursuant to N.C.G.S. § 15-196.1, defendant requested both the eighty-one days spent at IMPACT and twenty-five days spent in prior confinement for the charges be credited against his sentence. The trial court allowed the twenty-five days' credit but denied credit for the eighty-one days.

Defendant appealed to the Court of Appeals, which affirmed the trial court's denial of credit toward defendant's activated sentence for the eighty-one days spent at IMPACT. Defendant subsequently filed a notice of appeal with this Court based upon a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1) and a petition for discretionary review pursuant to N.C.G.S. § 7A-31(c). On 31 January 2002, this Court dismissed *ex mero motu* defendant's notice of appeal but allowed his petition for discretionary review.

In defendant's first assignment of error, he contends the Court of Appeals erred in affirming the trial court's denial of credit toward defendant's activated sentence for the eighty-one days spent at IMPACT. Specifically, defendant argues that he was "committed to or confined in a state or local correctional, mental or other institution" while at IMPACT and that he was therefore entitled to the credit. *See* N.C.G.S. § 15-196.1 (2001). We agree.

N.C.G.S. § 15-196.1, titled "Credits Allowed," is the statute which controls the trial court's application of credit for time served in sentencing defendants upon probation revocation. This statute provides:

> The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, *committed to or in confinement in any State or local correctional, mental or other institution* as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post-release supervision revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject.

N.C.G.S. § 15-196.1 (emphasis added).

In *State v. Farris*, 336 N.C. 552, 444 S.E.2d 182 (1994), this Court interpreted N.C.G.S. § 15-196.1 in regard to whether time served as a special condition of probation should be credited against a suspended sentence activated upon revocation of probation. The trial court in that case placed the defendant on special probation pursuant to N.C.G.S. § 15A-1351 with an active sentence of ninety days. *Id.* at 553, 444 S.E.2d at 183. N.C.G.S. § 15A-1351 allows a trial court to order a defendant to submit to a period or periods of imprisonment in a local confinement facility or in the custody of the Department of Correction as a condition of special probation. N.C.G.S. § 15A-1351(a) (2001). This Court rejected the State's argument that imprisonment imposed as a condition of special probation is like any other probation condition and thus should not be credited against an activated sentence. *Farris*, 336 N.C. at 555, 444 S.E.2d at 184. In *Farris*, we concluded that the language of N.C.G.S. § 15-196.1 demonstrated "the legislature's intention that a defendant be credited with all time defendant was in custody and not at liberty as the result of the charge." *Id.* at 556, 444 S.E.2d at 185.

The State contends, in the instant case, that defendant was not "committed to or confined" while in IMPACT and thus was not entitled to credit. Specifically, the State argues that statutory changes made to the IMPACT program in December 1998 demonstrate the legislature's intent that the IMPACT program not be a period of confinement or imprisonment. The State further contends that based upon this Court's opinion in *Farris*, the key issue is whether defendant was "in custody" while in IMPACT. According to the State's argument, the nature of the program itself, and defendant's testimony at his probation violation hearing, demonstrate he was not "in custody" and therefore was not entitled to jail credit.

N.C.G.S. § 15A-1343(b1) lists special conditions of probation. One of the special conditions of probation includes the IMPACT program. *See* N.C.G.S. § 15A-1343(b1)(2a) (2001). Under the original language in N.C.G.S. § 15A-1343(b1), a defendant ordered to attend IMPACT must "submit to a period of confinement in a facility operated by the Department of Correction for a minimum of 90 days or a maximum of 120 days under special probation . . . with the Intensive Motivational Program of Alternative Correctional Treatment." N.C.G.S. § 15A-1343(b1)(2a) (amendment effective 1 December 1998).

In a section of the Operations and Capital Improvement Appropriations Act of 1998 titled "Convert IMPACT to Residential

Program," the North Carolina General Assembly amended the IMPACT program. Act of Oct. 30, 1998, ch. 212, sec. 17.21, 1997 N.C. Sess. Laws 937, 1,200 (amending N.C.G.S. §§ 15A-1343(b1) and 15A-1343.1). The amended version of N.C.G.S. § 15A-1343(b1)(2a) requires a defendant to "[s]ubmit to a period of residential treatment" in the IMPACT program, rather than "a period of confinement." The remainder of the statute did not change in any substantial form.

The legislature also amended N.C.G.S. § 15A-1343.1, which sets out criteria for selecting and sentencing defendants to IMPACT. *Id.* The amendment added language stating that IMPACT "shall be a residential program" as defined by N.C.G.S. § 15A-1340.11(8). This statute defines "residential program" as a program where a defendant "is *required* to reside in a facility for a specified period and to participate in activities such as counseling, treatment, social skills training, or employment training, conducted at the residential facility or at other specified locations." N.C.G.S. § 15A-1340.11(8) (2001) (emphasis added).

On appeal, the Court of Appeals agreed with the State and concluded that the "General Assembly's action in converting IMPACT to a residential program . . . acknowledged that participation in IMPACT is a lesser sanction than commitment to or confinement in a state institution." *State v. Hearst*, 147 N.C. App. 298, 302, 555 S.E.2d 357, 360 (2001). In reaching this determination, the Court of Appeals noted that it recently considered N.C.G.S. § 15-196.1 in relation to house arrest and held that time spent under house arrest does not constitute confinement and is not entitled to credit. *Id.* at 301, 555 S.E.2d at 359 (citing *State v. Jarman*, 140 N.C. App. 198, 206, 535 S.E.2d 875, 880 (2000)). The Court of Appeals also found that defendant was "no more entitled to credit for time spent in the IMPACT program than he is for time spent during required visits with his probation officer." *Hearst*, 147 N.C App. at 303, 555 S.E.2d at 361. Therefore, based upon the above determinations, the Court of Appeals held that the IMPACT program was not "sufficiently incarcerative as to be 'custodial' " and that defendant was not entitled to credit against his active sentence. *Id.* We disagree.

" 'Criminal statutes are to be strictly construed against the State.' " *State v. Raines*, 319 N.C. 258, 263, 354 S.E.2d 486, 489 (1987) (quoting *State v. Glidden*, 317 N.C. 557, 561, 346 S.E.2d 470, 472 (1986)). "The intent of the legislature controls the interpretation of a

statute." *State v. Green*, 348 N.C. 588, 596, 502 S.E.2d 819, 824 (1998), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999). "Words in a statute generally must be construed in accordance with their common and ordinary meaning, unless a different meaning is apparent or clearly indicated by the context." *Raines*, 319 N.C. at 262, 354 S.E.2d at 489 (citing *State v. Koberlein*, 309 N.C. 601, 605, 308 S.E.2d 442, 445 (1983)). In addition, in *Raines*, this Court stated the following:

> "The object in construing penal, as well as other statutes, is to ascertain the legislative intent. . . . The words must not be narrowed to the exclusion of what the legislature intended to embrace. . . . When the words . . . include various classes of persons, there is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and object of the legislature. The rule of strict construction is not violated by permitting the words of [a] statute to have their full meaning, or the more extended of two meanings, . . . but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent."

Raines, 319 N.C. at 263, 354 S.E.2d at 489-90 (quoting *United States v. Hartwell*, 73 U.S. 385, 395-96, 18 L. Ed. 830, 832-33 (1867)).

> "The canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose. . . . Nor does it demand that a statute be given the 'narrowest meaning'; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers."

Raines, 319 N.C. at 263-64, 354 S.E.2d at 490 (quoting *United States v. Brown*, 333 U.S. 18, 25-26, 92 L. Ed. 442, 448 (1948)).

Although the legislature changed the IMPACT program's designating caption and terminology from "confinement" to submission to "residential treatment," the 1998 amendments did not make any substantive changes to the program itself. While we acknowledge that the wording used in the title of an act can provide useful guidance, we hold that this change in terminology is merely cosmetic and does not clearly demonstrate a legislative intent that the IMPACT program should not qualify for credit under N.C.G.S. § 15-196.1.

We thus turn our analysis to whether defendant's time in IMPACT constitutes confinement under N.C.G.S. § 15-196.1. After interpreting the plain meaning of N.C.G.S. § 15-196.1 and based upon our decision in *Farris*, we conclude that defendant was "in custody and not at liberty" and therefore was "in confinement" while at IMPACT.

Based upon information provided in the September 2000 Department of Correction's IMPACT brochure, the Department of Correction's Boot Camp began in Hoffman, North Carolina, with a ninety bed facility on 30 October 1989. In 1993, the General Assembly established a one hundred eighty bed facility in Morganton, North Carolina, now known as "IMPACT West." The General Assembly also approved the expansion of the program in Hoffman to a one hundred eighty bed facility, now known as "IMPACT East." The stated mission of IMPACT in this brochure is "to instill self-confidence, discipline and the work ethic by the administration of a strictly regimented paramilitary system." IMPACT "provides the opportunity for youthful offenders to develop positive, responsible behavior." Only convicted youthful offenders who meet the program's criteria may be ordered to attend IMPACT. *See* N.C.G.S. § 15A-1343.1 (2001). Upon successfully completing the program, defendants are discharged from IMPACT and released into the custody of their probation officers to complete their probation.

The conditions of confinement at IMPACT greatly differ from those of a parolee or a defendant on house arrest. Defendants held at an IMPACT facility, referred to as trainees, relinquish all their freedom to the IMPACT staff composed of Department of Correction officers. Daily activities are strictly regimented from 4:30 a.m. wake-up until 8:30 p.m., when trainees are given thirty minutes of free time before lights out at 9:00 p.m. The daily routine involves physical training, marching, cleaning rooms, and eight hours of work or drills. A majority of the work involves clearing land or cleaning property for federal, state, and local government agencies. Five nights a week, trainees are required to participate in two and one half hours of school, either GED instruction or a life-skills program.

During his probation violation hearing, defendant testified as to his experiences and the conditions at IMPACT. He testified that he voluntarily attended IMPACT, that the facility was not locked, that it did not have a fence around it, and that he could leave at any time. Defendant also gave testimony about the average day in the program. The State contends this testimony demonstrates that defendant was not in the custody of the State. We disagree. Regardless of defendant's

testimony and contrary to the State's argument, we conclude that this environment does present a custodial situation wherein defendant was denied his liberty.

In this case, defendant was "ordered" to attend and thus was required to "[s]ubmit to a period of residential treatment in the Intensive Motivational Program of Alternative Correctional Treatment (IMPACT)." N.C.G.S. § 15A-1343(b1)(2a). If defendant had not attended IMPACT as ordered, he would have been in violation of the special conditions of probation and subject to having his sentence activated. *See generally* N.C.G.S. § 15A-1344(a), (d), (e) (2001). As discussed above, the Court of Appeals likened defendant's attending IMPACT to a defendant's required visits with his probation officer and determined that both are voluntary conditions of probation. *Hearst*, 147 N.C. App. at 302, 555 S.E.2d at 360. The Court of Appeals concluded that defendant was not required to participate in IMPACT and was not required to meet with his probation officer. However, the Court of Appeals noted that if he had failed to do either, defendant would have been subject "to activation of his suspended sentence." *Id.* at 302-03, 555 S.E.2d at 360. In its brief, the State agrees with the Court of Appeals' conclusion that if defendant had failed to attend IMPACT, he would have been subject "to activation of his active sentence."

Although IMPACT is reported to be a ninety-eight day program on average, we note that defendant successfully completed the program in eighty-one days. The trial court sentenced defendant to a minimum of six months' imprisonment and a corresponding maximum of eight months' imprisonment and then suspended this sentence subject to terms of probation. Upon his violation of these terms, defendant was ordered to IMPACT in lieu of outright revocation and activation, which subsequently occurred. Thus, at the time of his first violation, defendant had the choice of either (1) attending IMPACT for the requisite period for completion of the program and then completing the rest of his probation, or (2) serving his active sentence of six to eight months. Under these circumstances, defendant's decision to either attend IMPACT or be sentenced to a longer period of incarceration cannot be found to be "voluntary" in the ordinary sense of that term as the State contends and the Court of Appeals concluded. In addition, while there are no locked gates or fences, the conditions at IMPACT resemble imprisonment. Trainees have no control over any daily activities while at IMPACT, except for thirty minutes a day, as demonstrated by defendant's testimony and the IMPACT brochure.

A defendant placed on house arrest or one required to visit a probation officer has no such restrictions. While sentenced to house arrest, a defendant is confined to his or her home, but still maintains a large amount of liberty. In fact, all such defendants are free to do as they please in their own homes. They are allowed to associate with family and friends, eat when and what they want, engage in all their normal home activities, and sleep when they want in the comfort of their own homes. Likewise, there exists substantial liberty in regard to required visits with a probation officer. A defendant meets with his or her probation officer for only a brief amount of time during a day over a specified period. Other than those required visits, a defendant has full freedom of association, activity and movement as long as such does not violate any other condition of probation.

While trainees may be "free to leave" IMPACT, those who fail or withdraw from the program face the probability of returning to prison. The State stated in oral argument that failure to complete IMPACT is a probation violation, which results in the defendant being returned to court for modification of the trial court's original order. *See generally* N.C.G.S. § 15A-1344(c). Defendant was aware of the consequences of leaving or quitting IMPACT. He testified during his probation violation hearing that if he left the facility, he "would have [to come] back to court for the contempt of court charge." As the State acknowledged in its brief, modification of a judgment based on a probation violation often results in a defendant facing activation of his or her suspended sentence. *See generally* N.C.G.S. § 15A-1344(d).

In many respects, a defendant ordered to submit to the IMPACT program has less freedom or liberty than a defendant serving an active sentence in a standard correctional facility. "Confinement" is defined as "the act of imprisoning or restraining someone; the state of being imprisoned or restrained," while "custody" is defined as "the care and control of a thing or person for inspection, preservation, or security." *Black's Law Dictionary* 390 (7th ed. 1999). *Black's Law Dictionary* also specifically defines types of custody such as "penal custody" and "physical custody." *Id.* "Penal custody" is defined as "custody intended to punish a criminal offender," and "physical custody" is defined as "custody of a person . . . whose freedom is directly controlled and limited." *Id.* The requirements and demands of the IMPACT program fully meet these definitions, and we thus conclude that defendant was "in confinement" or "custody" while attending IMPACT, within the ordinary and reasonable meaning of each of those terms as they are used in N.C.G.S. § 15-196.1. Defendant was

therefore entitled to credit for the eighty-one days he spent in the program. *See* N.C.G.S. § 15-196.1.

Defendant contends in his second assignment of error that failure to credit time spent attending IMPACT is in violation of N.C.G.S. § 15A-1340.17 because the sentence served will exceed the statutory sentence allowed; and in his third assignment of error, he argues that failure to credit time spent attending IMPACT violates guarantees in the United States Constitution and the North Carolina Constitution against double jeopardy. In view of our determination that time spent attending IMPACT should be credited against a defendant's activated sentence, we decline to address these issues.

In summary, based upon our holding in *Farris*, and pursuant to N.C.G.S. § 15-196.1, defendant must be credited with "all time [he] was in custody and not at liberty as the result of the charge." *Farris*, 336 N.C. at 556, 444 S.E.2d at 185. Defendant was "in custody and not at liberty" while participating in the IMPACT program. *Id.* Thus, we conclude that the trial court's refusal to credit the eighty-one days defendant spent attending IMPACT was error. The decision of the Court of Appeals is therefore reversed, and this case is remanded to that court for further remand to the trial court for disposition in accord with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. KEITH BUTLER

No. 653A01

(Filed 16 August 2002)

Drugs— trafficking in cocaine—sufficiency of evidence—constructive possession

The trial court did not err by denying defendant's motion to dismiss the charges of trafficking in cocaine based on plenary evidence of additional incriminating circumstances tending to establish defendant's constructive possession of cocaine found in a taxi under the driver's seat approximately twelve minutes after defendant exited the taxi, including the facts that: (1) defendant, carrying a single small bag, got off a bus that had originated in a

city deemed to be a source for narcotics; (2) upon seeing narcotic officers defendant began to act suspicious by walking very briskly through the bus terminal after making eye contact with the officers, defendant repeatedly glanced back at the officers who had begun to follow him, and defendant again paused to look back at the officers before hurrying into a taxi cab parked outside the terminal; (3) defendant urged the cab driver to leave immediately, and defendant appeared nervous and fidgety when the officers approached the cab to ask defendant to step out with his bag; (4) the cab driver testified that he felt defendant struggling and pushing the back of the cab driver's seat, and the driver testified that defendant was the only person who had been in a position to place the package in that location; and (5) defendant led the officers away from the vehicle and to the terminal doors in order to be questioned, and defendant made no effort to obtain another cab despite the urgency with which he had previously tried to depart the terminal.

Justice ORR dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 147 N.C. App. 1, 556 S.E.2d 304 (2001), finding no error in judgments entered 29 October 1998 by Jones (Abraham Penn), J., in Superior Court, Wake County. The case was calendared for argument in the Supreme Court 17 April 2002, but was determined on the briefs without oral argument upon defendant's motion for the Court to decide the case pursuant to N.C. R. App. P. 30(f)(1).

Roy Cooper, Attorney General, by Claud R. Whitener, III, Assistant Attorney General, for the State.

John T. Hall for defendant-appellant.

BUTTERFIELD, Justice.

Defendant Keith Butler was indicted on 7 July 1998 for trafficking in cocaine by transportation of twenty-eight grams or more but less than two hundred grams of cocaine and trafficking in cocaine by possession of twenty-eight grams or more but less than two hundred grams of cocaine. The trial court consolidated the charges for trial, and the jury found defendant guilty of both offenses. Thereupon, the trial court sentenced defendant to two consecutive terms of thirty-five to forty-two months' imprisonment. From the judgments entered

upon his convictions, defendant appealed to the Court of Appeals, assigning error, *inter alia*, to the trial court's failure to dismiss the charges for lack of sufficient evidence. The Court of Appeals, in a split decision, affirmed the trial court. Defendant appeals to this Court as of right based on the dissent.

At trial, the State presented evidence tending to show the following facts. Detectives D.C. Murphy and K.A. Halsaber, who were assigned to the Interdiction Unit of the Drug Task Force of the Raleigh Police Department, were surveilling the Greyhound Bus terminal on Jones Street on the morning of 20 January 1998. The objective of the Interdiction Unit, according to Murphy's testimony, was to intercept drugs entering Raleigh from "source" cities, those cities where drugs are known to be prevalent. On this occasion, the officers were watching the passengers of a bus that had just arrived from New York City, a source city, and that had as its final destination Miami Beach, which is also a source city. Defendant exited the bus carrying only a small duffel bag and quickly drew the attention of the officers when he began to behave in a suspicious manner. Murphy testified that defendant stopped when he reached the entrance to the terminal, turned around to look at the officers, paused momentarily, and then proceeded to walk "very briskly" through the terminal. The officers followed, and as defendant pressed his way to the exit, he looked back several times, making eye contact with the officers. Murphy stated that when defendant reached the exit, he hesitated, glanced back at the officers again, and then hurried through the door.

Christopher Thomas, a driver for the Checker Cab Company, was parked outside the terminal approximately two feet from the exit. Thomas testified that defendant hopped into the backseat of the cab directly behind the driver's seat; slammed the door; and yelled, "let's go, let's go, let's go." Before Thomas could drive off, however, the officers exited the terminal and signaled him not to move. The officers then identified themselves to defendant and asked him to get out of the vehicle with his bag, which was resting on the seat beside him. Murphy described defendant's demeanor at that time as "very nervous" and "fidgety." Further, Murphy noted that defendant was "very slow" to exit the vehicle and that he bent down and reached toward the driver's seat prior to opening the door. Murphy testified that he and Halsaber were able to "see just barely the top of [defendant's] head and part of his shoulder." Defendant's hands, according to Murphy, were hidden from the officers' view. Regarding defendant's movements, Thomas testified that he felt defendant "struggling"

behind him and "pushing the back of [Thomas'] seat" before opening the door.

Upon exiting the cab, and without being instructed to do so, defendant walked over to the front doors of the terminal, drawing the officers away from the vehicle. Murphy testified that this was unusual, in that the officers would typically begin such an interview standing right next to the cab so that the subject of the interview could get back into the cab and leave if the officers saw no need for further questioning.

While standing outside the terminal doors, the officers briefly questioned defendant concerning his name, point of origin, and destination. They then asked defendant to accompany them to a private room inside the terminal and, with defendant's permission, conducted a pat down of his person and a search of his duffel bag. Finding no contraband in defendant's possession, the officers told defendant he was free to leave, which he did. Rather than attempt to secure another taxicab, however, defendant left the terminal on foot.

Meanwhile, Thomas picked up another fare, a man Thomas recognized from having previously provided him taxi services. Thomas testified that the man entered the cab through the rear passenger door and occupied the rear passenger seat throughout the trip. Thomas said that he drove the man approximately six or seven blocks to the Wake County Public Safety Building. Additionally, Thomas stated that at no time during the ride did he observe or otherwise detect the man make any movements toward the driver's side of the cab. After dropping the man at his destination, Thomas returned directly to the bus terminal and did not pick up any other fares along the way. The entire trip, according to Thomas, lasted approximately ten minutes.

When Thomas returned to the terminal, Detective Murphy approached and asked to search his cab. Thomas consented, and Murphy discovered a package under the driver's seat, wrapped in a white napkin and secured with Scotch tape. The package contained a white powdery substance later identified as cocaine. Murphy asked Thomas when he had last cleaned the cab. Thomas stated that he had cleaned and vacuumed the cab prior to beginning his shift and that defendant was his first fare of the morning. According to Thomas, the cocaine had not been under the driver's seat when defendant entered the cab.

Shortly thereafter, the officers found defendant walking northbound on Glenwood Avenue, approximately ten to twelve blocks away from the terminal. They arrested defendant, and a search of his person revealed a small sum of money, a pager, and a cell phone.

By his sole assignment of error, defendant contends that the Court of Appeals erred in affirming the trial court's denial of his motion to dismiss the charges of trafficking in cocaine. Defendant argues that the evidence was insufficient to demonstrate beyond a reasonable doubt that he was in either actual or constructive possession of any contraband substance. For the reasons that follow, we must disagree.

When considering a motion to dismiss, the trial court's inquiry is limited to a determination of "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). To be substantial, the evidence need not be irrefutable or uncontroverted; it need only be such as would satisfy a reasonable mind as being "adequate to support a conclusion." *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001). For purposes of a motion to dismiss, evidence is deemed less than substantial if it raises no more than mere suspicion or conjecture as to the defendant's guilt. *State v. Wilson*, 354 N.C. 493, 521, 556 S.E.2d 272, 290 (2001).

In ruling on a motion to dismiss, the trial court must examine the evidence in the light most beneficial to the State, drawing all reasonable inferences therefrom in favor of the State's case. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 256 (2002). "The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility." *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001), *cert. denied*, — U.S. —, 153 L. Ed. 2d 162 (2002). "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). This is true, even if the evidence likewise permits a reasonable inference of the defendant's innocence. *State v. Grigsby*, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000).

With regard to possession of contraband, this Court recently set forth the applicable law as follows:

"[I]n a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials." *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986). Proof of nonexclusive, constructive possession is sufficient. *Id.* Constructive possession exists when the defendant, "while not having actual possession, . . . has the intent and capability to maintain control and dominion over" the narcotics. *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986). "Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). "However, unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred." [*State v.*] *Davis*, 325 N.C. [693,] 697, 386 S.E.2d [187,] 190 [(1989)]; *see also* [*State v.*] *Brown*, 310 N.C. [563,] 569, 313 S.E.2d [585,] 588-89 [(1984)].

State v. Matias, 354 N.C. 549, 552, 556 S.E.2d 269, 270-71 (2001).

In *Matias*, a majority of this Court concluded that the State's evidence was sufficient to establish the defendant's constructive possession of cocaine and that the trial court properly denied the defendant's motion to dismiss the charge. The evidence showed that while patrolling an apartment complex, two law enforcement officers detected an odor of marijuana emanating from a vehicle in the parking lot. The officers placed the driver under arrest and then instructed the remaining three occupants to get out of the vehicle. During a search of the vehicle, the officers discovered a clear plastic bag that contained marijuana and " 'a small piece of tin foil that was kind of balled up.' " *Id.* at 551, 556 S.E.2d at 270. Inside the foil was cocaine. The officers found the bag between the seat pads of the right rear seat, where the defendant had been sitting. According to the testimony of the officers, the "defendant was the only person who could have placed the plastic bag in the space between the seat pads." *Id.* While conducting the search, the officers also discovered rolling papers and observed marijuana seeds in the carpeting.

In concluding that there were additional incriminating circumstances sufficient to support a finding that the defendant was in constructive possession of the cocaine, the majority relied on the following: (i) that the "defendant had been in the car approximately

twenty minutes," (ii) that "there was an odor of marijuana in the car," (iii) that there were "marijuana seeds and rolling papers inside the car," (iv) that the package of narcotics was discovered between the pads of the defendant's seat, and (v) that there was testimony from an officer that the "defendant was the only person in the car who could have shoved the package containing the cocaine into the crease of the car seat." *Id.* at 552, 556 S.E.2d at 271. The majority held that, in light of this evidence, "a juror could reasonably determine defendant knew *drugs* were in the car." *Id.* (emphasis added).

The dissent, however, quarreled with the notion that the evidence supported a reasonable inference that the defendant knew of the presence of the cocaine. Unlike the marijuana, the dissent reasoned, the cocaine was odorless, and there was no conspicuous evidence of its use inside the vehicle. Therefore, the dissent took the position that the only incriminating circumstance tending to support the defendant's constructive possession of the cocaine was his proximity to where the package was hidden. According to the dissent, this evidence was insufficient to sustain the defendant's conviction for possession of cocaine.

In the case *sub judice*, the additional incriminating circumstances tending to establish defendant's constructive possession of the cocaine were plenary. Taken in the light most favorable to the State and drawing all reasonable inferences in favor of the State, the evidence showed that defendant, carrying a single small bag, alighted from a bus that had originated in New York City, a city deemed to be a source for narcotics. Upon seeing the narcotics officers, defendant began to act suspiciously. According to Detective Murphy, defendant paused, made eye contact with the officers, and then proceeded to walk "very briskly" through the terminal. As he did so, defendant repeatedly glanced back at the officers, who had begun to follow him. When defendant reached the front exit, he paused again to look back at the officers before hurrying into Thomas' cab, which was parked outside the terminal. Defendant slammed the door and urged Thomas to leave immediately, shouting, "let's go, let's go, let's go."

Further, Murphy testified that defendant appeared "very nervous" and "fidgety" when the officers approached the cab and asked him to step out with his bag. Murphy stated that defendant was "very slow" to get out of the cab and that, prior to opening the door, he bent over and reached toward the driver's seat. While in this position, defendant's hands were concealed from the officers' view. Thomas testified that he felt defendant "struggling" behind him and "pushing the back

of [Thomas'] seat." The package of cocaine was discovered under the driver's seat approximately twelve minutes later, and according to Thomas, defendant was the only person who had been in a position to place the package in that location.

The evidence further tended to show that defendant led the officers away from the vehicle and to the terminal doors in order to be questioned. Additionally, when the officers had finished their questioning and had allowed defendant to leave, he did so on foot. Despite the urgency with which he had previously tried to depart the terminal, defendant made no effort to obtain another cab, even though several available cabs were parked outside the terminal. From this evidence, a juror could reasonably infer that defendant possessed the cocaine when he exited the bus and that he stashed it under the driver's seat of the cab when the officers approached him for questioning. Thus, we conclude that there were sufficient indicia of defendant's constructive possession to warrant submission of the trafficking charges to the jury.

Defendant concedes in his brief that "[his] actions, with no more showing, [were] arguably consistent with being guilty of the crimes with which he was charged." He contends, however, that additional facts show his actions also to be "consistent with those of a totally innocent bus passenger." Specifically, defendant argues that his unusual behavior—his nervousness and the slow, deliberate manner in which he exited the cab—can be explained by the fact that he had recently been shot in the buttocks. Although defendant was certainly free to argue this theory to the jury, these additional facts make the State's evidence no less sufficient to send to the jury. Accordingly, we hold that the trial court properly denied defendant's motion to dismiss and that the Court of Appeals properly found no error in the trial court's ruling.

For the foregoing reasons, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice ORR dissenting.

In *State v. Matias*, I joined Justice Butterfield's dissent on the grounds that the evidence was insufficient to support sending the case to the jury based upon "constructive possession" of the discovered drugs. There, the majority concluded that "defendant was the

only person in the car who could have shoved . . . the cocaine into the crease of the car seat." 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001).

The case before us now fails to meet even the minimal standard established by the majority in *Matias*, and I therefore respectfully dissent and lament Justice Butterfield's change of view. In this case, there are at least two other individuals who had an equally good, if not better, opportunity to place the drugs under the driver's seat in the taxi. First, and obviously foremost, was the taxi driver who was in possession and control of the taxi throughout the relevant time frame. The other was the passenger who drove away in the taxi after defendant had exited the vehicle. I note, too, that defendant was in the vehicle for less than a minute, a considerably shorter period than either of the other two occupants, and that he was never alone.

The majority places great weight on the "suspicious" facts surrounding defendant's arrival from New York City, e.g., his nervousness and the like. While those circumstances may serve to demonstrate that the stop and subsequent search were reasonable police actions, they do not satisfy the evidentiary criteria necessary to establish constructive drug possession which, in the absence of a showing of exclusive control, requires the State to produce other incriminating evidence tying a defendant to the discovered contraband. *See State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989). Heretofore, this Court has not addressed whether suspicious conduct that may justify a search may also serve as sufficient "other incriminating evidence" for purposes of establishing constructive possession of drugs in situations where a suspect had neither an ownership interest in the premises nor exclusive control of such premises. However, other courts have considered suspicious conduct in the context of constructive possession, with the most compelling case being decided by the Virginia Supreme Court:

> The mere finding of the [contraband] upon the premises occupied by [the accused] and another created no presumption of law that [the accused] was in the possession of it . . . . There was no positive evidence of the possession of it by him. The circumstances were suspicious, to say the least; but circumstances of suspicion, no matter how grave or strong, are not proof of guilt sufficient to support a verdict of guilty. The actual commission of the crime by the accused must be shown by evidence beyond a reasonable doubt to sustain his conviction.

Powers v. Commonwealth, 182 Va. 669, 675-76, 30 S.E.2d 22, 25 (1944) (holding that mere suspicions regarding the defendant's conduct failed as a matter of law to link him to illegal substances that were discovered in a place not under his exclusive control). Thus, in step with the Virginia Supreme Court's well-reasoned view, I would hold that defendant's purported suspicious conduct, without more, proves insufficient as support for an inference of constructive possession. As a result, I would additionally conclude that such evidence is inadequate as a matter of law for purposes of validating defendant's convictions for offenses involving possession of the illegal drugs found in the taxi.

Finally, while the majority makes much of defendant's movements getting in and out of the taxi, it pays little heed at all to a plausible explanation for defendant's apparent physical struggles: shortly before the incident in question, defendant had been the victim of a robbery, during which he was shot in the buttocks. It is also of some interest to note that the undercover agents did not ask the taxi driver to allow them to inspect the car at the time they detained defendant, opting instead to permit the taxi to pick up another fare and leave the scene. Couple these circumstances with the fact that no other drugs, or even drug residue, were found on defendant, and this case appears even weaker than the one mounted against the defendant in *Matias*. I therefore must disagree with the majority.

STATE OF NORTH CAROLINA v. JATHIYAH A. AL-BAYYINAH, AKA TERRY DENNIS MOORE

No. 90A01

(Filed 16 August 2002)

Evidence— prior crimes or bad acts—dissimilar robberies—questionable pretrial identification procedure

The trial court erred in an attempted robbery with a dangerous weapon and felony murder case by allowing under N.C.G.S. § 8C-1, Rule 404(b) testimony of two prior robberies allegedly committed by defendant, and defendant is entitled to a new trial because: (1) the testimony described robberies that were factually dissimilar to the robbery and murder charged in the instant case, and the State failed to show sufficient similari-

ties existed beyond those characteristics inherent to most armed robberies; and (2) the testimony rested upon a pretrial identification procedure of questionable validity including a single-photo identification procedure where police told the witness that the man pictured was in custody and made statements intimating that the authorities believed the man had committed not only the crime for which he was detained, but also the prior robberies.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Gray, J., on 14 December 1999 in Superior Court, Davie County, upon a jury verdict finding defendant guilty of first-degree murder. On 20 June 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 11 March 2002.

Roy Cooper, Attorney General, by Joan M. Cunningham and Amy C. Kunstling, Assistant Attorneys General, for the State.

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

MARTIN, Justice.

On 7 December 1999, a jury convicted defendant Jathiyah A. Al-Bayyinah of attempted robbery with a dangerous weapon and felony murder. On 13 December 1999, the jury recommended a sentence of death, and the trial court entered judgment in accordance with that recommendation the following day.

The facts pertinent to our disposition of this case are summarized as follows. Simon Wilford Brown (Brown) owned a wholesale grocery store at 473 Depot Street in Mocksville, North Carolina, which he operated with the help of his family, including his son, Charles Brown (Charles). On 6 March 1998, Charles arrived at the store at approximately 7:30 a.m. He entered through the front door and locked it behind him. About twenty minutes later, he heard his father enter the store. A short time later, Charles rushed to the front of the store when he heard his father call out for him. Motioning toward the front door, Brown said a man had stabbed him and had run out the door and to the right.

While Charles gave chase, his father dialed 911 and reported that he had been stabbed in the course of a robbery. Brown identified the

robber as an African-American male wearing dark clothing and repeated several times that he thought he recognized the robber as a man who had tried to cash a paycheck in his store the previous day. When Charles returned to the store, he noticed that his father's wallet was on the floor and that money was scattered about. A later inventory of the store and Brown's wallet revealed that no substantial amount of money or merchandise was missing. Brown died nine days later, on 15 March 1998. Forensic pathologist Patrick Eugene Lantz, who performed the autopsy, testified that the cause of death was complications from a stab wound to the chest.

Clarence Melvin Parks testified that he saw an African-American male dressed in a dark hooded windbreaker and jeans near Brown's store shortly after 7:30 a.m. on the morning of 6 March 1998. Jean Sheets, who was in her car on Depot Street that morning, testified that she saw an African-American male dressed in dark clothing near Brown's store and that a short time later, she saw the man running down the street. Officer Joey Reynolds of the Mocksville Police Department also spotted defendant near the store on the day of the crime. Defendant was wearing jeans, a dark blue sweatshirt, black boots, and a black coat. Reynolds and two other officers pursued defendant into a wooded area and took him into custody.

At trial, the state introduced the testimony of Alexander Splitt, a Mocksville grocery store owner who had been robbed on two separate occasions approximately one month before Brown was stabbed. Splitt testified that the first robbery occurred on 20 January 1998 at about 6:40 a.m., when he was alone in his store. A man wearing a dark ski mask and dark clothing ran into the store brandishing a gun and came behind the store counter with Splitt. Splitt described the robber's voice and the words he spoke, relating that the robber demanded money and admonished Splitt not to look at him. Splitt testified that he could tell the man was African-American because the robber came very close to him, and Splitt could clearly see, under the lights of the store, the robber's exposed eyes, nose, lips, and hands. Splitt estimated the robber's height at around five feet seven or five feet eight inches. Splitt testified that the robber was moving very quickly and that, before he left the store, he forced Splitt to get down onto the floor behind the counter. Splitt noted that it was very dark outside and "drizzling," but when he got up and looked out of the front window, he testified that he could see the robber running across the street, away from the store.

The second robbery occurred on 22 January 1998 around 7:40 p.m. Splitt again described the weather as dark and drizzling. Splitt testified that an African-American man wearing dark clothing, including a dark blue hood, entered the store and asked Splitt for a pack of cigarettes. Splitt stated that as he turned his back on the man to retrieve the cigarettes, he thought he recognized the voice as the robber from two days before. When Splitt turned back around, the man was splashing gasoline onto the grocery counter from a two-liter soda bottle. The gasoline soaked Splitt's clothing and splashed onto the cash register. Splitt testified that the robber repeated his demand for money and pulled out a cigarette lighter, threatening to ignite the gasoline. Splitt recounted that he recognized not only the robber's voice, but also his eyes and face, visible under the hood. After Splitt gave him the money, he watched as the robber quickly exited and ran across the street away from the store in the same direction as the first robber. The day after this encounter, Splitt reported both of the robberies to the Davie County Sheriff's Department.

On 3 February 1998, Splitt reviewed the Department's mug shot book but was unable to identify the robber out of several thousand photos. Defendant's picture was not in the mug shot book at that time. A few hours after Brown was stabbed on 6 March 1998, a detective contacted Splitt and told him that he had a suspect in custody for a robbery that had occurred that morning. Splitt was invited to come to the magistrate's office to look at a photograph of defendant, the suspect. Splitt was shown a single photograph of defendant, and Splitt identified defendant as the man he believed had robbed his store on two previous occasions.

In response to defendant's motion to suppress Splitt's testimony, the state countered that Splitt's descriptions of the two prior armed robberies were admissible under Rule 404(b) of the North Carolina Rules of Evidence. The trial court denied defendant's motion to suppress. Defendant argues the trial court committed reversible error because Splitt's testimony was irrelevant and was used solely for the unfairly prejudicial purpose of proving bad character.

Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C.G.S. § 8C-1, Rule 404(b) (2001). In

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

Rule 404(b) evidence, however, should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused. *See* N.C.G.S. § 8C-1, Rule 404(a) ("Evidence of a person's character . . . is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion."); *see also Michelson v. United States*, 335 U.S. 469, 475-76, 93 L. Ed. 168, 174 (1948) ("The inquiry [into character] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the [jurors] and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.") (footnote omitted); *State v. Jones*, 322 N.C. 585, 588, 369 S.E.2d 822, 824 (1988) ("[T]he admissibility of evidence of a prior crime must be closely scrutinized since this type of evidence may put before the jury crimes or bad acts allegedly committed by the defendant for which he has neither been indicted nor convicted."). As we stated in *State v. Johnson*, 317 N.C. 417, 347 S.E.2d 7 (1986), "[t]he dangerous tendency of [Rule 404(b)] evidence to mislead and raise a legally spurious presumption of guilt requires that its admissibility should be subjected to strict scrutiny by the courts." *Id.* at 430, 347 S.E.2d at 15; *see also* 1A John H. Wigmore, *Evidence* § 58.2 (Peter Tillers ed. 1983) ("[Character evidence] is objectionable not because it has no appreciable probative value but because it has too much. The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge.").

To effectuate these important evidentiary safeguards, the rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity. *State v. Lloyd*, 354 N.C. 76, 88, 552

S.E.2d 596, 608 (2001); *State v. Lynch*, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993); *State v. Price*, 326 N.C. 56, 69, 388 S.E.2d 84, 91, *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990). Evidence of a prior bad act generally is admissible under Rule 404(b) if it constitutes "substantial evidence tending to support a reasonable finding by the jury that the defendant committed the *similar* act." *State v. Stager*, 329 N.C. 278, 303, 406 S.E.2d 876, 890 (1991) (citing *Huddleston v. United States*, 485 U.S. 681, 99 L. Ed. 2d 771 (1988)) (quotation marks omitted) (emphasis added).

Assuming, without deciding, that defendant committed the Splitt robberies, substantial evidence of similarity among the prior bad acts and the crimes charged is nonetheless lacking. The details of the Splitt robberies were generic to the act of robbery: The robber wore dark, nondescript clothing that obscured his face; carried a weapon; demanded money; and fled upon receiving it. Both times Splitt's store was robbed, the perpetrator took money, while in the instant crime, the robber took nothing of substantial value. Splitt was robbed first at gunpoint, then under threat of immolation, while the victim in the instant crime was surprised from behind, hit on the back of the head, and stabbed.

Even when compared with each other, the two Splitt robberies were so dissimilar that Splitt himself admitted it was only when he heard the perpetrator's voice during the second robbery that he believed the same person committed both robberies. In the first Splitt robbery, the robber rushed into the store and immediately demanded money, while in the second, the robber pretended to be a legitimate customer before demanding money. In the first robbery, the man used a gun; in the second, gasoline and a lighter. The first robbery took place in the early morning, and the second occurred at night. The first robber was masked, while the second was not.

In essence, Splitt's testimony described robberies that were factually dissimilar to the robbery and murder charged in the instant case. The state offered evidence showing that Splitt was robbed and that defendant may have committed the offenses. The state failed to show, however, that sufficient similarities existed between the Splitt robberies and the present robbery and murder beyond those characteristics inherent to most armed robberies, i.e., use of a weapon, a demand for money, immediate flight. *See Lynch*, 334 N.C. at 412, 432 S.E.2d at 354 (holding that, because the details of the prior bad acts and the crimes charged were dissimilar, they did not bear "any logical

relationship" to each other, and hence should not have been admitted under Rule 404(b)).

Moreover, in addition to the factual dissimilarity between the Splitt robberies and the instant crime, Splitt's testimony also rested upon a pretrial identification procedure of questionable validity. The trial court determined that the single-photograph identification procedure used in the present case was not impermissibly suggestive under the totality of the circumstances. The evidence of record, however, indicates that on the afternoon of the Brown robbery, the detective telephoned Splitt and told him that there had been a robbery in Mocksville that morning. The detective stated that a suspect was in custody for the robbery and asked Splitt "to look at [a] photograph [of the suspect] and tell me yes or no if he thought that was possibly someone that was involved in [Splitt's] case." When Splitt arrived at the magistrate's office, he was shown a single photograph of defendant, then in custody for the Brown robbery. Splitt identified defendant from the photograph as the man he believed had robbed his store on two prior occasions.

This pretrial identification procedure was potentially flawed in several respects. First, the detective made suggestive statements when inviting Splitt to view the single photograph of defendant. In *State v. Knight*, 282 N.C. 220, 192 S.E.2d 283 (1972), this Court held a pretrial identification procedure impermissibly suggestive where police showed the witness a single photograph of the defendant, stated that the man pictured was in custody, and asked if he was the perpetrator of a prior crime involving the witness. *Id.* at 226, 192 S.E.2d at 287; *see generally Simmons v. United States*, 390 U.S. 377, 383, 19 L. Ed. 2d 1247, 1253 (1968) ("Even if the police . . . follow the most correct photographic identification procedures and show . . . pictures of a number of individuals without indicating whom [the police] suspect, there is some danger that the witness may make an incorrect identification."). Similarly, in the case at bar, the detective told Splitt that the man pictured was in custody and made statements intimating that the authorities believed defendant had committed not only the crime for which he was detained, but also the robberies of Splitt's store.[1] *See, e.g., United States v. Wade*, 388 U.S. 218, 234, 18 L. Ed. 2d 1149, 1161 (1967) (noting that a single-suspect identification

1. At a pretrial hearing, even the state noted that it was "very concerned about not putting error into this case" because of "potential problems with the identification by [Splitt], because he was shown a photograph of the Defendant and asked by [a] law enforcement officer, is this the man who committed the robbery."

procedure can "clearly convey[] the suggestion to the witness that the one presented is believed guilty by the police"). Further, the detective admitted that he showed Splitt only one photograph and conceded on *voir dire* that a multiphotographic lineup is a better method for witness identification than a single-photographic showing. *See State v. Yancey*, 291 N.C. 656, 661, 231 S.E.2d 637, 640 (1977) ("Our courts have widely condemned the practice of showing suspects singly to persons for the purpose of identification."). The detective also admitted that he had ample time to put together a multiphotograph array but did not do so. The North Carolina Justice Academy (NCJA), which trains thousands of criminal justice personnel throughout the state, cautions against the use of improper identification procedures in its training materials.[2]

In sum, the Rule 404(b) evidence in the present case rested on questionable identification procedures, which in turn arose from robberies that were factually dissimilar to the robbery and murder charged in the instant case. The trial court therefore erred, under the facts and circumstances of the instant case, in admitting Splitt's testimony under Rule 404(b) of the North Carolina Rules of Evidence. Accordingly, as we cannot conclude that the admission of Splitt's testimony was harmless, *see* N.C.G.S. § 15A-1443(a) (2001), defendant is entitled to a new trial.

NEW TRIAL.

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2. NCJA course materials counsel officers that "[b]efore conducting an identification procedure, officers should not tell a witness that they have a suspect in custody or that a [picture of the] suspect will be among the . . . photographs the witness is about to view," and that "[t]here should be . . . several photos in a photo lineup." Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* 226 (North Carolina Institute of Government, ed., 2d ed. 1992). Trainees are also warned that "[p]resenting only one person to a witness for possible identification is a suggestive identification procedure that normally should be avoided." *Id.*

STATE v. MILLS

[356 N.C. 158 (2002)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
ANTHONY LASHAUN MILLS	)	

No. 110P02

This case is remanded to the North Carolina Court of Appeals for the limited purpose for reconsideration in light of *State v. Hearst*, 356 N.C. 132, —— S.E.2nd —— (2002).

By order of the Court in Conference, this 15th day of August 2002.

Edmunds, J.
For the Court

ADAMS v. JEFFERSON-PILOT LIFE INS. CO.

No. 111P02

Case below: 148 N.C. App. 356

Petition by defendants (Charles Adams, April Gardin, and Kelly Honeycutt) for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

BATDORFF v. N.C. STATE BD. OF ELECTIONS

No. 263PA02

Case below: 150 N.C. App. 108

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 15 August 2002.

BNT CO. v. BAKER PRECYTHE DEV. CO.

No. 373P02

Case below: 151 N.C. App. 52

Petition by defendant/third party plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 August 2002.

CALLICOAT v. FAULKNER

No. 375P01

Case below: 143 N.C. App. 715

Petition by respondent (Commissioner of Motor Vehicles) for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002. Conditional petition by petitioner for discretionary review as to additional issues pursuant to G.S. 7A-31 dismissed as moot 15 August 2002.

CERTAIN UNDERWRITERS AT LLOYD'S LONDON v. HOGAN

No. 36P02

Case below: 147 N.C. App. 715

Petition by defendants (Hogan & Hogan) for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

CLUNK v. PFIZER, INC.

No. 297P02

Case below: 149 N.C. App. 975

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

COCHRANE v. CITY OF CHARLOTTE

No. 150P02

Case below: 148 N.C. App. 621

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

CRANDALL v. KNECHTEL

No. 266P02

Case below: 149 N.C. App. 232

Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 15 August 2002.

CRAWFORD v. COMMERCIAL UNION MIDWEST INS. CO.

No. 19A02

Case below: 147 N.C. App. 455

Petition by defendant for writ of certiorari to review orders of the North Carolina Court of Appeals and pursuant to 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 15 August 2002.

CREECH v. RANMAR PROPERTIES

No. 572P01

Case below: 146 N.C. App. 97

Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 15 August 2002. Conditional petition by plaintiff for writ of certiorari as to additional issues dismissed as moot 15 August 2002.

CREEK POINTE HOMEOWNER'S ASS'N v. HAPP

No. 578P01

Case below: 146 N.C. App. 159

Petition by defendant and third party plaintiff (Richard Harp) for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

CRIDER v. JONES ISLAND CLUB, INC.

No. 691P01

Case below: 147 N.C. App. 262

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 15 August 2002.

DIXIE LUMBER CO. OF CHERRYVILLE, INC. v.
N.C. DEP'T OF ENV'T, HEALTH & NATURAL RES

No. 261P02

Case below: 150 N.C. App. 144

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

FRAZIER v. COOPER

No. 417P02

Case below: Craven County Superior Court

Application by petitioner pro se for writ of habeas corpus denied 15 July 2002.

FRAZIER v. LEE

No. 284P02

Case below: Craven County Superior Court

Application by petitioner pro se for writ of habeas corpus and writ of mandamus denied 15 July 2002.

FRAZIER v. STEELMAN

No. 388P02

Case below: Wake County Superior Court

Petition by petitioner pro se for writ of mandamus denied 15 August 2002. Petition by petitioner pro se for writ of prohibition denied 15 August 2002. Justice Edmunds recused.

GUILFORD FIN. SERVS., LLC v. CITY OF BREVARD

No. 295A02

Case below: 150 N.C. App. 1

Petition by respondent 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 15 August 2002. Verified motion by petitioner for expedited consideration denied 15 August 2002.

HARRIS v. THOMPSON CONTR'RS, INC.

No. 122PA02

Case below: 148 N.C. App. 472

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 15 August 2002.

IN RE B.A.

No. 193PA02

Case below: 149 N.C. App. 667

Petition by petitioner for writ of supersedeas allowed 15 August 2002. Petition by petitioner for discretionary review pursuant to G.S. 7A-31 allowed 15 August 2002.

IN RE BRAITHWAITE

No. 326P02

Case below: 150 N.C. App. 434

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 15 August 2002. Petition by respondent for writ of certiorari to review the order of the District Court, Durham County, denied 15 August 2002.

IN RE ECKARD

No. 415P01-2

Case below: 148 N.C. App. 541

Petition by petitioner (Guardian ad Litem) for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

IN RE GURLEY

No. 325P02

Case below: 150 N.C. App. 437

Motion by Attorney General to dismiss appeal by respondent (Durham County) for lack of substantial constitutional question allowed 15 August 2002. Petition by respondent (Durham County) for writ of certiorari to review the order of the District Court, Durham County denied 15 August 2002.

IN RE PITTMAN

No. 229P02

Case below: 149 N.C. App. 756

Notice of appeal by respondent (Lekeshia Harris) pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 15 August 2002. Petition by respondent (James Pittman) for discretionary review pursuant to G.S. 7A-31 denied 15 April 2002.

IN RE ROBERTS

No. 290PA02

Case below: 150 N.C. App. 86

Notice of appeal by respondent (Buncombe County Board of Education) pursuant to G.S. 7A-30 (substantial constitutional question) retained 15 August 2002. Petition by respondent (Buncombe County Board of Education) for discretionary review pursuant to G.S. 7A-31 allowed 15 August 2002.

KEENER LUMBER CO. v. PERRY

No. 248P02

Case below: 149 N.C. App. 19

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002. Conditional petition by defendants for discretionary review pursuant to G.S. 7A-31 dismissed as moot 15 August 2002.

LEGRANDE v. STATE

No. 327P02-1,-3,-4

Case below: Stanly County Superior Court

Application by plaintiff pro se for writ of habeas corpus denied 8 August 2002. Plaintiff's pro se complaint for injury to person dismissed 15 August 2002. Plaintiff's civil complaint against the State for malicicious and deliberate erroneous convictions, imprisonment dismissed 15 August 2002. Motion by plaintiff for a mediated settlement conference or a dispute settlement center resolution on civil complaint against the State for malicious and deliberate erroneous convictions, imprisonments and sentence of death dismissed 15 August 2002.

LOGAN v. ROGERS CONCRETE CO.

No. 161P02

Case below: 149 N.C. App. 232

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

METTS v. TURNER

No. 251P02

Case below: 149 N.C. App. 844

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

MOSES v. YOUNG

No. 236P02

Case below: 149 N.C. App. 613

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

N.C. DEP'T OF CORR. v. McKIMMEY

No. 238P02

Case below: 149 N.C. App. 605

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

N.C. FARM BUREAU MUT. INS. CO. v. HARRELL

No. 74P02

Case below: 148 N.C. App. 183

Petition by plaintiff-appellant for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

OFFISS, INC. v. FIRST UNION NAT'L BANK

No. 332P02

Case below: 150 N.C. App. 356

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 15 August 2002.

OWENBY v. YOUNG

No. 286PA02

Case below: 150 N.C. App. 412

Petition by defendant for writ of supersedeas allowed 15 August 2002. Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) retained 15 August 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 15 August 2002. Motion by plaintiff to dismiss notice of appeal based upon a constitutional question denied 15 August 2002.

PIEDMONT TRIAD REG'L WATER AUTH. v. LAMB

No. 312P02

Case below: 150 N.C. App. 594

Petition by plaintiff for writ of supersedeas denied 15 August 2002. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002. Temporary stay dissolved 15 August 2002.

RATCLIFF v. N.C. DEP'T OF HEALTH AND HUMAN SERVS.

No. 292P02

Case below: 149 N.C. App. 976

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

ROSERO v. BLAKE

No. 322A02

Case below: 150 N.C. App. 250

Motion by defendant for temporary stay denied 25 July 2002. Petition by defendant for writ of supersedeas denied 25 July 2002. Petition by plaintiff for writ of supersedeas allowed 15 August 2002. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellant Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 15 August 2002.

RUIZ v. BELK MASONRY CO.

No. 154P02

Case below: 148 N.C. App. 675

Motion by plaintiff to dismiss the appeal for lack of substantional constitutional question allowed 15 August 2002. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

SCIOLINO v. TD WATERHOUSE INVESTOR SERVS., INC.

No. 240P02

Case below: 149 N.C. App. 642

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

SHARPE v. SHARPE

No. 315P02

Case below: 150 N.C. App. 421

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

SQUIRES v. JIM WALTER HOMES, INC.

No. 343P02

Case below: 150 N.C. App. 438

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 August 2002.

STATE v. ALEXANDER

No. 408P02

Case below: 151 N.C. App. 598

Motion by defendant for temporary stay allowed 8 August 2002 pending determination of petition for discritionary review.

STATE v. ALLEN

No. 43P02

Case below: 147 N.C. App. 786

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 15 August 2002.

STATE v. BECTON

No. 328P02

Case below: 150 N.C. App. 714

Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

STATE v. BOEKENOOGEN

No. 689P01

Case below: 147 N.C. App. 292

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 15 August 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

STATE v. CAGLE

No. 336A95-2

Case below: Cumberland County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Cumberland County, denied 15 August 2002.

STATE v. CAMP

No. 304P02

Case below: 150 N.C. App. 714

Petition by defendant-appellant pro se for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

STATE v. CHRISTIAN

No. 291P02

Case below: 150 N.C. App. 77

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

STATE v. COBB

No. 296P02

Case below: 150 N.C. App. 31

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

STATE v. COE

No. 389P02

Case below: 144 N.C. App. 449

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 15 August 2002.

STATE v. COLE

No. 45P02

Case below: 147 N.C. App. 637

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 15 August 2002. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 15 August 2002.

STATE v. CRUMP

No. 294P02

Case below: 149 N.C. App. 977

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 15 August 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

STATE v. CUMMINGS

No. 510A99-2

Case below: Robeson County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court of Robeson County denied 15 August 2002. Motions by defendant to amend petition for writ of certiorari and to

amend petition a second time allowed 15 August 2002. Motion by defendant to remand for evidentiary hearing, to allow oral arguments and submission of briefs, to remand matter for modification of April 17, 2002 order, and to stay consideration and decision of matter pending resolution of a Robeson County motion for appropriate relief denied 15 August 2002.

STATE v. DAVIS

No. 109P02

Case below: 151 N.C. App. 749

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 15 August 2002.

STATE v. DEXTER

No. 390A02

Case below: 151 N.C. App. 430

Motion by Attorney General for temporary stay allowed 2 August 2002.

STATE v. DIEHL

No. 195A00-2

Case below: 147 N.C. App. 646

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 15 August 2002.

STATE v. GOODMAN

No. 174A02

Case below: 149 N.C. App. 57

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 15 August 2002.

STATE v. LANGSTON

No. 383P02

Case below: 149 N.C. App. 977

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 15 August 2002.

STATE v. LEE

No. 357P02

Case below: 150 N.C. App. 701

Petition by Attorney General for writ of supersedeas denied 15 August 2002. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

STATE v. LEGRANDE

No. 327P02-2

Case below: Stanly County Superior Court/346 N.C. App. 718

Petition by defendant for writ of certiorari to review the order of the Superior Court, Stanly County denied 15 August 2002. Motion by defendant for appropriate relief, dismissal of all charges on motion for appropriate relief in conjunction with petition for writ of certiorari no. 462A01-10, dismissal of all charges pursuant to G.S. 15A-1447(b)(g) on petition for writ of certiorari No. 462A01-10, denied 15 August 2002.

STATE v. LYNCH

No. 242A93-4

Case below: Gaston County Superior Court

Petition by defendant for writ of certiorari to review the orders of the Superior Court, Gaston County, denied 15 August 2002.

STATE v. MAHAN

No. 342P02

Case below: 150 N.C. App. 717

Motion by Attorney General for temporary stay denied 8 July 2002.

STATE v. MARTINEZ

No. 318P02

Case below: 150 N.C. App. 715

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 15 August 2002. Petition by defendant for discretion review pursuant to G.S. 7A-31 denied 15 August 2002.

STATE v. McCLAIN

No. 320P02

Case below: 150 N.C. App. 715

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 15 August 2002.

STATE v. McMILLIAN

No. 123P02

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 15 August 2002.

STATE v. MILLER

No. 142P02

Case below: 149 N.C. App. 233

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

STATE v. NELMS

No. 49P02

Case below: 147 N.C. App. 789

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 15 August 2002.

STATE v. O'CONNOR

No. 340P02

Case below: 150 N.C. App. 710

Motion by Attorney General for temporary stay denied 5 July 2002. Petition by the Attorney General for writ of supersedeas denied 5 July 2002. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 5 July 2002.

STATE v. RAY

No. 166A02

Case below: 149 N.C. App. 137

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 15 August 2002.

STATE v. RHODES

No. 387P02

Case below: 151 N.C. App. 208

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002. Petition by defendant for writ of supersedeas and motion for temporary stay denied 15 August 2002.

STATE v. ROUNDTREE

No. 313A02

Case below: 150 N.C. App. 440

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 15 August 2002.

STATE v. SCANLON

No. 480A99-3

Case below: Durham County Superior Court

Motion by defendant to remand amendments and second amendments to motion for appropriate relief allowed 15 August 2002.

STATE v. SNYDER

No. 181P02

Case below: 149 N.C. App. 233

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 15 August 2002. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeal denied 15 August 2002.

STATE v. SPIVEY

No. 299A02

Case below: 150 N.C. App. 189

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 15 August 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

STATE v. STANLEY

No. 376P02

Case below: 150 N.C. App. 717

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 15 August 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

STATE v. STOKES

No. 275A02

Case below: 150 N.C. App. 211

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 15 August 2002. Petition by Attorney General for writ of supersedeas allowed 15 August 2002. Petition by Attorney General 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 15 August 2002 as to issue 1; denied as to remaining issues.

STATE v. WATSON

No. 336P02

Case below: 150 N.C. App. 716

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

STATE v. WESTMORELAND

No. 132P02

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 15 August 2002.

STATE v. WOOD

No. 210P02

Case below: 149 N.C. App. 413

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

STATE ex rel. UTILS. COMM'N v. CAROLINA WATER SERV., INC.

No. 267PA02

Case below: 149 N.C. App. 656

Conditional petition by respondent for discretionary review pursuant to G.S. 7A-31 as to additional issues of the decision of the North Carolina Court of Appeals allowed 11 July 2002.

TRUJILLO v. N.C. GRANGE MUT. INS. CO.

No. 255P02

Case below: 149 N.C. App. 811

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

UNDERWOOD v. NORTHWESTERN MUT. LIFE INS. CO.

No. 288P02

Case below: 149 N.C. App. 979

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002. Conditional petition by defendants for discretionary review pursuant to G.S. 7A-31 as to additional issues of the decision of the North Carolina Court of Appeals dismissed as moot 15 August 2002.

WACHOVIA BANK OF N.C. v. WEEKS

No. 148P02

Case below: 149 N.C. App. 234

Petition by intervenor plaintiff (Sadie Graham Hart) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 15 August 2002. Motion by defendant to dismiss pursuant to Rule 21(c) dismissed as moot 15 August 2002.

ZABEN v. GARDINER

No. 289P02

Case below: 149 N.C. App. 979

Motion by defendant to withdraw petition for discretionary review allowed 15 August 2002.

PETITION TO REHEAR

STATE v. PEARSON

No. 541A01

Case below: 356 N.C. 22

Petition by defendant pro se for rehearing en banc of the decision of this Court pursuant to Rule 31 denied 15 August 2002. Motion by defendant pro se to suspend Rul 31(g) denied 15 August 2002. Motion by defendant pro se to stay mandate denied 15 August 2002. Motion by defendant pro se to discharge counsel denied 15 August 2002.

STATE OF NORTH CAROLINA v. TED ANTHONY PREVATTE

No. 492A99

(Filed 4 October 2002)

1. Venue— change—vicinage rights—no right to county of choice

The trial court did not violate defendant's vicinage rights in a first-degree murder and second-degree kidnapping case by changing venue from Anson County to Stanly County, because: (1) although defendant failed to present a sufficient showing of prejudice to change venue, the trial court had inherent authority in its discretion to change venue; (2) the trial court was making a decision at defendant's request to benefit defendant in his upcoming trial; (3) the trial court took into consideration whether there were adequate facilities and manageable dockets in the other counties; and (4) defendant does not have the right to change venue to the county of his choice, and a defendant may not condition a motion for a change of venue upon the trial court's agreeing to transfer the case to a particular county specified by defendant.

2. Criminal Law— request for ex parte hearing—pro se motion to dismiss attorneys

The trial court did not err in a first-degree murder and second-degree kidnapping case by failing to allow defendant's personal request to speak to the court outside the presence of the prosecution regarding his pro se motion to dismiss his attorneys, because: (1) the primary matter about which defendant desired to speak with the trial court in private was resolved; (2) the trial court properly granted defendant a hearing so defendant could explain his desire to change attorneys, but defendant failed to provide the trial court with sufficient information to support his motion for new counsel; (3) it does not appear that defendant and his attorneys ever reached an impasse such that the attorneys could not competently function when defendant's attorneys eventually agreed to obtain money for a private investigator as defendant requested, and it appears that defendant wished only that his attorneys would seek funds to obtain physical evidence; (4) it was within the attorneys' discretion to use their time and energy as they saw best to prepare for trial; and (5) defendant failed to present any evidence that an issue of a personal nature

was at stake, and defendant merely indicated that additional evidence might exist.

3. Constitutional Law— right to counsel—duty of loyalty—work product

A defendant in a first-degree murder and second-degree kidnapping case was not denied his Sixth Amendment right to counsel even though defendant alleges his attorneys violated their duty of loyalty and revealed their work product in front of the prosecution, because there is no evidence that defendant's attorneys revealed any information that constituted work product when the attorneys simply responded to the trial court's questions concerning what they had done to investigate and prepare the case without disclosing any of their mental processes.

4. Criminal Law— motion to dismiss attorneys—State's participation

The trial court did not err in a first-degree murder and second-degree kidnapping case by allegedly allowing the State to participate in the decision on defendant's motion to dismiss his attorneys, because: (1) the State's comments merely reflect its interpretation of the law governing defendant's motion as well as its belief that defendant was attempting to stall his trial; and (2) it was proper to ascertain the State's stance on defendant's motion since the timing of the trial could have affected the State.

5. Discovery— medical and psychological records—failure to object

The trial court did not err in a first-degree murder and second-degree kidnapping case by granting the State's request for discovery of defendant's medical and psychological records and by requiring the defense's psychology experts to issue written reports allegedly in violation of N.C.G.S. § 15A-905, because: (1) defendant never objected to the trial court's grant of the relevant discovery to the State; and (2) defendant agreed that the law gave the State the right to obtain the materials requested.

6. Jury— capital selection—motion to strike panel—juror recognized mug shot of defendant in newspaper

The trial court did not err in a first-degree murder and second-degree kidnapping case by denying defendant's motion to strike the panel of jurors that heard a prospective juror's com-

ment that she recognized a mug shot of defendant in the newspaper even though defendant contends the information allowed the other jurors to speculate about prior crimes defendant may have committed, because: (1) defendant provides no evidence that the mug shot the prospective juror saw was connected to another crime; and (2) there is no reason to believe the other jurors formed any improper opinions based on the prospective juror's comment about the mug shot.

7. Criminal Law— prosecutor's argument—jury voir dire—jurors did not have to believe expert

The trial court did not err in a first-degree murder and second-degree kidnapping case by permitting the State's comments during jury voir dire that the jurors did not have to believe any part of what an expert said simply based on the fact that the person is an expert witness, because: (1) the prosecutor did not express an opinion as to the credibility of specific witnesses; (2) the State's questions were simply intended to determine if jurors would equally consider testimony of lay witnesses concerning defendant's mental capacity; and (3) the State's questions regarding expert witnesses were in concert with the trial court's jury instruction regarding expert witnesses.

8. Criminal Law— prosecutor's argument—vouching—arguing just and true case

The State did not improperly vouch to the jury in a capital trial that it was arguing the just and true case by comments to prospective jurors about reaching the sentencing phase because: (1) the State never said the sentencing phase definitely would be reached, but only insinuated such a possibility; and (2) the trial court's clarifications and the prospective jurors' responses to the trial court and the State made it clear that the prospective jurors were not under the impression the sentencing phase was a certainty.

9. Jury— capital—duty to stand up alone and announce death verdict—excusal for cause

The trial court did not err in a first-degree murder and second-degree kidnapping case by allowing the State to inform prospective jurors that as a part of their duty they might have to stand up alone and announce a death verdict and by excusing for cause a prospective juror based on the fact that she could not fulfill this duty, because: (1) the State and the trial

court were merely describing the polling process to the jurors; and (2) the trial court perceived an inability on the prospective juror's part to follow the law with regard to imposition of capital punishment.

10. Evidence— testimony—bases of opinions—state of mind—failure to make offer of proof

The trial court did not err in a first-degree murder and second-degree kidnapping case by allegedly violating defendant's right to present evidence in his defense by failing to allow two expert witnesses to state the bases of their opinions and by limiting the testimony of some lay witnesses about defendant's state of mind, because: (1) one of the witnesses was allowed to testify about the general basis of her opinion; (2) defendant failed to make an offer of proof regarding the expert witnesses' testimony; and (3) defendant failed to make an offer of proof regarding the testimony of the lay witnesses and it appears unlikely the observations of these lay witnesses would have substantially impacted the jury's consideration of defendant's sanity.

11. Constitutional Law— effective assistance of counsel—psychological defenses—diminished capacity

A defendant in a first-degree murder and second-degree kidnapping case did not receive ineffective assistance of counsel even though defendant contends his attorneys' failed to adequately present psychological defenses including diminished capacity, because: (1) it can only be speculated whether the questions defendant contends should have been asked to support a diminished capacity defense would have been answered favorably to defendant; and (2) it was a matter of trial strategy to determine whether to offer evidence of both diminished capacity and insanity or to focus all efforts on insanity.

12. Criminal Law— prosecutor's argument—validity of expert testimony

The trial court did not err in a first-degree murder and second-degree kidnapping case by allowing the State's closing arguments regarding the validity of defendant's expert testimony and alleged attacks on the expert, because defendant failed to show the trial court abused its discretion in handling the State's actions at trial.

13. Evidence— hearsay—purpose other than truth of matter asserted

The trial court did not allow impermissible hearsay evidence in a first-degree murder and second-degree kidnapping case by allowing evidence from a witness stating that the victim's husband visited the victim on the day of the murder and told her he loved her because: (1) the statement was admitted for a purpose other than to prove its truth; (2) the statement is evidence that the victim believed a reconciliation was forthcoming and supported the victim's fear that defendant boyfriend might try to harm her or her family; and (3) the statement supports a conclusion that defendant was motivated to kill by the victim's desire to end her relationship with defendant and reconcile with her husband.

14. Evidence— rocky relationship—personal knowledge

The trial court did not commit prejudicial error in a first-degree murder and second-degree kidnapping case by allowing testimony from a witness stating that the relationship between the victim and her husband was rocky but that they always seemed to get back together even though defendant contends the testimony was given without personal knowledge, because as defendant concedes, this testimony was tested on cross-examination when the witness admitted that she did not live with the victim and her husband and thus did not know what she meant by "rocky."

15. Evidence— hearsay—state of mind exception

The trial court did not allow imperissible hearsay evidence in a first-degree murder and second-degree kidnapping case by allowing a witness to testify that the victim told her that the victim was attempting to reconcile with her husband, because: (1) the testimony was admissible under the N.C.G.S. § 8C-1, Rule 803(3) state of mind exception to show the victim's mental state and provided insight into her confrontation with defendant; and (2) the statement was an expansion on the origin of the victim's fear of defendant boyfriend.

16. Evidence— hearsay—objection sustained

The trial court did not err in a first-degree murder and second-degree kidnapping case by sustaining an objection when defendant asked a witness whether the victim's husband asked the witness to keep an eye on his wife and defendant boyfriend

so that the husband could use the information in court over custody of the kids, because the question solicited hearsay and was improper.

17. Jury— capital selection—voir dire—insanity defense

The trial court did not err in a first-degree murder and second-degree kidnapping case by overruling objections to the State's argument that allegedly distorted the legal standard applicable to the insanity defense during jury voir dire, because: (1) defendant waived this issue by failing to provide a transcript reference in his brief to the alleged statement and by failing to make an assignment of error on this issue as required by N.C. R. App. P. 10(a); and (2) even if defendant did not waive this issue, the statement was a proper attempt by the State to ascertain if jurors could follow the law concerning defendant's guilt as well as whether defendant was not guilty by reason of insanity.

18. Criminal Law— prosecutor's argument—insanity defense

The trial court did not err in a first-degree murder and second-degree kidnapping case by overruling objections to the State's argument that allegedly distorted the legal standard applicable to the insanity defense during closing arguments, because: (1) the State properly argued that defendant's mental illness did not alone meet the requirements for legal insanity; and (2) any alleged error by the State, stating that if the jurors found defendant insane that they should let him go, was properly handled by the trial court's instruction.

19. Criminal Law— prosecutor's argument—jury's duty to enforce law

The trial court did not err in a first-degree murder and second-degree kidnapping case by allowing the State to argue during closing arguments that the jury's duty is to enforce the law, because: (1) the State used its argument to clear up any jury confusion about the responsibilities of the police, the prosecutors, the judge, and the jury; and (2) the State sought to ensure the jury understood that its proper role included holding defendant accountable.

20. Criminal Law— prosecutor's argument—additional evidence during sentencing

The trial court did not err in a first-degree murder and second-degree kidnapping case by allowing the State to argue

during opening and closing arguments that if the jury found defendant guilty it would learn more during sentencing, because: (1) the State's argument merely reemphasized what the jury already knew, including that additional evidence would be submitted on the question of defendant's sentence if defendant was found guilty; and (2) this procedural issue was fully explained to the jury during jury selection.

21. Criminal Law— prosecutor's argument—consider in victim's shoes

The trial court did not err in a first-degree murder and second-degree kidnapping case by allegedly allowing the State to request during opening arguments that the jurors consider the victim as a relative and put themselves in the victim's shoes, because: (1) the State was simply providing some background on the victim; (2) the State's comment that the victim could be related to a member of the jury was an effort to show the victim was a typical community member; and (3) there is no indication the State was urging the jurors to put themselves in the victim's shoes.

22. Criminal Law— prosecutor's argument—lack of consequences

The prosecutor in a first-degree murder and second-degree kidnapping case did not improperly refer during opening and closing arguments to the lack of consequences defendant had suffered in the six years since the crimes were committed, because: (1) a reading of the arguments in their totality reveals that the prosecutor was suggesting defendant acted in a planned way and made numerous decisions in the process of the killing; (2) the trial court immediately admonished the prosecutor to stick to the evidence when he briefly remarked about the six-year time period; and (3) there was no instance where the prosecutor referred to the consequences to defendant as being relevant to the jury's determination of guilt.

23. Criminal Law— prosecutor's argument—no witness of a psychotic episode

The trial court did not err in a first-degree murder and second-degree kidnapping case by allowing the State to argue that there was not one witness for the defendant that could say the person committing the murder was having a psychotic episode or having some type of out-of-body experience because, despite the existence of conflicting expert opinion on the issue,

the State was properly pointing out that there was no definitive evidence to prove an episode took place.

24. Criminal Law— prosecutor's argument—manipulation of mental tests

The trial court did not err in a first-degree murder and second-degree kidnapping case by allowing the State to attempt to impeach the insanity defense with the idea that defendant had taken mental tests several times and knew how to manipulate them, because: (1) it was proper for the State to argue that defendant had some expertise portraying his psychological makeup in a favorable manner considering the broad evidence of defendant's mental problems and the evaluations and treatments he received for these problems; and (2) the trial court instructed the jurors that if their recollection of the evidence differed from that presented by the attorneys in argument, the jurors should disregard what the attorneys said and rely solely on their own independent recollection.

25. Criminal Law— prosecutor's argument—expert gathered information from others

The trial court did not err in a first-degree murder and second-degree kidnapping case by allowing the State to argue that its own expert had gathered information from other people in forming his opinion, because: (1) the State did not proceed with this line of argument after defendant's objection, and the State asked the jury to consider this issue based on its own recollection of testimony from the trial; and (2) the State's argument was in line with the trial court's instruction for the jurors to base their deliberations on their own memory of testimony.

26. Criminal Law— prosecutor's argument—fairness defendant showed victim—putting words in mouth of witnesses

The trial court did not err in a first-degree murder and second-degree kidnapping case by allowing the State to urge the jury to contrast the court's fair treatment of defendant to defendant's treatment of the victim and to state that defense counsel was putting words in the mouths of the witnesses, because: (1) the State's remarks concerning the fairness defendant showed the victim were well within the parameters created by our Supreme Court; and (2) the State's comment concerning defense counsel putting words in the mouths of witnesses was a response to defendant's attacking closing argument, was not abusive or

ongoing, and was isolated and did not deprive defendant of a fair trial.

27. Criminal Law— insanity—burden of proof—instructions

The trial court's instruction in a first-degree murder and kidnapping case that defendant had the burden to "prove insanity to your satisfaction" sufficiently charged the jury on the standard of proof needed by defendant to prove his insanity without an instruction that defendant had the burden of proving insanity by a preponderance of the evidence. Furthermore, the jury could not have been confused by the court's use of the terms "satisfied," "convinced," and "proof beyond a reasonable doubt" where the court fully instructed the jury on which standard to use and told the jury not to use the "beyond a reasonable doubt" standard in considering whether defendant was insane.

28. Constitutional Law— comment on right to remain silent—no direct reference—courtroom demeanor

The trial court did not commit plain error in a first-degree murder and second-degree kidnapping case by failing to intervene ex mero motu to prevent the State from allegedly commenting on defendant's exercise of his right to remain silent, because: (1) the State's argument that no witness could testify that defendant was having a psychotic episode at the time of the crimes was merely a comment on the witnesses who had testified and was not a direct reference to defendant's silence; and (2) the State's comment on defendant's failure to look into the jurors' eyes was merely a brief reference to defendant's courtroom demeanor.

29. Evidence— defendant would kill victim but mother paid too much to get him out of prison—motivation—deliberation

The trial court did not abuse its discretion in a first-degree murder and second-degree kidnapping case by overruling defendant's objections and denying defendant's motion to strike testimony by a State's witness informing the jurors about a statement defendant made that he would kill the victim but his mother paid too much money to get him out of prison, because: (1) the part of the statement in which defendant said he would kill the victim showed that defendant had the motivation to kill the victim and that defendant had thought about killing the victim for some time before the murder occurred; (2) the part of the statement where

defendant said his mother paid to get him out of prison allowed the jury valuable insight concerning defendant's thinking and evaluation prior to the murder; (3) hearing both parts of the statement gave the jury the opportunity to see how defendant was deliberating over whether to kill the victim since defendant's mental state was an issue at trial; (4) the testimony did not reveal why defendant had been in prison or why his mother paid for his release; and (5) any prejudice from the admission of the testimony was not significant since defendant, in questioning his own witnesses as well as in closing arguments, disclosed that he had spent time in prison.

30. Kidnapping— instructions--purpose of confinement or restraint

The trial court's instructions in a prosecution for two kidnappings did not unconstitutionally relieve the State of its burden of proving all elements of kidnapping because the court instructed the jury that it must find the confinement, restraint or removal was for the purpose of "murder" rather than "first degree murder," as specified in both indictments, or because the court failed to instruct the jury that it must also find defendant was "terrorizing" the second victim when the indictment in that case alleged terrorizing the victim as an additional purpose, where (1) both indictments alleged that the kidnapping was "for the purpose of facilitating the commission of a felony, First Degree Murder," and language in the indictments following "the commission of a felony" is mere surplusage and may properly be disregarded; and (2) although the indictment may allege more than one purpose, the State has to prove only one of the alleged purposes in order to sustain a conviction of kidnapping, and it was not necessary for the court to include terrorizing in its instructions.

31. Kidnapping— second-degree—additional restraint—sufficiency of evidence

The trial court did not err by upholding defendant's second-degree kidnapping convictions even though defendant contends they were an inherent and integral part of the female victim's murder, because the binding and the beating of the female victim and the restraint on the male victim were not essential actions necessary to restrain the female victim in order to murder her, but were additional actions that increased her helplessness and vulnerability.

32. Criminal Law— motion for mistrial—previous escape from prison—prior murder

The trial court did not abuse its discretion in a first-degree murder and second-degree kidnapping case by failing to declare a mistrial when the State introduced evidence that defendant escaped from prison while serving time for a prior murder in Georgia, because: (1) the trial court sustained defendant's objection and instructed the jury to disregard the reference to the escape; and (2) it is presumed that the jury followed the trial court's instructions.

33. Criminal Law— legal insanity—consideration after defendant found not guilty

The trial court did not err in a first-degree murder and second-degree kidnapping case by instructing the jury not to consider defendant's special issue of legal insanity unless the jury first found defendant was not guilty, because: (1) the trial court fully instructed the jury that it was to consider the insanity defense only if it found the State had proved its case beyond a reasonable doubt; and (2) taken in context with the trial court's instructions on the insanity defense consistent with the pattern jury instructions, there was no error.

34. Sentencing— capital—aggravating circumstance—defendant previously convicted of another capital offense—failure to submit

The trial court did not err in a capital sentencing proceeding by allowing the State to decline to present evidence of the aggravating circumstance under N.C.G.S. § 15A-2000(e)(2) that defendant had previously been convicted of another capital offense even though defendant had been found guilty of murder in 1974 in Georgia, because the State chose to proceed under the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance that the offense was a prior violent felony, and the fact that defendant had been convicted previously of murder was thus submitted to the jury for its consideration.

35. Sentencing— capital—jury instruction on life imprisonment—invited error

The trial court did not err in a capital sentencing proceeding by instructing the jury that it would have to choose between life imprisonment without parole and the death penalty even though

the maximum sentence at the time defendant committed the murder was the death penalty or life imprisonment with the possibility for parole, because: (1) defendant did not object to and in fact invited the trial court's error by requesting the instruction on life imprisonment without parole; (2) defendant repeatedly urged the jury to recommend a sentence of life imprisonment without parole; (3) a defendant cannot complain about a jury instruction that he specifically requests; and (4) defendant has no ex post facto claim since he was sentenced to the maximum punishment of death.

36. Sentencing— capital—aggravating circumstance—murder part of course of conduct—no plain error

The trial court did not commit plain error in a capital sentencing proceeding by failing to specify and define the alleged crime of violence in the N.C.G.S. § 15A-2000(e)(11) aggravating circumstance that the murder was part of a course of conduct, because: (1) the trial court never promised to specify a crime to constitute the course of conduct, and there is no requirement that the trial court specify the crime or crimes to support this circumstance; and (2) there was no possibility of double-counting even though the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance was submitted since the (e)(5) circumstance was limited to the kidnapping of the female victim while the (e)(11) circumstance was limited to the kidnapping and assault of the victim's son.

37. Sentencing— capital—aggravating circumstance—murder part of course of conduct—single crime sufficient

The trial court did not err in a capital sentencing proceeding by instructing the jury that a single crime of violence could support the N.C.G.S. § 15A-2000(e)(11) aggravating circumstance that the murder was part of a course of conduct, because: (1) the trial court instructed in a manner virtually identical to the pattern jury instructions; (2) a trial court may instruct the jury on (e)(11) by limiting the jury's consideration to the conduct involved in one other crime, and evidence of one other crime is sufficient to submit this circumstance; and (3) there was substantial evidence that defendant committed two violent crimes against the murder victim's son.

38. Sentencing— capital—aggravating circumstance—murder especially heinous, atrocious, or cruel

The trial court did not err in a capital sentencing proceeding by submitting the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel, because evidence showed the murder was pitiless, unnecessarily tortuous, and that it dehumanized the victim when: (1) defendant attacked the victim in the presence of her ten-year-old son; (2) defendant psychologically tortured the victim by threatening her son and locking him in a bathroom; (3) the victim did not know if defendant would kill her son as well; and (4) defendant struck the victim multiple times and shot her as she was trying to run away.

39. Sentencing— capital—motion to strike death penalty—discretion—constitutionality

The trial court did not err in a capital sentencing proceeding by failing to grant defendant's motion to strike the death penalty based on the fact that North Carolina's capital punishment scheme does not allow for discretion to choose not to seek the death penalty, because: (1) the required discretion is satisfied by the guided discretion given to juries who sentence defendants in capital cases in North Carolina; and (2) our Supreme Court has repeatedly held that our capital punishment system is constitutional despite the prosecutor's possession of broad discretion.

40. Sentencing— capital—prosecutor's arguments—defendant previously convicted of murder

The trial court did not err in a capital sentencing proceeding by overruling defendant's objections to the State's sentencing argument emphasizing that defendant had been previously convicted for a Georgia murder and that the only way to ensure defendant would not murder again was to return a death verdict, because defendant was convicted of the Georgia murder and the State had every right to refer to it during closing argument.

41. Criminal Law— prosecutor's argument—jury as law and justice—no impropriety

The prosecutor's argument in a capital sentencing proceeding telling the jury that "Today, you are the law. You are justice" and that "you 13 people are the law of this county" was a proper argument that the jury was the conscience of the community for the

purposes of defendant's trial and was not an improper argument that the jurors are a prosecutorial arm of the government.

42. Sentencing— capital—prosecutor's arguments—defendant wrote his own judgment

The trial court did not err in a capital sentencing proceeding by overruling defendant's objections to the State's sentencing argument that defendant wrote his own judgment, because: (1) the State's argument simply emphasized that defendant chose to take another's life; and (2) nothing in the argument relieves the jury of its responsibility of fairness and impartiality.

43. Criminal Law— prosecutor's argument—find defendant guilty for justice of victims' families

The trial court did not err in a first-degree murder case by overruling defendant's objections to the State's argument during the guilt-innocence phase that the jury should find defendant guilty in order to do justice for the victim and her family, because: (1) a prosecutor may properly argue that the victim's death represents a unique loss to the victim's family; (2) a prosecutor may argue the jury should do justice for the victim and the victim's family if the argument does not specifically relate to the family's opinion about the defendant or the crime; and (3) the reference to the victim's spirit being at the trial was nothing more than a reference to remaining family members and their need for justice.

44. Sentencing— capital—prosecutor's argument—belittling defendant's mitigating circumstances

The trial court did not err in a capital sentencing proceeding by allowing the State to belittle the mitigating circumstances submitted by defendant, because: (1) prosecutors may legitimately attempt to belittle or deprecate the significance of a mitigating circumstance; and (2) the State properly argued that the circumstances should not be an excuse for defendant to avoid the consequences of his actions.

45. Sentencing— capital—reinstruction on mitigating circumstance

The trial court did not err in a capital sentencing proceeding by reinstructing the jury on the definition of mitigating circumstance, because: (1) the trial court followed the pattern jury instructions and instructed the jury about each statutory and

nonstatutory mitigating circumstance, making it clear that statutory and nonstatutory mitigating circumstances were different; (2) the punishment recommendation form differentiated between findings necessary for the jury to find statutory and nonstatutory mitigating circumstances; (3) the trial court never indicated to the jurors that they could give no weight to statutory mitigating circumstances they found to exist; and (4) defendant failed to object to the reinstruction after it was given, and the jury was able to reach a verdict without further inquiry.

46. Sentencing— capital—peremptory instructions on mitigating circumstances—no factual inferences from trial court's rulings

The trial court did not commit plain error in a capital sentencing proceeding by instructing the jury that it was not to make any factual inferences from his rulings after giving peremptory instructions on mitigating circumstances, because: (1) even when a peremptory instruction is given, jurors can reject the evidence if they lack faith in its credibility; and (2) the instruction permitted the jury to determine whether it believed the evidence presented even when contradictory evidence was presented, and the trial court's later instruction was consistent with the peremptory instructions.

47. Sentencing— death penalty—proportionate

A sentence of death imposed upon defendant for first-degree murder was not disproportionate because: (1) defendant was convicted on the basis of malice, premeditation, and deliberation, and under the felony murder rule; (2) defendant kidnapped the victim and her ten-year-old son at gunpoint in their own home, and defendant viciously killed the victim while she was running away; (3) and the jury found the prior violent felony, commission during kidnapping, heinous, atrocious and cruel, and course of conduct aggravating circumstances.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Helms, J., on 22 February 1999 in Superior Court, Stanly County, upon a jury verdict finding defendant guilty of first-degree murder. On 19 July 2001, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments. Heard in the Supreme Court 11 March 2002.

Roy Cooper, Attorney General, by William B. Crumpler and Robert C. Montgomery, Assistant Attorneys General, for the State.

Center for Death Penalty Litigation, by Kenneth Rose, for defendant-appellant.

WAINWRIGHT, Justice.

In 1995, Ted Anthony Prevatte (defendant) was sentenced to death after being found guilty of first-degree murder and two counts of second-degree kidnapping. *State v. Prevatte*, 346 N.C. 162, 484 S.E.2d 377 (1997). Following defendant's appeal from these convictions, this Court granted defendant a new trial. *Id.*

On 17 February 1999, at his second trial, the jury found defendant guilty of first-degree murder and two counts of kidnapping. The first-degree murder conviction was based on the theories of malice, premeditation and deliberation, and the felony murder rule. The jury recommended and the trial judge imposed a sentence of death for the murder conviction and consecutive terms of imprisonment of thirty years each for the kidnapping convictions.

The record reveals the following pertinent facts. The thirty-two-year-old victim (Cindy McIntyre) was married with two children (Michael and Matthew). She and her husband, Mike, were estranged but trying to reconcile. The victim and defendant attended the same church, sang together in the choir, and had been dating for about a year. Defendant lived with his mother across the street from the victim.

On 1 June 1993, when the victim and her husband saw each other, the victim's husband gave her a rose, kissed her, and told her he loved her. Later that same day, the victim and her son Matthew were at home when defendant came in with a present for Matthew. As Matthew was opening the present, his mother said, "Oh my God." Matthew turned around and saw defendant pointing a gun at his mother. Defendant had borrowed a gun from his cousin that afternoon.

When Matthew saw defendant with the gun, Matthew jumped up, and defendant pointed the gun at him. Defendant took the victim and Matthew to the bedroom and made them get down on their knees. Defendant then hit and kicked the victim. Defendant pointed the gun

at Matthew's head and said if the victim did not shut up, defendant would shoot Matthew.

Defendant grabbed Matthew and locked him in a bathroom down the hall from the bedroom. Defendant briefly left the house but shortly returned and brought the victim out of the house, with her hands bound behind her back. Defendant had his hands on the victim's neck and shoulder area. Defendant forced the victim into a car, pulled the victim back out of the car, and then struck the victim three to four times and slammed the victim's head into the car. The victim's hands remained bound behind her back. Defendant next reached into the car and pulled out a handgun. When the victim tried to run away, defendant held the gun with both hands, aimed, and fired more than once. Defendant left immediately after the last shot.

An autopsy of the victim's body revealed she suffered three gunshot wounds. Each bullet passed through the victim's body. One bullet went through the middle of the victim's back and completely destroyed her aorta and heart. Massive bleeding occurred in the chest cavity. These wounds caused the victim's death.

Inside the master bedroom of the victim's house, investigators found a nylon rope tied to a bed frame and a roll of duct tape on the floor. The roll of duct tape was consistent with the duct tape used to bind the victim's hands.

Prior to the murder, the victim told a witness she was afraid of defendant because he knew she was reuniting with her husband. The victim said she was afraid defendant would hurt her, her children, or her husband. Witnesses also heard defendant say he would kill the victim if he could get away with it and he "[felt] like killing her."

Before analyzing defendant's arguments, we first note that defendant's two trial attorneys in this case are the same attorneys who represented defendant in his 1995 capital trial for this murder.

We also note defendant presented an insanity defense at trial. Two defense experts expressed opinions that defendant had a paranoid personality disorder and was insane at the time of the shooting. The State offered rebuttal evidence that on the day of the murders, defendant was observed acting in a calm, friendly manner. The State's expert testified that on the day of the murders, defendant was able to understand the nature and quality of his actions as well as the difference between right and wrong.

PRE-TRIAL ISSUES

[1] We first address defendant's assignment of error that his vicinage rights were violated in that venue should not have been changed from Anson County to Stanly County because the court lacked statutory authority to change venue, the court lacked inherent authority to change venue without giving an adequate reason, and defendant did not waive his right to venue. Defendant's argument is misplaced.

"The vicinage concept requires that the jurors be selected from a geographical district that includes the locality of the commission of the crime." 4 Wayne R. LaFave and Jerold H. Israel, *Criminal Procedure* § 16.1(b), at 462 (2d ed. 1999). "Technically, 'vicinage' means neighborhood, and 'vicinage of the jury' meant jury of the neighborhood or, in medieval England, jury of the county." *Williams v. Florida*, 399 U.S. 78, 93 n.35, 26 L. Ed. 2d 446, 456, n.35 (1970).

First, defendant contends he has a right to be tried in the county in which he was charged, namely, Anson County. The general rule in regard to venue is the prosecution must be in the county where the offense is committed. N.C.G.S. § 15A-131(c) (2001). However, defendant's contention ignores the facts of this case.

On 13 July 1998, defendant filed his motion for change of venue alleging that "there exists in the County of Anson . . . so great a prejudice against the defendant that he cannot obtain a fair and impartial trial." In support of his motion, defendant further alleged:

> 1. At the time of the incident alleged and continuing regularly thereafter, there was substantial pretrial publicity that created so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in Anson County.
>
> 2. There is a reasonable likelihood that a fair re-trial will be prevented.
>
> 3. The transcript of the prior trial showing over 1800 pages of jury voir dire purports that the defendant cannot receive a fair and impartial re-trial in Anson County.

As a result of the foregoing, defendant "respectfully move[d] the Court to grant his motion for change of venue."

On that same date, the trial court was hearing other motions in this case while defendant and both of his attorneys were present in court. The trial court gave defendant the opportunity to hear his

motion for change of venue that day. Defendant was informed that his case was coming up for trial on 27 July 1998, which was two weeks away. Defendant, through his attorneys, asked that the motion for change of venue not be heard at that time.

On 25 July 1998, defendant filed a handwritten, notarized motion to dismiss counsel which provided:

> [O]n Monday, July 13, 1998 defendant was caused to appear in Superior Court in Anson County for pretrial motions on the part of the defense which defendant had not been given any prior knowledge of said pretrial motions hearing, of which one motion—motion for change of venue—was favored by the prosecution in regard to the change of location—Standly [sic] County—which defense counsel told defendant was in his favor (in 1994 before defendant's first trial at a special session of Superior Court, defense counsel, McSheehan and Painter disagreed with defendant on a change of venue saying that if a change of venue was granted by the court, that the D.A. would get to pick the county for the trial to be held in and that the D.A. Honeycutt would pick [Stanly County] and Stanly County was "more bloodthirsty than Anson County." And also at the July 13, 1998, pretrial hearing defense counsel Mr. McSheehan and Mr. Painter both lied to defendant in trying to have defendant believe that he was going to trial in two weeks on July 27, 1998, to try and trick defendant into agreeing to their pretrial motion for a change of venue while well knowing, from having talk[ed] to the D.A., that the July 27, 1998, trial date had already been scheduled for another murder case of State of North Carolina v. Chris Holden.

It should be noted that defendant had a history of writing letters to dismiss his counsel. On 13 October 1997, the trial court had held a hearing on defendant's motion to reconsider appointment of one of his attorneys. At that hearing, defendant asked the court to allow him to withdraw his motion requesting that Mr. Painter be removed as one of his appointed attorneys. The trial court allowed defendant's motion to withdraw.

On 24 August 1998, the trial court held a hearing on defendant's motion to dismiss counsel. The following lengthy colloquy took place:

> THE COURT: This is your motion, Mr. Prevatte; is that correct?
>
> MR. PREVATTE: Yes, sir.

THE COURT: All right. Do you want to offer any evidence, Mr. Prevatte?

. . . .

MR. PREVATTE: . . . I just don't feel comfortable with these two gentlemen anymore. They tell me one thing, and then on down the road, they tell me something totally contradicts what they told me the first time. There's evidence out there to prove that State's main witness Jeffrey Burr lied. And they won't get it.

They won't petition the court for the things I need, like a private investigator to check it out, and go get it. And they just keep me confused. They—they—they said they were ready to go to court in July when I went down to Anson County. And they tried to trick me into taking a change of venue in Stanly County, which is even bad or even worse than having it tried in Union County.

. . . .

MR. PREVATTE: . . . And then the prosecution was in agreement with it. Anything the prosecution is in agreement with in my case, isn't in my best interest. They just don't do what I tell them. I needed court—to petition the court to get a private investigator to check out the evidence that's out there.

THE COURT: They don't do what you tell them to do?

MR. PREVATTE: Sir?

THE COURT: They don't do what you tell them to do?

MR. PREVATTE: No, sir. That's not it.

THE COURT: What is it?

MR. PREVATTE: They are my attorneys. But it's also my case.

THE COURT: I understand that.

MR. PREVATTE: And I know what's—some of the things that need to be done. I've told them, and they won't do it. And it all—the law—the law states that when a defendant and his counsel come[] to an impasse, that the defendant's desires override those of his counsel. I've read that in the North Carolina laws and procedures.

THE COURT: Anything you want to tell me about it?

MR. PAINTER [defense counsel]: Not unless he waives attorney/client privilege.

MR. MCSHEEHAN [defense counsel]: Not unless he waives attorney/client privilege, Judge. I'm not allowed to say anything.

. . . .

THE COURT: Well, what's your position as to whether or not these attorneys ought to remain in the case, whether or not some other attorney ought to be in it?

MR. GWYN [prosecutor]: Well, Your Honor, the defendant doesn't have the right to pick and choose whatever counsel he prefers to have or is more comfortable to have. We really feel, quite frankly, Your Honor, that the purpose of him filing this motion is simply for the purpose of delay. One alternative that occurs to the State is for the appointment of standby counsel in the form of Mr. Painter and Mr. McSheehan. Other than that, we take no position. We just want the court to be aware of our belief that Mr. Prevatte's motion in front of you is simply for the purpose of delaying and putting off the inevitable trial.

MR. PREVATTE: That's not so, Your Honor, with all due respect to the court. My attorneys, they—like I said, I just can't trust them no more. I know what's good for me and what's not good for me. And they—they half listen to me. They half—it's not to put it off. But how can you be ready to go to trial, when you haven't done some of the things that I specifically asked them to do? And then they try to trick me into agreeing to motions in Stanly County saying I was going to go to court in July, knowing full well that another inmate had been scheduled to go to court in July ahead of me.

When I first—first time we tried to get a change of venue out of Anson County, they said it will most likely be in Stanly County. And you don't want it there because the people in Stanly County is more blood thirsty than the people in Anson County. And now this time, they come back and say great, we got a change of venue, we're going to Stanly County. And the D.A. has agreed to it. I said, hold it.

THE COURT: Have you agreed to that?

MR. HONEYCUTT [prosecutor]: No, sir. The only thing—discussion that I've had about the change of venue, is I asked if they

were seriously going to contest it, that our position was going to be that the only court facility with a docket light enough to move the case was Stanly County. I also pointed out that the—that the defendant can get a quicker trial in Anson County. But I told them I didn't object on the State, they can be tried in any county they wanted to.

MR. PREVATTE: Your Honor, I asked my counsel to do things for back-up the change of venue outside the twentieth jurisdiction. Because I can't get a fair trial in Anson County, Richmond County, Stanly County or Monroe, due to the publicity. Not only in those counties, but out of Charlotte and the television news. And they won't do it. Then they come to me and say, we got you a change to Stanly County. There's going to be a good Judge there.

I told them, you said it was more thirsty—more blood thirsty in Stanly County than Anson County. Yeah, but they got a good Judge there. Like I told them, they could have the best Judge in the world. If that county had been prejudiced against me through news and other things, word of mouth and all, it would be just like Wadesboro, Anson County.

They—I've tried about getting witnesses to testify for me, expert witnesses. They keep telling me that the one said he don't remember me, and he don't want to come up here. I don't believe that. He—he's a psychiatrist. And he treated me for eleven months in Central State Hospital in Milledgeville, Georgia on a 24-hour basis. He, more than anybody, knows my mind.

And it's—you know, they—they try to say we was going to court in July. And they hadn't done all these things. And then I found out that the other guy had already been scheduled. As soon as the hearing was over, and I didn't want to go over these motions, Mr. Painter comes out and said, they're going to try so-and-so on the 27th. They knew that all along. They're playing mind games with me, Your Honor. And this is my life. I'm in a capital murder case.

THE COURT: What's your—what are you requesting in the case?

MR. PREVATTE: As what?

THE COURT: What are you asking me to do?

MR. PREVATTE: I want new counsel. I would appreciate that.

THE COURT: State care to be heard on that?

MR. GWYN: No, sir.

THE COURT: Have no opinion one way or the other?

MR. HONEYCUTT: Yes, sir. We say that it's unfair to the State to drag us out now. And as to whether or not this case was to be tried in July, Mr. Painter and Mr. McSheehan were informed by my office that this case was on the calendar in July as the back-up case in the event the first murder case that was tried down there—and I believe it was before Your Honor—broke down. So this—we were targeting this case for trial in July. Mr. Painter and Mr. McSheehan were made aware of that and kept informed of that.

MR. PREVATTE: Your Honor, all due respect to the court again. If they—if I was scheduled to be tried in July, if the other person wasn't, then my attorneys were totally unprepared. Because they hadn't done the things they needed to do.

THE COURT: Well, hadn't they already prepared your case one time before?

MR. PREVATTE: Yeah.

THE COURT: What else did they need to do then?

MR. PREVATTE: There's new evidence. There's not new evidence, but evidence that's been out there to prove that the State's main witness lied and made a deal with the D.A. to get 18 felonies dropped a month right after I was convicted. Not only did Mr. Honeycutt lie to the defense, he lied to the court and said he hadn't made a deal with the State witness.

THE COURT: Well, what effort could they have made to show this? What are you saying your lawyers could have done that you don't already have?

MR. PREVATTE: Well, I think, Your Honor—

THE COURT: Didn't they attempt to ask the witness about that during the first trial? And the Judge didn't let them; is that right?

MR. PREVATTE: That—that—that's right. But I thought—

THE COURT: And isn't that why your case got reversed?

MR. PREVATTE: Yes, sir. But I'm also saying there's other evidence there to show that he lied. And that would change the whole, all the way around, in my opinion. But all they want, they say, well, what if they find DNA.

THE COURT: What do you say is out there?

MR. PREVATTE: For that incident, Your Honor, I'd like to ask a full hearing in your chambers outside the hearing of the prosecution.

THE COURT: Well, do you all agree what he says cannot be used against him?

MR. HONEYCUTT: No, sir. We will not agree to that.

THE COURT: You won't agree to that?

MR. HONEYCUTT: At this point, he still has two lawyers representing him.

THE COURT: Well, that's the reason your case got reversed; is that right?

MR. PREVATTE: No, sir. The case got reversed for lack of due process, which—

THE COURT: My understanding is the case got reversed because the court did not allow cross examination of whether or not some—

MR. MCSHEEHAN: Davis. Judge, we were not allowed to cross examine the witness in front of the jury to probe him about any deal he may have or may not have had on the State, and let the jury pass on his credibility, and credibility questions asked and his responses thereto. And that's the Lass V Davis. And that's why it got reversed. The other 157 errors cited and passed on them, and they said they would not occur in the new trial.

THE COURT: All right. Mr. Painter, do you feel like you can continue to represent him in light of what's transpired?

MR. PAINTER: Your Honor, I have no animosity or no bad feelings toward Mr. Prevatte. I'm here at the court's direction to represent him as fully as my ability allows me to do so. And I would continue to represent him in the manner which I think under the law I am—I should be representing him. I will explain to him and talk to him any concerns he has. If he wants us to do something

that I feel is not in his best interest, I think I, as a lawyer, have a duty to make sure that I don't let him dictate something that is going to put him in harm's way.

And I think there's in fact a recent North Carolina Supreme Court case that basically says they're not to second-guess lawyers on post conviction relief where the defendant says, my lawyer didn't do so and so, because the defendant, first of all, didn't go to law school. Second of all, the lawyer in his expertise in being in the courtroom under fire, 12 people sitting in the box in a capital case is in a better position to judge what tactics to take than the Supreme Court sitting in Raleigh 18 months later.

THE COURT: Mr. McSheehan.

MR. MCSHEEHAN: Judge, I have no problem continuing representing Mr. Prevatte or continuing to represent Mr. Prevatte if the court so desires. We've got a lot of hours invested in this case. New counsel would take a long time for them to catch up, I'm sure. I've told him regardless of how the court rules, we are here if he needs us. And we were there for eight weeks the last time. We made trips to Arkansas, Tennessee. We made trips to Florida—I mean to Georgia on his behalf. And—

THE COURT: Have you considered this psychiatrist or whomever he's talking about from some other state?

MR. PAINTER: We went down there and talked with him, took a 24-hour trip back on April the 12th with—where we sat on the tarmac, got the plane cancelled, and drove back from Atlanta. It was a 24-hour trip from start to finish. And went down there and spent about an hour with the psychiatrist.

THE COURT: Was he called at trial?

MR. PAINTER: I'm sorry?

THE COURT: Was he called at trial?

MR. PAINTER: No, not last time. Not the first trial, no, sir.

MR. MCSHEEHAN: This is the psychiatrist that saw him in an eleven month period at state mental hospital in Milledgeville, Georgia.

THE COURT: Was it your opinion that it would not be to his benefit to call him to trial?

MR. PAINTER: Man had no recollection at all of having treated Mr. Prevatte.

MR. MCSHEEHAN: And he said he would check his records, Judge. And if he found records that were different, he would call us. We'd be glad to subpoena him if the court would allow us the expense of the trip, bring him up. But—

THE COURT: Given the fact you did what he's requested that you did previously; is that correct?

MR. PAINTER: On April 12th, yes, sir. We went down there and talked to the psychiatrist to prepare him for coming up here to trial.

. . . .

THE COURT: But any agreement about the transfer of this case to Stanly County?

MR. PAINTER: There was a discussion between us and the D.A. and we broached it with Mr. Prevatte.

THE COURT: Been no agreement about that one way or the other?

MR. PAINTER: No. There was discussion.

MR. PREVATTE: Your Honor, if I may. I have no animosity against these attorneys. I just—if I could speak to you in chambers, you would understand why that I told—asked them to do certain things, they haven't done that's in regard to my case and in my best interest. They went down there and talked to this psychiatrist. They said he don't remember nothing about me. I find that hard to believe. I mean, I don't—he may have said that. I'm not saying they lied.

. . . .

THE COURT: You hope to get in touch with him again?

MR. PAINTER: Yes, sir. We'll be glad to take the records down there. We'll be glad to take a photograph of him. We'll be glad to take whatever criminal records are available made to peak his memory or cause his memory to fire, hopefully, so he'll understand.

THE COURT: How much time have you spent preparing for this case?

MR. MCSHEEHAN: First time?

MR. PAINTER: 637 hours is what we had in the last case, first time we tried it.

MR. MCSHEEHAN: Over 600 hours counting trial?

MR. PAINTER: Yes, sir. It was six witnesses for trial.

MR. MCSHEEHAN: Eight witnesses.

MR. PAINTER: Eight witnesses.

THE COURT: So you spent over 300, 350 hours investigating everything?

MR. PAINTER: We went to Arkansas.

. . . .

THE COURT: Well, knowing you gentlemen as I do and your—shall we call it propensity to investigate I've seen in the past, definite for me to believe that you wouldn't have done everything that's necessary to provide the defense for this man.

MR. PREVATTE: Your Honor, that was in the last trial. I'm speaking of the trial from beginning now. I've asked them to petition the court for funds to hire a private investigator to get this evidence. Up to the time in July when we talked and said, you might be going to court, they hadn't done it. Their reasons for not wanting that evidence brought out is totally ridiculous. The reasons I can't say in front of here because of the prosecution. Go there in Your Honor's chambers, I could tell you. It's a parody to my case that, you know, to help me. And I don't want the prosecution to have any knowledge of it.

THE COURT: About you wanting to have a private investigator?

MR. PREVATTE: Sir?

THE COURT: About why you should have a private investigator?

MR. PREVATTE: I want to petition the court to get a private investigator to look for this evidence, to find it.

THE COURT: It's not automatic. Do you understand that?

MR. PREVATTE: Yes, sir, I know that. But they didn't even petition for it. In my opinion, they didn't even try. Your Honor, I'm on trial for my life. And I need all the support that I can get from my attorneys. I know these attorneys are good people, good men, good attorneys. But I know a little bit about my case that they don't, and—

THE COURT: Let me ask you something. Did they do everything you thought they should have done in the first trial?

MR. PREVATTE: No, sir. And I ended up with the death penalty.

THE COURT: All right.

MR. HONEYCUTT: I would just like the court to inquire of defendant if he's attempting to fire his attorneys. Is that issue before the court? Because if I understand the law, he has a right to fire his lawyers. But I also understand my best recollection with the appellate decisions are, indigent defendant does not have a right to fire his attorneys just because he doesn't think he's getting along with them. See that's a—there's a much more objective issue before the court other than the clash of personalities.

THE COURT: I understand that.

MR. HONEYCUTT: But I'd like the record to reflect whether or not he's attempting to fire his lawyer.

MR. PREVATTE: Your Honor, the motion was filed to dismiss counsel. I know no lawyer likes to face that kind of a motion. And like I said, I have nothing against these two gentlemen, other than some things that needed to be brought to the court's attention that could have kept me from getting the death penalty, or even convicted of, found guilty the first time. They've ignored it. They—I just want them to do like I ask in this situation, because I know what I'm talking about.

THE COURT: In other words, you just want them to do everything you tell them to do?

MR. PREVATTE: No, sir. I'm not an attorney. I'll be the first to admit that. I don't—I need a—I need counsel. But I'm saying, I don't need these two counsel.

THE COURT: You just want substitute counsel; is that right?

MR. PREVATTE: Court appointed.

THE COURT: You're not asking to dismiss all attorneys, you just want a substitute attorneys?

MR. PREVATTE: No, sir. I was wanting that the court appoint me new counsel.

THE COURT: That's what I'm saying. You want me to dismiss these two gentlemen and appoint two more; is that right?

MR. PREVATTE: Yes.

THE COURT: Anybody care to be heard further? All right, motion is denied. . . .

MR. GWYN: Your Honor, while we're all here, we also have their motion for a change of venue.

. . . .

MR. MCSHEEHAN: We haven't asked to put it on, Judge. . . .

. . . .

MR. HONEYCUTT: Well, we need to hear the motion for change of venue, because I'm trying to get a session set.

. . . .

THE COURT: Well, they didn't know if they were going to be his attorneys until after today or not. So I'm going to set it for the next term in Anson County.

In an order entered on 11 September 1998, the trial court calendared this case to be tried at the 12 October 1998 term in Anson County. The trial court found that the pending motions, such as the change of venue, were not heard on this day because of the illness of one of defendant's attorneys. The trial court then calendared all pending motions in this case to be heard at the 14 September 1998 term.

On 16 October 1998, defendant filed a motion for funds to conduct a survey, asking the court to enter an order approving funds to hire someone to conduct a survey of a cross-section of the citizens of Anson, Union, Stanly, and Richmond counties to determine whether defendant could receive a fair trial in the twentieth prosecutorial dis-

trict. Defendant alluded to the fact that he might argue for a change of venue to remove his case to a county outside of the twentieth prosecutorial district due to publicity.

On 19 October 1998, a hearing was held in Anson County on defendant's motion for change of venue and motion for funds to conduct a survey. Defendant and both of his attorneys were present in the courtroom.

At the hearing, defendant's counsel introduced the transcript of the jury *voir dire* during the first trial. As a result, the following colloquy took place:

> THE COURT: What page do you want me to look at?
>
> MR. MCSHEEHAN [defense counsel]: Judge, you'll find them highlighted as you go through, as you look at this. Primarily what our argument is that out of 100 people summoned that came in to sit on the jury, 85 were excused. . . . We're asking to introduce the transcript to show to the Court that out of the 100 plus or so jurors that were summoned, over 85 of them were excused and of those excused more than half of those excused, especially those excused that we were able to either excuse by cause or take them off peremptorily because they had an opinion about this particular case. That's as good a survey on an independent basis as we could possibly ask to find that he can't get a fair and impartial trial in Anson County.
>
> The District Attorney, the last time we had another motion that Mr. Prevatte had filed, said that he didn't object to transferring it to any county in the 20th Judicial District. He said that in open court.
>
> . . . .
>
> THE COURT: What is your position about transferring?
>
> MR. HONEYCUTT [prosecutor]: First of all, we say they have not met their burden of proof.
>
> THE COURT: I understand.
>
> MR. HONEYCUTT: Adequate facilities and a docket that's light enough in this district is in [Stanly] County, and they rejected that the last time we discussed this.
>
> . . . .

THE COURT: Is there any objection to moving it to a county in the district that can handle it facility-wise and scheduling-wise?

MR. HONEYCUTT: I just want to get the case tried. I want it in front of 12 people so we can try it.

THE COURT: I understand. Jury selection might go faster if it were in a separate county.

MR. MCSHEEHAN: Yes, sir. It took a little over two weeks to get the jury the last time.

. . . .

MR. MCSHEEHAN: And we didn't take as much time with the jury, perhaps as the State did, based on the questions.

Judge, we ask to move under statute [15A-957] that the court has the discretion to move it to another county in the same prosectorial district as defined in [statute 7A-60] or to another county in an adjoining district as defined in [7A-60].

Judge, for the convenience, for the ability to have Mr. Prevatte at hand, the best jail facility that we have is in Union County.

THE COURT: We're swamped with cases as it is.

MR. MCSHEEHAN: Well, I don't want to make an argument that somebody ought to change the venue on some of those, but regardless—well, that's—

THE COURT: We don't have enough courtrooms now to accommodate all the courts.

MR. MCSHEEHAN: This Court may remember that in that discussion that we had when Mr. Honeycutt said he didn't mind any of the districts, we were asked if we wanted to move it to [Stanly] and we said no—Mr. Prevatte said no. I know Richmond and Union are within our district, or any other choice that the Court might deem appropriate in moving it.

. . . .

THE COURT: How long has it been since it was tried the first time?

MR. MCSHEEHAN: We tried it, I believe, in January of 1997, so it will be—it will be four years in January, Judge. Well, so we're asking you to change the venue and I'll stop with this.

. . . .

MR. HONEYCUTT: I would like to make a couple of brief comments. First of all, Judge, as I recall when we tried this case in January of 1995, the publicity was not extensive. There was very low coverage from the Charlotte press, outside of him having been previously convicted of a first-degree murder and been sentenced to death and that was—and then he was paroled. That was more the angle.

Most importantly as I recall reading the newspaper articles that did come out, especially in the Anson newspaper, it only comes out once a week, is that correct? Once a week. The coverage was factual. The coverage—the things that were reported were things that happened in the courtroom. There's been no sensationalism of the case. There was no misrepresentation of the evidence that was presented in the case.

We contend that they've not even begun to meet a pattern which would suggest that they could not get a fair trial in Anson County. As for the jurors that were removed for cause, if I do recall properly, it did take almost two weeks to pick a jury, but there were many, many jurors who did not believe in the death penalty and who were not able to qualify. . . .

. . . .

. . . We contend they have not made a case for moving the case out of Anson County, but if the Court wants to move it, you have the discretion to do that. We ask that it remain in the district. I spent all the time in Hampton Inns this year that I would like to. I would like very much to get this case tried as soon as possible. We've postponed it from last spring for the defense attorneys, and then this October postponed it for the defense attorneys. It's time—it's time for this man to have to face the bar of justice.

. . . .

THE COURT: As to the motion to dismiss, it's my opinion that the showing does not meet a level necessary to require removal to another county as set forth in the State v Barns, and some

other fairly recent decisions. In my discretion I'm going to move it to [Stanly] County if there's no objection from the State.

MR. GWYN [prosecutor]: No objection.

THE COURT: We'll find people there who have not heard much of anything about the case and jury selection will probably go faster being in a different county instead of the one that we're presently in.

Since there's no argument from the State as to that point and are agreeable to it, in my discretion I'm going to allow the motion to move it there, not because a matter of law necessitates it but because of the consent expressed by the State.

As a result of the 19 October 1998 hearing, the trial court entered its order on 1 December 1998 denying defendant's motion for funds to conduct a jury survey, but granting defendant's motion for a change of venue and moved the case to Stanly County. The court found the following facts:

1. That [throughout] the hearing of defendant's motions, the defendant was personally present in open court and accompanied at all times by both his court appointed attorneys, David McSheehan and John Painter.

2. That upon consideration of the motions file[d], evidence presented, and arguments presented, or counsel the court finds that the defendant failed to present a sufficient showing of prejudice requiring the court to grant either the defendant's motion for change of venue or for funds to conduct a jury survey.

. . . .

4. In its discretion, however, and at the request of the defendant the court hereby grants the defendant's motion for a change of venue.

Next, defendant contends the trial court lacked the statutory authority and the inherent authority to change venue without giving an adequate reason. The statute for a change of venue provides:

If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:

(1) Transfer the proceeding to another county in the prosecutorial district as defined in G.S. 7A-60 or to another county in an adjoining prosecutorial district as defined in G.S. 7A-60, or

(2) Order a special venire under the terms of G.S. 15A-958.

The procedure for change of venue is in accordance with the provisions of Article 3 of this Chapter, Venue.

N.C.G.S. § 15A-957 (2001). We agree that the trial court found that defendant failed to present a sufficient showing of prejudice to change venue, but we disagree that the trial court lacked the inherent authority, in its discretion, to change venue.

It is well settled that "[n]otwithstanding this apparent statutory limitation upon the power of a court to order a change of venue, a court of general jurisdiction . . . has the inherent authority to order a change of venue in the interests of justice." *State v. Barfield*, 298 N.C. 306, 320, 259 S.E.2d 510, 524 (1979) (citing *English v. Brigman*, 227 N.C. 260, 41 S.E.2d 732 (1947)), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). "In either case, a motion for a change of venue is addressed to the sound discretion of the trial judge and will not be disturbed on appeal in the absence of a showing of an abuse of discretion." *Id.* A judge of a superior court "on his own motion, in his own discretion and in the furtherance of justice, has the authority to transfer a case from one county to another," *State v. Chandler*, 324 N.C. 172, 183, 376 S.E.2d 728, 735 (1989) even in the absence of express statutory authority. "Such power existed at common law, and, therefore, unless specifically denied by statute, still adheres in the courts of the country." *Brigman*, 227 N.C. at 261, 41 S.E.2d at 732. "These statutory limitations on the power of a court to order a change of venue are preempted by the inherent authority of the superior court to order a change of venue in the interest of justice." *Chandler*, 324 N.C. at 183, 376 S.E.2d at 735 (citing *Barfield*, 298 N.C. 306, 259 S.E.2d 510).

In the instant case, the trial court used its sound discretion and evoked its inherent authority to change venue in the interest of and furtherance of justice. The trial court was fully aware that defendant had been previously sentenced to death in Anson County. Because of the previous problems choosing jurors in Anson County and the accompanying publicity, defendant requested that venue be changed from Anson County. The trial court granted this request on 23 November 1998. From our review of the record, it is clear that the

trial court was making a decision at defendant's request to benefit defendant in his upcoming trial. It is clear from the record that the prosecution wanted to keep this case in Anson County and that the trial court prevailed upon the prosecution to consent to a change of venue to Stanly County. It is also clear from the record that the trial court took into consideration whether there were adequate facilities and manageable dockets in the other counties. The trial court determined that there would be less publicity in Stanly County and that jury selection would proceed at a faster rate. We hold that the trial court's decision was without error, structural or otherwise.

Next, defendant argues that he did not waive his right to venue, i.e., his right to be tried in Anson County. Defendant filed a motion for a change of venue, but now contends he did not want the change to be Stanly County. Defendant does not have the right to change venue to the county of his choice. At the hearing for a change of venue, defendant's attorney specifically asked not to have the case tried in Anson County, agreed that jury selection would go faster in another county, and noted that the best jail facility was in Union County. Defendant was present in the courtroom during the hearing and voiced no opposition to any of the arguments posed. Defendant had been very vocal on other occasions, but remained silent at this hearing. He made no objection to any arguments during this hearing and, in fact, made no comments at all. He never withdrew or repudiated his motion to change venue. This argument is without merit.

Defendant next contends that he is entitled to a new trial because he and his attorneys came to an impasse about venue and because his attorneys refused to follow defendant's directions. We have previously cited to the transcript of the hearing held on 24 August 1998 in which defendant explicitly refers to his right to direct his attorneys when they reached an impasse:

> MR. PREVATTE: And I know what's—some of the things that need to be done. I've told them, and they won't do it. And it all—the law—the law states that when a defendant and his counsel come[] to an impasse, that the defendant's desires override those of his counsel. I've read that in the North Carolina laws and procedures.

We disagree and hold that defendant's arguments are misplaced.

"[W]hen counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's

wishes must control . . . ." *State v. Brown*, 339 N.C. 426, 434, 451 S.E.2d 181, 187 (1994) (quoting *State v. Ali*, 329 N.C. 394, 404, 407 S.E.2d 183, 189 (1991)), *cert. denied*, 516 U.S. 825, 133 L. Ed. 2d 46 (1995). As previously noted, defendant had filed his motion for change of venue from Anson County. After a thorough review of the record, it is apparent that defendant did not want to be tried in any county in the twentieth prosecutorial district. Assuming, *arguendo*, that there was an impasse between defendant and his attorneys, and assuming it was an absolute impasse, defendant's arguments are misdirected. The impasse was between defendant and his attorneys about whether or not to have venue changed to Stanly County. In a motion for change of venue, the trial court determines whether a move to a different county will take place. Relief pursuant to a motion for change of venue may consist of the trial court transferring the trial either to another county in the same prosecutorial district or to another county in an adjoining prosecutorial district. *See* N.C.G.S. § 15A-957(1).

A defendant may not condition a motion for a change of venue upon the trial court's agreeing to transfer the case to a particular county specified by the defendant. In addition, the record does not support defendant's allegations about his defense counsel directing the venue choice or making efforts to change venue to Stanly County. As noted before, the hearing on the motion was the critical time for defendant to have declared any disapproval, repudiation, or withdrawal of the motion. Defendant has no right to dictate the choice of a new county or to exclude some county from those to be considered by the trial court. Neither his attorneys nor the trial court violated defendant's rights with respect to venue. This assignment of error is overruled.

[2] Defendant also assigns error to the trial court's failure to allow defendant's personal request to speak to the court outside the presence of the prosecution regarding his *pro se* motion to dismiss his attorneys.

Initially, defendant wrote the court to move for dismissal of his counsel. During the 24 August 1998 hearing on defendant's motion, defendant asked to speak to the court *ex parte* to explain the problems with his counsel to the court. The court did not agree to this request. The State refused to agree that it would not use defendant's statements during the hearing against defendant. Defendant indicated that the general basis of his complaint was that his attorneys had failed to meet several of his requests. Defendant told the judge

that the reasons his attorneys did not want "that evidence brought out is totally ridiculous. The reasons I can't say in front of here because of the prosecution."

Defendant now argues his attorneys could not openly speak absent an *ex parte* hearing because they were constrained by the attorney-client privilege. Defendant thus argues the trial court's failure to grant an *ex parte* hearing violated his Fifth, Sixth, and Fourteenth Amendment rights. Essentially, defendant argues the trial court's action put him in an impossible situation wherein if he revealed the necessary information concerning his attorneys' alleged ineptitude, this information would also be revealed to the prosecution, who could use it against defendant at trial. If defendant failed to reveal the information, however, he would be unable to support his motion for new counsel.

As the State aptly points out in its brief, although defendant cites several assignments of error, defendant presents arguments only on the issue of whether the trial court erred in failing to grant an *ex parte* hearing in the present case. As such, this is the sole issue here, and all other assignments of error are deemed abandoned. *See* N.C. R. App. P. 28(a).

A full review of the pertinent portions of the record is necessary to understand what was at issue during the hearing. Defendant spoke at great length at the hearing; defendant's attorneys also spoke in response to the trial court's inquiries. Defendant's attorneys indicated their reluctance to speak absent defendant's waiver of the attorney-client privilege. After defendant acknowledged that his attorneys had already prepared his case at a prior trial, the trial court asked defendant what additional actions needed to be taken. Defendant replied,

> There's new evidence. There's not new evidence, but evidence that's been out there to prove that the State's main witness lied and made a deal with the D.A. to get 18 felonies dropped a month right after I was convicted. Not only did [the State] lie to the defense, he lied to the court and said he hadn't made a deal with the State witness.

The trial court then asked if this was not the reason defendant's initial conviction had been reversed. *See Prevatte*, 346 N.C. 162, 484 S.E.2d 377. Defendant agreed and added, "But I'm also saying there's other evidence there to show that he lied." When the trial

court asked defendant what additional evidence he thought existed, defendant stated he would prefer to elaborate on the information in the judge's chambers. Although defendant's attorneys stated they could continue to fully represent defendant, defendant still insisted he and his counsel were at an impasse concerning certain issues of trial preparation. Among other things, defendant indicated that he had asked his counsel to petition the court for funds to hire a private investigator to find evidence and that counsel had failed to do so for "ridiculous" reasons.

Additional light is shed on the present issue by examination of a letter defendant wrote to another judge shortly after the hearing. Defendant specifically indicates at the start of the letter that he was writing it in reference to the 24 August 1998 hearing on the motion to dismiss counsel. In the letter, defendant referred to the trial court's questioning during the hearing about the nature of the evidence in issue. He stated that the evidence would show the witness in the first trial (Jeffrey Burr) lied in his testimony from beginning to end. Further, defendant asserted that the location of two bullets at the murder scene would prove that the witness' testimony was false. Specifically, according to the letter, two law enforcement officers (Hutchinson and Poplin) inserted false evidence of the bullets into the record at defendant's first trial.

Also in his letter, defendant said his attorneys had repeatedly ignored his requests to seek funds for a private investigator to locate this evidence. According to the letter, this is one of the reasons defendant wanted his attorneys dismissed. Defendant concluded his letter with a request that the trial court share the letter with defendant's attorneys in the hope they would then obtain a private investigator. Defendant's letter was later discussed at an October 1998 hearing on some of defendant's other motions. After discussion of the letter, the trial court allowed an oral motion by defendant's counsel for funds for someone to further investigate the issue.

Accordingly, defendant did eventually obtain what he sought from his attorneys. Moreover, because neither the two officers, Hutchinson and Poplin, nor the prior witness, Jeffrey Burr, testified at defendant's new trial, it appears defendant's concerns about this issue may have been unnecessary. Instead, the primary issue during the guilt/innocence phase of the trial appears to have been defendant's mental state at the time of the killing. It thus appears the primary matter about which defendant desired to speak with the trial court in private was resolved.

Our review of the record reveals the trial court properly handled defendant's motion for new counsel. An indigent defendant has no right to replace appointed counsel merely because the defendant is dissatisfied with the present attorney's work or because of a disagreement over trial tactics. *State v. Anderson*, 350 N.C. 152, 167-68, 513 S.E.2d 296, 306, *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326 (1999); *State v. Kuplen*, 316 N.C. 387, 396-97, 343 S.E.2d 793, 799 (1986). An attorney, whether retained or appointed,

> is not the mere lackey or "mouthpiece" of his client. He is in charge of and has the responsibility for the conduct of the trial, including the selection of witnesses to be called to the stand on behalf of his client and the interrogation of them.

State v. Robinson, 290 N.C. 56, 66, 224 S.E.2d 174, 179 (1976). When a defendant makes a motion for new counsel, if it appears the present attorney is reasonably competent and there is no conflict between attorney and client that renders the attorney incompetent, the motion for new counsel must be denied. *Anderson*, 350 N.C. at 167, 513 S.E.2d at 305-06.

In the present case, the trial court properly granted defendant a hearing so defendant could explain his desire to change attorneys. Defendant failed to provide the trial court with sufficient information to support his motion for new counsel. Because defendant's attorneys did eventually agree at the October 1998 hearing to obtain money for a private investigator, it does not appear defendant and his attorneys ever reached an impasse such that the attorneys could not competently function. Moreover, it was certainly within the attorneys' discretion to use their time and energy as they saw best to prepare for trial. In this case, the attorneys may have seen preparation of an insanity defense, rather than pursuit of the evidence defendant sought, as the best way to proceed. Accordingly, based on the evidence presented, the trial court properly denied defendant's motion for new counsel. *See State v. Sweezy*, 291 N.C. 366, 373, 230 S.E.2d 524, 529 (1976) (motion properly denied where "[d]efendant merely stated that he *felt* that his counsel were not *going* to represent him properly without pointing to any act or omission indicating incompetency or lack of diligence on the part of his counsel").

Defendant nonetheless insists he needed an *ex parte* hearing to disclose the information supporting his motion. Defendant failed to provide the trial court, however, with even a minimal basis to grant such an *ex parte* hearing. A trial court does not have to automatically

hold an *ex parte* hearing in circumstances such as those presented in the present case. *See State v. White*, 340 N.C. 264, 276, 457 S.E.2d 841, 848 (no *ex parte* hearing was required on defendant's motion for funds to hire private investigator), *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995); *State v. Phipps*, 331 N.C. 427, 450-53, 418 S.E.2d 178, 190-92 (1992) (no right to *ex parte* hearing on motion for funds for fingerprint expert). *But see State v. Ballard*, 333 N.C. 515, 519, 428 S.E.2d 178, 180 (*ex parte* hearing was needed for motion requesting assistance of psychiatric expert because this issue was "one of an intensely sensitive, personal nature"), *cert. denied*, 510 U.S. 984, 126 L. Ed. 2d 438 (1993). Despite the trial court's attempt in the present case to discuss with defendant what issues prompted his motion, defendant failed to present any evidence that an issue of a personal nature, as in *Ballard*, was at stake. Indeed, defendant merely mentioned to the trial court his desire to speak to the trial judge alone. Even if defendant's comments are given the broadest possible reading, defendant merely indicated that additional evidence might exist. In short, defendant offered no evidence of his need to reveal information at the hearing that would have been useful to the prosecution or that would have otherwise needed secret presentation. Rather, similar to *White* and *Phipps*, defendant apparently wished only that his attorneys would seek funds to obtain physical evidence. As such, defendant failed to show an *ex parte* hearing was needed.

Finally, because we hold that defendant's motion for new counsel was handled properly, we also reject defendant's equal protection claim.

Defendant's assignment of error is without merit.

[3] In another assignment of error, defendant argues his Sixth Amendment right to counsel was denied when his attorneys violated their duty of loyalty and freely revealed their work product in front of the prosecution. During the 24 August 1998 hearing on defendant's motion to dismiss his attorneys, the trial court questioned defendant's attorneys about their representation of defendant. According to defendant, his attorneys improperly revealed their work product concerning trial strategy and undermined defendant's case. Defendant argues that an actual conflict of interest developed between defendant's interest in effective representation and his attorneys' interest in their professional reputation. Moreover, defendant alleges the trial court improperly allowed the State to be involved in the consideration of whether defendant's counsel was adequate.

A criminal defendant has a right to representation free from conflict. *State v. Bruton*, 344 N.C. 381, 391, 474 S.E.2d 336, 343 (1996). To prove a violation of this right, a defendant must show that the conflict affected his attorney's performance at trial. *Id.* In the present case, defendant argues his attorneys revealed trial strategy at the pretrial hearing and thus undermined his defense at trial.

As a preliminary matter, upon this Court's extensive review of the 24 August 1998 hearing, we find no evidence that defendant's attorneys revealed any information that constituted work product. Rather, the attorneys simply responded to the trial court's questions concerning what they had done to investigate and prepare the case. Because the attorneys described in general terms what had been done, rather than disclosing any of their mental processes, there was no work product violation. *See State v. Hardy*, 293 N.C. 105, 126, 235 S.E.2d 828, 841 (1977) ("The [work product] doctrine was designed to protect the mental processes of the attorney from outside interference and provide a privileged area in which he can analyze and prepare his client's case.").

At the hearing, defendant's attorneys disclosed that they had made trips to other states, interviewed a psychiatrist in Georgia who treated defendant, and expressed a willingness to return for an additional visit with the psychiatrist. The attorneys also indicated they had interviewed every witness defendant wished, had investigated defendant's apprehension in Arkansas, and were prepared to impeach a witness whose prior testimony might have been in exchange for dismissal of charges against the witness. The attorneys also informed the trial court that they had discussed with the State transferring the case to Stanly County but had not reached any agreement.

Defendant's attorneys disclosed no information at the hearing that revealed their defense strategy. Indeed, defendant has failed to show how his trial would have differed were it not for his attorneys' statements at the hearing. Defendant's attorneys simply answered the trial court's questions, as they were required to do as officers of the court, in as responsible a manner as possible to aid in the consideration of defendant's motion to dismiss his attorneys.

[4] Defendant also argues the State was improperly allowed to participate in the decision on defendant's motion to dismiss his attorneys. Defendant cites the following exchange at the hearing:

THE COURT: Well, what's your position as to whether or not these attorneys ought to remain in the case, whether or not some other attorney ought to be in it?

[THE STATE]: Well, Your Honor, the defendant doesn't have the right to pick and choose whatever counsel he prefers to have or is more comfortable to have. We really feel, quite frankly, Your Honor, that the purpose of him filing this motion is simply for the purpose of delay. One alternative that occurs to the State is for the appointment of standby counsel in the form of Mr. Painter and Mr. McSheehan. Other than that, we take no position. We just want the court to be aware of our belief that Mr. Prevatte's motion in front of you is simply for the purpose of delaying and putting off the inevitable trial.

The State's comments merely reflect its interpretation of the law governing defendant's motion as well as its belief that defendant was attempting to stall his trial. Because the timing of the trial could have affected the State, it was proper for the trial court to ascertain the State's stance on defendant's motion.

This assignment of error is overruled.

[5] In another assignment of error, defendant contends the trial court erred by granting the State's request for discovery of defendant's medical and psychological records and by requiring the defense's psychology experts to issue written reports in violation of N.C.G.S § 15A-905, which provides in pertinent part:

> Reports of Examinations and Tests.—If the court grants any relief sought by the defendant under G.S. 15A-903(e), the court must, upon motion of the State, order the defendant to permit the State to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession and control of the defendant which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial, when the results or reports relate to his testimony. In addition, upon motion of a prosecutor, the court must order the defendant to permit the prosecutor to inspect, examine, and test, subject to appropriate safeguards, any physical evidence or a sample of it available to the defendant if the defendant intends to

> offer such evidence, or tests or experiments made in connection with such evidence, as an exhibit or evidence in the case.

N.C.G.S. § 15A-905(b) (2001).

Defendant argues the first requirement of the statute was not met because he never requested any results or reports in the State's possession. Defendant argues this is the proper interpretation of the statute despite the fact that the State was entitled to discovery of the material at issue in defendant's first trial.

Our examination of the record reveals defendant never objected during the hearing to the discovery in issue. Indeed, defendant actually conceded that the State had properly interpreted the applicable law granting the State the right to discovery.

At a pretrial hearing on 13 July 1998, the State asked the trial court to order, as it had in defendant's first trial, that defendant permit the State to copy results or reports of all psychological examinations of defendant that defendant intended to offer into evidence at trial. In response, one of defendant's attorneys stated, "They're entitled to it if we intend to offer it. That's what I understand the law is." The trial court then entered an order requiring defendant to notify the State of any mental health or similar report defendant intended to use. Defendant's counsel responded to the trial court's oral order by saying, "Yes, sir."

Defendant never objected to the trial court's grant of the relevant discovery to the State. Indeed, as indicated above, defendant agreed that the law gave the State the right to obtain the materials requested. As such, defendant has failed to preserve this issue for appellate review and, having conceded the issue at trial, cannot properly raise it here. *See* N.C. R. App. P. 10(b)(1).

Defendant's assignment of error is overruled.

JURY SELECTION

[6] In another assignment of error, defendant contends the trial court erred by denying defendant's motion to strike the panel of jurors that heard prospective juror Mabry's comment that she recognized a mug shot of defendant in the paper. The following portion of jury selection is relevant:

> [THE STATE]: . . . Because this did receive some attention from the press. Do any of you all recall those circumstances or that murder or this case?

(Jurors shake their head[s] negatively.)

[THE STATE]: Okay.

MS. MABRY: I do recognize his mug shot that was in the paper. I mean, I remember that picture.

[THE STATE]: Okay. When did that appear in the paper?

MS. MABRY: Well, I'm not quite sure. But maybe I pictured him somewhere else. But I remember we—we discussed his mustache.

[THE STATE]: Okay. Are we talking about a matter of years ago?

MS. MABRY: Yeah.

[THE STATE]: Or are we talking about recently?

MS. MABRY: It wouldn't be recent.

[THE STATE]: Because I wasn't aware that it had been in the paper recently.

MS. MABRY: It wouldn't be recent.

[THE STATE]: I misunderstood and thought that you meant recently.

MS. MABRY: No. I just remember the mustache.

[THE STATE]: He looks familiar now that you've had a chance to look at him a little bit?

MS. MABRY: Right.

[THE STATE]: Now, do you recall, Ms. Mabry, whether or not when you saw his picture in the paper, forming an opinion about this case?

MS. MABRY: That was a while back. I wouldn't—I don't remember.

[THE STATE]: Okay. If you formed an opinion about that—this case, would you hold that opinion now. Or are you, as you sit here today, without opinion about this case, open minded and fair?

MS. MABRY: Open minded.

[THE STATE]: Okay. You have no opinion about the guilt of Mr. Prevatte as he sits here today?

MS. MABRY: No.

[THE STATE]: Okay. And you don't feel like the fact that you saw his name in the paper—which we've acknowledged that he got some press attention. The fact that you saw his picture in the paper would prevent you from being fair and impartial in this case?

MS. MABRY: No.

[THE STATE]: Okay. All right. Anybody else?

(Jurors shake their head[s] negatively.)

Mabry was eventually excused for a reason unrelated to defendant's picture appearing in the paper. Defendant argues the information about the mug shot allowed the other jurors to speculate about prior crimes defendant may have committed.

First, defendant provides no evidence that the mug shot that Mabry saw was connected to another crime. The murder in issue was committed over five years prior to the trial and so the mug shot certainly could have been related to that crime.

Second, there is no reason to believe the other jurors formed any improper opinions based on Mabry's comment about the mug shot. In *State v. Corbett*, we considered a prospective juror's remark that he had been following the case in the paper and had formed an opinion that the defendant was guilty. 309 N.C. 382, 385, 307 S.E.2d 139, 142 (1983). The defendant argued this remark prevented the remaining jurors from exercising their own judgment. *Id.* at 386, 307 S.E.2d at 143. This Court held it was the defendant's burden to show a juror held an improper opinion. *Id.* Moreover, this Court stated:

> Defendant has failed to establish that the mere fact that one prospective juror who was later excused for cause stated that in his opinion defendant was guilty caused the remaining prospective jurors to become unable to render a verdict based on the evidence presented in court. Defendant has presented no evidence that [the prospective juror's] opinion carried *any* weight with the jurors selected.

Id. at 386-87, 307 S.E.2d at 143.

In the present case, unlike *Corbett*, prospective juror Mabry made no comment that she thought defendant was guilty. Instead, she merely mentioned seeing his mug shot in the paper. Further, the trial court instructed the jury numerous times to base its considerations of the case solely on the evidence presented.

Because defendant has failed to show prospective juror Mabry's comment influenced the jury's deliberations, we hold there was no error here.

This assignment of error is overruled.

[7] In another assignment of error, defendant argues the trial court erred by permitting the State's questions during jury *voir dire* which implied that jurors were free to ignore or devalue testimony of psychologists, psychiatrists, and other experts. Defendant failed to preserve this issue for appeal as he did not refer in his assignment of error to all the questions that he addresses in his brief. This Court can review "those assignments of error set out in the record on appeal." N.C. R. App. P. 10(a). To be sufficient, assignments of error must "direct[] the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references." N.C. R. App. P. 10(c)(1); *see also State v. Price*, 326 N.C. 56, 87, 388 S.E.2d 84, 101-02, *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990). Defendant also failed to object to all but two of the questions at trial. When he objected to those two questions, he objected on other grounds.

Regardless of whether defendant preserved this issue, the questions to which defendant objects did not misstate the law. For example, defendant objects to the following comment by the State during jury *voir dire*: "You don't have to believe any part of what an expert witness says, just because that person is an expert witness."

The law in North Carolina is well established that a prosecutor may not express his opinion as to the credibility of a witness. *State v. Riddle*, 311 N.C. 734, 737, 319 S.E.2d 250, 253 (1984). In this case, however, the prosecutor did not express an opinion as to the credibility of specific witnesses. He did not intimate that he thought defendant's experts would lie or that he did not believe defendant's experts. The State's questions during jury *voir dire* were simply intended to determine if jurors would equally consider testimony of lay witnesses concerning defendant's mental capacity.

Before jury deliberations began, the trial court instructed the jury on expert witnesses as follows:

> Now, in this case, you've heard evidence from witnesses who have testified as expert witnesses. Now, an expert witness is permitted to testify in the form of an opinion in a field where he purports to have specialized skill or knowledge. Now, as I've instructed you, you are the sole judges of the credibility of each witness and the weight to be given to the testimony of each witness.
>
> In making this determination as to the testimony of an expert witness, you should consider, in addition to the other tests of credibility and weight, the witness' training and qualifications and experience or lack therefore, the reasons if any given for the opinion, whether the opinion is supported by facts that you find from the evidence, whether the opinion is reasonable, and whether it is consistent with other believable evidence in the case.
>
> Now, you should consider the opinion of an expert, but you are not bound by it. In other words, you are not required to accept an expert witness' opinion to the exclusion of the facts and circumstances disclosed by other testimony.

These instructions were given in accordance with the pattern jury instructions, *see* N.C.P.I.—Crim. 104.94 (1990), and have been approved by this Court, *State v. Kennedy*, 320 N.C. 20, 36-37, 357 S.E.2d 359, 369 (1987). The State's questions regarding expert witnesses were in concert with the trial court's jury instruction. We hold the State's questions were proper.

This assignment of error is overruled.

[8] In another assignment of error, defendant argues the trial court erred by overruling his objections to prosecutorial vouching. Defendant argues the State's comments during jury *voir dire* were unacceptable in that the State vouched to the jury that it was arguing the just and true case. Defendant argues multiple statements by the State were prejudicial. Most of these statements referred to evidence the State would present and to what would occur during the sentencing phase. For example, defendant argues it was error when the State asked a juror the following question:

> Would you also agree, then, that in a case that the State is seeking the death penalty, that as a matter of fairness, the jury

should give some consideration to the death penalty once it reached that point?

At this point, defendant objected to the term "once it reached that point," and the trial court clarified, stating, "Well, if it reaches that point."

Defendant further argues the following line of questioning by the State was prejudicial:

> [THE STATE]: Did you understand that if you are convinced based on the facts of this case and His Honor's instructions on the law, that if you are convinced that the death penalty is the appropriate punishment for that man over there, that would then be your duty to come back and announce that to be your verdict, the death penalty?
>
> . . . .
>
> [DEFENSE COUNSEL]: Object to the form of the question in the manner which it was stated, assumes certain things.
>
> THE COURT: You understand that we may not reach the punishment phase at all. Do you understand that?
>
> [PROSPECTIVE JUROR]: Yes.
>
> THE COURT: Okay. Just necessary to ask these preliminary questions in case we do go into that at a later time.
>
> [THE STATE]: My question . . . was really more whether or not you recognize that it may become—and we say it will become in this case—your duty to find the defendant guilty of first degree murder, and then to announce the death penalty as the sentence in that case. It is not an academic or a hypothetical proposition. We're saying you will get there. Do you understand that to be your duty?
>
> [DEFENSE COUNSEL]: Objection. Objection.
>
> THE COURT: It will be your duty to decide the issue one way or the other. Do you understand that?
>
> [PROSPECTIVE JUROR]: Yes.
>
> THE COURT: If it reaches that.

In questioning another prospective juror, the State asked:

Should the defendant be convicted of first degree murder—we contend he will be—and the jury that then hears the sentencing issues decide for itself unanimously by proof beyond a reasonable doubt that the appropriate penalty given the law, given what aggravating circumstances are, and what the mitigating circumstances are, given His Honor's instruction as to those things, that the appropriate penalty is death, do you understand then that it would be your duty to come back and announce that as your sentence recommendation?

. . . .

. . . [I]t's not a hypothetical question I'm asking here. It's not speculative or academic. It's something we contend will happen. So my question of you is not—not hypothetical

. . . .

. . . You understand that that—should we reach that point, that that is going to be what's required of you? That that is part of your—your duty as a juror.

[PROSPECTIVE JUROR]: Yes.

[THE STATE]: Given that certain circumstance.

[PROSPECTIVE JUROR]: I understand.

. . . .

[THE STATE]: Okay. You realize that that is, under your oath, what's going to be required of you should you reach that point.

[PROSPECTIVE JUROR]: (Nods head affirmatively.)

[THE STATE]: All right.

[PROSPECTIVE JUROR]: Yeah.

[THE STATE]: And that the State has a right to a fair trial.

[PROSPECTIVE JUROR]: Yeah.

[THE STATE]: And that as part of a fair trial, should we reach that point, the State has a right for that to happen.

[PROSPECTIVE JUROR]: Yes.

Defendant also argues that comments during questioning of another prospective juror were prejudicial:

[THE STATE]: Do you understand that in a death penalty case, as in any criminal trial, the State, as well as the defendant, are entitled to a fair trial. Okay? Entitled to jurors who will fairly consider both sentencing options. Okay? The death penalty—

[DEFENSE COUNSEL]: Objection.

[THE STATE]: As well as life imprisonment.

THE COURT: What's that?

[DEFENSE COUNSEL]: Improper statement, Judge. They consider the—first a guilt or not guilty in this case before they get to that. And then they consider the evidence presented.

THE COURT: You understand it's a two-part trial and you determine the guilt or innocence of the defendant of the underlying crime first?

[PROSPECTIVE JUROR]: Yes.

THE COURT: Only if he's found guilty do we go into a sentencing phase. Do you understand that?

[PROSPECTIVE JUROR]: (Nods head affirmatively.)

THE COURT: You're asked these questions only in case we get to a second phase. You understand all that?

[PROSPECTIVE JUROR]: Yes, sir.

[THE STATE]: . . . the State contends we're going to get to that point. And that's why these questions are relevant. Do you understand that we're contending that we will get to a sentencing phase, okay? And that's why this is not a hypothetical type situation. That's why this isn't just—

[DEFENSE COUNSEL]: Objection.

[THE STATE]: —exercise.

THE COURT: Overruled.

Defendant argues in several other instances the State overstepped its bounds and prejudiced the prospective jurors.

During jury *voir dire*, as in jury arguments, counsel cannot put incompetent and prejudicial matters before the jury " 'by injecting his own knowledge, beliefs and personal opinions' " when they are unsupported by the evidence. *State v. Gibbs*, 335 N.C. 1, 38-39, 436

S.E.2d 321, 342 (1993) (quoting *State v. Johnson*, 298 N.C. 355, 368, 259 S.E.2d 752, 761 (1979)), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994). In *Gibbs*, the defendant argued that during jury *voir dire*, the prosecutor's prefacing of questions with comments about moving from the first stage of trial to the penalty phase were improper and the implication that the penalty phase would be reached was prejudicial. *Id.* at 38, 436 S.E.2d at 342. This Court held that such comments, even when repeated, did not constitute an attempt to put before the prospective jurors "prejudicial matters by injecting [counsel's] own beliefs or personal opinions unsupported by evidence." *Id.* at 39, 436 S.E.2d at 343.

In the present case, the State never said the sentencing phase definitely would be reached, but only insinuated such a possibility. The State's comments, taken in context, "refer to the conditional nature of bifurcated capital prosecutions." *Id.* at 39, 436 S.E.2d at 342. Further, the trial court's clarifications and the prospective jurors' responses to the trial court and to the State made it clear that the prospective jurors were not under the impression the sentencing phase was a certainty. After reviewing all the comments to which defendant objects, we hold these statements were not improper.

Accordingly, defendant's assignment of error regarding prosecutorial vouching is without merit.

[9] In another assignment of error, defendant argues the trial court erred by allowing the State to inform prospective jurors that as part of their duty they might have to stand up alone and announce a death verdict. Defendant further argues the trial court erred by excusing prospective juror Thomas because she could not fulfill this duty.

The following transcript excerpt is pertinent to our analysis of this issue:

> [THE STATE]: If based on those things, if the State has convinced you, Mrs. Thomas [prospective juror], of the defendant's guilt and the appropriateness of the death penalty as the punishment in this case, do you think that you could come back with that as being your sentence recommendation for the death penalty?
>
> MS. THOMAS: I believe in the death penalty in some cases. But personally, I have a problem with being the one to say—to say, you know, put this man to death.

[THE STATE]: Well, to be very honest with you, Mrs. Thomas, that's exactly what we're asking members of this jury to do. Do you understand that?

MS. THOMAS: Yes.

[THE STATE]: And also what we'll be asking, should we get to that point, and we say we will get to that point, not only would you be asked to make up that as your verdict, guilty of first degree murder as well as the two kidnappings, but also the death penalty as being your recommendation. What you would be required to do, ma'am, is to come back into court and stand up all by yourself and announce to everyone in court, including the defendant over there, that the death penalty is your sentence recommendation.

It is only fair that you know that now going in. But that is going to be a part of your duty as a juror in this case, should we reach that point. We contend we will. Now, having heard all that, do you feel that you could do that?

MS. THOMAS: I'm not sure that I could.

[THE STATE]: You understand that the questions that I've asked are based largely on what would be required of jurors in the case at different points, and that it is not a hypothetical or academic or speculative question on our part in asking if you would be able to do that.

MS. THOMAS: Right.

[THE STATE]: We need to know yes or no if you could.

MS. THOMAS: I don't think I could.

[THE STATE]: Do you understand that that is part of what's required?

MS. THOMAS: Yes.

[THE STATE]: Would the fact that you don't think that you could do that prevent you from, first of all, finding the defendant guilty of first degree murder?

[DEFENSE COUNSEL]: Objection.

[THE STATE]: Knowing that you'd then have to pass upon the sentencing issue?

THE COURT: Overruled.

MS. THOMAS: If I thought he was guilty, I would say guilty.

[THE STATE]: Knowing that you would then have to decide what the sentence should be?

MS. THOMAS: Yes.

[THE STATE]: Knowing that you would also then have to come back into court and do something that you've said you don't think you could do?

MS. THOMAS: Well, I couldn't say that I thought he was not guilty if I thought he was guilty.

[THE STATE]: You understand that part of your obligation as a juror, is to come back in the court and announce whatever sentence recommendation you announce?

MS. THOMAS: Yes.

[THE STATE]: By yourself, one at a time?

MS. THOMAS: Yes.

[THE STATE]: And did I understand you to say that you don't think that you could do that if the sentence recommendation is the death penalty?

MS. THOMAS: That's right.

THE COURT: Is there something about having to stand there and affirm the sentence that bothers you, or that you've got to stand up and say something personally that bothers you, or—

MS. THOMAS: No. It would bother me to stand up and say this man has got to—I've got to make the decision that this man has got to die.

THE COURT: Well, what will happen if the time comes if—if the jury recommends the death sentence, the clerk will read a form that—substantially as follows, that foreman of the jury has returned a recommendation that the sentence—defendant be sentenced to death. And each person on the jury would have to stand individually, and the clerk would say, "Your foreman has returned a recommendation that the defendant be sentenced to death. Is this your recommendation, and do you still assent thereto? Do you still agree to it?" You would be required to say

yes or no. Each of you would be required to stand there and say yes or no, that you agree with it or disagree. Do you understand?

MS. THOMAS: Yes.

THE COURT: You don't think you could be part of that process?

MS. THOMAS: (Shakes head negatively.)

THE COURT: Ma'am?

MS. THOMAS: No, sir.

THE COURT: You understand that would be part of your duty as a juror to go through that if you served on the case?

MS. THOMAS: Yes.

THE COURT: Are your feelings about that so strong, then, you feel it would impair your ability to be a juror in this case, knowing that that would be part of the process?

MS. THOMAS: I would have a problem with saying it.

THE COURT: Well, we got to know up front. Not a thing about, you know, I should have let them know this earlier. We need to know before we get into the case.

MS. THOMAS: I would have to say yes, it would.

THE COURT: That it would impair your ability to be a juror in this case?

MS. THOMAS: Yes.

At this point, the State challenged for cause, defendant objected and sought to further question the juror, and the trial court overruled defendant's objection.

The standard to determine if a prospective juror may be excluded for cause because of her views on capital punishment was clearly laid out in the United States Supreme Court's decision in *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985). The "standard 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.' " *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)). A juror's bias need not be unmistakably clear and there are situations where the trial court

"is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.* at 426, 83 L. Ed. 2d at 852.

After a careful review of the transcript, it is clear the trial court and the State thoroughly questioned Thomas about her views. Moreover, regarding defendant's argument concerning jurors' individual ability to announce a death verdict, it appears the State and the trial court were merely describing the polling process for the jurors. Because the trial court perceived an inability on Thomas' part to follow the law with regard to imposition of capital punishment, the trial court, in its discretion, concluded Thomas was not fit to serve on the jury.

This assignment of error is overruled.

GUILT-INNOCENCE PHASE

[10] In another assignment of error, defendant contends the trial court violated defendant's right to present evidence in his defense. Specifically, defendant argues the trial court erred by failing to allow two expert witnesses, Dr. Daphne Timmons and Dr. Nathan Strahl, to state the bases of their opinions. Further, defendant argues the trial court erred by limiting the testimony of some lay witnesses about defendant's state of mind.

In reviewing defendant's brief, it is difficult to ascertain the exact trial questions defendant argues were erroneously handled. This Court has thus scrutinized each segment of the record purportedly identified by defendant in the relevant assignments of error. We find no error in any of the testimony presented in these portions of the record. Below, we address the portions of testimony to which defendant makes ample argument in his brief.

First, defendant contends the trial court erred in handling the following exchange between Dr. Timmons and defense counsel:

> [DEFENSE COUNSEL]: Did you talk to the defendant Ted Prevatte about his actions and how he was feeling and what he was doing immediately up to the time that Cindy McIntyre was killed on June the first of 1993?
>
> [DR. TIMMONS:] Yes.
>
> [DEFENSE COUNSEL]: And relate to the court and the jury what Mr. Prevatte told you in regards to that.

[THE STATE]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Well, did you use what Mr. Prevatte told you as far as what he was thinking and what he was feeling and what he was doing immediately prior to the time he went over to Cindy McIntyre's house on June the first of 1993 and formulate and evaluate and make—formulating an opinion as to his sanity or insanity on June the first, 1993?

[THE STATE]: Objection.

THE COURT: Sustained.

It is well settled that an expert must be allowed to testify to the basis of her opinion. *State v. Ward*, 338 N.C. 64, 105-06, 449 S.E.2d 709, 732 (1994), *cert. denied*, 514 U.S. 1134, 131 L. Ed. 2d 1013 (1995). Nonetheless, admission of the basis of an expert's opinion is not automatic. *State v. Workman*, 344 N.C. 482, 495, 476 S.E.2d 301, 308 (1996). The trial court, in its discretion, must determine whether the statements in issue are reliable, especially if the statements are self-serving and the defendant is not available for cross-examination. *Id.* Moreover, if the statements appear unnecessary to the expert's opinion, exclusion of the basis may be proper. *State v. Baldwin*, 330 N.C. 446, 457, 412 S.E.2d 31, 38 (1992).

In the present instance, it appears Dr. Timmons was allowed to testify to some of what she was told by defendant and to her review of defendant's psychiatric records as well as her own psychological testing of defendant. Accordingly, it seems Dr. Timmons was able to testify to the general basis of her opinion. Moreover, defendant made no offer of proof concerning the questions in issue; thus, we can only speculate as to the witness' potential responses to the questions in issue. We reject defendant's invitation to consider the transcript from a prior trial in this respect because we cannot know if the witness' viewpoint remained constant from the first to the second trial. Accordingly, we reject defendant's argument that the trial court erred in handling the testimony above.

Defendant also argues that another objection by the State was improperly sustained when defendant elicited testimony that defendant was taking medication and then asked Dr. Timmons about the impact of these drugs on a person with mental illness and whether the combination could affect defendant's ability to maintain contact

with reality. Again, defendant made no offer of proof concerning this question, and this Court can only speculate to the issues that were involved at trial. Moreover, a few questions later, Dr. Timmons was allowed to testify that, on 1 June 1993, defendant was not in touch with reality and thus did not understand that what he was doing was wrong. As such, we cannot ascertain any prejudicial error here.

Defendant further argues that Dr. Strahl, like Dr. Timmons, was also prevented from testifying to the basis of his opinion. For example, according to defendant, Dr. Strahl was limited both in talking about defendant's reported sleeping and the combination of drugs he was taking as well as in explaining the significance defendant's relationship with the victim played in Dr. Strahl's opinion.

As to defendant's sleeping and drugs, defendant's attorney was allowed to ask Dr. Strahl about the drugs and medications that defendant was taking. The State's objection to a question about defendant's sleeping problems was then sustained. The trial court heard arguments outside the jury's presence before making a final ruling. Although defense counsel initially indicated an intent to ask a question for the record, we find no evidence that an offer of proof was ever actually made. Accordingly, it is difficult to tell where this line of questioning was aimed.

As to defendant's relationship with the victim, the trial court also sustained the State's objection and heard arguments outside the jury's presence. Defendant again made no offer of proof. Accordingly, as with prior issues, this Court can only speculate as to how Dr. Strahl's opinion was impacted by the relationship between defendant and the victim. We refuse to enter into such speculation, and therefore hold that the testimony in issue was properly handled by the trial court.

Finally, defendant argues the trial court erred in limiting the testimony of certain lay witnesses concerning defendant's state of mind. Specifically, defendant points to the trial court sustaining objections: (1) to defendant's attorney asking Matthew McIntyre whether defendant was a "very polite man, was out there helping neighbors and things"; and (2) to defendant's attorney asking Ralph Pegram if he had seen defendant "helping Jeff Burr's mom up there cut wood" and "doing things for the elderly folks in the neighborhood." Defendant now argues these questions were relevant to defendant's state of mind. Once again, there was no offer of proof from which this Court can glean the relevancy of these questions. Moreover, it appears

unlikely the observations of these lay witnesses would have substantially impacted the jury's consideration of defendant's sanity. Accordingly, even assuming error *arguendo*, we find no prejudice.

This assignment of error is overruled.

[11] In another assignment of error, defendant argues that his attorneys' failure to adequately present psychological defenses constituted ineffective assistance of counsel. Defendant cites the following question posed by defense counsel to Dr. Timmons:

> And based upon your examination of the defendant, the various records and statements about which you've testified, do you have an opinion satisfactory to yourself and based upon your professional training and experience as to whether on or about June the first, 1993, at the time of the alleged offense of first degree murder of Cynthia McIntyre, the defendant Ted Anthony Prevatte was capable of premeditation and deliberation?
>
> [THE STATE]: Objection.
>
> THE COURT: Sustained.

Relying on a transcript from the prior trial, defendant asserts the witness would have said she did not believe defendant was capable of premeditation and deliberation.

Defendant concedes the State's objection was proper because expert witnesses generally may not testify as to whether a legal standard has been met. *See State v. Smith*, 315 N.C. 76, 100, 337 S.E.2d 833, 849 (1985). Defendant argues his counsel failed, however, by not asking the permissible question of whether defendant was capable of formulating and carrying out plans or of forming the specific intent to kill.

To show ineffective assistance of counsel, defendant must prove (1) the performance of his counsel was deficient, and (2) defendant was prejudiced by this deficiency. *See State v. Mason*, 337 N.C. 165, 177-78, 446 S.E.2d 58, 65 (1994); *State v. McHone*, 334 N.C. 627, 643, 435 S.E.2d 296, 306 (1993), *cert. denied*, 511 U.S. 1046, 128 L. Ed. 2d 220 (1994).

In the present case, as the State aptly points out, the hypothetical questions that defendant argues should have been asked would have sought evidence to support a diminished capacity defense. As in the prior issue, however, we can only speculate whether the questions in

issue would have been answered favorably to defendant. There are significant differences between an insanity defense and a diminished capacity defense. *See State v. Ingle*, 336 N.C. 617, 628-30, 445 S.E.2d 880, 885-86 (1994), *cert. denied*, 514 U.S. 1020, 131 L. Ed. 2d 222 (1995). As such, there is no way for this Court to know if defendant's questions would have in fact been helpful to defendant's case.

Assuming *arguendo* that the witness would have offered evidence helpful to a diminished capacity defense, it was still a matter of trial strategy to determine whether to offer evidence of both diminished capacity and insanity or to focus all efforts on insanity. Decisions concerning which defenses to pursue are matters of trial strategy and are not generally second-guessed by this Court. *State v. Lowery*, 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986). Accordingly, we find no deficiency in the performance of defendant's counsel.

This assignment of error is overruled.

[12] In another assignment of error, defendant argues his rights were violated by the State's attacks on Dr. Timmons and the State's distortion of her testimony during closing argument. Among the specific instances defendant cites are the State calling Dr. Timmons "Mrs. Timmons" during cross-examination, interrupting Dr. Timmons and refusing to allow her to explain her answers, and repeating the same questions after sustained objections. Defendant argues some of the same tactics were used in questioning Dr. Strahl. Defendant argues the State also unprofessionally denigrated the experts' testimony during closing arguments by asking, "What is the legal evidence in this case that supports the testimony of any psychiatrist that you've heard?" Defendant cites the following portion of the State's closing argument concerning Dr. Timmons:

> She gave him a battery of tests. Bunch of tests. Ink blots and trees and stick figures. What was it she said about the stick figures? Showed immaturity? Maybe he just can't draw. Did anybody think of that? A tree that's got bark. Bark shows something. Leaves. Looks like a tree to me.

Defendant also cites the State's statement, "Was it fair when the people who came up here and testified sat here and had words put in their mouth by the defense?" Defendant argues these actions violated state law and defendant's due process rights.

After an extensive review of each portion of the transcript to which defendant assigns error, we find no instance where the trial

court failed to adequately control the State's actions. A prosecutor has the duty to vigorously present the State's case. *See State v. Brock*, 305 N.C. 532, 538, 290 S.E.2d 566, 571 (1982). In so doing, the prosecutor may cross-examine a witness concerning any relevant issue, including the witness' credibility. N.C.G.S. § 8C-1, Rule 611(b) (2001). It is within the trial court's sound discretion to ensure that all cross-examination questions are proper in scope and asked in good faith. *State v. Bronson*, 333 N.C. 67, 79-80, 423 S.E.2d 772, 779 (1992). During closing arguments, attorneys are given wide latitude to pursue their case. *State v. Scott*, 343 N.C. 313, 343, 471 S.E.2d 605, 623 (1996). It is also within the trial court's discretion to control these arguments by each attorney. *Id.* An appellate court normally will not review the exercise of the trial court's discretion "unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury." *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E.2d 110, 122 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985).

This Court takes seriously the need for counsel to perform professionally in pursuing their case. We refuse to permit attorneys to disparage or impugn the trial process with improper actions. *State v. Sanderson*, 336 N.C. 1, 442 S.E.2d 33 (1994). In the present case, however, defendant has failed to show the trial court abused its discretion in handling the State's actions at trial.

This assignment of error is overruled.

[13] In another assignment of error, defendant argues the trial court erred by allowing impermissible hearsay evidence. We consider each of defendant's arguments in turn.

First, the State was permitted to ask Betty Barber about the victim's husband visiting the house on the day of the murder and whether he said "anything to her at that time that you remember?" Over defendant's objection, the witness testified, "I think he told her he loved her."

"Out-of-court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Golphin*, 352 N.C. 364, 440, 533 S.E.2d 168, 219 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). In this instance, Mike McIntyre's statement that he loved Cindy was properly admitted for a purpose other than to prove its truth. *See* N.C.G.S. § 8C-1, Rule 801(c) (2001). The statement is evidence that Cindy believed a reconciliation was forthcoming and thus supports Cindy's fear that defendant might

try to harm her or her family. *See State v. Bishop*, 346 N.C. 365, 378-81, 488 S.E.2d 769, 775-77 (1997). Moreover, the statement supports a conclusion defendant was motivated to kill by Cindy's desire to end her relationship with defendant and reconcile with her husband. Accordingly, the trial court properly admitted the testimony in issue for a nonhearsay purpose.

[14] Defendant also assigns some significance to Barber later testifying that the relationship between Cindy McIntyre and her husband was "rocky" but that they "always seemed to get back together." According to defendant, this testimony was given without personal knowledge. Defendant concedes this testimony was tested on cross-examination when the witness admitted she did not live with Cindy McIntyre and her husband and thus did not know what she meant by "rocky." Accordingly, we find no prejudicial error here.

[15] Second, defendant points to the State asking Joyce Burr, "Did Cindy McIntyre tell you in fact that she was attempting to reconcile with her husband?" Over defendant's objection, the witness answered, "Yes." This testimony was admissible under the state of mind exception to the general prohibition on hearsay. N.C.G.S. § 8C-1, Rule 803(3) (2001). Under this exception, a statement is admissible if it applies to a "declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." *Id.*

The testimony in issue was immediately preceded by testimony that Cindy McIntyre had said "that she was afraid of the defendant because he knew that she was going to try to get back with her husband." The testimony in issue was an expansion on the origin of the victim's fear of defendant. The statement of the victim's intent to reconcile with her husband shows McIntyre's mental state and provides insight into her confrontation with defendant. Accordingly, the statement is admissible not as a recitation of facts but to show state of mind. *See State v. King*, 353 N.C. 457, 474-78, 546 S.E.2d 575, 589-91 (2001), *cert. denied*, —— U.S. ——, 151 L. Ed. 2d 1002 (2002).

[16] Defendant also argues the trial court improperly sustained an objection when defendant asked Ralph Pegram, "[D]id Mike McIntyre ask you to keep an eye on Cindy and Ted so he could use that in court over custody of the kids?" Although defendant made no offer of proof as to the question's potential answer, we nonetheless have tried to review how this question elicited admissible information. We find this

question solicited hearsay and was improper. Accordingly, we hold the trial court did not err.

Finally, defendant contends that even if the statements above were not hearsay, they should have been excluded because they were irrelevant. As we indicated, these statements had a relevant, non-hearsay purpose, and thus were properly admitted.

Defendant's assignment of error is without merit.

[17] In another assignment of error, defendant argues the trial court erred by overruling objections to the State's argument that distorted the legal standard applicable to the insanity defense. While defendant's arguments on this issue involve both jury selection and guilt-innocence, we elect to address the arguments here for purposes of consistency. We again consider defendant's specific arguments in turn.

First, during jury *voir dire*, defendant argues the State asked a jury panel, "Do you all feel that you could follow His Honor's instructions with regard to both defenses? But he's first of all, not guilty at all, period. And that also, he is not guilty by reason of being insane at the time?" According to defendant, his objection was overruled. Defendant argues the State thus misstated the law as cumulative rather than alternative.

Defendant provides no transcript reference in his brief to this statement and we find no assignment of error on this issue. As such, defendant has waived this issue. N.C. R. App. P. 10(a). Nonetheless, we have reviewed this issue and find such a statement would be a proper attempt by the State to ascertain if jurors could follow the law concerning defendant's guilt as well as whether defendant was not guilty by reason of insanity. The trial court properly instructed the jury following the guilt phase. We thus find no error here.

[18] Second, during its closing argument, the State said:

> Ted Prevatte most assuredly is not, should not be considered by you to be the poster boy for perfect mental health. Every expert that testified . . . can see to the fact that Ted has some degree of mental health problems.
>
> The difference is, and the question you have to ask yourself is, does that mental illness rise to the level of providing an excuse for him kidnapping two people and murdering one of them? That's what it boils down to.

Defendant argues that in this closing argument, the State essentially asked the jury to make a policy decision about the importance of the insanity rule. To the contrary, the State appears to have been arguing that defendant's mental illness did not alone meet the requirements for legal insanity. *See State v. Franks*, 300 N.C. 1, 10, 265 S.E.2d 177, 182 (1980) (evidence of mental disease or deficit alone does not completely establish insanity defense); *State v. Potter*, 285 N.C. 238, 249-51, 204 S.E.2d 649, 657 (1974) (evidence of mental illness does not alone establish legal insanity). Accordingly, the State made a proper argument.

Finally, defendant attributes error to the State's argument to the jurors that if they found defendant insane, they should "let him go." According to defendant, combined with the State's prior argument concerning mental illness being an excuse, this argument implied to the jury that defendant would be able to freely move throughout society if the jury found him not guilty by reason of insanity. At the time of this statement, however, after defendant's objection, the trial court told the jury, "I'll instruct you on the consequences at a later time." Indeed, the trial court did later instruct the jury that "a defendant found not guilty by reason of insanity shall immediately be committed to a state mental facility." The trial court further explained to the jury the hearing process defendant would go through and the burden he would have to meet in order to be released. Accordingly, any alleged error was properly handled via the trial court's instruction.

This assignment of error is without merit.

In another assignment of error, defendant argues the State's jury arguments infected the trial with unfairness in that they asked the jury to find defendant guilty for impermissible reasons. Defendant cites six arguments from the State's opening and closing arguments. In many of the instances cited, defendant's appellate counsel appears to have taken minor comments from the State out of context in an attempt to create the illusion of impropriety or prejudice. Nonetheless, we consider each of defendant's arguments in turn.

As a preliminary matter, we note prosecutors have an obligation to be zealous advocates and are thus provided wide latitude in hotly contested cases like the present one. *State v. McCollum*, 334 N.C. 208, 227, 433 S.E.2d 144, 154 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994); *see also State v. Smith*, 352 N.C. 531, 561, 532 S.E.2d 773, 792 (2000), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360

(2001). Moreover, control of arguments is generally left to the trial court's discretion, and reversal is warranted only where the remark in issue is extreme and clearly calculated to prejudice the jury. *Huffstetler*, 312 N.C. at 111, 322 S.E.2d at 122. We now consider each of defendant's arguments.

[19] First, the State argued the jury's duty is to enforce the law. The following portion of the State's closing argument appears relevant:

> Now, ladies and gentlemen, we call it jury duty. It's not jury spend a few days off work. It's not jury come up here and have fun. It's jury duty. Because you have a job to do. Your job is not done. Your job is just getting ready to start. You've got to take everything that you heard back there, and you've got to decide what the right thing to do is. You've got to decide whether or not that man is gonna be accountable for his actions on June the first of 1993, to enforce the law.
>
> Now, it's a common misconception that police officers enforce the law. They don't enforce the law. Police officers are fact gatherers. Police officers take pieces of crime, be they witnesses, victims, evidence, whatever, and they gather them up. D.A's office doesn't enforce the law. D.A's office takes all those pieces that the police officers bring them, investigators bring to them, and they put it together. And we show it to you. Judge doesn't enforce the law.
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE STATE]: Judge is the umpire.
>
> THE COURT: Overruled.
>
> [THE STATE]: His job is to make sure that that man down there gets a fair trial, and that the State of North Carolina gets a fair trial. So who enforces the law? The answer is obvious. You all enforce the law.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [THE STATE]: Without juries composed of citizens from the community, there's no one to enforce the law. All the laws in the books don't mean a thing if nobody enforces the law. All of the evidence collection and forensic evaluation means nothing if there aren't juries to enforce the law. So it's up to you, ladies and

gentlemen. Are you going to enforce the law? Are you going to hold him accountable?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[DEFENSE COUNSEL]: That's a misstatement.

[THE STATE]: Are you going to do your duty? Ladies and gentlemen, are you going to do your duty and rise up as one voice, one voice of the community?

[DEFENSE COUNSEL]: Objection. Improper.

THE COURT: Sustained.

[THE STATE]: And tell that boy—

[DEFENSE COUNSEL]: Objection.

THE COURT: Wait a minute. Sustained as to any community argument.

[THE STATE]: Tell this man—

THE COURT: Wait a minute. Don't consider that, members of the jury.

[THE STATE]: —that he can get away with it?

[DEFENSE COUNSEL]: Objection.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[THE STATE]: Are you going to tell him that he's unaccountable, and that what he did on June the first of 1993 was wrong? Are you going to do your duty? Are you ready to do your duty? I think you are. You've got what you need.

This Court has held it improper for a prosecutor to " 'suggest that the jury is effectively an arm of the State in the prosecution of the defendant or that the jury is the last link in the State's chain of law enforcement.' " *State v. Lloyd*, 354 N.C. 76, 130, 552 S.E.2d 596, 632 (2001) (quoting *State v. Elliott*, 344 N.C. 242, 285, 475 S.E.2d 202, 222-23 (1996), *cert. denied*, 520 U.S. 1106, 137 S.E.2d 312 (1997)). Prosecutors are allowed to outline the function of the various participants in a trial. Such an argument may properly include statements

concerning the vital importance of jurors to the system of justice and an admonition that the "buck stops here." *See State v. McNeil*, 350 N.C. 657, 687-88, 518 S.E.2d 486, 505 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000).

In the present case, it appears the State used its argument to clear up any jury confusion about the responsibilities of the police, the prosecutors, the judge, and the jury. The State ultimately sought to ensure the jury understood that its proper role included holding defendant accountable. Accordingly, the State's argument remained in line with this Court's precedent.

[20] Second, defendant cites as error the State's opening and closing argument where the State said that if the jury found defendant guilty, it would learn more during sentencing. We hold that the State's argument merely reemphasized what the jury already knew, namely, that if defendant was found guilty, additional evidence would be submitted on the question of defendant's sentence. This procedural issue had been fully explained to the jury during jury selection, and it was not error for the State to refer to this fact during argument.

[21] Third, defendant contends the State's opening argument included a request that the jurors consider the victim as a relative and put themselves in the victim's shoes. The following portion of the State's opening argument appears relevant:

> [THE STATE]: You will come to know a little bit more about Cindy through evidence presented by the State. You will come to know that in fact, she had two children. She worked at Wadesboro Manufacturing. She—I believe you will find after listening to all the evidence, will see that she is not very different from all of us. She could very well be a wife of some of you, a daughter to some of you—
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE STATE]: —a sister of some of you.
>
> THE COURT: Sustained.
>
> [THE STATE]: And that like many folks, she had some imperfections. Some of those will be that she had some uncertainties within her own life about her marriage to Michael. That on June first of 1993, she had resolved those uncertainties. She and Michael McIntyre, her husband of 14 years, had decided to pull family back together. She had decided to end the relationship that

she had been involved with the defendant in. Exercising her own free will and her right to choose is what she did, the evidence will tend to show.

Arguments that ask the jurors to place themselves in the victim's shoes are improper. *McCollum*, 334 N.C. at 224, 433 S.E.2d at 152. In the present case, however, it appears the State was simply providing some background on the victim. The State's comment that Cindy could be related to a member of the jury appears to have been an effort to show Cindy was a typical community member. There is no indication the State was urging the jurors to put themselves in Cindy's shoes. As such, the State's argument was proper.

[22] Fourth, defendant argues the State improperly referred, during opening and closing arguments, to the lack of consequences defendant had suffered in the six years since the crimes were committed. Defendant argues such consequences are irrelevant to defendant's guilt. Defendant further argues the State improperly ignored the trial court sustaining defendant's objections to this line of argument.

When the State's opening and closing arguments are read in their totality, it is clear the State was suggesting defendant acted in a planned way and made numerous decisions in the process of the killing. When the State briefly remarked during opening statements about the six-year time period, the trial court immediately admonished the State to stick to the evidence. Moreover, in our review of the State's opening and closing arguments, we find no instance where the State referred to the consequences to defendant as being relevant to the jury's determination of guilt. Accordingly, we hold that the trial court properly handled the portions of argument in issue.

Fifth, defendant argues the State contradicted the evidence and argued facts not in evidence. Defendant cites several examples, and we consider each individually.

[23] Defendant first points to the State's comment that "[t]here wasn't one witness for the defendant that could speak to you and look you in the eye and tell you the person that used this rope and this knot was having a psychotic episode or having some type of out-of-body experience." Here, the State was asserting that no witness could testify as a fact that defendant was having a psychotic episode at the time of the murder. Despite the existence of conflicting expert opinion on the issue, the State was properly pointing out that there was no definitive evidence to prove an episode took place.

[24] Defendant also contends the State tried to impeach the insanity defense with the idea that defendant had taken mental tests several times and knew how to manipulate them. According to defendant, there was no evidence of this in the record. Defendant cites the following portion of the State's argument:

> Ladies and gentlemen, I pose this question to you. In those 17 and a half years that he was down there being evaluated by those Georgia doctors, how many times do you think he's taken those tests? The man knows the game.
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE STATE]: He knows how to accomplish what he wants.
>
> . . . .
>
> THE COURT: Overruled.
>
> [THE STATE]: He knows how to portray himself in whatever light helps him out. 17 and a half years of practice makes perfect, ladies and gentlemen.

Considering the broad evidence of defendant's mental problems and the evaluations and treatment he received for these problems, it was proper for the State to argue that defendant had some expertise portraying his psychological makeup in a favorable manner. Further, the trial court instructed the jurors that if their recollection of the evidence differed from that presented by the attorneys in argument, the jurors should disregard what the attorneys said and rely solely on their own independent recollection.

[25] Defendant additionally argues there was no support in the record for the State's argument that its own expert, Dr. Robert Rollins, had gathered information from other people in formulating his opinion. It is helpful to consider this argument in context:

> [THE STATE]: . . . Well, Doctor Rollins told you he had other stuff, information gathered by his assistant Mr. Meachum. Evidence from people who were out there.
>
> [DEFENSE COUNSEL]: Objection. Not evidence.
>
> [THE STATE]: Evidence from officers. Evidence from the D.A.'s office.
>
> [DEFENSE COUNSEL]: Objection.

THE COURT: Well, sustained as to people who were out there. Overruled as to the remaining.

[THE STATE]: He didn't just talk to the defendant. He talked to people, contrary to what they assert.

[DEFENSE COUNSEL]: Objection. That's not the testimony.

[THE STATE]: And I'll tell you what, ladies and gentlemen—

THE COURT: Overruled.

[THE STATE]: —you think about it, and you decide what you remember him saying.

After our review, we conclude the State did not proceed with this line of argument after defendant's objection. Rather, the State asked the jury to consider this issue based on its own recollection of testimony from the trial. This is in line with the instruction the trial court properly gave the jurors to base their deliberations on their own memory of testimony rather than the attorneys' arguments.

Accordingly, we find the trial court properly handled the issues raised by defendant. Moreover, the trial court's instructions cured any potential error.

[26] Finally, defendant argues the State improperly urged the jury to contrast the court's fair treatment of defendant to defendant's treatment of the victim. Defendant also contends the State impugned the integrity of defense counsel and defendant's witnesses by asking the jury if it was "fair when the people who came up here and testified sat here and had words put in their mouth by the defense?" According to defendant, this argument was irrelevant and inflammatory and penalized defendant's exercise of his due process right to a fair trial.

The State's remarks concerning the fairness defendant showed the victim are well within the parameters created by this Court. *See McNeil*, 350 N.C. at 688-89, 518 S.E.2d at 505 ("[t]his Court has repeatedly held it is not improper to argue that defendant, as judge, jury, and executioner, single-handedly decided the victim's fate."); *Elliott*, 344 N.C. at 275-76, 475 S.E.2d at 217 (prosecutor's request that jury give victim a fair trial "amounted to nothing more than a request that the State be given equal consideration."). Similarly, the State's remark concerning defense counsel putting words in the mouths of witnesses was proper. The State had a right to respond to defendant's attacking closing argument. *See State v. Trull*, 349 N.C. 428, 453, 509 S.E.2d 178,

194 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999). Moreover, the State's argument was not abusive or ongoing. Rather, our review of the record indicates the State's comment was isolated and did not deprive defendant of his right to a fair trial. *See State v. Bowman*, 349 N.C. 459, 473-74, 509 S.E.2d 428, 437 (1998), *cert. denied*, 527 U.S. 1040, 144 L. Ed. 2d 802 (1999).

This assignment of error is overruled.

[27] In another assignment of error, defendant contends the trial court erred in its jury instructions on insanity. The trial court instructed the jury in a manner virtually identical to our state's pattern jury instructions:

> [S]ince sanity and soundness of mind is the natural and normal condition of people, everyone is presumed to be sane until the contrary is made to appear. This means that the defendant has the burden of proof on the issue of insanity. However, unlike the State, which must prove all the other elements of the crime beyond a reasonable doubt, the defendant need only prove his insanity to your satisfaction. That is, the evidence taken as a whole must satisfy you not beyond a reasonable doubt, but simply to your satisfaction that the defendant was insane at the time of the alleged offense.

See N.C.P.I.—Crim. 304.10 (1992).

Defendant contends this instruction was ambiguous because a defendant has the burden of proving insanity by a preponderance of the evidence. Because the trial court used the term "prove his insanity to your satisfaction," defendant contends the trial court failed to adequately and clearly instruct the jury on the proper burden of proof.

In *State v. Weeks*, we considered an instruction almost identical to the one given in the present case. 322 N.C. 152, 175, 367 S.E.2d 895, 908-09 (1988). In *Weeks*, we determined the trial court's refusal to define "satisfaction" did not leave unbridled discretion in the jury as to defendant's burden of proof. *Id.* Similarly, in the present case, we hold "the jury was properly instructed on the standard of proof needed by defendant to prove his insanity." *Id.* at 175, 367 S.E.2d at 909.

Moreover, we find no merit in defendant's suggestion that the jury may have been confused by the interchangeable use of the terms

"satisfied," "convinced," and "proof beyond a reasonable doubt." Based on our review of the record, we conclude defendant is attempting to create the appearance of impropriety by stringing together comments from the State and the trial court which occurred at unconnected times during the trial. The trial court fully instructed the jury on which standard to use and specifically told the jury not to use the "beyond a reasonable doubt" standard in considering whether defendant was insane. *See State v. Ward*, 301 N.C. 469, 473-74, 272 S.E.2d 84, 87 (1980). In short, there was no risk that the jury applied an improper standard to its insanity deliberations.

This assignment of error is without merit.

[28] In another assignment of error, defendant argues the trial court committed plain error by failing to intervene *ex mero motu* to prevent the State from commenting on defendant's exercise of his right to remain silent. Defendant cites two comments by the State. First, the State said, "There wasn't one witness for the defendant that could speak to you and look you in the eye and tell you the person that used this rope and this knot was having a psychotic episode or having some type of out-of-body experience." Second, the State said, "[T]here's not been a consequence for that man that sits over there who won't even look you folks in the eye. . . . And hasn't the entire trial."

Criminal defendants have a constitutional right not to testify and it is improper for prosecutors to comment on a defendant's exercise of this right. *State v. Mitchell*, 353 N.C. 309, 326, 543 S.E.2d 830, 840, *cert. denied*, —— U.S. ——, 151 L. Ed. 2d 389 (2001). However, if a prosecutor's comment on a defendant's failure to testify was not extended or was a "slightly veiled, indirect comment on [a] defendant's failure to testify," there was no prejudicial violation of the defendant's rights. *Id.* at 326, 543 S.E.2d at 841; *see also State v. Rouse*, 339 N.C. 59, 96, 451 S.E.2d 543, 563 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995). Further, comments on a defendant's courtroom demeanor are not necessarily comments on a defendant's silence. *State v. Barrett*, 343 N.C. 164, 177-78, 469 S.E.2d 888, 895-96, *cert. denied*, 519 U.S. 953, 136 L. Ed. 2d 259 (1996).

In the present case, the State's argument that no witness could testify that defendant was having a psychotic episode was merely a comment on the witnesses who had testified. The State was arguing that no defense witness could testify concerning defendant's mental state at the time of the killing. Because we find no direct reference in

this comment to defendant's silence, we hold the trial court did not err by failing to intervene *ex mero motu*.

Similarly, as to the State's comment on defendant's failure to look into the jurors' eyes, we conclude this was merely a brief reference to defendant's courtroom demeanor. This comment cannot reasonably be read in a manner that implicates the defendant's right not to testify. As such, the trial court did not err in handling this portion of the State's argument.

This assignment of error is without merit.

[29] In another assignment of error, defendant contends the trial court erred by overruling objections and denying his motion to strike testimony by a State's witness informing the jurors about a prejudicial, irrelevant statement that defendant allegedly made. Defendant's argument pertains to the following portion of Joyce Burr's testimony:

> Q Mrs. Burr, tell the members of the jury what the defendant told you or told you and your husband the day before Cindy's death.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> A He said that if he could kill the bitch and get away with it, he would. But he wasn't, because his mother paid too much money to get him out of prison in Georgia.
>
> [DEFENSE COUNSEL]: Move to strike.
>
> THE COURT: Overruled.
>
> Q Now, Mrs. Burr, did he tell you who that—did he tell you who the person was that he was referring to as bitch?
>
> A Cindy.

According to defendant, this testimony was improperly and prejudicially admitted as proof of his other crimes. Additionally, defendant argues the prejudice from the testimony was enhanced when the State later repeated the statement and called attention to it during argument.

Prior to the admission of the testimony in issue, the trial court held a hearing. Defendant objected to the part of the statement revealing that his mother paid money to get him out of prison. The trial court ruled the testimony was relevant and admissible pursuant

to North Carolina Rule of Evidence 403. We conclude this ruling was not an abuse of the trial court's discretion.

Only relevant evidence is admissible. N.C.G.S. § 8C-1, Rule 402 (2001). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2001). In criminal cases, Rule 401 should be broadly construed so that all evidence which may shed any light on the alleged crime is admitted. *State v. Cagle*, 346 N.C. 497, 506, 488 S.E.2d 535, 542, *cert. denied*, 522 U.S. 1032, 139 L. Ed. 2d 614 (1997). Nonetheless, a trial court should exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403 (2001). A trial court's ruling on such an issue will be disturbed on appeal only if the trial court's decision was so arbitrary that it could not have been based on reason. *Cagle*, 346 N.C. at 506-07, 488 S.E.2d at 542.

In analyzing the statement in issue here, we find considerable probative value in both parts of the statement. The first part of the statement, in which defendant said he could kill the victim, showed that defendant had the motivation to kill the victim. It also revealed that defendant had thought about killing the victim for some time before the murder occurred. The second part of the statement, in which defendant said his mother paid to get him out of prison, allowed the jury valuable insight concerning defendant's thinking and evaluation prior to the murder. Hearing both parts of the statement gave the jury the opportunity to see how defendant was deliberating over whether to kill the victim. Because defendant's mental state was an issue at trial, this information was extremely relevant and probative to the jury's deliberations.

We also must consider the danger of unfair prejudice to defendant via the admission of the testimony. The testimony did not reveal why defendant had been in prison or why his mother paid for his release. Further, our review of the record reveals defendant, in questioning his own witnesses as well as in closing arguments, disclosed that he had spent time in prison. Accordingly, we find any prejudice from the admission of the testimony in issue was not significant enough to warrant the testimony's suppression. Moreover, because we hold the testimony was properly admitted, we also hold the State's references to the testimony were proper.

This assignment of error is overruled.

[30] In another assignment of error, defendant argues the trial court's instructions unconstitutionally relieved the State of its burden of proving all elements of the kidnapping crimes and the evidence was insufficient to support kidnapping as charged in the indictments.

The indictment for the kidnapping of Matthew McIntyre alleged defendant confined, restrained, or removed Matthew from one place to another "for the purpose of facilitating the commission of a felony, First Degree Murder." The indictment for the kidnapping of Cindy McIntyre alleged defendant confined, restrained, or removed her from one place to another "for the purpose of facilitating the commission of a felony, First Degree Murder, and terrorizing" the victim.

The trial court's instructions on the kidnappings required the State to show *inter alia*, that defendant "confined or restrained or removed [the victims] for the purpose of facilitating [defendant's] commission for murder" of Cindy McIntyre. The jury returned a verdict finding defendant guilty of first-degree kidnapping, but did not specify which purpose or purposes contained in the indictment formed the basis for the verdict.

Defendant argues his constitutional rights were violated because the trial court instructed the jury that it must find the kidnapping was for the purpose of "murder" instead of "first degree murder," as specified in the indictment, and because the trial court failed to instruct the jury that it must find defendant was "terrorizing" Cindy McIntyre as the indictment alleged. N.C.G.S. § 14-39(a) provides that a defendant is guilty of kidnapping if he

> shall unlawfully confine, restrain, or remove from one place to another . . . if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; *or*
>
> (2) Facilitating the commission of *any felony* or facilitating flight of any person following the commission of a felony; *or*
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; *or*

(4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.

N.C.G.S. § 14-39(a) (2001) (emphasis added).

This Court has held that language in an indictment following the words "committing a felony" is "mere harmless surplusage and may properly be disregarded in passing upon its validity." *State v. Freeman*, 314 N.C. 432, 435-36, 333 S.E.2d 743, 745-46 (1985). Similarly, we hold the trial court's instructions here were adequate and valid. The omission of "first degree" to modify "murder" was neither error nor prejudicial.

Defendant's contention that the trial court erred in failing to instruct the jury that it must find defendant was terrorizing Cindy McIntyre is also without merit. A kidnapping indictment

> must allege the purpose or purposes upon which the State intends to rely, and the State is restricted at trial to proving the purposes alleged in the indictment. Although 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.

State v. Moore, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986) (citations omitted). While the indictment for the kidnapping of Cindy McIntyre listed "terrorizing" as one of the purposes, it was not necessary for the trial court to include terrorizing in its instructions. The trial court thus did not err in its instructions.

[31] Defendant further argues the kidnappings were an inherent and integral part of Cindy McIntyre's murder and therefore the conviction for her kidnapping cannot stand. This argument is also without merit. We have held that "a person cannot be convicted of kidnapping when the only evidence of restraint is that 'which is an inherent, inevitable feature' of another felony," but evidence of actions constituting additional restraint can support such a conviction. *State v. Beatty*, 347 N.C. 555, 559, 495 S.E.2d 367, 369 (1998) (quoting *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978)). The additional restraint may consist of actions that increase the victim's helplessness and vulnerability. *See id.* at 559, 495 S.E.2d at 369-70. In the present case, the binding and beating of Cindy McIntyre and the restraint of Matthew McIntyre were not essential actions necessary to restrain Cindy in order to murder her, but were additional actions that increased her

helplessness and vulnerability. Accordingly, defendant's assignment of error is overruled.

[32] In another assignment of error, defendant argues the trial court erred by failing to declare a mistrial when the State introduced evidence that defendant escaped from prison while serving time for a prior murder in Georgia. Defendant also argues it was error for the trial court to fail to declare a mistrial when the State introduced evidence about defendant pulling the trigger in the Georgia murder. However, defendant points to no specific transcript reference and makes no specific argument about this alleged error. We therefore only examine the contention regarding the evidence of the escape. The following exchange took place during the State's cross-examination of defense expert witness Dr. Strahl:

> Q . . . [I]n your review of the Georgia Department of Corrections records, were you aware that [defendant] had escaped while he was serving time down there in Georgia?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> Q Were you aware?
>
> A I was not aware, no.
>
> Q That wouldn't change your opinion, would it?
>
> A In terms of dangerousness to others?
>
> Q In terms of adjusting well to prison life, being a good inmate.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Now, is this contained in the records that were introduced?
>
> [THE STATE]: Weren't introduced, Your Honor. I'm asking if he's aware of it.
>
> [DEFENSE COUNSEL]: No, sir.
>
> THE COURT: Well, sustained. Don't consider the question, members of the jury, about any prior escape. Can all of you disregard that?
>
> (Jurors nod their head[s] affirmatively.)

The decision to grant a motion for a mistrial is within the discretion of the trial court. *State v. McCarver*, 341 N.C. 364, 383, 462 S.E.2d

25, 36 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996). A mistrial should be declared only if there are serious improprieties making it impossible to reach a fair, impartial verdict. *Id.* at 383, 462 S.E.2d at 35-36. "Jurors are presumed to follow a trial court's instructions." *Id.* at 384, 462 S.E.2d at 36.

Here, the trial court sustained defendant's objection and instructed the jury to disregard the reference to the escape. Because we assume the jury followed this instruction and defendant seemed satisfied at the time with the instruction and did not request a mistrial, the trial court did not err by failing to declare a mistrial *ex mero motu*. Accordingly, this assignment of error is overruled.

[33] In another assignment of error, defendant argues the trial court erred by incorrectly instructing the jury not to consider defendant's special issue of legal insanity unless the jury first found defendant was not guilty. Consistent with our state's pattern jury instructions, the trial court instructed the jury as follows:

> Now, if you find the defendant not guilty for any reason, you will return a verdict of not guilty, and will so indicate on each of the forms. But you will not—and you will only answer the special issue that I just read to you if you return a verdict of not guilty. Now, if you return a verdict of not guilty, you must answer the special issue which asks whether you found the defendant not guilty because you were satisfied that he was insane. If you found the defendant not guilty because you were satisfied that he was insane, answer yes. If you were not so satisfied, answer no.

See N.C.P.I.—Crim. 304.10 (1992). Defendant argues this instruction was reasonably likely to mislead the jury to believe that before it could consider defendant's special issue of legal insanity, the jury was required to find defendant not guilty.

Defendant's argument is without merit. Prior to the above referenced instruction, the trial court had instructed the jury that

> when there's evidence which tends to show that the defendant was legally insane at the time of the alleged offense, you will consider this evidence only if you find that the State has proved beyond a reasonable doubt each of the things about which I've instructed you. Even if the State does prove each of these things beyond a reasonable doubt, the defendant would nevertheless be not guilty if he was legally insane at the time of the alleged offense.

See N.C.P.I.—Crim. 304.10 (1992). The trial court fully instructed the jury that it was to consider the insanity defense only if it found the State had proved its case beyond a reasonable doubt. Taken in context with the trial court's instructions on the insanity defense, there was no error.

This assignment of error is without merit.

SENTENCING PROCEEDING

[34] In another assignment of error, defendant argues the trial court erred by allowing the State to arbitrarily decline to present evidence of the aggravating circumstance that defendant had previously been convicted of another capital offense which is the statutory aggravating circumstance set out in N.C.G.S. § 15A-2000(e)(2), which refers in pertinent part to an aggravating circumstance where "[t]he defendant had been previously convicted of another capital felony." N.C.G.S. § 15A-2000(e)(2) (2001).

N.C.G.S. § 15A-2000(e)(3) refers in pertinent part to an aggravating circumstance in which "[t]he defendant had been previously convicted of a felony involving the use or threat of violence to the person."

Defendant was found guilty of murder in 1974 in Georgia. In the present case, the State did not pursue a prior capital felony aggravating circumstance under N.C.G.S. § 15A-2000(e)(2) but instead proceeded as though the offense was a prior violent felony under N.C.G.S. § 15A-2000(e)(3). The prosecutor said, "We've been thinking of doing this since last spring just as a way of simplifying [issues regarding the constitutionality of the Georgia statute under which defendant was sentenced]."

Defendant relies on this Court's decision in *State v. Case* where we held that if an aggravating circumstance could be supported by the evidence, the State must submit it. 330 N.C. 161, 163, 410 S.E.2d 57, 58 (1991). In *Case*, this Court held:

> It was error for the State to agree not to submit aggravating circumstances which could be supported by the evidence. . . . If our law permitted the district attorney to exercise discretion as to when an aggravating circumstance supported by the evidence would or would not be submitted, our death penalty scheme would be arbitrary and, therefore, unconstitutional. Where there

> is no evidence of an aggravating circumstance, the prosecutor may so announce, but this announcement must be based upon a genuine lack of evidence of any aggravating circumstance.

Id. at 163, 410 S.E.2d at 58.

The facts of the present case are clearly distinguishable from *Case*. Here, the State requested a statutory aggravating circumstance based on the evidence of the prior murder in Georgia. The (e)(3) circumstance was requested and submitted in lieu of the (e)(2) circumstance. The integrity of the capital sentencing scheme, which was at issue in *Case*, is not at issue here. Whether it was styled as a capital felony or as a violent felony, the fact that defendant had been convicted previously of murder was submitted to the jury for its consideration. Defendant's assignment of error is without merit.

[35] In another assignment of error, defendant argues the trial court erred by instructing the jury about a sentencing option not authorized by statute. In June 1993, when defendant committed the murder, the maximum sentence for first-degree murder was either death or life imprisonment with the possibility of parole. N.C.G.S. § 15A-1371(a1) (Cum. Supp. 1993) (amended 1993, effective 1995). The trial court instructed the jury only that if it found defendant guilty of first-degree murder, it would have to choose between life imprisonment without parole and the death penalty. Defendant did not object to and in fact invited the trial court's error by requesting the instruction on life imprisonment without parole. Further, defendant repeatedly urged the jury to recommend a sentence of life imprisonment without parole. Defendant now argues the jury may have been influenced to decide that life imprisonment without parole would be a worse punishment than death because the jury heard defendant was mentally disturbed, suicidal, masochistic, unhappy and was living a tortured life in prison.

"[T]his Court has consistently denied appellate review to defendants who have attempted to assign error to the granting of their own requests." *State v. Wilkinson*, 344 N.C. 198, 213, 474 S.E.2d 375, 383 (1996). A defendant cannot complain about a jury instruction that he specifically requests. *Id.*; *State v. McPhail*, 329 N.C. 636, 643, 406 S.E.2d 591, 596 (1991).

Defendant specifically requested and was granted an instruction on life imprisonment without parole. This was invited error, and thus defendant's argument is misplaced.

Further, the prohibition against *ex post facto* laws was not violated as defendant claims. Here, defendant was sentenced to the maximum punishment of death, which was provided by law at the time of the murder. Accordingly, defendant has no *ex post facto* claim. This assignment of error is overruled.

[36] In another assignment of error, defendant argues the trial court erred by failing to specify and define the alleged crime of violence in the statutory aggravating circumstance submitted pursuant to N.C.G.S. § 15A-2000(e)(11). Defendant argues this makes the aggravating circumstance vague and overbroad in violation of the Eighth Amendment. Further, because the trial court did not instruct the jury on which crime constituted the course of conduct, defendant now argues it is possible that the jury relied on kidnapping to find the (e)(11) circumstance.

During the jury charge, the trial court instructed the jury as follows:

> And finally, number four, was this murder part of a course of conduct in which the defendant engaged, and did that course of conduct include the commission by the defendant of other crimes of violence against another person. Now, a murder is part of such a course of conduct if you find from the evidence beyond a reasonable doubt that in addition to killing the victim, the defendant, on or about the alleged date, was engaged in a course of conduct which involved the commission of another crime of violence against another person, and that this other crime was included in the same course of conduct in which the killing of the victim was also a part, you would find this aggravating circumstance and would so indicate by having your foreperson write yes in the space provided. If you do not so find or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance, and will so indicate by having your foreperson write no in that space.

See N.C.P.I.—Crim. 150.10 (1993).

At the charge conference, during the discussion of the (e)(11) aggravating circumstance, the following exchange took place:

> THE COURT: Was this murder part of the course of conduct in which the defendant engaged, and did that course of conduct include the commission by the defendant of a crime of violence

against another person. Or would you rather it read "other crimes of violence."

[THE STATE]: Other crimes of violence, Your Honor.

THE COURT: Okay.

[DEFENSE COUNSEL]: Note our objection to that and point out that [defendant has] already been convicted of kidnapping, and that's the only other crime against the other persons, kidnapping of Matthew and kidnapping of Cynthia. And I think that's allowing the use of double of—you know, twice, using it twice.

THE COURT: Okay. Well, assault. He assaulted him with a firearm, though, so, and that's for the jury to say and determine, I think. I think the evidence supports it.

Defendant argues that the trial court promised to submit a theory of assault to constitute the other violent crime in the course of conduct. Because the trial court did not submit such a theory, defendant argues the error is preserved for this Court's review on the merits.

After reviewing the transcript, we conclude the trial court never promised to specify a crime to constitute the course of conduct. Further, defendant did not object to the trial court's jury instruction. We therefore review this issue under a plain error standard, under which reversal is justified when the claimed error is so basic, prejudicial, and lacking in its elements that justice was not done. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

We have held that the term "course of conduct" is not "unconstitutionally vague or without definition." *State v. Williams*, 305 N.C. 656, 685, 292 S.E.2d 243, 260-61, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982). The trial court here used an instruction that was virtually identical to a pattern jury instruction. N.C.P.I. Crim.—150.10 (1993).

The trial court's instruction on the (e)(11) aggravating circumstance was sufficient. Defendant gives no authority showing the trial court must specify the crime or crimes to support the (e)(11) aggravating circumstance, and this Court has approved the type of instruction used by the trial court here.

Further, there was no possibility here of double-counting. The trial court instructed the jury it could find the (e)(5) aggravating circumstance that defendant committed the murder while engaged

in the commission of kidnapping if it found that while killing the victim,

> the defendant was confining or restraining or removing Cindy McIntyre from one person—place to another without her consent, and that this was for the purpose of facilitating his commission of murder, or for the purpose of terrorizing her, and that this confinement or restraint or removal was a separate complete act, independent of and apart from the murder . . . .

Later, the trial court instructed the jury that it could find the (e)(11) aggravating circumstance if it found defendant was in a course of conduct involving another crime of violence against another person. Thus, the (e)(5) aggravating circumstance was limited to the kidnapping of the victim while the (e)(11) aggravating circumstance was limited to the kidnapping and assault of the victim's son. Accordingly, defendant's assignment of error is overruled.

[37] In another assignment of error, defendant argues the trial court erred by incorrectly instructing the jury that a single crime of violence could support the (e)(11) aggravating circumstance. Defendant argues that the (e)(11) language demonstrates clear legislative intent to limit the aggravating circumstance to cases where the jury finds there is no reasonable doubt that the defendant committed multiple crimes of violence during the course of conduct.

As discussed above, the trial court instructed the jury on the (e)(11) aggravating circumstance in a manner virtually identical to our state's pattern jury instructions. *See* N.C.P.I.—Crim. 150.10 (1993). The following portion of the instruction appears relevant:

> Now, a murder is part of such a course of conduct if you find from the evidence beyond a reasonable doubt that in addition to killing the victim, the defendant, on or about the alleged date, was engaged in a course of conduct which involved the commission of another crime of violence against another person, and that this other crime was included in the same course of conduct in which the killing of the victim was also a part, you would find this aggravating circumstance and would so indicate by having your foreperson write yes in the space provided.

Defendant's argument is without merit. This Court has approved of this instruction in other cases. *State v. Garner*, 340 N.C. 573, 594-95, 459 S.E.2d 718, 729-30 (1995), *cert. denied*, 516 U.S. 1129, 133 L. Ed. 2d 872 (1996); *State v. Hill*, 331 N.C. 387, 418-19, 417 S.E.2d

765, 780-81 (1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993). In *Hill*, the trial court instructed the jury as follows:

> If you find from the evidence beyond a reasonable doubt that, in addition to killing the victim, the defendant on or about the alleged date was engaged in a course of conduct which involved the commission of another *crime* of violence against another *person* and that these other crimes [sic] were included in the same course of conduct in which the killing of the victim was also a part, you would find this aggravating circumstance.

Hill, 331 N.C. at 418, 417 S.E.2d at 781 (emphasis added).

The instruction given by the trial court in *Hill* was substantially the same as that given in the present case. In *Hill*, this Court explicitly approved of the trial court's instruction, holding that "the terms 'crime' and 'person' in their singular forms in the challenged instruction . . . tended, in light of the evidence in the present case, to indicate that the jury could . . . consider only the defendant's attempt to kill Mrs. Hill [a victim other than the victim of the murder for which the defendant was being tried] on 10 January 1990 and not other events." *Id.* at 418-19, 417 S.E.2d at 781. A trial court may properly instruct the jury on (e)(11) by limiting the jury's consideration to the conduct involved in one other crime. *Id.* at 419, 417 S.E.2d at 781.

Further, we have held that evidence of one other crime is sufficient to submit the (e)(11) aggravating circumstance. *State v. Rogers*, 316 N.C. 203, 234, 341 S.E.2d 713, 731 (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). In *Rogers*, there was evidence that after killing one victim, the defendant fired his weapon at another man intending to kill him. *Id.* This Court held that "[t]he jury, by returning guilty verdicts, found beyond a reasonable doubt that [the defendant murdered one man and assaulted another man and] that the trial court properly submitted this [(e)(11)] aggravating circumstance to the jury for its consideration." *Id.*

In the present case, there was substantial evidence that defendant committed two violent crimes against Matthew McIntyre. While accosting Cindy McIntyre, defendant assaulted Matthew McIntyre by pointing a gun at his head and kidnapped Matthew by forcing him into a small bathroom and locking the door so he could not get out. The jury may have used either or both of these crimes against

Matthew to support the (e)(11) aggravating circumstance. This assignment of error is overruled.

[38] In another assignment of error, defendant argues that the trial court erred by submitting the aggravating circumstance that the murder was especially heinous, atrocious, or cruel pursuant to N.C.G.S. § 15A-2000(e)(9) without sufficient evidence in the record. At the charge conference, defense counsel argued the case did not involve prolonged physical or psychological torture, but the trial court disagreed. In deciding whether to submit the (e)(9) aggravating circumstance, "the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom." *State v. Hamlet*, 312 N.C. 162, 175, 321 S.E.2d 837, 846 (1984). To find this aggravating circumstance, the murder must be *especially* heinous, atrocious, or cruel. *State v. Stanley*, 310 N.C. 332, 336-37, 312 S.E.2d 393, 396 (1984). The (e)(9) aggravating circumstance can be submitted when the killing is agonizing or dehumanizing to the victim; when the killing is conscienceless, pitiless, or unnecessarily torturous to the victim; or when the murder shows the defendant's mind was unusually depraved, beyond the depravity normally present in first-degree murder. *Gibbs*, 335 N.C. at 61-62, 436 S.E.2d at 356.

We hold that the evidence in this case justified the submission of the (e)(9) aggravating circumstance. The jury could have found this murder to be particularly heinous, atrocious, and cruel because much evidence showed the murder was pitiless and unnecessarily tortuous and that it dehumanized the victim. Defendant attacked the victim in the presence of the victim's ten-year-old son. Defendant then psychologically tortured the victim by threatening her son and locking him in a bathroom. The victim did not know if defendant would kill her son as well. Defendant bound the victim's hands with rope and tape, forced her into a car, pulled her from the car, struck her multiple times, and slammed her head into the car. She screamed for help and begged for her life, but defendant shot her as she tried to run away. In light of this overwhelming evidence, we hold that the (e)(9) aggravating circumstance was properly submitted to the jury.

This assignment of error is overruled.

[39] In another assignment of error, defendant argues the trial court erred by not granting defendant's motion to strike the death penalty. Defendant argues that North Carolina's capital punishment scheme fails to allow for discretion to choose not to seek the

death penalty and is thus unconstitutional. Defendant's argument is without merit.

A capital punishment system must allow for the exercise of discretion. *McCleskey v. Kemp*, 481 U.S. 279, 311-12, 95 L. Ed. 2d 262, 291 (1987); *Woodson v. North Carolina*, 428 U.S. 280, 300-04, 49 L. Ed. 2d 944, 958-61 (1976). This Court has held the required discretion is satisfied by the guided discretion given to juries who sentence defendants in capital cases in North Carolina:

> While it is true that the present statute empowers the jury in effect to impose sentence upon the defendant, that decision is not made blindly. No defendant may be sentenced to death unless and until the jury finds at least one statutory aggravating circumstance to exist beyond a reasonable doubt which outweighs any mitigating circumstance in a sufficiently substantial manner so as to call for the death penalty. No aggravating circumstance which is not provided by the language of the statute may be considered by the jury in imposing sentence.

Barfield, 298 N.C. at 351-52, 259 S.E.2d at 542.

Further, this Court has repeatedly held that our capital punishment system is constitutional despite the prosecutor's possession of broad discretion. *See State v. Ward*, 354 N.C. 231, 245, 555 S.E.2d 251, 261 (2001).

The trial court did not err by denying defendant's motion to eliminate the death penalty.

Defendant's assignment of error is overruled.

[40] In another assignment of error, defendant argues that the trial court erred by overruling defendant's objections to the State's sentencing arguments.

During closing argument, the State emphasized that defendant had been previously convicted for the Georgia murder and that the only way to ensure defendant would not murder again was to return a death verdict:

> [THE STATE]: One murder is enough. One murder is way too many. Two is unconscionable. You also heard at sentencing, this was the watch that came off of James Rouse and off of that man's buddy. You also saw and held this picture. And there he stands posing just like a proud peacock posing in front of James Rouse's

car, holding this like he's proud of himself. Like he's proud of himself, folks. Hold him accountable.

And what did he do down there in Georgia? That's what's left of James Rouse when the defendant over there is through robbing—robbing and killing him. You saw these pictures. Because you know that in Georgia, March 1974, that man over there, with this right here, put it to the base of his skull.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[THE STATE]: Right like that, right like that, mashing into the base of his skull just like I've got it, pulled the trigger, and did that. That's the prior violent felony that we're asking you all to consider.

Defendant argues that there was no evidence defendant personally wielded the shotgun in the prior murder or shot victim Rouse, and that instead the evidence showed defendant's codefendant wielded the gun at the time of their capture and arrest.

Evidence at the penalty phase of the trial revealed the following about the prior murder: On 7 March 1974, deputies from the Anson County Sheriff's Office pursued defendant and another man in a small blue station wagon; the passenger fired at the officers with a .22-caliber handgun and a twelve-gauge long-barrel shotgun; during the chase, the passenger threw a twelve-gauge sawed-off shotgun out the window; after apprehending defendant and the passenger, officers found a Polaroid photograph in the station wagon which showed defendant standing in front of the car holding a handgun and the sawed-off shotgun; the body of James Rouse was found in Georgia in March 1974 and Rouse had suffered a close contact wound at the base of his neck; the car defendant was driving when arrested and which was also depicted in the Polaroid photograph was the victim's car; and a shotgun shell found inside the car was fired from the sawed-off shotgun.

This Court has held that arguments are within the control and discretion of the trial court. *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).

Counsel is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn

> therefrom. Conversely, counsel is prohibited from arguing facts which are not supported by the evidence. These principles apply not only to ordinary jury arguments, but also to arguments made at the close of the sentencing phase in capital cases.

Id.

In the present case, the evidence showing defendant posing in front of the Georgia murder victim's car and holding the weapon used to kill that victim permits a reasonable inference that defendant was the shooter.

Defendant argues other statements by the prosecution heightened the prejudice of referring to the prior murder. We conclude simply that defendant was convicted of the Georgia murder, and the State had every right to refer to it during closing argument.

[41] Defendant further argues that his rights were violated when the trial court allowed the State to argue that the jurors were a prosecutorial arm of the government as follows:

> [THE STATE]: You, ladies and gentleman, 13 most important people in this courthouse. You are the 13 most important people in this county. Today, you are the law. You are justice. From Richfield to Albemarle, from Oakboro to Badin, you 13 people are the law in this county.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [THE STATE]: Now, the question is, what are you going to tell that man sitting down there when you go back there to deliberate? What are you going to tell him? Are you going to tell him, it's alright, forget about that stuff in Georgia, forget about the nature of this killing, send him off to prison? Or are you going to say, fooled me once, shame on you, fooled me twice, shame on me.
>
> Ladies and gentlemen, the only thing, the only thing it takes for evil to triumph, is for good people to do nothing. Today is your day to do something. Today is your day to be justice.

In examining a similar closing argument in *State v. Brown*, 320 N.C. 179, 203, 358 S.E.2d 1, 18, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987), this Court held such an argument was proper. In *Brown*, the prosecutor argued

> You know something, Ladies and Gentlemen of the Jury, today you are the somebody that everybody talks about, and justice is in your lap. The officers can't do any more. The State can't do any more. You speak for all the people of the State of North Carolina as to this bloody murder in the first degree.

Id. There, we held that argument did

> no more than remind the jurors that "the buck stops here" and that for purposes of defendant's trial, they are the voice and conscience of the community. Nor is there any improper suggestion that the jury is the last link in the State's chain of law enforcement. The jury is merely admonished of its general responsibility impartially to assimilate the evidence of aggravating and mitigating circumstances, to weigh them, and to recommend defendant's sentence accordingly.

Id. at 204, 358 S.E.2d at 18 (citations omitted). Here, as in *Brown*, the State merely told the jury that it was the voice and conscience of the community for purposes of defendant's trial. This argument was proper.

[42] Defendant additionally argues that it was error for the trial court to overrule an objection to the following argument:

> [THE STATE]: He's not here from some fluke of circumstance, ladies and gentlemen. He's not here because of some external powers being exerted on him. He's here because of the choices he's made throughout the course of his life that lead him right here. And ladies and gentlemen, when they stand up here and they talk to you about the State and its thirst for vengeance, about how we're looking for revenge, I want you to remember one thing: That that man signed his own death warrant—
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [THE STATE]: —on June the first of 1993. And he signed it in the blood of Cindy McIntyre. He's not here because of you. He's not here because of us. He's here because of him. And you remember that. Because of the choices that he has made, two people are no longer with us. The choices he has made throughout his life. And now he faces the consequences.

In *State v. Artis*, the State made a similar argument that this Court analyzed and found to be proper. 325 N.C. 278, 328-29, 384 S.E.2d 470, 499 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). There the State argued:

> Today is judgment day. Who wrote that judgment, Ladies and Gentlemen of the Jury? Are you going to write it? You don't write anything. This man sitting right here wrote his own judgment in this case.
>
> . . . .
>
> He wrote his own judgment in this case when he broke the law, when he killed and murdered [the victim]. He passed judgment on himself. He wrote his own death warrant, which is now for you to sign and, therefore, make it lawful.

Id. at 328, 384 S.E.2d at 499. As in *Artis*, the State's argument here simply emphasizes that defendant chose to take another's life. Because nothing in the argument relieves the jury of its responsibility of fairness and impartiality, the trial court did not err by permitting this argument.

[43] Further, defendant argues his rights were violated by various portions of the state's closing arguments. Although the majority of defendant's concerns relate to the sentencing proceeding, defendant also refers to some arguments from the guilt-innocence phase which we will address here.

During the guilt-innocence phase of the trial, the State argued the jury should find defendant guilty in order to do justice for the victim and her family and to do justice for the family of the victim of the Georgia murder. The State argued as follows:

> [THE STATE]: . . . This kind of case, the loss is unique. It's permanent. It's devastating for these folks here.
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE STATE]: It's devastating, of course—
>
> THE COURT: Overruled.
>
> [THE STATE]: —for Cindy McIntyre. There is not gonna be a spot on your jury verdict that says, "We, the members of the jury, wish that we could give Cindy McIntyre back her life."

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[THE STATE]: There's not going to be a spot on this verdict sheet for that. Although as much as you wish there could be, there isn't one. After the defendant, after this human wrecking ball had careened through the lives of Cindy McIntyre and her family and done that damage, what is the testimony about what he did? Folks, he just got in his car and spun away.

The State further argued that the case was

about the horror, pain, consequence that these good people have felt every day of their lives—

[DEFENSE COUNSEL]: Objection.

[THE STATE]: —since June first of 1993.

THE COURT: Overruled.

[THE STATE]: It's a pain that's not going away. You can't bring [the victim] back. But there is something you can do. You can give these people, and you can give Cindy McIntrye's memory some closure.

[DEFENSE COUNSEL]: Objection. Improper.

[THE STATE]: You can end this.

THE COURT: Well, sustained as to the family.

[THE STATE]: You can do the right thing here. And you will do the right thing here. Ask you to find the defendant guilty of first degree murder, and nothing less, based on both premeditation and deliberation.

Defendant also objects to the State's admonishment during sentencing closing argument of "don't you forget what this case is about . . . . It's not about him. It's about her. And don't forget it." The State further argued:

When you deliberate this issue, this fourth and final issue, and you're trying to find out for yourselves whether or not the aggravating circumstances are sufficiently substantial, I'd ask you to consider these things: First of all, would the family of James Rouse say that this was sufficiently substantial?

[DEFENSE COUNSEL]: Objection.

[THE STATE]: Would the family of Cindy McIntyre—

THE COURT: Well, sustained.

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained as to the family of Rouse. Don't consider that ladies and gentlemen.

[THE STATE]: It will be up to you to decide, ladies and gentlemen of the jury, what is sufficiently substantial . . . . [Y]ou can do justice not only for yourselves, but for Cindy McIntyre.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[THE STATE]: You can do justice for James Rouse.

[DEFENSE COUNSEL]: Objection.

THE COURT: Well, sustained as to James Rouse, members of the jury.

[THE STATE]: You can do justice for the defendant. Because your answer should be death.

Defendant also argues that the following comments made by the State during the sentencing argument were improper:

Ladies and gentleman, Cindy is gone through the actions of that man. Cindy McIntyre is gone. But her spirit is here.

[DEFENSE COUNSEL]: Objection.

[THE STATE]: And it's been here throughout this whole trial.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[THE STATE]: Ladies and gentlemen, you saw it. You saw it in the courage of that boy right there when he took the witness stand, told you the best that he could remember about his momma's last moments. You saw her spirit when Cindy's momma took the stand and told you about her trying to put her family back together. She's been here, Cindy. And you've heard her. She's speaking to you now.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[THE STATE]: She speaks to you, ladies and gentlemen, as clear as that church bell rings down there on a crisp February morning. And what is she saying? She's saying, do the right thing. Do justice. Do it for her.

A prosecutor may properly argue that the victim's death represents a unique loss to the victim's family. *Payne v. Tennessee*, 501 U.S. 808, 825-27, 115 L. Ed. 2d 720, 735-36 (1991); *State v. Gregory*, 340 N.C. 365, 426-27, 459 S.E.2d 638, 673-74 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). Further, a prosecutor may argue the jury should do justice for the victim and the victim's family if the argument does not specifically relate to the family's opinions about the defendant or the crime. *State v. Laws*, 325 N.C. 81, 105-06, 381 S.E.2d 609, 623 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990).

In the present case, the State merely argued that the family suffered a unique loss and urged the jury to do justice. The reference to the victim's spirit being at the trial was nothing more than a reference to remaining family members and their need for justice. Defendant's argument is without merit.

[44] Defendant also argues his rights were violated because the State asked the jury to penalize defendant for presenting mitigating circumstances. While arguing to the jury that defendant must be held accountable for his actions, the State argued:

There's going to be evidence—arguments about mitigating circumstances. Well, when you go back there, when you go into this room and begin to deliberate the fate of the defendant, ask yourselves well, was the defendant's alcohol abusive father in the yard of Cindy McIntyre cheering him on?

[DEFENSE COUNSEL]: Objection.

[THE STATE]: Go, Ted, go.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

The State later argued defendant had to face the consequences for his actions:

> Because of the choices that he has made, two people are no longer with us. The choices he has made throughout his life. And now he faces the consequences. And even today, after 20 years of killing, robbing, kidnapping, shooting and mayhem, he tries to escape his fate by presenting you—
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE STATE]: —with mitigating circumstances.
>
> THE COURT: Overruled.

This Court has held that "[p]rosecutors may legitimately attempt to belittle or deprecate the significance of a mitigating circumstance." *State v. Billings*, 348 N.C. 169, 186-87, 500 S.E.2d 423, 433-34 (holding a prosecutor's argument urging the jury to reject mitigating circumstances because many people have the same problems was proper), *cert. denied*, 525 U.S. 1005, 142 L. Ed. 2d 431 (1998); *State v. Larry*, 345 N.C. 497, 528-29, 481 S.E.2d 907, 925 (holding a prosecutor's comment that a mitigating circumstance was an "excuse" for the defendant's crime was proper), *cert. denied*, 522 U.S. 917, 139 L. Ed. 2d 234 (1997); *see also State v. Heatwole*, 344 N.C. 1, 21, 473 S.E.2d 310, 320 (1996) (holding the following statement by a prosecutor to the jury was proper: "You may find the defendant suffers from a serious mental illness. So what."), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997).

The State in this case properly belittled the mitigating circumstances submitted by defendant. The State argued that the circumstances should not be an excuse for defendant to avoid the consequences of his actions. It was not error to permit these arguments.

Defendant's assignment of error is overruled.

[45] In another assignment of error, defendant argues the trial court erred when it reinstructed the jury on the definition of a mitigating circumstance. In its original instructions on mitigating circumstances, the trial court's instructions mirrored the North Carolina Pattern Jury Instructions:

> Issue two is, do you find from the evidence the existence of one or more of the following mitigating circumstances. Now, 25 possible mitigating circumstances are listed on the form. And you should consider each of them before answering issue two. Now, a mitigating circumstance is a fact or a group of facts which do not constitute a justification or excuse for a killing, or reduce it

> to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing, or making it less deserving of extreme punishment than other first degree murders.
>
> Now, our law identifies several possible mitigating circumstances. However, in 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.

See N.C.P.I.—Crim. 150.10 (1993).

During sentencing deliberations, the jury asked, "The term to have a mitigating value, we're a little bit unsure of exactly what that term means." The trial court reinstructed the jury as follows:

> A mitigating circumstance is a fact or group of facts which do not constitute a justification or excuse for a killing or reduce it to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing, or making it less deserving of extreme punishment than other first degree murders.

This instruction was virtually identical to the instruction provided in our state's pattern jury instructions. *See* N.C.P.I.—Crim. 150.10 (1993).

Defendant argues this reinstruction was error because the jurors were concerned about how much value they could give particular statutory or nonstatutory mitigating circumstances, and the trial court should have told the jurors "that they could give the facts presented to them whatever mitigating value or weight they wanted and that statutory mitigating circumstances must be given *some* value."

In *State v. Jaynes*, the trial court instructed the jury about mitigating circumstances by saying that

> A number of mitigating circumstances listed on the form have been submitted to the jury for its consideration; the same being (1) through and including (37). Now as to these listed circumstances, it is for you to determine from the circumstances and the facts in this case whether or not *any listed circumstance*

> has mitigating effect. And if one or more of you should determine by a preponderance of the evidence that the mitigating circumstance listed exists and that it has mitigating value, then you would find that it existed and answer so. If none of you finds that, then you would indicate, no, as to that.

342 N.C. 249, 285, 464 S.E.2d 448, 470 (1995) (alteration in original), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996). The trial court in *Jaynes* further instructed the jurors that they must determine whether or not the listed circumstance had mitigating effect. *Id.* This Court held the trial court erred because it "told jurors that they could elect to give no weight to statutory mitigating circumstances they found to exist." *Id.* at 286, 464 S.E.2d at 470.

In *State v. Davis*, 349 N.C. 1, 506 S.E.2d 455 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999), a case where the jury instructions were similar to those given in the case before us, this Court held that the trial court's instructions on mitigating circumstances were unlike those given in *Jaynes* and were proper. *Id.* at 54-55, 506 S.E.2d at 484-85. We held that

> the trial court properly informed the jurors that in order to find a statutory mitigating circumstance to exist, all they must find is that the circumstance is supported by a preponderance of the evidence. However, unlike statutory mitigating circumstances, the trial court instructed the jurors that in order to find nonstatutory mitigating circumstances, they must (1) find by a preponderance of the evidence that the circumstance existed, *and* (2) find that the circumstance has mitigating value. These instructions properly distinguished between statutory and nonstatutory mitigating circumstances and informed the jurors of their duty under the law.

Id. at 56, 506 S.E.2d at 485.

In the present case, the trial court followed the North Carolina Pattern Jury Instructions and instructed the jury about each statutory and nonstatutory mitigating circumstance. The trial court made it clear that statutory and nonstatutory mitigating circumstances were different. When referring to the statutory mitigating circumstances, the trial court instructed the jury:

> If one or more of you finds by a preponderance of the evidence that this circumstance exists, 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 this circumstance to exist, you would so indicate by having your foreperson write no in that space.

See N.C.P.I.—Crim. 150.10 (1993).

When referring to the nonstatutory mitigating circumstances, the trial court instructed the jury:

> If one or more of you finds by a preponderance of the evidence that this circumstance exists, and also is deemed mitigating, 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 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 that space.

See N.C.P.I.—Crim. 150.10 (1993).

Additionally, the punishment recommendation form clearly differentiated between findings necessary for the jury to find statutory and nonstatutory mitigating circumstances. For each statutory mitigating circumstance, next to the blank in which the jury foreperson was to write "yes" or "no," the instructions specified "one or more of us finds this mitigating circumstance to exist." For each of the nonstatutory mitigating circumstances, next to the blank in which the jury foreperson was to write "yes" or "no," the instructions specified "one or more of us finds this circumstance to exist and deem it to have mitigating value."

After a review of the record, we hold that the trial court's instructions here were not like those given in *Jaynes*. The trial court here never indicated to the jurors that they could give no weight to statutory mitigating circumstances they found to exist. The trial court fully and completely explained to the jurors their duties regarding statutory and nonstatutory mitigating circumstances. Defendant failed to object to the reinstruction after it was given. Following the trial court's reinstruction, the jury was able to reach a verdict without further inquiry.

This assignment of error is overruled.

[46] In another assignment of error, defendant argues the trial court committed plain error by instructing the jury that it was not to make any factual inferences from his rulings. The trial court gave the jury peremptory instructions on mitigating circumstances. In giving these

instructions, the trial court said that "all the evidence tends to show this is true." Shortly thereafter, the trial court instructed the jury as follows:

> Now, the law, as indeed it should, requires the presiding judge to be impartial. So you're not to draw any inference from any ruling that I've made, or any inflection in my voice or expression on my face, or anything else I may have said or done during this trial. As I say, you're not to let that indicate to you that I have an opinion or have intimated an opinion as to whether any part of the evidence should be believed or disbelieved, as to whether any aggravating or mitigating circumstance has been proved or disproved, or as to what your recommendation ought to be. It is solely up to you to find the true facts of a case and to make a recommendation reflecting the truth as you find it to be.

See N.C.P.I.—Crim. 150.10 (1993). Defendant argues this instruction undermined and rendered meaningless the peremptory instructions.

It appears defendant's appellate counsel has twisted the trial proceedings to create the appearance of impropriety. This Court has held that even when a peremptory instruction is given, jurors can reject the evidence if they lack faith in its credibility. *State v. Carter*, 342 N.C. 312, 322, 464 S.E.2d 272, 279 (1995), *cert. denied*, 517 U.S. 1225, 134 L. Ed. 2d 957 (1996). The instruction in the present case permitted the jury to determine whether it believed the evidence presented even when contradictory evidence was presented. The trial court's later instruction was consistent with the peremptory instructions.

This assignment of error is without merit.

PRESERVATION ISSUES

Defendant raises seven additional issues which he concedes have been previously decided contrary to his position by this Court: (1) the trial court erred by sustaining the State's objection to defendant's argument concerning the method of execution by lethal injection in a manner limiting defendant's mitigating argument; (2) the trial court erred by instructing the jury that it must be unanimous as to issues one, three, and four; (3) the trial court erred by instructing the jury that it could consider all guilt phase evidence during the penalty phase; (4) the trial court's instruction on the especially heinous, atrocious, or cruel aggravating circumstance was unconstitutionally vague; (5) the indictments for murder and kidnapping were insufficient; (6) defendant was subjected to multiple punishments arising

out of the same transaction; and (7) defendant's exposure to the jury in leg shackles and handcuffs violated N.C.G.S. § 15A-1031.

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

[47] Having concluded that defendant's trial and capital sentencing proceeding were free from prejudicial error, we are required to review and determine: (1) whether the evidence supports the jury's finding of the aggravating circumstances upon which the sentence of death was based; (2) whether the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2).

In the present case, the jury convicted defendant of first-degree murder based on malice, premeditation, and deliberation, and under the felony murder rule. The jury also found defendant guilty of second-degree kidnapping. Following a capital sentencing proceeding, the jury found four aggravating circumstances: (1) defendant had been previously convicted of a felony involving use of violence to the person, N.C.G.S. § 15A-2000(e)(3); (2) the murder was committed while the defendant was engaged in the commission of kidnapping, N.C.G.S. § 15A-2000(e)(5); (3) this murder was especially heinous, atrocious or cruel, N.C.G.S. § 15A-2000(e)(9); (4) this 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, N.C.G.S. § 15A-2000(e)(11).

Three statutory mitigating circumstances were submitted for the jury's consideration: (1) the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (2) the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, N.C.G.S. § 15A-2000(f)(6); and (3) the catchall mitigating circumstance that there existed any other circumstance arising from the evidence that any juror deems to have mitigating value, N.C.G.S. § 15A-2000(f)(9). Of these statutory mitigating circumstances, the jury found only (f)(2) to exist. Of the 22 nonstatutory mitigating circumstances submitted by the trial court, the jury found

six to exist: (1) defendant cared for and assisted his mother, Catherine Prevatte, while living with her; (2) defendant helped his mother financially; (3) defendant made repairs to his mother's house; (4) defendant took his mother to the doctor, grocery store, and church; (5) defendant, after his release from the Georgia Department of Corrections, attended Southside Baptist Church; and (6) defendant served on the Southside Baptist Church building grounds committee.

After thoroughly examining the record, transcript, briefs, and oral arguments, we conclude the evidence fully supports the aggravating circumstances found by the jury. Further, we find no indication the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We turn then to our final statutory duty of proportionality review.

The purpose of proportionality review is to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Proportionality review also acts "[a]s a check against the capricious or random imposition of the death penalty." *Barfield*, 298 N.C. at 354, 259 S.E.2d at 544. In conducting proportionality review, we compare the present case with other cases in which this Court concluded the death penalty was disproportionate. *McCollum*, 334 N.C. at 240, 433 S.E.2d at 162.

We have found the death sentence disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713; *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

We conclude this case is not substantially similar to any case in which this Court has found the death penalty disproportionate. Defendant was convicted on the basis of malice, premeditation, and deliberation, and under the felony murder rule. "The finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *Artis*, 325 N.C. at 341, 384 S.E.2d at 506. Further, this Court has repeatedly noted that "a finding of first-degree murder based on theories of premeditation and deliberation and of felony murder is significant." *State v. Bone*, 354 N.C. 1, 22, 550 S.E.2d 482,

495 (2001), *cert. denied*, —— U.S. ——, 152 L. Ed. 2d 231 (2002). Moreover, defendant kidnapped the victim and her ten-year-old son Matthew at gunpoint in their own home. Defendant locked Matthew in a bathroom, tied up his mother, and then gunned her down as she screamed for help and tried to run away. While the victim was not murdered inside the house, the attack that precipitated the murder took place there and led to the victim's brutal death upon her attempt to escape. It is thus worthwhile to note this Court's oft-cited proviso that "[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). In the present case, defendant viciously killed the victim after confronting and kidnapping the victim's young son. There is no doubt defendant invaded the sanctity of the victim's home. These facts clearly distinguish this case from those in which this Court has held a death sentence disproportionate.

We also compare this case with the cases in which this Court has found the death penalty to be proportionate. *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although we review all cases in the pool of "similar cases" when engaging in our statutorily mandated duty of proportionality review, "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.*; *accord State v. Gregory*, 348 N.C. 203, 213, 499 S.E.2d 753, 760, *cert. denied*, 525 U.S. 952, 142 L. Ed. 2d 315 (1998). After thoroughly analyzing the present case, we conclude this case is more similar to cases in which we have found the sentence of death proportionate than to those in which we have found it disproportionate.

Whether a sentence of death is "disproportionate in a particular case ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). Therefore, based upon the characteristics of this defendant and the crimes he committed, we are convinced the sentence of death recommended by the jury and ordered by the trial court in the instant case is not disproportionate or excessive.

Accordingly, we conclude defendant received a fair trial and capital sentencing proceeding, free from prejudicial error. The judgments and sentences entered by the trial court, including the

sentence of death for first-degree murder, must therefore be left undisturbed.

NO ERROR.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 257 CRAIG B. BROWN, RESPONDENT

No. 300A02

(Filed 4 October 2002)

Judges— district court—misconduct—censure

A district court judge is censured for willful misconduct and conduct prejudicial to the administration of justice that brings the judicial office into disrepute based upon his violation of Canons 2A and 3A(1) of the N.C. Code of Judicial Conduct when he entered two 1998 orders ex parte not only vacating 1983 and 1986 judgments of conviction of a defendant for DWI but also dismissing those cases when he knew that each of the two cases was before him only on a motion for appropriate relief and was not on any court calendar for disposition.

This matter is before the Court upon a recommendation by the Judicial Standards Commission, entered 23 May 2002, that respondent, Judge Craig B. Brown, a Judge of the General Court of Justice, District Court Division, Fourteenth Judicial District of the State of North Carolina, be censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of Canons 2A and 3A(1) of the North Carolina Code of Judicial Conduct. Considered in the Supreme Court 12 September 2002.

No counsel for Judicial Standards Commission or respondent.

ORDER OF CENSURE

The Judicial Standards Commission (Commission) notified Judge Craig B. Brown (respondent) on 2 January 2001 that it had ordered a preliminary investigation to determine whether formal proceedings under Commission Rule 9 should be instituted against him. The subject matter of the investigation included allegations that in the summer of 1998 respondent entered two orders *ex parte* dismissing the DWI charges against the defendant in *State v. Ronald Taborn*,

Durham County file nos. 83 CR 24987 and 86 CR 41630, when respondent knew each of the two cases were before him only on a motion for appropriate relief.

On 10 December 2001, special counsel for the Commission filed a complaint alleging as follows:

> 3. The Respondent engaged in conduct inappropriate to his judicial office as follows:
>
> a. Ronald Taborn (Taborn)[] was convicted of driving while under the influence in Durham County file number 83 CR 024987 (the 1983 case).
>
> b. Taborn was convicted of driving while impaired in Durham County file number 86 CR 041630 (the 1986 case).
>
> c. On or about May 25, 1998, Taborn retained J. Wesley Covington (Covington), to assist Taborn in expunging the conviction in the 1983 case.
>
> d. On or about June 16, 1998, Covington drafted a motion for appropriate relief on Taborn's behalf, asking the court to vacate the judgment in the 1983 case.
>
> e. On or about July 7, 1998, Covington met with Respondent concerning Taborn's motion for appropriate relief in the 1983 case. No representative of the District Attorney's staff was present and Taborn's case was not on any court calendar for disposition at the time of the ex parte meeting between Covington and Respondent[.]
>
> f. After the meeting with Covington, Respondent knowingly caused his signature to be stamped on an order that not only vacated the judgment but dismissed the 1983 case.
>
> g. On or about July 7, 1998[,] Durham County court personnel entered Respondent's order concerning the 1983 case into the official court computer system.
>
> h. On or about July 17, 1998, Taborn retained Covington to assist Taborn in expunging his conviction in the 1986 case.
>
> i. On or about July 28, 1998, Covington drafted a motion for appropriate relief on Taborn's behalf, asking the court to vacate the judgment in the 1986 case.

j. On or about August 28, 1998, Covington met with Respondent concerning Taborn's motion for appropriate relief in the 1986 case. No representative of the District Attorney's staff was present and Taborn's case was not on any court calendar for disposition at the time of the ex parte meeting between Covington and Respondent.

k. On or about August 28, 1998, Respondent knowingly caused his signature to be stamped to an order which not only vacated the judgment but dismissed the 1986 case.

l. On or about August 28, 1998, Durham County court personnel entered Respondent's order concerning the 1986 case into the official court computer system.

4. Respondent's actions constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute and violate[s] Canons 2A, 2B, 3A(1) and 3A(4) of the North Carolina Code of Judicial Conduct.

In addition and in the alternative, the Commission alleged that respondent engaged in conduct inappropriate to his judicial office as follows:

[5.] a. [P]aragraphs 3(a)-(e), 3(g)-(j) and 3(l) are realleged and reincorporated as if set out fully herein.

b. On or about July 7, 1998, Respondent caused his signature to be stamped to an order dismissing the 1983 case without taking adequate steps to ascertain the contents and effect of the order.

c. On or about August 28, 1998, Respondent caused his signature to be stamped to an order dismissing the 1986 case without taking adequate steps to ascertain the contents and effect of the order.

6. As to the Alternative Claim for Relief, Respondent's actions constituted willful misconduct in office and conduct prejudicial to the administration of justice[] that brings the judicial office into disrepute and violate[s] Canon[s] 2A, 2B and 3A.

On 28 December 2001, respondent answered the complaint, admitting the facts as alleged in paragraph 3(a), 3(b), 3(c), 3(d), 3(g), 3(h), 3(i), and 3(*l*). Respondent further answered as follows:

[3.] (e) Insofar as Paragraph 3e alleges that Covington met with Respondent concerning Taborn's motion for appropriate relief in the 1983 case, the same is admitted. Insofar as Paragraph 3e alleges that no representative of the District Attorney's staff was present, it is admitted, upon information and belief, that no representative of the District Attorney's staff was present at the bench; however, insofar as the meeting with Covington occurred while Respondent was on the bench in open court presiding over a regularly scheduled session of the District Court for Durham County[,] . . . it is believed by Respondent that a member of the staff of the District Attorney's office was indeed present in court at the time Covington approached Respondent. Further, in light of the considerable length of time which has passed since the meeting with Covington[,] Respondent cannot recall whether or not he was informed by Covington that the motion for appropriate relief in the 1983 case had been presented by Covington to the District Attorney; however, insofar as Respondent does not believe that he would have ever consented to consider the same in the absence of an assurance by Covington that the consent of the District Attorney had been given to an ex parte consideration and entry of an order for appropriate relief in the 1983 case, that allegation is denied. Insofar as Paragraph 3e alleges that Taborn's case was not on any court calendar for disposition on or about July 7, 1998, the same is admitted.

(f) Insofar as Paragraph 3f alleges that Respondent knowingly caused his signature to be stamped on an order that, by its terms, vacated the judgment in the Taborn case, the same is admitted; however, Respondent was at no time informed nor did Respondent know that the order referred to in Paragraph 3f, in fact, dismissed the 1983 case. Respondent alleges further in response to the allegations of Paragraph 3f that his approval and signature of the order vacating the judgment and dismissing the 1983 case was procured by the willful and knowing misrepresentation made to Respondent by Covington that were calculated to mislead and did, in fact, mislead Respondent into believing that he was entering only an order for appropriate relief vacating Taborn's 1983 con-

viction and allowing the case to be placed on the calendar for the entry of a new judgment. Because Respondent is blind and had established appropriate procedures for review of proposed orders by his judicial assistant, he was entitled to believe and, in fact, did believe that his signature stamp was placed on an order which accurately reflected the order he intended be entered and not an order dismissing the 1983 case. In fact, Respondent's former judicial assistant, who was incompetent and who was later terminated, failed to alert him to the material difference in the order resulting in the dismissal of the 1983 case.

. . . .

(j) Insofar as Paragraph 3j alleges that Covington met with Respondent on or about August 28, 1998, concerning his motion for appropriate relief in the 1986 case, the same is, upon information and belief, admitted. Insofar as Paragraph 3j alleges that no representative of the District Attorney's staff was present, the same is denied. Insofar as Paragraph 3j alleges that Taborn's case was not on any court calendar for disposition on or about August 28, 1998, the same is admitted.

(k) Insofar as Paragraph 3k alleges that Respondent knowingly caused his signature to be stamped on an order that, by its terms, vacated the judgment in the Taborn case, the same is admitted; however, Respondent was at no time informed nor did Respondent know that the order referred to in Paragraph 3k in fact dismissed the 1986 case. Respondent alleges further in response to the allegations of Paragraph 3k that his approval and signature of the order vacating the judgment and dismissing the 1986 case was procured by willful and knowing misrepresentations made to Respondent by Covington that were calculated to mislead and did, in fact, mislead Respondent into believing that he was entering an order for appropriate relief vacating Taborn's 1986 conviction and allowing the case to be placed on the calendar for the entry of a new judgment. Because Respondent is blind and had established appropriate procedures for review of proposed orders by his judicial assistant, he was entitled to believe and, in fact, did believe that his

signature stamp was placed on an order which accurately reflected the order he intended be entered and not an order dismissing the 1986 case. In fact, Respondent's former judicial assistant, who was incompetent and who was later terminated, failed to alert him to the material difference in the order resulting in the dismissal of the 1986 case.

. . . .

4. Insofar as Paragraph 4 constitutes a legal conclusion, the same is neither admitted nor denied.

5. Paragraph 5, insofar as the preamble to the same alleges that Respondent engaged in conduct inappropriate to his judicial office, the same is more specifically responded to hereinbelow:

   (a) Paragraph 5a requires no additional answer.

   (b) Paragraph 5b is admitted insofar as the same alleges that on or about July 7, 1998, Respondent caused his signature to be stamped on an order dismissing the 1983 case. The remaining allegations of Paragraph 5b are denied.

   (c) Paragraph 5c is admitted insofar as the same alleges that on or about August 28, 1998, Respondent caused his signature to be stamped on an order dismissing the 1986 case. The remaining allegations of Paragraph 5c are denied.

6. Insofar as Paragraph 6 constitutes a legal conclusion, the same is neither admitted nor denied.

WHEREFORE, Respondent respectfully prays that the North Carolina Judicial Standards Commission make an appropriate recommendation to the North Carolina Supreme Court as provided by law and as the facts and evidence warrant.

On 7 March 2002, respondent was served with a notice of formal hearing concerning the charges alleged. The Commission conducted the hearing on 3 May 2002, at which time special counsel presented no evidence as to the allegations of paragraphs 3(f) and 3(k) of the complaint. Therefore, the Commission made no findings of fact, conclusions of law, or recommendation concerning those paragraphs of the complaint and dismissed those allegations. Special counsel did

present evidence at the hearing as to the allegations of paragraphs 5(a)-5(c) of the complaint, to which allegations respondent, through counsel, admitted at the hearing. After hearing the evidence, the Commission concluded that respondent's actions constituted:

a. conduct in violations of Canons 2A and 3A(1) of the North Carolina Code of Judicial Conduct and

b. conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

The Commission recommended that this Court censure respondent.

In proceedings pursuant to N.C.G.S. § 7A-376, this Court acts as a court of original jurisdiction, rather than in its usual capacity as an appellate court. *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). In reviewing the recommendations of the Commission, the recommendations are not binding upon this Court. We consider the evidence on both sides and then exercise independent judgment as to whether to censure, to remove, or to decline to do either. *In re Nowell*, 293 N.C. 235, 244, 237 S.E.2d 246, 252 (1977).

The quantum of proof in proceedings before the Commission is proof by clear and convincing evidence. *Id.* at 247, 237 S.E.2d at 254. Such proceedings are not meant "to punish the individual but to maintain the honor and dignity of the judiciary and the proper administration of justice." *Id.* at 241, 237 S.E.2d at 250. After thoroughly examining the evidence presented to the Commission, we conclude the Commission's findings of fact are supported by clear and convincing evidence, and we adopt them as our own. *See In re Harrell*, 331 N.C. 105, 110, 414 S.E.2d 36, 38 (1992).

The conduct of respondent unquestionably warrants censure. As we recognized in *Nowell:*

> The power of the district court over the lives and everyday affairs of our citizens makes it imperative that the district court judges of the State not only be fully capable but also dedicated to carrying out their official responsibilities in accordance with the law and established standards of judicial conduct.

Nowell, 293 N.C. at 252, 237 S.E.2d at 257. Respondent overstepped his authority, engaged in misconduct, and brought disrepute to the judiciary of our state.

In light of the foregoing, we conclude that respondent's actions constitute conduct in violation of Canons 2A and 3A(1) of the North Carolina Code of Judicial Conduct. Therefore, pursuant to N.C.G.S. §§ 7A-376 and 7A-377 and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, it is ordered that respondent, Craig B. Brown, be, and he is hereby censured for willful misconduct and conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

By Order of the Court in Conference, this the 3rd day of October, 2002.

Butterfield, J.
For the Court

TALLY EDDINGS, M.D. v. SOUTHERN ORTHOPEDIC AND MUSCULOSKELETAL ASSOCIATES, INC.

No. 10A02

(Filed 4 October 2002)

Arbitration and Mediation— arbitration—employment contract—Federal Arbitration Act—interstate commerce—remand for determination

A decision of the Court of Appeals that on orthopedic surgeon's employment contract containing an arbitration clause evidenced a transaction involving commerce so that it was governed by the Federal Arbitration Act, and that a claim of fraudulent inducement of the entire contract is thus an issue to be determined by the arbitrator, is reversed for the reasons stated in the dissenting opinion that it is impossible for the appellate court to determine whether the employment contract involved interstate commerce and is within the scope of the Federal Arbitration Act, that the case should be remanded to the trial court for a determination of this issue, and that if the trial court determines that the case does not involve interstate commerce and that state law governs enforcement of the agreement, any allegations of fraud are to be determined by the trial court rather than by arbitration.

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. 375, 555 S.E.2d 649 (2001), reversing and remanding an order entered 30 June 2000 by Downs, J., in Superior Court, Buncombe County. Heard in the Supreme Court 10 September 2002.

Kelly & Rowe, P.A., by E. Glenn Kelly, for plaintiff-appellant.

McGuire, Wood & Bissette, P.A., by T. Douglas Wilson, Jr., for defendant-appellee.

PER CURIAM.

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

REVERSED.

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

DALLAS SWINSON v. LEJEUNE MOTOR COMPANY, INC.

No. 34A02

(Filed 4 October 2002)

Premises Liability— trip and fall—depression in pavement—obvious defect—contributory negligence

A decision of the Court of Appeals holding that a jury question was presented on the issue of contributory negligence in an action against an auto dealer by a customer who tripped and fell when she stepped into a depression in the dealer's parking lot while looking for her repaired auto is reversed for the reasons stated in the dissenting opinion that plaintiff was contributorily negligent as a matter of law in failing to discover and avoid an obvious defect.

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. 610, 557 S.E.2d 112 (2001), reversing a judgment signed 26 August 2000 by Balog, J.,

in Superior Court, Onslow County. Heard in the Supreme Court 11 September 2002.

Jeffrey S. Miller for plaintiff-appellee.

Wallace, Morris & Barwick, P.A., by P.C. Barwick, Jr., for defendant-appellant.

PER CURIAM.

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

REVERSED.

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

DAVID P. REYNOLDS v. CYNTHIA W. REYNOLDS (NOW FLYNN)

CYNTHIA FLYNN (FORMERLY REYNOLDS) v. DAVID P. REYNOLDS

No. 38A02

(Filed 4 October 2002)

Contempt— suspended jail sentence—criminal—appellate jurisdiction

A decision of the Court of Appeals holding that a contempt order arising from a child support action was civil rather than criminal where the court imposed an active thirty-day jail sentence suspended upon the posting of a cash bond, the payment of interest, the payment of attorney fees and the timely payment of future child support due under prior order, and that the trial court was without authority to adjudicate defendant in civil contempt because he complied with the previous orders before the hearing, is reversed for the reasons stated in the dissenting opinion that the order adjudicated defendant in criminal contempt and that a district court order of criminal contempt is appealable to the superior court rather than to the Court of Appeals.

IN RE MITCHELL

[356 N.C. 288 (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. 566, 557 S.E.2d 126 (2001), vacating in part and affirming in part an order entered 30 August 1999 by Jones (William G.), J., in District Court, Mecklenburg County. Heard in the Supreme Court 11 September 2002.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr. and Preston O. Odom, III, for appellant Cynthia Flynn (formerly Reynolds).

Horack, Talley, Pharr & Lowndes, P.A., by Thomas R. Cannon and Kary C. Watson, for appellee David Reynolds.

PER CURIAM.

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

REVERSED.

IN THE MATTER OF: MITCHELL, M., A MINOR CHILD, D.O.B. 12/24/94

IN THE MATTER OF: MITCHELL, K., A MINOR CHILD, D.O.B. 01/16/98

IN THE MATTER OF: MITCHELL, K., A MINOR CHILD, D.O.B. 02/06/96

No. 127A02

(Filed 4 October 2002)

Termination of Parental Rights— dispositional stage—best interests of children—proper determination

The decision of the Court of Appeals remanding a termination of parental rights case is reversed for the reasons stated in the dissenting opinion that the trial court did not place an improper burden on respondent in the dispositional stage to show that termination is not in the children's best interest and that the trial court did not fail to exercise its discretion in finding that termination would be in the best interests of the children.

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. 483, 559 S.E.2d

237 (2002), affirming in part, reversing in part, and remanding orders entered 16 November 2000 by Pool, J., in District Court, Transylvania County. Heard in the Supreme Court 12 September 2002.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Stuart A. Brock, for appellant Guardian ad Litem.

Charles W. McKeller for respondent-appellee Cynthia Chatman.

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion.

REVERSED.

TINA KELLY v. CARTERET COUNTY BOARD OF EDUCATION, DAVID LENKER, JR., RENEE NEWMAN, JOHN WELMERS

No. 139A02

(Filed 4 October 2002)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 149 N.C. App. 188, 560 S.E.2d 390 (2002), dismissing plaintiff's appeal from an order entered 19 January 2001 by Alford, J., in Superior Court, Carteret County. Heard in the Supreme Court 11 September 2002.

Ralph T. Bryant, Jr., P.A., by Ralph T. Bryant, Jr., for plaintiff-appellant.

Kirkman, Whitford & Brady, P.A., by Neil B. Whitford, for defendant-appellees.

Patterson, Harkavy & Lawrence, L.L.P., by Ann Groninger, on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

Tharrington Smith, L.L.P., by Ann Majestic and Lisa Lukasik, on behalf of the North Carolina School Boards Association; and the North Carolina School Boards Association, by Allison B. Schafer, General Counsel, amicus curiae.

PER CURIAM.

AFFIRMED.

JERRY GOYNIAS v. SPA HEALTH CLUBS, INC.

No. 89A02

(Filed 4 October 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. 554, 558 S.E.2d 880 (2002), affirming an order for summary judgment entered 13 April 2000 by Hudson, J., in Superior Court, Orange County. Heard in the Supreme Court 9 September 2002.

Anderson Law Firm, by Michael J. Anderson, for plaintiff-appellant.

Little & Little, PLLC, by Cathryn M. Little, for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. MASON ARNOLD

No. 30A02

(Filed 4 October 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. 670, 557 S.E.2d 119 (2001), finding no error in a judgment entered 12 September 2000 by Jones (Paul L.), J., in Superior Court, Greene County. Heard in the Supreme Court 10 September 2002.

Roy Cooper, Attorney General, by Floyd M. Lewis, Assistant Attorney General, for the State.

William D. Spence for defendant-appellant.

PER CURIAM.

AFFIRMED.

MARGARET WILLIAMS PITTS, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED v. AMERICAN SECURITY INSURANCE COMPANY, AMERICAN SECURITY INSURANCE GROUP, STANDARD GUARANTY INSURANCE COMPANY, AND WACHOVIA BANK OF NORTH CAROLINA, N.A.

No. 369PA01

(Filed 4 October 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. 1, 550 S.E.2d 179 (2001), reversing in part, vacating in part, and remanding an order and opinion entered by Tennille, J., on 7 February 2000 in Superior Court, Pitt County. Heard in the Supreme Court 9 September 2002.

The Blount Law Firm, P.L.L.C., by Marvin K. Blount, Jr., for plaintiff-appellee.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Carl N. Patterson, Jr., and Donald H. Tucker, Jr., for defendant-appellants American Security Insurance Company and Standard Guaranty Insurance Company.

Womble Carlyle Sandridge & Rice, by Burley B. Mitchell, Jr., Hada V. Haulsee, and Reid C. Adams, Jr., for defendant-appellant Wachovia Bank of North Carolina, N.A.

Bell, Davis & Pitt, P.A., by William K. Davis and Stephen M. Russell, on behalf of the National Association of Manufacturers, the Chamber of Commerce of the United States, and United Services Automobile Association, amici curiae.

North Carolina Justice Center, by Carlene McNulty, on behalf of AARP, CRA-NC, Financial Protection Law Center, North Carolina Consumer's Council, North Carolina Justice and Community Development Center, and NC PIRG, amici curiae; and Financial Protection Law Center, by Mallam J. Maynard, amicus curiae.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Edward C. Winslow III and Clinton R. Pinyan, on behalf of North Carolina Bankers Association, amicus curiae.

Rhoda Billings; and Robinson, Bradshaw & Hinson, P.A., by John M. Conley, on behalf of North Carolina Citizens for Business and Industry, amicus curiae.

Lewis & Roberts, PLLC, by Gary W. Jackson, on behalf of the North Carolina Academy of Trial Lawyers and the American Civil Liberties Union of North Carolina Legal Foundation, Inc., amici curiae.

PER CURIAM.

Justices ORR, WAINWRIGHT, and EDMUNDS did not participate in the consideration or decision of this case. The remaining members of the Court were equally divided, with two members voting to affirm the decision of the Court of Appeals and two members voting to reverse. Therefore, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Reese v. Barbee*, 350 N.C. 60, 510 S.E.2d 374 (1999); *Nesbit v. Howard*, 333 N.C. 782, 429 S.E.2d 730 (1993).

AFFIRMED.

CHARLES PHILLIP BOND	)	
	)	
v.	)	ORDER
	)	
CY A. GRANT, SR., RESIDENT COURT JUDGE BERTIE COUNTY SUPERIOR COURT et al.	)	

143A95-A

This matter having come before the Court on Petitioner's "Motion for Failure to Grant Habeas Corpus Without Delay and Refusal to Grant Said Writ, N.C.G.S. § 17-9 and 17-10," and it appearing to the Court that petitioner filed with this Court a paper writing that had been notarized on 9 April 2002 titled "Application For A Writ Of Habeas Corpus Pursuant To G.S. Chapter 17," which writing was received on or about 11 April 2002;

And it further appearing that petitioner filed with the Clerk of Court for Bertie County a virtually identical paper writing notarized on same date and bearing the same title and caption, which was received by that court on or about 26 April 2002;

And it further appearing that this Court considered petitioner's application and on 15 April 2002 entered an order denying petitioner's application;

It is hereby ordered that because petitioner made simultaneous filings in two courts and this Court properly considered and denied petitioner's filing, petitioner's instant motion is dismissed as moot.

By order of the Court in Court in Conference, this 30th day of September, 2002.

Edmunds, J.
For the Court

STATE v. MORGANHERRING

[356 N.C. 295 (2002)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
WILLIAM MORGANHERRING	)	

340A95-2

Defendant's petition for Writ of Certiorari filed in this Court on 15 March 2002 is allowed for the limited purpose of entering the following orders:

The 17 January 2002 orders of Superior Court Judge J. B. Allen, Jr. are vacated. This matter is remanded to the Superior Court, Wake County, for entry of an order allowing defendant's 12 October 2001 motion to allow transportation of defendant from the North Carolina Department of Correction to Duke University Medical Center for a P.E.T. Scan. Defendant's Motion for Appropriate Relief is hereby remanded for reconsideration subsequent to the administration of the P.E.T. scan and any amendments which defendant may file related to the P.E.T. scan.

By order of the Court in Conference this 3rd day of October, 2002, at 11:00 a.m.

Edmunds, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
JOHNNIE LEE SPRUILL	)	

404A92-4

Defendant's petition for Writ of Certiorari is allowed for the limited purpose of entering the following orders:

The 1 October 2001 order of Superior Court Judge Cy Grant denying defendant's third Motion for Appropriate Relief, filed 5 June 2001, is vacated. Defendant may file amendments to his fourth Motion for Appropriate Relief, now pending in the Superior Court, Northampton County, pursuant to N.C.G.S. § 15A-1415(g). Notwithstanding the provisions of N.C.G.S. § 15A-1415(g), defendant shall have at least 30 days prior to the date of a hearing on the merits in which to file amendments.

By order of the Court in Conference, this 3rd day of October, 2002, at 11:00 a.m.

Edmunds, J.
For the Court

ADAMS v. BANK UNITED OF TEXAS F.S.B.

No. 350P02

Case below: 150 N.C. App. 713

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 23 September 2002.

BLEDSOLE v. JOHNSON

No. 370PA02

Case below: 150 N.C. App. 619 & Cumberland County District Court

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 3 October 2002 as to issues 1 and 3. Petition by defendant for writ of certiorari to review the order of the District Court, Cumberland County, allowed 3 October 2002.

BOLICK v. BON WORTH, INC.

No. 356P02

Case below: 150 N.C. App. 428

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

BONEY PUBLISHERS, INC. v. BURLINGTON CITY COUNCIL

No. 479P02

Case below: 151 N.C. App. 651

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 9 October 2002.

CAMPEN v. FEATHERSTONE

No. 377P02

Case below: 150 N.C. App. 692

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 3 October 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002. Justice Orr recused.

CAROLINA HOLDINGS, INC. v. HOUSING APPEALS BD. OF THE CITY OF CHARLOTTE

No. 230P02

Case below: 149 N.C. App. 579

Motion by respondent to dismiss appeal allowed 3 October 2002. Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002. Conditional petition by respondent for discretionary review pursuant to G.S. 7A-31 dismissed as moot 3 October 2002.

CROWFIELDS CONDO. ASS'N v. SMITH

No. 485P02

Case below: 151 N.C. App. 747

Petition by defendants pro se for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002. Motion by defendants pro se to amend the petition to change fonts, format & typographical concerns allowed 3 October 2002.

CUMMINGS v. GLIDDEN CO.

No. 455P02

Case below: 151 N.C. App. 297

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

EATMAN LEASING, INC. v. EMPIRE FIRE & MARINE INS. CO.

No. 525P01

Case below: 145 N.C. App. 278

Petition by defendant (Empire Fire & Marine Insurance Company) for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002. Petition by defendant (Empire Fire & Marine Insurance Company) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 October 2002.

ESTATE OF HENDRICKSON v. GENESIS HEALTH VENTURE, INC.

No. 406P02

Case below: 151 N.C. App. 139

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 October 2002. Conditional petition by defendants (Genesis Elder Care Network Services, Inc. and Genesis Eldercare Rehabilitation Services, Inc.) for discretionary review pursuant to G.S. 7A-31 dismissed as moot 3 October 2002.

FOSTER v. U.S. AIRWAYS, INC.

No. 280P02

Case below: 149 N.C. App. 913

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

FRAZIER v. COOPER

No. 417P02

Case below: Craven County Superior Court

Applications by petitioner pro se for writ of habeas corpus denied 3 September 2002. Expedited petition by plaintiff pro se to rehear and reconsider 417P02 denied 3 September 2002.

FRAZIER v. STATE OF N.C.

No. 413P02

Case below: Craven County Superior Court

Notice of appeal to the Supreme Court by plaintiff pro se denied 3 September 2002. Petition by plaintiff pro se for leave and order to proceed as an indigent appellant denied 3 September 2002. Motion by plaintiff pro se objections and exceptions of the Sanford Steelman, Jr. orders filed in the Craven County Clerk's office denied 3 September 2002.

FRAZIER v. STEELMAN

No. 388P02

Case below: Wake County Superior Court

Motion by plaintiff pro se and memorandum of *Bayard v. Singleton* N.C. Jurisprudence overlooked by this court denied 3 September 2002. Justice Edmunds recused.

FUTRELL v. RESINALL CORP.

No. 399A02

Case below: 151 N.C. App. 456

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 3 October 2002.

GRINDSTAFF v. BYERS

No. 442A02

Case below: 152 N.C. App. 288

Motion by plaintiff for temporary stay denied 27 August 2002. Motion by defendant (J. Byers) for temporary stay allowed 5 September 2002. Second motion by plaintiff for stay denied 9 September 2002. Motion by defendant for judicial assistance and clarification of previous orders entered by the Supreme Court allowed 9 September 2002 as follows: 1. The Honorable Rebecca Knight of the Buncombe County District Court is to immediately, upon receipt of the mandate from the North Carolina Court of Appeals on Monday, September 9, 2002, enter an Order awarding custody to the defendant, Jonathan Byers, pursuant to that mandate. 2. The Buncombe County District Court is prohibited from entering further orders for custody in this matter, with the exception of the order mandated by the North Carolina Court of Appeals on September 9, 2002. Motion by plaintiff to withdraw appeal allowed 9 September 2002.

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

No. 520A01

Case below: 145 N.C. App. 290

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002. Petition by respondents, New Harborgate Corporation and Bluebird Corportion, for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002. Motion by petitioner to have issue treated as N.C.App. R. 15(d) request rather than Rule 14(a) Appeal of right denied 3 October 2002. Motion by respondents, New Harborgate Corporation and Bluebird Corporation, to dismiss appeal allowed 3 October 2002.

HARLLEE v. HARLLEE

No. 378P02

Case below: 151 N.C. App. 40

Petition by plaintiff for discretionary review pursuant to G.S. 7 A-31 withdrawn 5 September 2002. Motion by plaintiff to be allowed to withdraw petition for discretionary review allowed 5 September 2002.

HARRELL v. HAWLEY

No. 104PA02

Case below: 148 N.C. App. 214

Joint motion to withdraw appeal allowed 10 September 2002.

HILL v. HILL

No. 688P01

Case below: 147 N.C. App. 313

Motion by defendants (Garford Hill, Jewell Hill, Barbara Garrison and William Garrison) to dismiss appeal for lack of substantial constitutional question allowed 3 October 2002. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002. Motion by plaintiff for summary remand denied 3 October 2002. Motion by plaintiff not to remove Hon. Mark D. Martin denied 3 October 2002.

ICARD v. ICARD

No. 386P02

Case below: 150 N.C. App. 717

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 October 2002.

IN RE CLARK

No. 402P02

Case below: 151 N.C. App. 286

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

IN RE PINEAULT

No. 468P02

Case below: 152 N.C. App. 196

Petition by respondent (Pineault) for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

IN RE RAMSEY

No. 394P02

Case below: 151 N.C. App. 597

Notice of appeal by respondent (Brandi Ramsey) pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 3 October 2002. Petition by respondent (Brandi Ramsey) for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

INTEGON SPECIALTY INS. CO. v. AUSTIN

No. 432P02

Case below: 151 N.C. App. 593

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

JENKINS v. PIEDMONT AVIATION SERVS.

No. 12P02

Case below: 147 N.C. App. 419

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002. Petition by defendants for writ of supersedeas and motion for temporary stay denied 3 October 2002.

KANIPE v. LANE UPHOLSTERY

No. 435P02

Case below: 151 N.C. App. 478

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002. Conditional petition by plaintiff for discretionary review pursuant to G.S. 7A-31 dismissed as moot 3 October 2002.

KELLY v. WEYERHAEUSER CO.

No. 384P02

Case below: 150 N.C. App. 713

Petition by plaintiff pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 October 2002.

KOONE v. BENTON

No. 656P01

Case below: 146 N.C. App. 752

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

LEGRANDE v. STATE

No. 327P02

Case below: Stanly County Superior Court

Petition by plaintiff for rehearing on civil complaint against State for malicious and deliberate erroneous convictions, imprisonments, and sentence of death in capital cases 95CRS567 and 95CRS847 denied 3 October 2002.

LIBORIO v. KING

No. 301P02

Case below: 150 N.C. App. 531

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

MILEY v. H.C. BARRETT & ASSOCS.

No. 347P02

Case below: 150 N.C. App. 437

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 October 2002.

N.C. STATE BAR v. GILBERT

No. 434A02

Case below: 151 N.C. App. 299

Motion by defendant for temporary stay allowed 22 August 2002.

ORTHODONTIC CTRS. OF AM., INC. v. HANACHI

No. 375P02

Case below: 151 N.C. App. 133

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

RUSSELL v. LABORATORY CORP. OF AM.

No. 333P02

Case below: 151 N.C. App. 63

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 17 September 2002.

SIBLEY v. N.C. BD. OF THERAPY EXAM'RS

No. 429A02

Case below: 151 N.C. App. 367

Notice of appeal by petitioner pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 3 October 2002. Petition by petitioner 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 3 October 2002. Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

SINGLETON v. HAYWOOD ELEC. MEMBERSHIP CORP.

No. 403A02

Case below: 151 N.C. App. 197

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 3 October 2002.

STATE v. ALEXANDER

No. 408P02

Case below: 151 N.C. App. 598

Motion by plaintiff to dismiss appeal allowed 3 October 2002. Petition by defendant for writ of supersedeas denied and temporary stay dissolved 3 October 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

STATE v. ALSTON

No. 507P02

Case below: 138 N.C. App. 327

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals dismissed 3 October 2002.

STATE v. ARMISTEAD

No. 359P02

Case below: 150 N.C. App. 714

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 October 2002.

STATE v. ARTIS

No. 489A02

Case below: 151 N.C. App. 749

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 3 October 2002.

STATE v. BILLINGS

No. 414P02

Case below: 151 N.C. App. 598

Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

STATE v. BROWN

No. 444P02

Case below: 151 N.C. App. 598

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 October 2002.

STATE v. BROWN

No. 643P01

Case below: 146 N.C. App. 590

Motion by Attorney General to dismiss appeal allowed 3 October 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

STATE v. BULLIN

No. 379P02

Case below: 150 N.C. App. 631

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

STATE v. CLIFTON

No. 381P02

Case below: 151 N.C. App. 599

Motion by Attorney General to dismiss appeal allowed 3 October 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

STATE v. CONAWAY

No. 389A92-4

Case below: Richmond County Superior Court

Application by defendant for writ of habeas corpus denied 3 September 2002.

STATE v. DAVIS

No. 75P02

Case below: 148 N.C. App. 215

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002. Alternative petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 October 2002.

STATE v. GALLOWAY

No. 536A01

Case below: 145 N.C. App. 555

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 3 October 2002.

STATE v. GARVIN

No. 441P02

Case below: 151 N.C. App. 749

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 3 October 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

STATE v. GREENE

No. 233P02

Case below: 149 N.C. App. 668

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 15 August 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 15 August 2002.

STATE v. HARRIS

No. 345A92-4

Case below: Onslow County Superior Court

Petition by plaintiff for writ of certiorari to review the order of the Superior Court, Onslow County, dismissed 3 October 2002. Motion by defendant to dismiss petition for writ of certiorari allowed 3 October 2002.

STATE v. JACOBS

No. 149P02

Case below: 137 N.C. App. 588

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 October 2002.

STATE v. JOHNSON

No. 500P02

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 3 October 2002.

STATE v. JONES

No. 510P02

Case below: 152 N.C. App. 719

Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

STATE v. KUBRICHT

No. 422P02

Case below: 151 N.C. App. 600

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002. Motion by plaintiff to deny petition for discretionary review dismissed as moot 3 October 2002.

STATE v. LEWIS

No. 446P02

Case below: 151 N.C. App. 600

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 3 October 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals dismissed 3 October 2002.

STATE v. LEWIS

No. 426P02

Case below: 151 N.C. App. 600

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

STATE v. MALLOY

No. 419P02

Case below: 151 N.C. App. 600

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 October 2002.

STATE v. McCRAE

No. 447P02

Case below: 151 N.C. App. 601

Motion by the Attorney General to dismiss the appeal filed by defendant pro se for lack of substantial constitutional question allowed 3 October 2002. Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

STATE v. McDONALD

No. 400P02

Case below: 151 N.C. App. 236

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 3 October 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

STATE v. MILLER

No. 453P02

Case below: 151 N.C. App. 601

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 October 2002.

STATE v. PAYNE

No. 431P02

Case below: 151 N.C. App. 601

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

STATE v. QUICK

No. 457P02

Case below: 152 N.C. App. 220

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 3 October 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

STATE v. SMITH

No. 490P02

Case below: 152 N.C. App. 29

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 October 2002.

STATE v. SPRUILL

No. 404A92-4

Case below: Northampton County Superior Court

Motion by defendant for remand dismissed as moot 3 October 2002.

STATE v. STARNER

No. 498P02

Case below: 152 N.C. App. 150

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 October 2002.

STATE v. STONE

No. 601P01

Case below: 146 N.C. App. 308

Motion by Attorney General to dismiss appeal allowed 3 October 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

STATE v. STRANGE

No. 481P02

Case below: 151 N.C. App. 751

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

STATE v. STREETER

No. 651P01

Case below: 146 N.C. App. 594

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 October 2002.

STATE v. VALENTINE

No. 274P02

Case below: 149 N.C. App. 979

Notice of appeal by defendant pro se pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 3 October 2002. Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

STATE v. WALTERS

No. 542P01

Case below: 145 N.C. App. 505

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 3 October 2002.

STATE v. WILLIAMS

No. 521PA02

Case below: 153 N.C. App. 192

Motion by Attorney General for temporary stay allowed 3 October 2002 pending petition for discretionary review.

STATE v. WILLIAMS

No. 278A99

Case below: 355 N.C. 501

Motion by defendant to supplement argument in support of motions to stay the mandate, to correct opinion, and for further relief denied 19 September 2002. Motion by Attorney General to strike defendant's supplementary argument allowed 19 September 2002. Motion by defendant to correct opinion denied 19 September 2002. Motion by defendant for a temporary stay of mandate denied 19 September 2002. Motion by defendant for other relief denied 19 September 2002.

STATE v. WILLIAMS

No. 448P02

Case below: 151 N.C. App. 535

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 October 2002.

STATE v. WILSON

No. 405P02

Case below: 151 N.C. App. 219

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 October 2002.

STEVENS v. GUZMAN

No. 254P02

Case below: 149 N.C. App. 974

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

STEVENS v. GUZMAN

No. 97P01-2

Case below: 149 N.C. App. 974
140 N.C. App. 780
354 N.C. 214

Petition by plaintiff for writ of certiorari to review the decisions of the North Carolina Court of Appeals denied 3 October 2002. Motion by plaintiff to reconsider the Supreme Court's ruling of 5 October 2001 (354 N.C. 214) denied 3 October 2002.

STUBBS v. NICHOLAS HOLDINGS, L.P.

No. 369P02

Case below: 150 N.C. App. 718

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

TRASK v. PENDER CTY.

No. 437P02

Case below: 151 N.C. App. 602

Petition by petitioners for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002. Petition by respondents for discretionary review pursuant to G.S. 7A-31 dismissed as moot 3 October 2002.

VITTITOE v. VITTITOE

No. 418P02

Case below: 150 N.C. App. 400

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

WARD v. LONG BEACH VOL. RESCUE SQUAD

No. 464P02

Case below: 151 N.C. App. 717

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002.

WHITESIDE ESTATES, INC. v. HIGHLANDS COVE, L.L.C.

No. 657P01

Case below: 146 N.C. App. 449

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 October 2002. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 3 October 2002.

STATE OF NORTH CAROLINA v. IZIAH BARDEN

No. 96A01

(Filed 22 November 2002)

1. Confessions and Incriminating Statements— motion to suppress—failure to give Miranda warnings—no arrest or restraint

The trial court did not err in a capital first-degree murder prosecution by denying defendant's motion to suppress evidence of statements he made to police on 5 April 1998 and 16 April 1998 and by allowing the subsequent admission of those statements into evidence at trial even though defendant was not given Miranda warnings, because the totality of circumstances shows that defendant was not in custody in that a reasonable person in defendant's position would not have believed that he was under arrest or that he was restrained to a degree that would cause him to believe he was formally arrested when: (1) for both interviews, defendant voluntarily drove his own car to meet police for questioning; (2) defendant was repeatedly informed both before he agreed to talk with investigators and after he arrived for questioning that he was not under arrest and was free to leave at any time; (3) at no point during the interaction between defendant and the police was defendant ever restrained or confined to the degree associated with a formal arrest; and (4) at the conclusion of each interview, defendant was allowed to go.

2. Confessions and Incriminating Statements— motion to suppress—voluntariness

The trial court did not err in a capital first-degree murder prosecution by denying defendant's motion to suppress evidence of statements he made to police on 5 April 1998 and 16 April 1998 even though defendant contends they were not voluntary, because: (1) defendant was offered drinks and cigarettes during one of his interviews; (2) defendant was allowed to use the restroom without being escorted by an officer; (3) defendant was not restrained or handcuffed during either session; (4) neither interview was prolonged; and (5) the record is devoid of any suggestion of physical threats to or pressure exerted on defendant to obtain a statement.

3. Search and Seizure— defendant's shoes—bloodstain—voluntariness

The trial court did not err in a capital first-degree murder prosecution by admitting evidence of blood derived from a pair of shoes seized from defendant that he was wearing on 5 April 1998 while he was being interviewed by police, because the totality of circumstances reveals that defendant voluntarily gave his shoes to the police when: (1) defendant was neither placed in a coercive environment where he surrendered the shoes to the officers nor subjected to duress to the point that defendant felt he had no other meaningful choice; (2) a reasonable person in defendant's position would not have believed that he was under arrest; (3) defendant voluntarily provided his shoes to the officers for inspection; and (4) the retention of the shoes did not immobilize defendant since investigators gave defendant a pair of slippers to wear home.

4. Jury— capital selection—peremptory challenges—*Batson*—racial discrimination

The trial court erred in a capital first-degree murder prosecution by holding that defendant had not made a prima facie showing of racial discrimination at the time he raised a *Batson* objection to the prosecutor's peremptory challenges of two African-American prospective jurors and the case is remanded to the trial court for the limited purpose of holding a hearing pursuant to *Batson* to give the State an opportunity to present race-neutral reasons for striking these prospective jurors.

5. Appeal and Error— preservation of issues—failure to object—jury voir dire—plain error doctrine inapplicable

Although defendant in a capital first-degree murder prosecution contends the trial court erred during jury selection by allowing the prosecutor to make improper comments on defendant's right to testify, to ask prosecutors whether the death penalty is a necessary law, to inject into jury selection the issue of the victim's race, to attempt to establish rapport with prospective jurors, and to make incomplete and misleading statements concerning the sentencing phase during jury selection, defendant has failed to properly preserve these issues for review because: (1) defendant did not raise a timely objection to any of these statements; and (2) our Supreme Court has declined to extend application of the plain error doctrine to situations where a party has

failed to object to statements made by the other party during jury voir dire.

6. Criminal Law— prosecutor's argument—victim a Hispanic man from Mexico

The trial court did not abuse its discretion in a capital first-degree murder prosecution by failing to intervene ex mero motu during the prosecutor's opening argument stating that the victim was a Hispanic man who moved here from Mexico even though defendant contends the prosecutor improperly used the victim's race to urge the jury to convict defendant and to pressure the jury to prove that it was not prejudiced against the Hispanic community, because: (1) the statement was a passing reference to the victim's ethnic background in a substantial opening argument; and (2) it was not clear that the reference to the victim's race was improper at all, let alone grossly improper.

7. Evidence— testimony from victim's supervisor—victim's character—work ethic—responsibleness

The trial court did not commit plain error in a capital first-degree murder prosecution by admitting evidence from the victim's supervisor about the victim's work ethic and responsibleness, because the evidence was relevant to explain the particular circumstances of the crime including: (1) the victim's various duties and responsibilities; (2) why the victim worked late nights; (3) the victim's work habits; and (4) the victim's payday routine as well as where and how he kept his money.

8. Evidence— testimony from victim's brother—victim's wallet—in-court identification of victim's wife and daughter

The trial court did not commit plain error in a capital first-degree murder prosecution by admitting evidence from the victim's brother concerning the victim's wallet, the fact that the victim sent money back to his wife and child in Mexico, and an in-court identification of the victim's wife and daughter, because: (1) the evidence was relevant to explain the victim's habits in handling his salary; (2) the testimony of the witness both describes the victim carrying in his wallet the money received after cashing his paycheck and explains the reasons the victim needed cash; and (3) the mere identification of the victim's wife and daughter at trial does not constitute improper victim-impact evidence.

9. Evidence— photograph of victim—relevancy

The trial court did not err in a capital first-degree murder prosecution by allowing the introduction of a photograph of the victim taken three months before his death, because: (1) the photograph was relevant to demonstrate the victim's appearance before the murder and help establish a basis from which the medical examiner could testify as to the various wounds inflicted upon the victim; and (2) it has consistently been held that during the guilt-innocence phase of a trial, a photograph of the victim taken before death is admissible.

10. Homicide— first-degree felony murder—motion to dismiss—sufficiency of evidence—armed robbery

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree felony murder even though defendant contends the evidence was insufficient to support the underlying felony of armed robbery, because the evidence reveals that: (1) defendant wanted to borrow more money from the victim, but the victim refused the loan request; (2) the fatal blows to the victim's skull, the taking of the wallet, and the discarding of evidence occurred in an unbroken transaction after the victim turned his back to defendant; and (3) the particular point in this sequence where the robbery occurred is immaterial when the death and the taking are so connected as to form a continuous chain of events.

11. Criminal Law— prosecutor's argument—defendant's exercise of right not to testify

The trial court did not err in a capital first-degree murder prosecution by allegedly allowing the prosecutor to improperly comment during closing arguments on defendant's exercise of his right not to testify at trial, because: (1) the prosecutor did not directly implicate defendant's right not to testify, but instead the prosecutor attempted to demonstrate to the jury that defense counsel's argument that the murder was not premeditated could not explain either defendant's statement to the police or the nature of defendant's attack on the victim; (2) even assuming the prosecutor's rhetorical question about why defendant moved the victim's body can be perceived as touching on defendant's decision not to testify, the trial court did not commit error by failing to intervene ex mero motu; and (3) the prosecutor's statements that the State's case was uncontradicted is not an improper

comment on defendant's failure to testify since contradictions in the State's evidence, if such existed, could have been shown by the testimony of others or by cross-examination of the State's witnesses themselves.

12. Criminal Law— prosecutor's argument—biblical arguments

The trial court did not err by failing to intervene ex mero motu in a capital first-degree murder prosecution during the prosecutor's biblical arguments, because the prosecutor did not argue that the Bible commanded a guilty verdict, but instead analogized the murder of Abel by Cain to the case at bar to emphasize the importance of the evidence derived from the victim's blood and to point out that the blood "spoke" after the victim had been silenced.

13. Criminal Law— prosecutor's argument—defendant failed to corroborate defense

The trial court did not abuse its discretion in a capital first-degree murder prosecution by failing to sustain defendant's objection to the prosecutor's argument that defendant did not call a dentist to corroborate his defense that the victim caused defendant considerable pain by slapping defendant on the cheek when defendant had a toothache, because the prosecutor may argue that a defendant failed to produce a witness or other testimony to refute the State's case.

14. Criminal Law— prosecutor's argument—voluntary manslaughter

The trial court did not err in a capital first-degree murder prosecution by failing to intervene ex mero motu during the prosecutor's argument concerning the trial court's submission of voluntary manslaughter, because: (1) the challenged argument correctly stated that voluntary manslaughter did not include the element of malice; (2) the prosecutor was arguing his theory of the case and asking the jury to reject any interpretation of the evidence that would allow it to return a verdict of guilty of voluntary manslaughter; and (3) the jury was notified that the attorneys' arguments were only advocacy while the trial court supplied the law.

15. Sentencing— aggravating circumstances—felony involving the use or threat of violence to the person—testimony of rape victim

The trial court did not commit error or plain error in a capital first-degree murder sentencing proceeding by permitting a State's witness to testify to prior events surrounding her attack and rape by defendant in support of the submission of the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance that defendant had been previously convicted of a felony involving the use or threat of violence to the person, because: (1) 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; (2) the witness's testimony that defendant's friends told her to do what defendant said while he was attempting to remove her clothes based on the fact that defendant was crazy was not hearsay since it was offered to explain the effect of the words on the victim; (3) the testimony was not too vivid or disturbing to be unfairly prejudicial, and the evidence was admissible to illuminate the circumstances surrounding the prior violent felony committed by defendant; (4) the trial court was not required to strike the testimony that the witness was extremely bitter with defendant since it merely pointed out that defendant's question was accurate in assuming that the witness was embittered but was inaccurate as to the reason; and (5) the witness was not claiming to have testified as to the objective truth.

16. Criminal Law— prosecutor's argument—improper statement that defendant requested mitigating circumstance of no significant history of prior criminal activity

The trial court did not err in a capital first-degree murder sentencing proceeding by allowing the prosecutor to improperly comment during closing arguments that defendant requested the submission of the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance that defendant has no significant history of prior criminal activity when defendant specifically requested that the (f)(1) mitigator not be submitted, because: (1) the prosecutor immediately corrected himself during his argument by stating that the trial court would present the mitigating circumstance to the jury; and (2) any misunderstanding was cured when the trial court instructed that the defendant did not seek this mitigating circumstance.

17. Criminal Law— prosecutor's argument—facts outside the record

The trial court did not err in a capital first-degree murder sentencing proceeding by failing to intervene ex mero motu when the prosecutor allegedly argued facts outside the record including statements that there was no evidence that the victim slapped defendant and that the victim probably could have lived but defendant did not know that, because: (1) the first statement about the lack of evidence may be read as pointing out that defendant's statement that the victim slapped him was uncorroborated; and (2) the second statement was only a passing comment made in a lengthy argument, and even if defendant had objected, it had no prejudicial effect.

18. Criminal Law— prosecutor's argument—race

The trial court did not err in a capital first-degree murder sentencing proceeding by failing to intervene ex mero motu during the prosecutor's closing argument concerning whether the Hispanic victim and his family could receive justice in Sampson County because the argument was not designed to generate an issue of race in the trial but instead sought to remind the jury of the victim's humanity despite the victim's social status and modest economic means.

19. Criminal Law— prosecutor's argument—misstatements of law

The trial court did not err in a capital first-degree murder sentencing proceeding by allegedly allowing the prosecutor to misstate the law during his closing arguments including statements that mitigating circumstances were synonymous with excuses, that fewer than all jurors could find an aggravating circumstance, that the jury could return a death sentence based solely on the aggravating circumstances, that misrepresented the significance of Issue Three, and that the jury it had already found an aggravating circumstance of pecuniary gain based on its conviction of defendant for armed robbery during the guilt-innocence phase, because: (1) the statements made by the prosecutor, while not technically correct, were not so misleading that the trial court erred by failing to intervene ex mero motu; (2) any misstatements of law by the prosecutor were cured by proper instructions given by the trial court when it charged the jury; and (3) the prosecutor's statement that armed robbery "is" pecuniary gain was not so wide of the mark as to constitute reversible error.

20. Criminal Law— prosecutor's argument—voice and conscience of community

The trial court did not abuse its discretion in a capital first-degree murder sentencing proceeding by allegedly allowing the prosecutor to argue that the jury's accountability to its community should lead it to vote for death, because: (1) the prosecutor properly argued to the jury that it was the voice and moral conscience of the community without suggesting that the jury lend an ear to the community; (2) the prosecutor urged the jury to remember that the final responsibility for the case rested with the jury; and (3) the prosecutor did not contend that the community demanded defendant's execution but instead asked the jury not to do itself and the community the disservice of returning a recommendation of life imprisonment.

21. Criminal Law— prosecutor's argument—defendant killed victim to eliminate witness

The trial court did not err in a capital first-degree murder sentencing proceeding by allowing the prosecutor to argue that defendant killed the victim to eliminate him as a witness, because the prosecutor's comments on efforts arguably made by defendant to escape successfully and enjoy the use of the stolen money were not so grossly improper as to require the court to intervene ex mero motu when the robbery and the infliction of mortal wounds to the victim were intertwined parts of a continuous transaction.

22. Sentencing— victim's good character—impact of crime on victim's family

The trial court did not err in a capital first-degree murder sentencing proceeding by admitting the State's evidence and argument concerning both the victim's good character and the impact of the crime on the victim's family, because: (1) the testimony from the victim's wife and the victim's brother fell squarely within the reach of N.C.G.S. § 15A-833 and was not so prejudicial that it made the trial fundamentally unfair; and (2) N.C.G.S. § 15A-833 permits introduction of victim-impact evidence at sentencing and although it may have been preferable for the prosecutor to forecast that defendant's lawyer would argue that the jury should not consider such evidence, rather than it could not, it is not impermissible for one side to attempt in argument to address the anticipated arguments of the opposition.

23. Sentencing— aggravating circumstances—murder especially heinous, atrocious, or cruel

The trial court did not err in a capital first-degree murder sentencing proceeding by submitting the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel, because: (1) defendant borrowed money from the victim to support a drug habit and struck the victim on the head fourteen times when the victim refused a second request to borrow money that same night; (2) at least half of the fourteen wounds penetrated the victim's skull; (3) while a pathologist testified that two of the wounds were considered significant injuries to the victim's head that would likely instantly incapacitate the victim, defendant's statement suggested that the victim did not die immediately; and (4) viewed in the light most favorable to the State, the murder was violent and depraved.

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

The trial court did not err in a capital first-degree murder sentencing proceeding by submitting the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance that defendant has no significant history of prior criminal activity even though defendant's prior criminal record consists of a 1984 conviction for rape, because: (1) the presence of some evidence of a defendant's prior violent criminal activity does not preclude submission of the (f)(1) mitigator; (2) a defense expert testified that defendant had no significant history of prior criminal activity and that defendant's behavior on the night of the alleged crime was out of character for him; and (3) defendant sought during cross-examination of the rape victim to convince the jury that the victim's version of the events was not believable.

25. Sentencing— aggravating circumstances—mitigating circumstances—no significant history of prior criminal activity—prior violent felony

Although defendant contends the trial court erred in a capital first-degree murder sentencing proceeding by submitting both the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance that defendant has no significant history of prior criminal activity and the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance that defendant had been previously convicted of a felony involving the use or threat of violence to the person, our Supreme Court

has consistently held that the submission of both of these circumstances is proper.

26. Sentencing— mitigating circumstances—nonstatutory—defendant's good reputation in community

The trial court did not err in a capital first-degree murder sentencing proceeding by failing to submit defendant's proposed nonstatutory mitigating circumstance concerning defendant's good reputation in the community in which he lives, because: (1) defendant's eight character witnesses who presented evidence of laudable personal characteristics and specific instances of good conduct did not address defendant's actual reputation in the community; and (2) even assuming the trial court did err, the error was harmless beyond a reasonable doubt since the court submitted two mitigating circumstances relating to defendant's character evidence and the jury was not prevented from considering defendant's mitigating evidence.

27. Sentencing— mitigating circumstances—nonstatutory—defendant a responsible praiseworthy worker—failure to give peremptory instruction

The trial court did not err in a capital first-degree murder sentencing proceeding by failing to peremptorily instruct on the nonstatutory mitigating circumstance that defendant was a responsible praiseworthy worker who supervisors relied on, because the evidence of this circumstance was controverted by: (1) testimony by one of defendant's supervisors that defendant was given a leave of absence to attend a drug-treatment center; and (2) testimony by a defense expert that defendant's chronic alcohol abuse caused him to lose a number of jobs.

28. Sentencing— mitigating circumstances—nonstatutory—defendant a productive member of U.S. Army—failure to give peremptory instruction

The trial court did not err in a capital first-degree murder sentencing proceeding by failing to peremptorily instruct on the nonstatutory mitigating circumstance that defendant was a productive member of the U.S. Army, because: (1) although defendant was a competent soldier and received an honorable discharge during his first term of enlistment, he was convicted of rape during his second term and dishonorably discharged; and (2) the trial court provided a peremptory instruction as to the related non-

statutory mitigating circumstance that defendant was honorably discharged from the United States Army.

29. Sentencing— mitigating circumstances—inability to appreciate criminality of conduct or to conform to law—failure to give peremptory instruction

The trial court did not err in a capital first-degree murder sentencing proceeding by failing to peremptorily instruct on the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, because: (1) the testimony of an expert witness who has prepared an analysis of a defendant in preparation for trial lacks the indicia of reliability based on the self-interest inherent in obtaining appropriate medical treatment; and (2) in light of the defense expert's reservations and the inconsistencies between defendant's statements, it cannot be said that this circumstance was supported by uncontroverted and manifestly credible evidence.

30. Sentencing— mitigating circumstances—nonstatutory—alcohol abuse by mother and family members—failure to give peremptory instruction

The trial court did not err in a capital first-degree murder sentencing proceeding by failing to peremptorily instruct on the nonstatutory mitigating circumstance that defendant's mother abused alcohol as did other family members, because in light of defendant's family ties with the witnesses and the lack of specific evidence as to defendant's contact with the drinking, it cannot be said that uncontroverted and manifestly credible evidence existed to support a peremptory charge as to this circumstance.

31. Sentencing— mitigating circumstances—nonstatutory—defendant exposed to violence among family members as a child—failure to give peremptory instruction

The trial court did not err in a capital first-degree murder sentencing proceeding by failing to peremptorily instruct on the nonstatutory mitigating circumstance that defendant was exposed to violence among family members as a child, because the family relationship between defendant and the witnesses and the uncertainties expressed in their testimony reveals that there was not the requisite manifest credibility to require a peremptory instruction on this circumstance.

32. Sentencing— mitigating circumstances—nonstatutory—defendant witnessed mother returning home with men in drunken state—failure to give peremptory instruction

The trial court did not err in a capital first-degree murder sentencing proceeding by failing to peremptorily instruct on the nonstatutory mitigating circumstance that as a child defendant witnessed his mother returning home with men in a drunken state, because: (1) the record contains no suggestion that defendant's mother would leave home to find these visitors or, having left home for whatever reason, would return with them; and (2) the instruction is ambiguous in that it could refer to the drunken state of either the mother or the various men.

33. Criminal Law— prosecutor's argument—defendant's failure to call wife to testify

Although the trial court erred in a capital first-degree murder sentencing proceeding by failing to give a detailed peremptory curative instruction after the prosecutor improperly commented about defendant's failure to call his wife to testify, the error was not prejudicial because: (1) although the trial court failed to sustain defendant's initial objection when the prosecutor strayed into improper territory, the trial court sustained defendant's renewed objection as soon as the prosecutor began to develop this theme and the trial court instructed the jury to disregard that argument; (2) evidence of defendant's guilt was strong and included a confession; and (3) defendant failed to establish under N.C.G.S. § 15A-1443 that a different verdict would have resulted if the trial court had sustained defendant's objection more promptly and given a properly detailed curative instruction.

34. Sentencing— aggravating circumstances—pecuniary gain—jury instructions

The trial court did not commit plain error in a capital first-degree murder sentencing proceeding by its instruction on the N.C.G.S. § 15A-2000(e)(6) pecuniary gain aggravating circumstance even though defendant contends it allowed the jury to find the aggravating circumstance without finding that the motive for the murder was pecuniary gain.

35. Sentencing— capital—death penalty—no influence of passion or prejudice

The trial court did not err in a first-degree murder case by sentencing defendant to the death penalty even though defendant

contends it was imposed under the influence of passion or prejudice in violation of N.C.G.S. § 15A-2000(d)(2), because: (1) the prosecutor based his decision to seek the death penalty on the number of aggravating circumstances, the seriousness of the case, and the treatment of other similar cases; (2) there was no impropriety whatsoever in the trial judge's humane words of encouragement to a defendant who had just been told that he is going to die; and (3) the jury's failure to find twenty-five of the twenty-seven submitted mitigating circumstances did not demonstrate the jurors behaved irrationally.

36. 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 three aggravating circumstances including the N.C.G.S. § 15A-2000(e)(3) prior crime of violence aggravator, the N.C.G.S. § 15A-2000(e)(6) pecuniary gain aggravator, and the N.C.G.S. § 15A-2000(e)(9) especially heinous, atrocious or cruel aggravator; (2) defendant bludgeoned the victim in the head numerous times, changed weapons during the course of the attack, and defendant acknowledged that the victim may have been alive after the attack but took no steps to assist the victim; (3) defendant instituted the attack only after the victim, who had already loaned defendant money once that night, refused to make a second loan of twenty dollars; and (4) defendant's attack began after the victim turned his back to defendant to resume his duties at work.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Balog, J., on 12 November 1999 in Superior Court, Sampson County, upon a jury verdict finding defendant guilty of first-degree murder. On 25 June 2001, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to an additional judgment. Heard in the Supreme Court 14 February 2002.

Roy Cooper, Attorney General, by William N. Farrell, Jr., Senior Deputy Attorney General; John G. Barnwell, Assistant Attorney General; and Ellen Scouten, Special Deputy Attorney General, for the State.

Staples Hughes, Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for defendant-appellant.

EDMUNDS, Justice.

Defendant was indicted for first-degree murder and robbery with a dangerous weapon. The trial began on 1 November 1999, and defendant was found guilty of first-degree murder under felony murder rule and guilty of robbery with a dangerous weapon. At defendant's capital sentencing proceeding, the jury found that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and recommended a sentence of death. On 12 November 1999, the court entered judgment imposing a death sentence for the first-degree murder conviction while arresting judgment on the conviction for armed robbery.

Both defendant, Iziah Barden, and the victim, Felipe Resendiz, were employed by Master Casings, a business located in Clinton, North Carolina. Defendant was a machine operator, while the victim was a contract worker who cleaned the equipment in the evenings. The victim's responsibilities often required that he work until 1:00 or 2:00 a.m., and he would close the business when he left.

Friday, 27 March 1998, was a payday at Master Casings. Around 4:30 that afternoon, the victim cashed his paycheck at a bank, then began work at the plant at 6:00 p.m. He was still on the job when the plant janitor left the building at 10:30 p.m.

The next morning, two workers found the lifeless victim lying facedown in the plant. They observed obvious wounds to the back of his head and saw that his back pocket had been pulled inside out. Investigators found a stainless-steel paddle inside a bin near the body. A small amount of blood was on the paddle's blade. An autopsy revealed that the victim had been struck on the head fourteen times. The evidence indicated that the victim's assailant used different implements because some injuries were caused by an instrument with a sharp edge, while others were caused by an object with a round striking surface. The victim's skull had been exposed by the blows and was fractured in several places. The cause of death was determined to be severe blunt-force trauma to the head.

On 5 April 1998, defendant was questioned by Detective Edward McClain of the Clinton Police Department. Detective McClain went to Master Casings, where defendant was working, and asked to speak with him. The detective identified himself, explained that he was investigating the victim's death, and asked defendant to accompany him to the police station. He told defendant that he was not under arrest and did not have to come, but stated that he would appreciate

defendant's help. Defendant agreed and drove separately to the police station in his own vehicle. He went to the detective's office, where the detective reminded defendant that he was not under arrest and did not advise defendant of his rights pursuant to *Miranda v. Arizona*. Defendant made a statement that was not incriminating.

After defendant completed this statement, the detective noticed a substance that appeared to be blood on the sole of one of defendant's shoes. When the detective told defendant that there might be evidence on the shoe and asked if he could examine it, defendant consented and handed over both shoes. The detective seized the shoes after taking a closer look, and defendant was allowed to leave the police station wearing slippers provided by the police. Later analysis of the shoe revealed that the stain was indeed blood and that DNA from the blood matched DNA from the victim.

On 10 April 1998, the manager of a construction company conducted a predemolition inspection of a small building near the Master Casings plant. When he saw a bag that appeared to contain clothing and a billfold, he called the police. Responding officers found that the bag held bloody Master Casings uniform trousers with defendant's name on the waistband, a billfold containing the victim's driver's license, and a sledgehammer. DNA analysis established that the blood on the steel paddle at Master Casings, the blood on the uniform trousers, and the blood found on the sledgehammer all came from the victim.

On 16 April 1998, investigators from the North Carolina State Bureau of Investigation and the Clinton Police Department returned to Master Casings and asked to speak with defendant. As before, defendant was told he was not under arrest and was allowed to drive his own car to the office of the SBI agent. There, the investigators again informed defendant he was not under arrest and did not advise him of his *Miranda* rights.

Although defendant at first denied any involvement in the victim's death, upon further questioning he confessed. He told the investigators that on 27 March 1998 he had been smoking crack cocaine at a house near Master Casings. He knew the victim would be working late, so around 11:00 p.m., he went to the plant to borrow money from the victim. The victim loaned him $20.00, which he used to purchase additional crack cocaine. After smoking that crack, defendant remained unsatisfied, so around 1:00 a.m. on 28 March 1998, he returned to Master Casings to borrow more money from the victim.

According to defendant, when he made the request, the victim responded with some words in Spanish that he did not understand, followed by the word "black." Defendant assumed that the victim had insulted him, but before he could react, the victim slapped him on his left cheek. Defendant said that he then was suffering from a toothache, so the slap had been particularly painful.

As the victim returned to his work, defendant said he saw a small sledgehammer on top of a machine. He picked it up and approached the victim from behind. Defendant said he struck the victim on the back of the head with the hammer three or four times. Defendant said the victim appeared to be trying to reach something, which he thought might be a weapon, in his front pocket. The victim fell, and defendant continued to hit him on the head with the hammer. The victim was still moving slightly and mumbling as defendant removed the victim's wallet from his back pocket. Defendant said he changed his trousers because they were bloody and took $180.00 from the victim's wallet. He put his pants, the now-empty wallet, and the sledgehammer in a bag that he left near some railroad tracks. After defendant completed this statement, the investigators allowed him to depart. He was arrested approximately two hours later.

PRETRIAL ISSUES

Defendant raises two issues pertaining to the pretrial proceedings in his case. First, defendant argues that the trial court erred in denying his motion to suppress evidence of statements he made to police on 5 April 1998 and 16 April 1998 and in allowing the subsequent admission of those statements into evidence at trial. Second, defendant contends the trial court improperly admitted evidence derived from the pair of shoes seized from him on 5 April 1998. We address these arguments *seriatim*.

In his motion to suppress the statements, defendant argued they were inadmissible because he was not given *Miranda* warnings prior to the allegedly custodial interrogations during which he made the statements. *See Miranda v. Arizona*, 384 U.S. 436, 444-45, 16 L. Ed. 2d 694, 706-07 (1966). In addition, defendant argued that the statements were involuntary and taken in violation of his federal and state constitutional rights. The trial court held a pretrial hearing on the motion to suppress on 21 October 1999. After hearing evidence, the trial court concluded that the statements were voluntarily given by defendant at a time when he was not in custody, and denied the motion.

On appeal, defendant again raises these issues as to his statements. In addition, defendant contends the admission of these statements was plain error.

We note at the outset that defendant did not object at trial to the introduction of evidence regarding either the 5 April 1998 statement or the 16 April 1998 statement, nor did he object to evidence derived from his shoes. We have previously held that a pretrial motion to suppress evidence is not sufficient to preserve for appellate review the issue of whether the evidence was properly admitted if the defendant fails to object at the time the evidence is introduced at trial. *State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198-99 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001); *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (per curiam). Nevertheless, because these issues raise important constitutional questions in the context of a capital case, we will address defendant's contentions pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure.

[1] We first consider whether the trial court erred in denying defendant's motion to suppress his statements. Defendant contends that he gave each statement during a custodial interrogation, without notice of his *Miranda* rights. The applicable standard in reviewing a trial court's determination on a motion to suppress is that the trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the 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). Any conclusions of law reached by the trial court in determining whether defendant was in custody "must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997).

At the 21 October 1999 suppression hearing, the trial court made the following pertinent findings of fact:

3. That during the investigation, Detective McClain received information that the defendant was possibly involved in the homicide.

4. That as a result, on April 5, 1998, Detective McClain went to the defendant's place of work, the Master Casing factory, to attempt to interview the defendant.

5. That at Master Casing, Detective McClain asked to speak with the defendant and the defendant's employer summoned him to the front office.

6. That in the office, Detective McClain identified himself to the defendant as a Clinton Police Officer and that he was investigating the death of Felipe Resendiz.

7. That Detective McClain asked the defendant to accompany him to the Clinton Police Department.

8. [That] Detective McClain advised the defendant that he was not under arrest, that the Detective would appreciate his help, and the defendant did not have to come with him.

9. That the defendant did agree to accompany Detective McClain to the Clinton Police Department for an interview.

10. That Detective McClain left in his vehicle first and the defendant followed in his own vehicle.

11. That Detective McClain and the defendant went to Detective McClain's office at the Clinton Police Department and sat down in the office with the door open.

12. That Detective McClain again advised the defendant that he was investigating the death of Felipe Resendiz and he believed the defendant had information about that matter and the detective would appreciate the defendant giving him that information.

13. That [McClain] advised the defendant again that he was not under arrest, that he was free to leave at any time.

14. That the defendant was with Detective McClain on this occasion no more than one hour and did give a statement, however, it was not incriminating.

15. That the defendant did not receive any Miranda warnings during this interview process.

16. That the Court finds as a fact that [defendant] was not in custody and that a reasonable person in [defendant's] circumstances would believe that he was not in custody and was free to go.

17. That after the statement of the defendant was obtained, . . . he was allowed to go to the bathroom unaccompanied, after

which, he came back to Detective McClain's office on his own.

18. That Detective McClain observed what he believed to be blood on the outside of the sole of the defendant's shoes.

19. That Detective McClain asked the defendant if he could look at the defendant's shoes, telling the defendant that he suspected that there was evidence on his shoes.

20. That the defendant consented to allowing the officer to look at his shoes and took off his shoes and gave them to Detective McClain.

21. That Detective McClain and Special Agent Jay Tilley of the State Bureau of Investigation, who had joined Detective McClain after the statement was obtained, examined the shoes, and saw what appeared to them to be blood.

22. [That] Detective McClain then seized the shoes for submission to the laboratory for blood and DNA analysis.

23. That the defendant was then released and allowed to leave following the interview.

24. That there were no promises or threats or any type of inducement directed to the defendant by Detective McClain or Agent Tilley.

25. That Detective McClain next had contact with the defendant on April 6, 1998 when the defendant consented to giving Detective McClain a blood sample and fingerprints and allowed himself to be photographed.

26. That Detective McClain next had contact with the defendant on April 16, 1998 at about 2:00 p.m. when Detective McClain and Special Agent John Thomas Keane of the State Bureau of Investigation went to the defendant's place of employment at Master Casings to attempt to interview him again.

27. That on this occasion, they went to the office and asked the supervisors if they could interview or speak to the defendant, and the defendant was again summoned to the supervisor's office.

28. That Detective McClain introduced [S]pecial Agent Keane to the defendant.

29. That the officers asked the defendant if he minded speaking with them about the matter of the death of Felipe Resendiz away from the premises of Master Casings.

30. That the officers again advised the defendant that he was not under arrest and that if he accompanied them for an interview that he could leave any time that he wanted to do so and the defendant stated that he understood.

31. That the defendant asked again to drive himself rather than being driven by the officers and he was allowed to do so.

32. That he followed the officers to the State Bureau of Investigation resident agent's office located on the second floor of the Sampson County Courthouse Annex building.

33. That at the courthouse annex, the defendant followed the officers into the building and they went to the resident agent's office.

34. That Special Agent Keane and Detective McClain interviewed the defendant in that office with the door closed, both for privacy of their interview and to lessen noise from outside the office.

35. That the officers again advised the defendant that he was not under arrest and that he could leave any time that he desired to go back to work or elsewhere and they did nothing to detain him and the defendant again indicated that he understood.

36. That the defendant was not in custody and no reasonable person would have believed under the circumstances that he was not free to go.

37. That the officers did not advise the defendant of his Miranda rights.

38. That during the interview, the officers provided the defendant with a soft drink, as they had indicated to him at the beginning of the interview they would if he desired, and he was also provided cigarettes as requested.

39. That the defendant at first denied his involvement in the homicide of Felipe Resendiz and later admitted that he was involved and did commit this homicide.

40. That the officers had advised the defendant that they believed that he was not telling the truth when he denied his involvement and told him that he needed to be truthful, that this was his opportunity to be truthful; made references to the defendant having been in the Army and that that was a respectable position and that he should be respectable and truthful now in making his statement.

41. That the officers also, prior to his admission, advised the defendant that there was evidence and interviews that pointed to him being responsible for the homicide. The officers also told the defendant that he would feel better about himself if he told the truth.

42. That during this interview, the defendant was in control of his mental and physical faculties.

43. That his answers were responsive to the officers' questions and he was cooperative and calm and not under the influence of any impairing substance.

44. That after being encouraged by the officers to tell the truth about what had occurred, the defendant did become tearful and did confess to his involvement in the homicide of Felipe Resendiz.

45. That after his confession, the defendant asked to go to the bathroom and was allowed to do so. Detective McClain showed the defendant where the restroom was, and then Detective McClain left the defendant alone at the bathroom and returned to the office where the interview was being conducted . . . . The defendant came back to the office some three to four minutes later.

46. That this interview lasted approximately one hour.

47. That the officers informed the defendant that he was free to leave, and he was at first hesitant to leave, still being upset from having confessed to his involvement in the homicide, but did soon leave in his own automobile by himself after calling his employer to advise that he would not be back to work.

48. That the defendant had informed the officers that he wanted to go home, and they told him that he was free to go there or anywhere else.

49. That there were no promises, threats or inducements of any kind to the defendant to induce him to make a statement.

Based on these findings of fact, the trial court made the following conclusions of law:

1. That on April 6 [sic], 1998, the defendant voluntarily and consensually gave his shoes to Detective McClain. And that Detective McClain, after examining them, had probable cause to seize them. Under the circumstances, he could not return them to the defendant to obtain a search warrant since they could easily have been destroyed or disposed of by the defendant.

2. That on April 5, 1998, the defendant voluntarily gave a statement to Detective McClain when the defendant was not in custody.

3. That on April 16, 1998, the defendant voluntarily gave a statement to Detective McClain and Special Agent Keane at a time when the defendant was not in custody.

Both the United States Supreme Court and this Court have held that *Miranda* applies only in the situation where a defendant is subject to custodial interrogation. *Miranda v. Arizona*, 384 U.S. at 444, 16 L. Ed. 2d at 706; *State v. Gaines*, 345 N.C. 647, 661, 483 S.E.2d 396, 404, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997); *State v. Phipps*, 331 N.C. 427, 441-42, 418 S.E.2d 178, 185 (1992). The proper inquiry for determining whether a person is "in custody" for purposes of *Miranda* is "based on the totality of the circumstances, whether there was a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.' " *State v. Buchanan*, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001). In this case, we must examine "whether a reasonable person in defendant's position, under the totality of the circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest." *Id.* at 339-40, 543 S.E.2d at 828; *see also Thompson v. Keohane*, 516 U.S. 99, 112, 133 L. Ed. 2d 383, 394 (1995).

The record shows that for both interviews, defendant voluntarily drove his own car to meet with police for questioning. Defendant was repeatedly informed both before he agreed to talk with the investigators and after he arrived for questioning that he was not under arrest and was free to leave at any time. At no point during the interaction

between defendant and the police was defendant ever restrained or confined to the degree associated with a formal arrest. At the conclusion of each interview, defendant was allowed to go. As the United States Supreme Court has stated:

> Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.

Oregon v. Mathiason, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977); *see also State v. Gaines*, 345 N.C. at 662, 483 S.E.2d at 405. Although defendant cites an instance where the door to one of the interview rooms was closed, no single factor is necessarily controlling when we consider the totality of the circumstances. *See, e.g.*, *State v. Bone*, 354 N.C. 1, 11, 550 S.E.2d 482, 489 (2001) ("[W]e have noted that an individual's voluntary agreement to accompany law enforcement officers to a place customarily used for interrogation does not constitute an arrest."), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231 (2002); *State v. Daughtry*, 340 N.C. 488, 504-07, 459 S.E.2d 747, 754-56 (1995) (the defendant held not to be in custody when the defendant agreed to accompany the police to the station for questioning; was told that he was not under arrest and could leave at any time; was not handcuffed or restrained; and was questioned at the police station by officers, who at one point closed the door for privacy), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996); *State v. Medlin*, 333 N.C. 280, 291, 426 S.E.2d 402, 407 (1993) (the defendant held not to be in custody when he was escorted to police station bathroom, was told he could leave at any time, and was in presence of officers at all times); *State v. Phipps*, 331 N.C. at 442-45, 418 S.E.2d at 185-87 (the defendant held not to be in custody where he voluntarily went to the station to talk with investigators when asked by the police, was not arrested, was allowed to return home, and later agreed to take a polygraph examination). We hold that, based upon the totality of the circumstances, a reasonable person in defendant's position would not have believed that he was under arrest or that he was restrained to a degree that would cause him to believe he was formally arrested. We agree with the trial court's findings of fact and conclusions of law that defendant

was not "in custody" when he made statements on 5 April and 16 April 1998, and therefore, the police were not required to give *Miranda* warnings.

[2] We next consider whether the trial court erred in denying defendant's motion to suppress his statements based upon defendant's contention that they were not voluntary. Defendant argues that circumstances of the 5 April 1998 and 16 April 1998 interrogations, viewed either together or separately, had a coercive impact on defendant that rendered his statements involuntary.

A statement is admissible if it "was given voluntarily and understandingly." *State v. Schneider*, 306 N.C. 351, 355, 293 S.E.2d 157, 160 (1982). The determination of whether defendant's statements are voluntary "is a question of law and is fully reviewable on appeal." *State v. Greene*, 332 N.C. 565, 580, 422 S.E.2d 730, 738 (1992). The appropriate test is one "in which the court looks at the totality of the circumstances of the case in determining whether the confession was voluntary." *State v. Jackson*, 308 N.C. 549, 581, 304 S.E.2d 134, 152 (1983). Factors that are considered include

> whether defendant was in custody, whether he was deceived, whether his Miranda rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

State v. Hardy, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994).

Applying the above factors to the instant case, we agree with the trial court's conclusion of law that defendant's statements were voluntary. Although there is no need to cite again the evidence discussed above, we note that additional factors from the record support the trial court's findings. During one of the interviews, defendant was offered drinks and cigarettes. He was allowed to use the rest room without being escorted by an officer. At no point during either session was defendant restrained or handcuffed. Neither interview was prolonged. The record is devoid of any suggestion of physical threats to or pressure exerted on defendant to obtain a statement. Therefore, we hold that, based upon the totality of the circumstances, defendant gave the statements voluntarily. In light of this holding, we also hold

that the trial court did not commit plain error by admitting defendant's statements.

[3] Next, defendant argues that the trial court erred when it denied his pretrial motion to suppress evidence derived from his shoes, which were obtained by police during the 5 April 1998 interview. Defendant contends the evidence was inadmissible because it constituted a warrantless seizure of his property unsupported by either probable cause or exigent circumstances. Although defendant did not object to the introduction of this evidence at trial, as with defendant's statements, we will address defendant's constitutional arguments pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure.

The record reveals that during the interrogation, Detective McClain observed what he believed to be blood on the outside sole of defendant's right shoe. When Detective McClain asked defendant if he could look at his shoes, defendant replied "sure" and gave them to the detective. Detective McClain packaged the shoes for crime analysis and explained to defendant "[t]hat there was possibly blood on [defendant's] shoes and [that he] wanted to either prove or disprove either [defendant's] involvement or . . . not . . . in this matter." Detective McClain gave defendant a pair of slippers to wear home.

At the conclusion of the suppression hearing, the trial court made the extensive findings of fact and conclusions of law quoted above and denied defendant's motion to suppress. Our review of a denial of a motion to suppress by the trial court is "limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

After a careful review of the record, we hold that the trial court's conclusions of law were correct. As a general rule, " '[a] governmental search and seizure of property unaccompanied by prior judicial approval in the form of a warrant is per se unreasonable unless the search falls within a well-delineated exception to the warrant requirement.' " *State v. Hardy*, 339 N.C. at 226, 451 S.E.2d at 610 (quoting *State v. Cooke*, 306 N.C. at 135, 291 S.E.2d at 620).

Consent, however, has long been recognized as a special situation excepted from the warrant requirement, and a search is not

> unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given. *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L. Ed. 2d 854 (1973). For the warrantless, consensual search to pass muster under the Fourth Amendment, consent must be given and the consent must be voluntary. *Id.* at 222, 36 L. Ed. 2d at 860. Whether the consent is voluntary is to be determined from the totality of the circumstances. *Id.* at 227, 36 L. Ed. 2d at 863.

State v. Smith, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997).

In this case, the totality of the circumstances fully supports the trial court's conclusion that defendant voluntarily gave his shoes to the police. Defendant was neither placed in a coercive environment where he surrendered the shoes to the officers involuntarily nor subjected to duress to the point that defendant felt he had no other meaningful choice. As we have held above, a reasonable person in defendant's position would not have believed that he was under arrest. Just as defendant voluntarily drove to the interview sites and gave statements concerning the murder, he voluntarily gave up his shoes without compulsion or coercion.

Although the State cites our decision in *State v. Bone*, 354 N.C. at 8-9, 550 S.E.2d at 487, that case is distinguishable from the case at bar despite a number of factual similarities. In *Bone*, this Court held that the trial court properly allowed evidence of shoes seized from the defendant based upon the theories of plain view coupled with exigent circumstances and of search incident to a lawful arrest. *Id.* When asked to give his shoes to the police, the defendant in *Bone* refused and surrendered them only after a search warrant was issued. *Id.* at 7, 550 S.E.2d at 486. In *Bone*, we determined that the defendant suffered a " 'restraint on freedom of movement of the degree associated with a formal arrest,' " such that defendant was effectively placed under arrest at the moment his shoes were taken from him. *Id.* at 12, 550 S.E.2d at 489 (quoting *State v. Gaines*, 345 N.C. at 662, 483 S.E.2d at 405). By contrast, defendant here voluntarily provided his shoes to the officers for inspection. Moreover, the retention of his shoes did not immobilize defendant because investigators gave defendant a pair of slippers to wear home. We hold the seizure of defendant's shoes was proper because defendant voluntarily consented to the seizure, not as a result of coercion or arrest. This assignment of error is overruled.

JURY SELECTION

[4] We next address issues raised by defendant pertaining to jury selection. Defendant argues that the trial court erred when it held that he had not made a *prima facie* showing of racial discrimination at the time he objected to the prosecutor's peremptory challenges to prospective jurors Baggett and Corbett. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the Constitution of North Carolina forbid the use of peremptory challenges for a racially discriminatory purpose. *Batson v. Kentucky*, 476 U.S. 79, 89, 90 L. Ed. 2d 69, 83 (1986); *State v. Golphin*, 352 N.C. at 425, 533 S.E.2d at 210. In *Batson*, the United States Supreme Court set out a three-part test to determine whether a prosecutor impermissibly used peremptory challenges to excuse prospective jurors on the basis of race, *see Hernandez v. New York*, 500 U.S. 352, 358-59, 114 L. Ed. 2d 395, 405 (1991) (citing *Batson v. Kentucky*, 476 U.S. at 96-98, 90 L. Ed. 2d at 87-89), and we have adopted this test, *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). First, the defendant must make a *prima facie* showing that the prosecutor exercised a peremptory challenge on the basis of race. *Hernandez v. New York*, 500 U.S. at 358, 114 L. Ed. 2d at 405. If such a showing is made, the prosecutor is required to offer a facially valid and race-neutral rationale for the peremptory challenge or challenges. *Id.* at 358-59, 114 L. Ed. 2d at 405. Finally, the trial court must decide whether the defendant has proven purposeful discrimination. *Id.* at 359, 114 L. Ed. 2d at 405.

In the case at bar, we are concerned only with the first prong of this test. The record reveals that the court used a rolling system of jury selection. Twelve prospective jurors were seated in the jury box and questioned about their fitness to serve. As individuals among the original twelve were challenged for cause, replacements were immediately brought forward and questioned along with those remaining from the original panel. Once twelve prospective jurors were seated who had not been challenged for cause or had survived such challenges, the prosecutor was allowed to conduct *voir dire* of these twelve and exercise peremptory challenges. Thereafter, defendant was permitted to question the remaining prospective jurors and exercise his peremptory challenges.

Defendant raised a *Batson* objection when the prosecutor peremptorily excused prospective jurors Baggett and Corbett. Those individuals were the thirty-eighth and thirty-ninth prospective jurors

called forward. At that point, twelve prospective jurors had already been excused for cause by the court. The prosecutor had so far peremptorily excused five prospective jurors: one white male, one African-American male, two African-American females, and one Native American male. Prospective jurors Baggett and Corbett were African-Americans, and when the prosecutor peremptorily excused both of them, defendant raised a *Batson* objection. Although the prosecutor argued to the court that he did not believe that defendant had established a *prima facie* case of discrimination, he stated that he was prepared to explain his reasons for each peremptory challenge. The court declined the offer of explanations, ruling: "I do find there . . . has not been any prima faci[e] showing of racial discrimination of the selection of the jurors, and the State will not be required to state reasons for prior peremptories used or these peremptories used. . . . But I don't feel there's any pattern thus far." Prospective jurors Baggett and Corbett were excused, and jury selection continued.

> Where the trial court rules that a defendant has failed to make a *prima facie* showing, our review is limited to whether the trial court erred in finding that defendant failed to make a *prima facie* showing, even if the State offers reasons for its exercise of the peremptory challenges.

State v. Smith, 351 N.C. 251, 262, 524 S.E.2d 28, 37, *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100 (2000). In *State v. Quick*, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995), this Court set out various factors to consider in analyzing the jury selection process where a *Batson* challenge is raised, including the races of the victim and the defendant, repeated use of peremptory challenges against minorities tending to establish a pattern of strikes against that minority in the venire, the acceptance rate of prospective minority jurors by the party exercising the questioned peremptory challenges, and so forth. Although the *Quick* factors are not exhaustive, they do provide guidance in the case at bar.

Defendant is African-American, and the victim was Hispanic. Other than the alleged racial motive for the exercise of his peremptory challenges that we are now scrutinizing, nothing in the record demonstrates or even suggests that the prosecutor expressed or showed any prejudice against minorities. Although he asked prospective jurors whether the victim's Hispanic origin would be a factor in their deliberation, we perceive no hint of racism in questions of this type. Instead, it appears the questions were asked to reveal any racial

prejudices held by prospective jurors. In analyzing the prosecutor's peremptory challenges in the context of this case and this jury, we observe that at the point defendant raised his *Batson* claim, the prosecutor had already peremptorily excused five of seven eligible African-American prospective jurors (including prospective jurors Baggett and Corbett) and one Native American prospective juror. Thus, the prosecutor accepted only 28.6% of the eligible African-American prospective jurors. If the Native American prospective juror peremptorily excused by the prosecutor is also considered a minority for the purposes of this analysis, the acceptance rate of minorities is even lower. By contrast, the prosecutor peremptorily challenged only one white prospective juror out of twenty who were eligible to serve on the jury, for an acceptance rate of whites of 95%. Viewed from another perspective, at the time of defendant's *Batson* objection, the prosecutor had expended 14.3% of his peremptory challenges against a white prospective juror, 14.3% of his peremptory challenges against a Native American prospective juror, and 71.4% of his peremptory challenges against African-American prospective jurors. On the other hand, the prosecutor accepted two prospective African-American jurors even though he had available peremptory challenges.

We emphasize that a numerical analysis of the type employed here is not necessarily dispositive. However, such an analysis can be useful in helping us and the trial court determine whether a *prima facie* case of discrimination has been established. *State v. Fletcher*, 348 N.C. 292, 320, 500 S.E.2d 668, 684 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 113 (1999). Employing such an analysis, we have held that a defendant failed to establish a *prima facie* case of discrimination where the minority acceptance rate was 66%, *State v. Ross*, 338 N.C. 280, 285-86, 449 S.E.2d 556, 561-62 (1994); 50%, *State v. Nicholson*, 355 N.C. 1, 24, 558 S.E.2d 109, 127, *cert. denied*, —— U.S. ——, 154 L. Ed. 2d 71 (2002); *State v. Belton*, 318 N.C. 141, 159-60, 347 S.E.2d 755, 766 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396; 40%, *State v. Fletcher*, 348 N.C. at 320, 500 S.E.2d at 684; *State v. Abbott*, 320 N.C. 475, 481-82, 358 S.E.2d 365, 369-70 (1987); and 37.5%, *State v. Gregory*, 340 N.C. 365, 398, 459 S.E.2d 638, 657 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996).

We are aware that we risk splitting hairs unduly if we attempt to distinguish between the 37.5% acceptance rate of prospective minority jurors in *Gregory* and the 28.6% rate here. However, we have also

held that "[s]tep one of the *Batson* analysis . . . is not intended to be a high hurdle for defendants to cross. Rather, the showing need only be sufficient to shift the burden to the State to articulate race-neutral reasons for its peremptory challenge." *State v. Hoffman*, 348 N.C. 548, 553, 500 S.E.2d 718, 722 (1998). Here, although we acknowledge that the issue is a close one, we hold that the trial court's conclusion that defendant failed to present a *prima facie* showing sufficient to satisfy the first prong of a *Batson* challenge was error. In so holding, we do not suggest that any improprieties actually took place during the jury selection. That determination is to be made upon remand, as detailed below. We note that the trial court demonstrated its sensitivity to the requirements of *Batson* when defendant made a second such objection later during the jury selection. The trial court then found that defendant had met his *prima facie* burden and required the prosecutor to explain his peremptory challenges.

Although we find no other potentially prejudicial error in defendant's trial, we remand this case to Superior Court, Sampson County, for the limited purpose of holding a hearing pursuant to *Batson*. On remand, a judge presiding over a criminal session shall give the State an opportunity for presenting race-neutral reasons for striking prospective jurors Baggett and Corbett. If the trial court finds that the prosecutor's explanations are not race-neutral, it shall order a new trial. If the trial court finds that the prosecutor's explanations are race-neutral, defendant shall be given the opportunity to demonstrate that the explanations are pretextual. If defendant is able to meet his burden of proving intentional discrimination, the trial court shall order a new trial, but if defendant does not meet this burden, the trial court shall make appropriate findings of fact and conclusions of law and order commitment to issue in accordance with the judgment entered 12 November 1999. *State v. McCord*, 140 N.C. App. 634, 654, 538 S.E.2d 633, 645-46 (2000), *disc. rev. denied*, 353 N.C. 392, 547 S.E.2d 33, *and disc. rev. denied*, 353 N.C. 392, 547 S.E.2d 34 (2001).

[5] Defendant raises several other issues related to jury selection. Defendant cites eight specific instances during jury selection that he claims are improper comments by the prosecutor on defendant's right not to testify. Defendant additionally argues that four other errors occurred during jury selection: (1) the prosecution improperly asked prospective jurors whether they believed the death penalty is a necessary law, (2) the prosecution improperly injected into jury selection the issue of the victim's race, (3) the prosecution attempted

to establish rapport with prospective jurors, and (4) the prosecution made incomplete and misleading statements concerning the sentencing phase during jury selection.

Defendant did not raise a timely objection to any of these statements. This Court has "declin[ed] to extend application of the plain error doctrine to situations where a party has failed to object to statements made by the other party during jury *voir dire*." *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). Therefore, we hold that defendant has failed to properly preserve these issues for review by this Court. *See* N.C. R. App. P. 10(b)(1).

[6] Defendant also raises one argument pertaining to the prosecutor's opening statement. Defendant claims the prosecution improperly injected race into the trial when, in the first sentence of his opening argument, the prosecutor stated: "Felipe Resendiz, a Hispanic man who moved here from Mexico, left the job . . . ." Defendant argues that the prosecutor improperly used the victim's race to urge the jury to convict defendant and to pressure the jury to prove that it was not prejudiced against the Hispanic community. Because defendant failed to object to the argument, we must determine "whether 'the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*.' " *State v. Anthony*, 354 N.C. 372, 423, 555 S.E.2d 557, 590 (2001) (quoting *State v. Mitchell*, 353 N.C. 309, 324, 543 S.E.2d 830, 839, *cert. denied*, 534 U.S. 1000, 151 L. Ed. 2d 389 (2001)), *cert. denied*, —— U.S. ——, 153 L. Ed. 2d 791 (2002). Our review of the record indicates that the statement was but a passing reference to the victim's ethnic background in a substantial opening argument. We are unable to say that the reference to the victim's race was improper at all, let alone so grossly improper that the trial court abused its discretion in failing to intervene.

These assignments of error are overruled.

GUILT-INNOCENCE PHASE

[7] Defendant contends that the trial court erred when it admitted during the guilt-innocence phase of the trial the prosecution's evidence and argument pertaining to the victim's character and to victim impact. Defendant identifies three instances where he claims the trial court allowed irrelevant and inadmissible evidence. We discuss each incident separately.

The first instance concerned the testimony of the victim's supervisor, Billy Jacobs. At trial, Jacobs gave the following pertinent testimony:

> Q. Can you tell the jurors how you knew [the victim]?
>
> A. [The victim], he worked for me in the Plant for probably eight or nine months when he came back. He worked there before. He would go to Mexico and come back. And he was such a good worker, we'd hire him back. So, he was working in the Plant on the machines to start with and we had—we started contracting the cleaning processes of it because the inspectors was [sic] so bad on us that nobody—if I just hired people by the hour, it weren't sufficient cleaning. So—
>
> . . . .
>
> Q. And did [the victim] ask to do this job?
>
> A. Yes, sir.
>
> Q. Why did you allow [the victim] to have this job?
>
> A. Well, he said he would love to try it and [the victim] was a real responsible working guy and I really had a lot of confidence in him that he could do it because a lot of times when the guys would not clean up good at nights, I would get [the victim], his brothers and we would all get together and they—we would all get together and clean it up and they did a real good job.
>
> . . . .
>
> Q. All right. Mr. Jacobs, did—how would you describe work he did once he started doing the contract work cleaning up the Master Casing[s] Plant?
>
> A. He did exactly what I thought he would do. He did an excellent job. I mean he had little write-ups. I mean, we'd have little minor stuff, but it [was] no real big stuff. We was [sic] really proud of the performance he was doing.
>
> . . . .
>
> Q. Now, prior to you leaving, did you have a talk with [the victim] in reference to—was he renting some equipment from you?

A. Yes, sir. I have a high pressure sprayer and he was renting that from me by the week and when he came in that Friday to start to work, he always paid me a hundred dollars a week for the rent of[] the machine.

Q. And did he pay you a hundred dollars on this occasion?

A. Yes, sir.

Q. How did he pay you?

A. Well, he reached in his back pocket and pulled out his wallet and he handed me a $100 bill.

. . . .

Q. Did he—what did he do with the wallet after he paid you?

A. He put it back in his back pocket.

Q. Mr. Jacobs, did you see any other money or were you able to see the contents of his wallet?

A. No, sir.

Q. So you don't know—

A. Not where I was sitting from him. . . . I never had to ask him for it, he would always just—on Fridays, we would give him his check and he would go to the bank and most of the time he'd meet me there before we left.

Defendant argues that this testimony was irrelevant and improperly admitted as evidence of the victim's good character.

Because defendant did not object to any portion of the above testimony, we review this issue for plain error. *See* N.C. R. App. P. 10(c)(4). Plain error is applied only in extraordinary cases where, " 'after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." ' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnote omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

Evidence is relevant if it demonstrates "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). This Court has stated

that "in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994).

In this case, our examination of the record reveals the testimony was relevant to explain the particular circumstances of the crime. The evidence explained the victim's various duties and responsibilities and showed why he worked late nights. In addition to describing the victim's work habits, the testimony was relevant to describe the victim's payday routine as well as where and how he kept his money. Therefore, we hold the evidence was properly admitted. *See State v. Davis*, 349 N.C. 1, 24-26, 506 S.E.2d 455, 468 (1998) ("prosecution was properly permitted to present evidence of [victim's] temperament and management style in order to prove the circumstances of the crime"), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999).

[8] The next instance about which defendant complains involves the testimony of the victim's brother:

Q. [Were] you familiar with [the victim] having a wallet?

A. Yes.

Q. And did you see that wallet on Friday, the 27th of March?

A. Yes.

Q. What did he keep in his wallet other than his money?

A. He had his license and some other identification.

Q. Is [the victim] married?

A. Yes.

Q. Is his wife—where was his wife back in March of 1998?

A. She was in Mexico.

Q. Do you know if [the victim] sent any money to his wife during this time?

A. Yes. He did send it.

Q. Do they have any children?

A. Yes; a girl.

Q. How old is the girl?

A. She's going to be seven years.

Q. Is his wife out here in the audience? Do you see his wife?

A. Yes.

Q. Can you point her out to the Court?

A. It's the girl over there with the green sweater.

. . . .

[PROSECUTOR]: I show you State's Exhibit No. 17 and ask if you can look at that and if you can identify the person in that photo?

INTERPRETER: It is my brother.

Q. Is that Felipe Resendiz?

A. It is Felipe, my brother.

. . . .

Q. And approximately how long before his death did he get that picture taken?

A. It was about three months.

As above, because defendant did not object to the testimony at trial, we review the testimony for plain error. *See* N.C. R. App. P. 10(c)(4). This testimony, along with the testimony of Jacobs concerning the victim's wallet, is relevant to explain the victim's habits in handling his salary. The testimony of the witness both describes the victim carrying in his wallet the money received after cashing his paycheck and explains the reasons the victim needed cash. Consequently, the trial court properly allowed this evidence to be introduced at trial. Further, there was no error in the prosecution's asking the witness to identify the victim's wife and daughter at trial. The mere identification of the victim's wife and child does not constitute improper victim-impact evidence. *State v. Nobles*, 350 N.C. 483, 499-500, 515 S.E.2d 885, 895-96 (1999) (publication of photograph of victim's children to jury, along with their names and birth dates, held permissible).

[9] Finally, defendant argues that the introduction of the photograph of the victim, taken three months before his death, constituted prejudicial error. The trial court overruled defendant's timely objection

and admitted the photograph into evidence. After reviewing the evidence, we believe the trial court properly allowed the jury to consider this exhibit. The photograph was relevant in that it demonstrated the victim's appearance before the murder and helped establish a basis from which the medical examiner could testify as to the various wounds inflicted upon the victim. We have consistently held that, during the guilt-innocence phase of a trial, a photograph of the victim taken before death is admissible. *See, e.g., State v. Goode*, 341 N.C. 513, 538-40, 461 S.E.2d 631, 646-47 (1995) (admission of a family photograph of the victims taken before their deaths not prejudicial).

These assignments of error are overruled.

[10] Defendant argues that his first-degree felony murder conviction must be vacated because the evidence failed to support the underlying felony of armed robbery. At the close of the guilt-innocence phase of the trial, defendant moved to dismiss the murder charge based upon insufficiency of the evidence. The trial court denied the motion and allowed the jury to consider whether defendant was guilty of first-degree murder under theories both of premeditation and deliberation and of felony murder. The jury returned a verdict of guilty of first-degree murder on the basis of felony murder only. Defendant argues that the evidence showed that defendant beat the victim after being slapped and insulted by the victim and took the victim's wallet only as an "afterthought."

A motion to dismiss on the ground of sufficiency of the evidence raises for the trial court the issue "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). The existence of substantial evidence is a question of law for the trial court, which must determine whether there is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). "The court must consider the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from that evidence." *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001). The evidence may be direct, circumstantial, or both. *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382-83 (1988).

To survive defendant's motion to dismiss the armed robbery charge, the prosecution must have offered substantial evidence of the following:

> (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened.

State v. Beaty, 306 N.C. 491, 496, 293 S.E.2d 760, 764 (1982), *overruled on other grounds by State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988); *see also* N.C.G.S. § 14-87(a) (2001). 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 armed robbery charge. Although defendant claims he was provoked, according to defendant's own statement, he approached the victim twice to borrow money. When the victim declined to make a second loan, defendant struck the victim several times on the head with a sledgehammer. After the victim fell, defendant reached into the victim's back pocket, removed his wallet, then left the scene to clean up. Defendant argues the taking of the wallet after the beating was only an opportunistic act that fails to meet the requirements under the armed robbery statute.

The evidence does not support defendant's contention. We have held that

> [t]he commission of armed robbery as defined by N.C.G.S. § 14-87(a) does not depend upon whether the threat or use of violence precedes or follows the taking of the victims' property. Where there is a continuous transaction, the temporal order of the threat or use of a dangerous weapon and the takings is immaterial. *State v. Rasor*, 319 N.C. 577, 587, 356 S.E.2d 328, 335 [(1987)]; *State v. Hope*, 317 N.C. 302, 306, 345 S.E.2d 361, 364 (1986). Further, provided that the theft and the force are aspects of a single transaction, it is immaterial whether the intention to commit the theft was formed before or after force was used upon the victims. *State v. Fields*, 315 N.C. 191, 337 S.E.2d 518 (1985).

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). The prosecution provided substantial evidence to support every element of armed robbery. Defendant wanted to borrow more money, but the victim refused the loan request. The fatal blows to the victim's skull, the taking of his wallet, and the discarding of evidence occurred in an unbroken transaction after the victim turned his back to defendant. The particular point in this sequence where the robbery occurred is immaterial. "When, 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. at 202, 337 S.E.2d at 525. This assignment of error is overruled.

[11] Defendant also argues in several assignments of error that the prosecutor's closing arguments to the jury during the guilt-innocence phase of his trial were improper in numerous respects. Defendant contends the trial court erred when it allowed the prosecutor to comment improperly on defendant's exercise of his right not to testify at trial. During his guilt-innocence phase closing argument, the prosecutor pointed out that defendant struck the victim fourteen times, then made the following pertinent comments:

> [Defendant] broke [the victim's] skull out of his head. Fourteen times. He can't—he can't stand 14 times. You can['t] justify 14 times, ladies and gentlemen; you can't.
>
> Think of what this man was going through. He had every reason to live. He had every—he had a family. He had a wife and a daughter. He worked, lived and breathed and ate and drank and had money, had good times and bad times just like every one of us, you and I. And he sat there and he just died on a cold slab of concrete; fourteen blows.
>
> *Get him to explain 14 blows to you.*
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.

(Emphasis added.) Later during that same argument the prosecutor described the evidence at the scene of the killing and argued:

> What did [the evidence] tell you? Almost all the blood spots what? Were up or sideways or they were all only about this high up (demonstrating). So now, for it to be sideways, he's going to have to be somewhere right in here, a few feet off the ground. Those up ones, he's going to have to be on the ground.
>
> If [defendant] wasn't beating [the victim], and just slamming his head with this hammer while [the victim] was on the ground, *ask him to tell you how the blood got up on this white bin*—
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.

(Emphasis added.)

We must determine whether the trial court erred in overruling defendant's objection.

> We have consistently held that counsel must be allowed wide latitude in the argument of hotly contested cases. He may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his side of the case. Whether counsel abuses this privilege is a matter ordinarily left to the sound discretion of the trial judge, and we will not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury. . . . It is the duty of the trial judge, upon objection, to censor remarks not warranted by the evidence or the law and, in cases of gross impropriety, the court may properly intervene, *ex mero motu*.

State v. Covington, 290 N.C. 313, 327-28, 226 S.E.2d 629, 640 (1976) (citations omitted). In making our determination, we examine the full context in which the statements were made. *State v. Lloyd*, 354 N.C. 76, 113-14, 552 S.E.2d 596, 622-23 (2001).

Because defendant did not present any evidence during the guilt-innocence phase, he was entitled to both the first and the last closing arguments. *See* Gen. R. Pract. Super. and Dist. Ct. 10, 2002 Ann. R. N.C. 8. Our review of the relevant portions of trial transcripts reveals that the prosecutor was responding to contentions made by defense counsel during defendant's first closing argument. In defendant's initial closing argument, his counsel argued that defendant admitted in his statement to police that he committed the crime but that the facts of the case did not amount to premeditated and deliberate murder. Counsel for defendant stated:

> [Defendant] does not deny that he committed this crime. . . . He admitted to it in his statement. But we contend to you that it is not first degree murder. We contend that it was not premeditated. He did not go there intending to kill. . . .
>
> . . . .
>
> . . . We do deny that it's first degree murder. It's our position and we contend that [defendant] is guilty of voluntary manslaughter.
>
> . . . .

> You heard the medical examiner get on the stand and testify that there may have been another weapon involved but he's not absolutely sure. . . . Nowhere in [defendant's] statement did he mention that he used another weapon. And there again, like I said earlier, the State wants you to believe part of his statement but not all of it.

In his argument, the prosecutor sought to rebut defendant's assertions that the murder was not premeditated. By stating "[g]et him to explain 14 blows to you," the prosecutor was not remarking on defendant's silence but rather challenged defense counsel to explain in their closing argument why fourteen blows to the victim's head with, apparently, more than one weapon did not amount to premeditated and deliberate murder. We have stated that prosecutors "may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State." *State v. Reid*, 334 N.C. 551, 555, 434 S.E.2d 193, 196 (1993). In *Reid*, this Court held that it was error for the prosecutor to comment directly on a defendant's right not to testify by stating, " 'The defendant has not taken the stand in this case.' " *Id.* at 554-58, 434 S.E.2d at 196-98; *see also State v. Waddell*, 11 N.C. App. 577, 181 S.E.2d 737 (1971). In the case at bar, however, the prosecutor did not directly implicate defendant's right not to testify. Instead, the prosecutor attempted to demonstrate to the jury that defense counsel's argument that the murder was not premeditated could not explain either defendant's statement to police or the nature of defendant's attack on the victim.

Defendant complains the prosecutor made several improper "indirect" comments about defendant's failure to testify. Specifically, defendant points to the following arguments:

> Dr. Barr tells us he can't say for certain, and we don't know, but he said he believes there were two different instruments. . . .
>
> . . . .
>
> You saw the abrasions on the side of [the victim's] face. You say, "Well, what does that mean?" . . .
>
> . . . .
>
> Well, how did that happen? I contend to you that the evidence—the evidence is speaking to you now. Listen to what it says here. The evidence is telling you that [the victim] fell and

> this was a major blow that just put him down, laid him on the ground, laying [sic] on his right side. And remember how when . . . Dr. Barr talked about the scrape marks; how that was consistent with him having been moved for some reason? Who knows what was going on in [defendant's] mind? . . .
>
> . . . .
>
> Why [defendant] moved him; who knows? Felipe didn't move. [The victim] didn't move on his own.

Because defendant did not object to these arguments at trial, we must determine whether the trial court's failure to intervene *ex mero motu* constituted an abuse of discretion. *See State v. Anthony*, 354 N.C. at 423, 555 S.E.2d at 590. A " 'trial court is not required to intervene *ex mero motu* unless the argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial.' " *State v. Smith*, 351 N.C. at 269, 524 S.E.2d at 41 (quoting *State v. Atkins*, 349 N.C. 62, 84, 505 S.E.2d 97, 111 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999)). In the instant case, even assuming that the prosecutor's rhetorical question can be perceived as touching on defendant's decision not to testify, the trial court did not commit error by failing to intervene *ex mero motu*. *See State v. Fletcher*, 348 N.C. at 322-23, 500 S.E.2d at 685-86 (argument about unanswered questions served to remind jury that it could nevertheless find defendant guilty beyond a reasonable doubt).

Defendant contends that on at least three occasions, the prosecutor improperly stated that the State's case was "uncontradicted." Again, because defendant did not object to this argument, we must determine whether the argument was so grossly improper that the trial court should have intervened *ex mero motu*. *See State v. Lloyd*, 354 N.C. at 116, 552 S.E.2d at 624. In addressing whether it is improper for the prosecution to characterize a case as "uncontradicted," this Court has stated that

> [c]ontradictions in the State's evidence, if such existed, could have been shown by the testimony of others or by cross-examination of the State's witnesses themselves. Thus the prosecution was privileged to argue that the State's evidence was uncontradicted and such argument may not be held improper as a comment upon defendant's failure to testify.

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). Based upon our review of the

record, we hold that the trial court did not err in failing to intervene *ex mero motu*. This assignment of error is overruled.

[12] Defendant asserts the prosecutor improperly argued that the Bible endorsed a guilty verdict:

> Why did [the victim] die? It's the oldest reason in the book: Greed, pure and simple. [The victim] had something and [defendant] wanted it and he was determined to take it from him.
>
> You know, Cain killed Abel because he had something he wanted. He killed him because he had God's blessing; and he didn't like that so he killed him. It goes back to Biblical times. . . .
>
> . . . .
>
> You know what? [The victim] still speaks to us today. He's speaking to us right now. He's been speaking to us throughout this whole trial. He's been telling you what happened. He's not only told you who killed him— . . . he's told us how he was killed. And you say, "How has he done that? How has [the victim] told us that?" His very life blood as it spewed out of his body, as it flows from the wounds being inflicted upon him, from his head, that very life blood speaks to us today. The blood that gave him life, speaks to you today in death. . . .
>
> After Cain killed Abel, God said to Cain "What has thou done? The voice of thy brother's blood cryest up to me from the ground." . . .
>
> The voice of [the victim], the voice of his blood, cries unto you from the ground. It tells you what happened here.
>
> There's no mistake. There's no confusion. It speaks to you and it says that that man, with malice in his heart, with premeditation and with deliberation and during the commission of a felony, a violent felony, brutally, horrifically beat his head to a pulp . . . .
>
> . . . .
>
> . . . I dare say, forevermore, you'll ever be able to put the voice of [the victim's] life blood as it cries up to you from the ground, ladies and gentlemen. Treat this case as it is deserving. Convict the defendant of first degree murder on both theories. Tell him, "No. We're not going to have this. This, we don't allow."

Defendant did not object to these statements at trial. Consequently, our standard of review is whether the prosecutor's arguments were so grossly improper that the trial court erred in 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).

This Court has strongly cautioned against the use of arguments based on religion.

> Jury arguments based on any of the religions of the world inevitably pose a danger of distracting the jury from its sole and exclusive duty of applying secular law and unnecessarily risk reversal of otherwise error-free trials. Although we may believe that parts of our law are divinely inspired, it is the secular law of North Carolina which is to be applied in our courtrooms. Our trial courts must vigilantly ensure that counsel for the State and for defendant do not distract the jury from their sole and exclusive duty to apply secular law.

State v. Williams, 350 N.C. 1, 27, 510 S.E.2d 626, 643 (citations omitted), *cert. denied*, 528 U.S. 880, 145 L. Ed. 2d 162 (1999). Even so, "this Court has repeatedly noted the wide latitude allowed counsel in arguing hotly contested cases, and it has found biblical arguments to fall within permissible margins more often than not." *State v. Artis*, 325 N.C. 278, 331, 384 S.E.2d 470, 500 (1989) (citations omitted), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

The remarks in this case are not so grossly improper that the trial court erred when it failed to intervene *ex mero motu*. The prosecutor did not argue that the Bible commanded a guilty verdict. Instead, he analogized the murder of Abel by Cain to the case at bar chiefly for the purpose of emphasizing the importance of the evidence derived from the victim's blood and to point out that the blood "spoke" after the victim had been silenced. Nevertheless, we again take this opportunity to discourage litigators from making gratuitous biblical references and religious arguments. *State v. Rogers*, 355 N.C. 420, 464, 562 S.E.2d 859, 886 (2002).

[13] Next, defendant argues the trial court abused its discretion when it failed to sustain his objection to the prosecutor's argument that defendant did not call a dentist to corroborate his defense. In his inculpatory statement to police, defendant claimed that on the night of the murder he had a toothache and that the victim slapped him on

the cheek, causing considerable pain. During the prosecutor's closing argument, he made the following pertinent argument:

> You know, [defendant] talked about—I tell you—you know he talked about these statements. You know, "My tooth was hurting and [the victim] slapped it and it really hurt really bad. And so that made [defendant], you know, just really angered [defendant]." Why didn't he call a dentist?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: Why didn't he call a dentist? Come in and say, "Well, you know if it was that bad a toothache"—don't you know—don't you know, ladies and gentlemen, that you would have gone to the dentist in the next few days; that you would have seen somebody? Or there would have been somebody that would have come in and said, "Yeah; I saw him. I know he had a bad toothache. I can testify to that."] But, I didn't see a single person that came up here and testified to that for him; did they? Not a single person. Why is that? 'Cause it wasn't a toothache. He wasn't hurting that bad. If he had hurt that bad, he wouldn't have volunteered to work that next day.

The prosecution may argue that a defendant failed to produce a witness or other evidence to refute the State's case. *See, e.g., State v. Morston*, 336 N.C. 381, 406, 445 S.E.2d 1, 15 (1994); *State v. Mason*, 315 N.C. 724, 732, 340 S.E.2d 430, 436 (1986). Here, the prosecution's theory of the case was that defendant killed the victim with premeditation and deliberation and for the purpose of taking his money. Defense counsel used defendant's statement that he had a toothache to argue that defendant was provoked to attack by the slap. In response, the prosecutor argued that defendant did not call a dentist because defendant never had a toothache. Based on this record, we hold that the trial court did not abuse its discretion in overruling defendant's objection.

[14] Finally, defendant contends the prosecutor's closing argument misstated the law concerning the reason why the trial court was submitting voluntary manslaughter:

> If someone intentionally inflicts wounds on a person with a deadly weapon, slamming or hitting their head with a three-pound hammer, resulting in the blows that resulted in this case

and it results in his death without just cause or justification, that's malice. That is one element for first degree murder.

It's also an element of second degree murder. I can tell you that if you find there is malice in this case, you don't even go to manslaughter because manslaughter is a case—as it [sic] the instruction includes—it basically says the killing of a human being without malice. If you find malice, it's not a manslaughter case. It's not anywhere close but you will be instructed about that because the law requires that you be instructed on that and that's the only reason that you will be instructed.

Again, defendant did not object to this argument, so we review to determine "whether the argument was so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Call*, 353 N.C. 400, 416-17, 545 S.E.2d 190, 201, *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548 (2001).

Voluntary manslaughter is defined as the unlawful killing of a human being without malice, either express or implied, *State v. McNeil*, 350 N.C. 657, 690, 518 S.E.2d 486, 506 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000), and is a lesser included offense of first-degree murder, *State v. Thomas*, 325 N.C. 583, 591, 386 S.E.2d 555, 559 (1989). The trial court determined at the charge conference that evidence existed to support charging the jury as to voluntary manslaughter. Knowing what the judge would charge, the prosecutor addressed the alternatives that would be presented to the jury and argued to the jury that it should not find defendant guilty of this lesser included offense.

The challenged argument correctly stated that voluntary manslaughter did not include the element of malice. In fact, the judge's instruction to the jury as to that offense specifically defined manslaughter as "the unlawful killing of a human being without malice and without premeditation and without deliberation." Consequently, the prosecutor was correct when he argued that if the jury found defendant acted with malice, voluntary manslaughter was not a possible verdict. The prosecutor then discussed the evidence and contended that there was no question that defendant's actions were malicious; that the issue was not even close; and that a verdict of manslaughter therefore would be not only unwise, but also improper. Although defendant objects to the prosecutor's argument that voluntary manslaughter was being submitted only because the law required it, we perceive that the prosecutor was instead arguing

his theory of the case and asking the jury to reject any interpretation of the evidence that would allow it to return a verdict of guilty of voluntary manslaughter. The argument was not so improper as to warrant intervention by the trial court. Moreover, the court preliminarily instructed the jury before the parties argued that the final arguments were not evidence but were a permissible attempt by the attorneys to persuade the jury to return a particular verdict. At the conclusion of all the arguments, the court further instructed the jury that it was "absolutely necessary that you understand and apply the law as I give it to you and not as you think it is or as you might like it to be." Therefore, the jury was notified that the attorneys' arguments were only advocacy, while the court supplied the law.

These assignments of error are overruled.

SENTENCING ISSUES

[15] In another assignment of error, defendant argues that the sentencing proceeding testimony of State's witness Rebecca Campbell was unfairly prejudicial. During the capital sentencing proceeding, the trial court admitted into evidence a written judgment from the United States Army General Court Martial detailing that in 1984 defendant pled guilty to and was convicted of the rape of Campbell. The prosecution introduced this evidence in support of the submission of the (e)(3) statutory aggravating circumstance, that defendant had been previously convicted of a felony involving the use or threat of violence to the person. *See* N.C.G.S. § 15A-2000(e)(3) (2001). The prosecution then called Campbell to testify to the events surrounding the attack and rape by defendant. Defendant argues that her testimony was irrelevant and inadmissible, constituted a violation of defendant's Eight and Fourteenth Amendment rights, and was plain error.

Defendant contends several errors occurred during Campbell's testimony. We will consider these claims *seriatim*. As we do, we note that North Carolina's capital punishment statute provides in pertinent part that, during the sentencing phase,

> [e]vidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f) of this section. Any evidence which the court deems to have probative value may be received.

N.C.G.S. § 15A-2000(a)(3). Evidence is admissible at the capital sentencing proceeding if it is relevant, competent, and probative. *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). More specifically, this Court has held 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." *State v. Roper*, 328 N.C. 337, 365, 402 S.E.2d 600, 616, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991).

Defendant claims the trial court erroneously admitted hearsay testimony from Campbell when she testified, over defendant's objection, that as defendant was attempting to remove her clothes, his friends advised her "to do what [defendant] says because he's crazy." Although this Court has held that hearsay is admissible at a capital sentencing proceeding, *see State v. Golphin*, 352 N.C. at 466, 533 S.E.2d at 234, this statement was not hearsay. "When evidence of a statement by someone other than the testifying witness is offered for a purpose other than to prove the truth of the matter asserted, the evidence is not hearsay." *State v. Reid*, 335 N.C. 647, 661, 440 S.E.2d 776, 784 (1994). The statement that defendant was crazy was offered not for the truth of the matter asserted, but rather to explain the effect of the words on the victim. Therefore, the testimony was properly admitted by the trial court.

As to defendant's remaining arguments in this assignment of error, we review for plain error because defendant did not object to any of the testimony he now claims was improper. *See* N.C. R. App. P. 10(b)(2); *State v. Braxton*, 352 N.C. 158, 223, 531 S.E.2d 428, 465 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). Defendant argues that Campbell's testimony was prejudicially graphic and inflammatory. However, in *State v. Moseley*, 336 N.C. 710, 720, 445 S.E.2d 906, 911-12 (1994), *cert. denied*, 513 U.S. 1120, 130 L. Ed. 2d 802 (1995), this Court determined that it was not error for the State to introduce at sentencing testimony from the victim of a prior violent felony to support the (e)(3) aggravating circumstance even though the testimony tended to be graphic. We have reviewed the testimony in question and have determined that it is not so vivid or disturbing as to be unfairly prejudicial to defendant. Instead, the testimony described in reasonably objective terms the number of injuries sustained by the victim and the effect of the incident on her life. Accordingly, this evidence was admissible to illuminate the circumstances surrounding the prior violent felony committed by defendant.

Defendant argues the trial court erroneously failed to exclude testimony from Campbell that she was "extremely bitter" with defendant. This evidence came out when defense counsel asked her on cross-examination: "I take it you're sort of bitter with the military." The court overruled the prosecutor's objection, and defense counsel asked the question again in more general terms: "I take it you're bitter." She responded, "Not the military; I'm extremely bitter, yes, with [defendant] because of what he did to me and he ruined my life. [Defendant] ruined my health. [Defendant] ruined my emotional stability and my mental ability." Defendant did not elicit this testimony because his original question was limited to Campbell's perceptions of the military. Nevertheless, in her previous testimony, Campbell detailed the many psychological and physical difficulties she had experienced as a result of being raped. She pointed out that defendant's question was accurate in assuming that she had been embittered but was inaccurate as to the reason. The court did not err in failing *sua sponte* to strike this testimony.

Finally, defendant alleges that Campbell stated that her testimony was true. Our examination of the transcript reveals one statement where Campbell responds to a question by stating that she has truthfully testified as to her recollection of events. Because she was not claiming to have testified as to the objective truth, we find no error in this testimony.

After a thorough review of the record, we determine that the trial court did not commit error or plain error in permitting the admission of the testimony of Campbell. This assignment of error is overruled.

Defendant also assigns as error six aspects of the prosecutor's closing arguments during the capital sentencing proceeding. Defendant objected to one of these aspects. As to the rest, our standard of review is to determine whether the argument was so grossly improper as to warrant the trial court's intervention *ex mero motu*. *State v. Craig*, 308 N.C. 446, 457, 302 S.E.2d 740, 747, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983).

[16] First, defendant contends the prosecutor told the jury that defendant requested the submission of the (f)(1) mitigating circumstance, that defendant has no significant history of prior criminal activity. N.C.G.S. § 15A-2000(f)(1). In fact, at the charge conference, defendant specifically requested that the (f)(1) mitigator not be submitted, but the trial court nevertheless instructed as to this circum-

stance. During the prosecutor's closing argument at sentencing, he stated:

> Let's—Number 1, they'll present, well that's—you'll have—the Court will present to you—on this piece of paper is one that says, "Has the defendant previously been convicted of a felony involving the use or threat of violence?" You know, that's Number 1. "The defendant has no significant history of criminal—of prior criminal activity."

While a prosecutor may not argue to a jury that a defendant submitted the (f)(1) mitigating circumstance when defendant has objected to its use, in the case at bar we do not find that the prosecutor's argument was grossly improper. The prosecutor immediately corrected himself during his argument by stating that the court would present the mitigating circumstance to the jury. Further, we have held that any misunderstanding can be cured when the trial court instructs that the defendant did not seek this mitigating circumstance. *State v. Parker*, 350 N.C. 411, 437, 516 S.E.2d 106, 124 (1999), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000); *State v. Walker*, 343 N.C. 216, 223, 469 S.E.2d 919, 923, *cert. denied*, 519 U.S. 901, 136 L. Ed. 2d 180 (1996). In the case *sub judice*, the trial court gave such an instruction.

[17] Second, defendant argues that, at least on two occasions, the prosecutor argued facts outside the record. Specifically, defendant complains the prosecutor argued that "[defendant] said 'He slapped me.' There's no evidence of that," and that "[the victim] probably could have lived but [defendant] did not know that."

We have held that "[t]rial counsel is allowed wide latitude in argument to the jury and may argue all of the evidence which has been presented as well as reasonable inferences which arise therefrom." *State v. Guevara*, 349 N.C. 243, 257, 506 S.E.2d 711, 721 (1998), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999). As to the prosecutor's statement that there was no evidence that the victim slapped defendant, the record of the prosecutor's entire argument shows that he acknowledged that defendant's statement included the claim that the victim slapped him. The prosecutor's argument about the lack of evidence, therefore, may be read as pointing out that defendant's statement was uncorroborated. The prosecutor's comment that the victim might have lived is harder to understand in light of the severity of the victim's injuries. Presumably, the prosecutor was not referring to that portion of defendant's statement where he said the victim

was still mumbling and stirring after the assault, because defendant was the source of that information. At any rate, the statement was only a passing comment made in a lengthy argument, and even if defendant had objected, we fail to see that it could have had any prejudicial effect. After a review of the record, we believe these statements were not so grossly improper as to warrant intervention by the trial court *ex mero motu*.

[18] Third, defendant claims he deserves a new sentencing hearing because the prosecutor improperly introduced race into his sentencing phase closing argument.

> Can [the victim] and his family receive justice in Sampson County?
>
> . . . .
>
> Can they receive justice in Sampson County? They look different than us, they don't speak the language that I—we speak. They come in here and we have to have somebody speak the language for us. [The victim] didn't speak the language. He was a foreigner.
>
> We see them [at] the Piggly Wiggly and just don't feel comfortable and it's just not—we don't know how to relate. Sometimes, they're almost invisible. Don't let [the victim] and his family be invisible to you. He deserves the same justice that all of us enjoy; the same protection of the law. [The victim]—each of you said that you agreed with that.

After examining the full transcript and the context in which these comments were made, we hold that the statements were not so grossly improper that the trial court should have intervened *ex mero motu*. The prosecutor's arguments were not designed to generate an issue of race in the trial. Instead, the prosecutor sought to remind the jury of the victim's humanity and to point out that, despite the victim's unexalted social status and modest economic means, his murder was as consequential as the killing of any other mortal. *See* William Shakespeare, *Merchant of Venice* act 3, sc. 1, 60-69.

[19] Fourth, defendant contends the prosecutor misstated the law at least five times during his closing argument in the sentencing proceeding. Specifically, defendant argues that the prosecutor incorrectly argued (1) that mitigating circumstances were synonymous with excuses, (2) that fewer than all jurors could find an aggravating

circumstance, (3) that the jury could return a death sentence based solely on the aggravating circumstances, (4) that the prosecutor misrepresented the significance of Issue Three, and (5) that the prosecutor erroneously told the jury that it had already found an aggravating circumstance of pecuniary gain because it had convicted defendant of armed robbery in the guilt-innocence phase. Defendant objected only to the fifth alleged misstatement; as to the others, we review the record to determine whether the prosecutor's statements were grossly improper. "A trial court is not required to intervene *ex mero motu* where a prosecutor makes comments during closing argument which are substantially correct 'shorthand summaries' of the law, 'even if slightly slanted toward the State's perspective.' " *State v. Warren*, 347 N.C. 309, 322, 492 S.E.2d 609, 616 (1997) (quoting *State v. Frye*, 341 N.C. 470, 491, 461 S.E.2d 664, 682-83 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996)), *cert. denied*, 523 U.S. 1109, 140 L. Ed. 2d 818 (1998).

After a careful review of each statement alleged as error, we find no gross impropriety in the prosecutor's arguments. *See, e.g., State v. Hill*, 347 N.C. 275, 299, 493 S.E.2d 264, 278 (1997) (no gross impropriety where mitigating circumstances characterized by prosecutor as excuses), *cert. denied*, 523 U.S. 1142, 140 L. Ed. 2d 1099 (1998); *State v. Frye*, 341 N.C. at 491, 461 S.E.2d at 682-83 (prosecutor's slightly slanted statements as to significance of Issue Three not grossly improper). The statements made by the prosecutor, while not technically correct, were not so misleading that the trial court erred by failing to intervene *ex mero motu*. Most important, any misstatements of law by the prosecutor were cured by proper instructions given by the trial court when it charged the jury. Finally, we address the prosecutor's comment to the jury that its conviction of defendant for armed robbery established the aggravating circumstance of pecuniary gain. Although defendant raised a timely objection to this argument, we do not perceive that defendant could have been prejudiced by the prosecutor's statement. The jury had already returned a verdict of guilty of armed robbery, and the court was going to submit pecuniary gain as a possible aggravating circumstance for the jury to consider at sentencing. The prosecutor's statement that armed robbery "is" pecuniary gain was not so wide of the mark as to constitute reversible error.

[20] Fifth, defendant contends that the prosecutor improperly argued that the jury's accountability to its community should lead it to vote for death. The prosecutor argued:

You took an oath. You became—you became the voice and the moral conscious [sic] of this community.

[DEFENSE COUNSEL]: Objection.

THE COURT: Just a moment. It's overruled. You may proceed.

[PROSECUTOR]: Thank you, Your Honor.

You become the voice and the moral conscious [sic] of this community. That's what your position is now. As a result, you have an obligation to do something about this crime.

[DEFENSE COUNSEL]: Objection.

THE COURT: Your objection is overruled. You may proceed.

[PROSECUTOR]: I contend to you that the buck stops here. If you let this man have life, you'll be doing yourself, this community and this State a disservice.

This Court has consistently held that a prosecutor may argue that a jury is "the voice and conscience" of the community. *State v. Brown*, 320 N.C. 179, 204, 358 S.E.2d 1, 18, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987); *State v. Bishop*, 346 N.C. 365, 396, 488 S.E.2d 769, 786 (1997). A prosecutor may also ask the jury to "send a message" to the community regarding justice. *State v. Artis*, 325 N.C. at 329-30, 384 S.E.2d at 499-500. In contrast, we have held that a prosecutor cannot encourage the jury to "lend an ear to the community." *State v. Golphin*, 352 N.C. at 471, 533 S.E.2d at 237. In other words, the jury may speak for the community, but the community cannot speak to the jury. Accordingly, we hold that the prosecutor properly argued to the jury that it was the voice and moral conscience of the community without suggesting that the jury "lend an ear to the community." Instead, the prosecutor urged the jury to remember that the final responsibility for the case rested with them. In *State v. Miller*, 315 N.C. 773, 779, 340 S.E.2d 290, 293-94 (1986), we held a similar argument proper where the prosecutor argued:

"The buck stops in these 12 seats right here. If anything is going to be done about serious crime—this case . . .

"MR. HARRIS: Objection.

"THE COURT: Overruled.

"or any other case where 12 people can come in and occupy these 12 seats, that's what i[t] comes down to and I know that you're

> conscientious individuals and people with abundance of reason and common sense and I'm going to sit down here in just a moment confident that you're going to do the right thing and I suggest to you the right thing is to find Jerry Miller guilty of three counts of armed robbery . . . ."

In the case at bar, the prosecutor did not contend that the community demanded defendant's execution. Instead, he asked the jury not to do itself and the community the "disservice" of returning a recommendation of life imprisonment. Based upon our review of the record, we hold that the trial court did not abuse its discretion in overruling defendant's objections to the argument.

[21] Sixth, and finally, defendant contends the trial court committed error when it allowed the prosecutor to argue that defendant killed the victim to eliminate him as a witness. After discussing defendant's 1984 rape conviction, the prosecutor made the following argument: "But [defendant] left a witness the last time; didn't he? It cost him three and a half years in Fort Leavenworth, Kansas. If there's one thing you can say about [defendant] it's that he learns."

Defendant did not object to this comment, so we review the record for evidence of gross impropriety. The prosecution did not request an instruction as to the (e)(4) aggravating circumstance. However, the jury found that defendant was guilty of armed robbery, the felony supporting the felony murder conviction. Because the robbery and the infliction of mortal wounds on the victim in the instant case were intertwined parts of a continuous transaction, *State v. Olson*, 330 N.C. 557, 566, 411 S.E.2d 592, 597 (1992), the prosecutor's comments on efforts arguably made by defendant to escape successfully and enjoy the use of the stolen money were not so grossly improper as to require the court to intervene *ex mero motu*, *see State v. Oliver*, 302 N.C. 28, 62, 274 S.E.2d 183, 204 (1981).

[22] Defendant renews in the context of sentencing his contention that the trial court erred when it admitted the State's sentencing evidence and argument concerning both the victim's good character and the impact of the crime on the victim's family. Victim-impact statements may be used during a capital sentencing proceeding because the State 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." N.C.G.S. § 15A-833 (2001). Victim-impact statements 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." *Id.* However, any evidence "so unduly prejudicial that it renders the trial fundamentally unfair" is inadmissible. *Payne v. Tennessee*, 501 U.S. 808, 825, 115 L. Ed. 2d 720, 735 (1991).

We first address the testimony as to the victim's character. In this case, the victim's wife came to the United States for the trial. She testified at the sentencing proceeding that she and the victim had a six-year-old daughter. The victim had worked in Sampson County and had sent money to her in Mexico to support the family. When asked to describe the victim as a father and a husband, she replied, "[H]e was very good. He worked to give us the best." One of the victim's brothers testified through an interpreter that

> [the victim] was a person, noble, respected, he was a working man. He came from Mexico to work here in the United States—
>
> [DEFENSE COUNSEL]: Objection. Motion to strike that response.
>
> THE COURT: It's overruled. You may continue.
>
> [WITNESS]: . . . to send money to his wife [and] daughter that they were in Mexico. He would also send money to my mother. He was a responsible man for the whole, entire family.

The testimony of family members helped describe for the jury what type of person the victim had been and what had been lost when he was killed.

> "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."

Id. (quoting *Booth v. Maryland*, 482 U.S. 496, 517, 96 L. Ed. 2d 440, 457 (1987) (White, J., dissenting) (citation omitted)). This testimony fell squarely within the reach of N.C.G.S. § 15A-833 and was not so prejudicial that it made the trial fundamentally unfair.

Defendant also contends that the prosecutor improperly argued victim-impact to the jury during his closing argument.

> You should decide this case from the evidence, on the law, and you should decide it from what is right and do justice. And

> they'll tell that you shouldn't decide it on the basis of sympathy for the family and that's true. But you can consider what this family has been going through. You can consider what this family has lost. [Defendant's] lawyer is going to say you can't consider it.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: You can consider all of those things.

N.C.G.S. § 15A-833 permits introduction of victim-impact evidence at sentencing. Although it may have been preferable for the prosecutor to forecast that defendant's lawyer would argue that the jury *should not* consider such evidence, rather than *could not*, it is not impermissible for one side to attempt in argument to address the anticipated arguments of the opposition. *See, e.g., State v. Walls*, 342 N.C. 1, 48-49, 463 S.E.2d 738, 763 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996); *State v. Daniels*, 337 N.C. 243, 279, 446 S.E.2d 298, 320-21 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995). We do not find reversible error in the prosecutor's argument.

These assignments of error are overruled.

[23] Defendant contends that there was insufficient evidence to support the trial court's submission to the jury of the statutory aggravating circumstance that the murder was "especially heinous, atrocious, or cruel" pursuant to N.C.G.S. § 15A-2000(e)(9). In determining whether the evidence was sufficient to support the circumstance, this Court "must consider the evidence 'in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom.' " *State v. Flippen*, 349 N.C. 264, 270, 506 S.E.2d 702, 706 (1998) (quoting *State v. Lloyd*, 321 N.C. 301, 319, 364 S.E.2d 316, 328, *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988)), *cert. denied*, 526 U.S. 1135, 143 L. Ed. 2d 1015 (1999). "[D]etermination of whether submission of the (e)(9) aggravating circumstance is warranted depends on the particular facts of each case." *State v. Call*, 353 N.C. at 424, 545 S.E.2d at 205.

We have identified three types of murders that warrant submission of the (e)(9) aggravating circumstance.

> The first type consists of those killings that are physically agonizing for the victim or which are in some other way dehumanizing. *State v. Lloyd*, 321 N.C. [at] 319, 364 S.E.2d [at] 328. The

second type includes killings that are less violent but involve infliction of psychological torture by leaving the victim in his or her "last moments aware of but helpless to prevent impending death," *State v. Hamlet*, 312 N.C. [162,] 175, 321 S.E.2d [837,] 846 [(1984)], and thus may be considered "conscienceless, pitiless, or unnecessarily torturous to the victim," *State v. Brown*, 315 N.C. 40, 65, 337 S.E.2d 808, 826-27 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *and overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). The third type includes killings that "demonstrate[] an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder[s]." *Id.* at 65, 337 S.E.2d at 827.

State v. Lloyd, 354 N.C. at 122, 552 S.E.2d at 627-28 (citations altered; textual alterations in original).

The evidence shows that defendant borrowed money from the victim to support a drug habit, then returned that same night to solicit another loan for more drugs. When the victim refused the second request, defendant struck the victim on the head at least fourteen times. The pathologist who performed the autopsy testified that the wounds found on the victim's head were likely caused by two dissimilar weapons. At least half of the fourteen wounds penetrated to the skull, causing fracture. While the pathologist testified that two of the wounds were considered "significant injuries" to the head that would "likely instantly incapacit[ate]" the victim, defendant's statement suggested that the victim did not die immediately. Special Agent Keane, who participated in the interview of defendant on 16 April 1998, testified as follows:

> [Defendant] stated that as his head was turned to the right, he observed a small, sledge-like hammer lying on top of a grinder. [Defendant] then took two steps and picked the hammer up with his right hand. [Defendant] then walked . . . up to [the victim] who was continuing to wash the equipment down. [The victim] had his back to [defendant]. [Defendant] then struck [the victim] in the back of the head three or four times with the hammer. [Defendant] indicated that it appeared that [the victim] was trying to get something, possibly a weapon, from his left, front pants pocket. [Defendant] then struck [the victim] three more times with the hammer about the head. [The victim] then fell to his knees. [Defendant] stated that he then hit [the victim] a couple of more times in the neck area.

> [The victim] then fell completely onto the floor, onto his stomach. [Defendant] stated that [the victim] was mumbling something and was moving slightly on the floor.

Viewed in the light most favorable to the State, we agree that this murder was violent and depraved. *See State v. Huffstetler*, 312 N.C. 92, 115-16, 322 S.E.2d 110, 125 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). The (e)(9) aggravating circumstance was properly submitted for the jury's consideration. This assignment of error is overruled.

[24] Defendant next contends that the trial court erred when it submitted the (f)(1) mitigating circumstance that "[t]he defendant has no significant history of prior criminal activity." N.C.G.S. § 15A-2000(f)(1). As noted earlier in this opinion, defendant asked the trial court during the charge conference not to instruct the jury as to this circumstance. The trial court denied defendant's request and submitted to the jury the (f)(1) mitigator in addition to the (e)(3) aggravating circumstance that defendant "had been previously convicted of a felony involving the use or threat of violence to the person," N.C.G.S. § 15A-2000(e)(3). The (f)(1) instruction included a statement by the court advising the jury that defendant had not requested the submission of that mitigating circumstance. Defendant argues the (f)(1) mitigating circumstance was not supported by the evidence and its submission violated defendant's right to a fair sentencing hearing.

This Court has held that "the test governing the trial court's decision to submit the (f)(1) mitigator is 'whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity.' " *State v. Blakeney*, 352 N.C. 287, 318, 531 S.E.2d 799, 821 (2000) (quoting *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988)), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001). If the trial court determines that a rational jury could find that defendant had no significant history of prior criminal activity, "the statutory mitigating circumstance must be submitted to the jury, without regard to the wishes of the State or the defendant." *State v. Mahaley*, 332 N.C. 583, 597, 423 S.E.2d 58, 66 (1992), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 649 (1995). The presence of some evidence of a defendant's prior violent criminal activity does not preclude submission of the (f)(1) mitigator. *See, e.g., State v. Billings*, 348 N.C. 169, 188-89, 500 S.E.2d 423, 435 (proper to submit (f)(1) mitigating circumstance despite the defendant's prior conviction for attempted second-degree murder as well as a history of drug-dealing), *cert. denied*, 525 U.S.

1005, 142 L. Ed. 2d 431 (1998); *State v. Ball*, 344 N.C. 290, 310-11, 474 S.E.2d 345, 357 (1996) (proper to submit (f)(1) mitigating circumstance despite the defendant's convictions for robbery, felonious assault, and forgery, as well as a history of drug abuse), *cert. denied*, 520 U.S. 1180, 137 L. Ed. 2d 561 (1997).

Our review of the record reveals that the trial court properly submitted the (f)(1) mitigating circumstance. Defendant's prior criminal record consists of a 1984 conviction for rape. We believe that a rational juror could have found defendant had no significant history of prior criminal activity. Defendant tendered expert testimony that his addiction to alcohol and drugs caused him to do things that he could not control. In fact, defendant's expert, Dr. Roy Mathew, testified that defendant has

> [no] breaking and entering charges—
>
> [PROSECUTOR]: Objection.
>
> WITNESS: —there was no history of breaking and entering—
>
> THE COURT: Overruled.
>
> WITNESS: —no history of mugging anybody, no history of family violence, no history of getting into fights in bars, no history of getting into fights where he was working; that, combined with reports furnished by all the clinics he has been to offer him as an introverted, shy person[,] force[s] me to[] conclude that his behavior during the night of the alleged crime was out of character with him.

Moreover, defendant sought during cross-examination of the rape victim to convince the jury that the victim's version of the events was not believable. For example, defendant elicited that although the victim claimed that she had been brutally raped, she had been treated and released from the hospital within three or four hours. Defendant was similarly able to show that the victim's statement to investigators was inconsistent with her sentencing testimony as to how much she had to drink and her state of inebriation on the night of the attack. In light of the nature of defendant's criminal history and of defendant's evidence, considered either independently or together, we conclude that the trial court properly submitted the (f)(1) mitigating circumstance.

[25] We also reject defendant's related assertion that the trial court erred in submitting both the (f)(1) mitigating circumstance and the

(e)(3) aggravating circumstance. We have consistently held the submission of both of these circumstances to be proper. *See State v. Blakeney*, 352 N.C. at 319, 531 S.E.2d at 821-22; *State v. Ball*, 344 N.C. at 311-13, 474 S.E.2d at 357-59; *State v. Walker*, 343 N.C. at 224-26, 469 S.E.2d at 923-24. This assignment of error is overruled.

[26] Defendant contends the trial court erred when it failed to submit defendant's proposed nonstatutory mitigating circumstance number five, which read: "Consider whether . . . defendant has a good reputation in the community in which he lives." Defendant complains that he presented eight witnesses at his sentencing proceeding whose testimony fully supported this proposed circumstance.

> This Court has held that in order for a defendant to
>
> demonstrate that the trial court erred by refusing to submit a requested nonstatutory mitigating circumstance, defendant must establish that "(1) the nonstatutory mitigating circumstance is one which the jury could reasonably find had mitigating value, and (2) there is sufficient evidence of the existence of the circumstance to require it to be submitted to the jury."

State v. Blakeney, 352 N.C. at 316-17, 531 S.E.2d at 820 (quoting *State v. Benson*, 323 N.C. 318, 325, 372 S.E.2d 517, 521 (1988)). Our examination of the record reveals that none of the eight witnesses testified to defendant's good reputation in the community in which he lived. For example, witnesses Dwight Thornton and Billy Ray Jacobs testified to defendant's exemplary work habits, while defendant's sister testified how defendant helped their mother during illness, and Reverend Becton spoke of defendant's service to the church. We have reviewed the testimony of all of defendant's character witnesses at the sentencing proceeding. The evidence of laudable personal characteristics and specific instances of good conduct did not address defendant's actual reputation in the community. Based upon the evidence, we hold that the trial court properly denied defendant's request for the submission of this nonstatutory mitigating circumstance to the jury.

Even assuming *arguendo* that the trial court did err, the error was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (2001). "A trial court's error in failing to submit a nonstatutory mitigating circumstance is harmless 'where it is clear that the jury was not prevented from considering any potential mitigating evidence.' " *State v. Skipper*, 337 N.C. 1, 56, 446 S.E.2d 252, 283 (1994) (quoting

State v. Green, 336 N.C. 142, 183, 443 S.E.2d 14, 38, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994)), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995). The trial court submitted the following two mitigating circumstances relating to defendant's character evidence:

> (4) . . . .
>
> P. Friends, family and employers uniformly describe the Defendant as a peaceful, non-aggressive person.
>
> Q. The Defendant was a productive member of his church in the years just preceding his arrest.

Accordingly, the jury was not prevented from considering defendant's mitigating evidence. This assignment of error is overruled.

Defendant contends that the trial court erred when it refused to instruct peremptorily that five nonstatutory and one statutory mitigating circumstances submitted to the jury were supported by uncontroverted evidence. This Court has frequently noted a significant difference between statutory and nonstatutory mitigating circumstances in a capital case. If the jury finds that a statutory mitigating circumstance exists, it must also find that the circumstance has mitigating value; by contrast, the jury may find that a nonstatutory mitigating circumstance exists but has no mitigating value. *See, e.g.*, *State v. Lawrence*, 352 N.C. at 31, 530 S.E.2d at 826. Despite this difference, where a defendant seeks a peremptory instruction as to a statutory *or* nonstatutory mitigating circumstance that is supported by uncontroverted and manifestly credible evidence, the defendant is entitled to a peremptory instruction. *State v. Green*, 336 N.C. at 173-74, 443 S.E.2d at 32-33; *State v. Gay*, 334 N.C. 467, 493, 434 S.E.2d 840, 855 (1993). Although the form of the peremptory instruction is different for statutory and nonstatutory mitigating circumstances, *State v. Green*, 336 N.C. at 173-74, 443 S.E.2d at 32-33, failure to give such an instruction where one is warranted constitutes reversible error, *State v. Gay*, 334 N.C. at 493-94, 434 S.E.2d at 855.

> It is possible that one or more of the nonstatutory mitigating circumstances found by none of the jurors would have been found by one or more of the jurors had the judge given a peremptory instruction as requested. In regard to the nonstatutory mitigating circumstances which were found by one or more jurors, we have no way of knowing whether or not they were unanimously found. If one was not unanimously found, it is possible that more jurors, or all the jurors, would have found the circum-

stance to exist and to have mitigating value had a peremptory instruction been given.

It is reasonably possible that the number of circumstances found by individual jurors in response to Issue Two at the sentencing proceeding could have had an effect on the balancing required for Issue Three. Therefore we are unable to say that the failure to peremptorily instruct the jury as to the nonstatutory mitigating circumstances which were supported by uncontroverted evidence did not impair the jury's consideration of such circumstances. Accordingly, we are unable to find the error harmless beyond a reasonable doubt. Therefore, defendant must receive a new sentencing proceeding.

Id. at 494, 434 S.E.2d at 855.

Although in *Gay* this Court cited a harmless error standard of review as to this issue, our above-quoted analysis effectively ruled out the likelihood of finding harmless error in any but the most unusual circumstances. Nevertheless, while the reasons supporting the remedy of virtually automatic reversal set out in *Gay* are sound, the effect is unquestionably draconian. In practice, a trial judge must recall from a trial that has extended over days or even weeks not only the evidence purporting to support a particular mitigating circumstance, but also whether other evidence controverted defendant's evidence, directly or indirectly. Even where the judge has the active assistance of trial counsel, the prospect can be daunting.

In the case at bar, defendant filed a written motion titled "Request for Peremptory Jury Instructions as to Non-Statutory Mitigating Circumstances." The judge thereafter held a charge conference and agreed to instruct as to every such circumstance requested by defendant except for one that defendant withdrew as being duplicative. The judge then reviewed each nonstatutory mitigating circumstance individually, in some cases discussed the circumstance, invited comment from defense counsel and the prosecutor, then determined whether his instruction as to that mitigating circumstance would be peremptory. In light of this procedure followed by the conscientious trial court, we will review with deference its determinations whether the record showed that a particular circumstance was controverted or manifestly credible. We consider defendant's contentions *seriatim*. As we do, we bear in mind that in *Gay* the State conceded that the evidence was uncontroverted as to defendant's nonstatutory mitigating circumstances, *id.* at 493 n.4, 434

S.E.2d at 855 n.4, while in the case at bar, the State argues that the court's decisions were justified by the record.

[27] Defendant submitted the nonstatutory mitigating circumstance that "[t]he Defendant was a responsible praise worthy worker who supervisors relied on." Because there was evidence to support this circumstance, the court properly submitted it to the jury. However, Dwight Thornton, one of defendant's supervisors, testified that defendant was given a leave of absence to attend a drug-treatment program. Defendant's expert, Dr. Mathew, testified that defendant's chronic alcohol abuse caused him to lose a number of jobs. Because the evidence as to this circumstance was controverted, the trial court properly declined to give a peremptory instruction.

[28] Defendant asked the court to instruct peremptorily that "the Defendant was a productive member of the U.S. Army, winning awards and citations, for his performance." The record shows that defendant served in the Army twice. During his first term of enlistment, defendant was a competent soldier and received an honorable discharge. However, he was convicted of rape during his second term and dishonorably discharged. In light of this decidedly mixed record, the trial court properly declined to give a peremptory instruction as to this circumstance. We also note that the court provided a peremptory instruction as to the related nonstatutory mitigating circumstance that "the Defendant was honorably discharged from the United States Army."

[29] Defendant sought a peremptory instruction as to the statutory mitigating circumstance that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." N.C.G.S. § 15A-2000(f)(6). Defendant presented evidence of such impairment through the expert testimony of Dr. Mathew, who acknowledged that his analysis of defendant was made solely in preparation for his court appearance. We have held that the testimony of an expert witness who has prepared an analysis of a defendant in preparation for trial "lacks the indicia of reliability based on the self-interest inherent in obtaining appropriate medical treatment" and, because not "manifestly credible," does not support a peremptory instruction as to this particular mitigating circumstance. *State v. Bishop*, 343 N.C. 518, 557-58, 472 S.E.2d 842, 863-64 (1996), *cert. denied*, 519 U.S. 1097, 136 L. Ed. 2d 723 (1997). Also, as in *Bishop*, the expert testimony in the case at bar was not uncontroverted. Dr. Mathew testified on cross-examination

that he based his analysis on the amount of cocaine defendant told him he had consumed the night of the murder; however, if defendant had consumed a lesser amount of cocaine that night, Dr. Mathew would significantly change his opinion as to defendant's ability to appreciate the criminality of his conduct. The State concomitantly established that defendant advised Dr. Mathew that he had smoked eight or ten rocks of crack cocaine before the murder, but reported to police that he had consumed only three rocks. In light of Dr. Mathew's reservations and the inconsistencies between defendant's statements, we cannot say this mitigating circumstance was supported by uncontroverted and manifestly credible evidence.

[30] Defendant requested that the court provide a peremptory instruction that "the Defendant's mother abused alcohol, as did other family members." During the charge conference, the judge reviewed defendant's list of requested mitigating circumstances, discussing which ones were entitled to a peremptory instruction. When he reached the one now under consideration, he stated: "I'm not inclined to give a peremptory on that. Does the defendant wish to be heard further?" Defense counsel responded: "No." Thereafter, the court instructed as to the circumstance, but not peremptorily. The record shows that defendant called as witnesses Sally Williams, a sister, and Angeline Williams, a cousin. Sally Williams testified that their mother drank, as did other members of the family, and Angeline Williams testified that there was drinking around the house on weekends and that all the adults were alcoholics. However, there was no testimony as to defendant's presence during these drinking bouts. Although Dr. Mathew, defendant's expert, acknowledged that defendant's mother might have been an alcoholic, he could not be certain. In light of defendant's family ties with these witnesses and the lack of specific evidence as to defendant's contact with the drinking, we cannot say that uncontroverted and manifestly credible evidence existed to support a peremptory charge as to this mitigating circumstance.

[31] Defendant requested a peremptory instruction that "the Defendant was exposed to violence among family members as a child." When this instruction was discussed at the charge conference, the judge stated, "[A]s to [this circumstance], not inclined to give it [peremptorily]." Defense counsel replied, "I don't wish to be heard." The record establishes that both Sally Williams and Angeline Williams recalled that there had been fights at the family home, and Angeline Williams testified that "we" were exposed to fighting. Although the term "we" unquestionably refers to the younger children in the house,

she also testified that there were a number of such children and did not discuss the nature or extent of defendant's involvement. Sally Williams spoke of a murder that took place at an aunt's house. When asked if defendant had been present and seen that murder, she responded: "I reckon he was standing around too. He had a—I don't know—he probably were on the outside where it—the shooting were at 'cause they was a lot of kids. . . . I can't say that he seen him shoot him . . . ." However, Sally Williams also testified without equivocation that defendant helped take the victim to seek medical help. Because of the family relationship between defendant and these witnesses and the uncertainties expressed in their testimony, we cannot say that this evidence contained the requisite manifest credibility to require the court to instruct the jury as to this mitigating circumstance in peremptory form.

[32] Finally, defendant requested a peremptory instruction on the nonstatutory mitigating circumstance that "as a child the Defendant witnessed his mother returning home with men at a drunken and half drunken state." At the charge conference, the trial court and counsel changed this circumstance to read that "as a child, the defendant was present in the home when his mother returned home with various men in a drunken state." When this circumstance was discussed at the charge conference, the judge stated, "I'm not inclined to give a peremptory. Does the defendant wish to be heard further?" Defense counsel responded, "No." The only evidence in the record to support this circumstance is Angeline Williams' testimony:

> [DEFENSE COUNSEL]: Okay. And would there be men over there lots of times?
>
> A. We had a lot of activity with male friends.
>
> Q. Would they spend the night over there sometimes?
>
> A. Yes, sir.
>
> Q. And did this go on in front of all the children?
>
> A. Yes, sir; it was very open.

The testimony in which the above-quoted questions are embedded deals with visitors who would drink, sometimes to excess. Nevertheless, the record contains no suggestion that defendant's mother would leave home to find these visitors or, having left home for whatever reason, would return with them. In addition, the instruction is ambiguous in that it could refer to the drunken state of either

the mother or the various men. Accordingly, the trial court properly refused defendant's request for this peremptory instruction.

These assignments of error are overruled.

[33] Defendant contends that he is entitled to a new capital sentencing proceeding because the trial court erred when it allowed the prosecutor to comment about defendant's failure to call his wife to testify. In his closing argument during the sentencing proceeding, the prosecutor stated:

> [Defendant and his counsel] called Dr. Mathew. Let's take a second and talk about him. One thing he talks about is how the things are going on in his life and what he's going through. You would think that they would call some people who would have said, "This was all the drugs he was doing that night" or, "This is how it happened." They could have called and said—the burden of persuasion is on them. They could have called Mercado Green, Aretha Herring, the one he was going to have sex with that night and go off in the room with. *Did they call his wife? Did they call his wife to testify?*
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: *Why do you think they didn't call his wife? Maybe 'cause she would have testified to something they didn't want to hear.*
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Objection sustained. The jury will disregard that argument.
>
> [PROSECUTOR]: They didn't call all these people that would say, "Well, I know he's been doing drugs all his life." No. They called Dr. Mathew. And what did he say? And well, there's no need of getting into a whole lot of it.

(Emphasis added.) Section 8-57(a) states in pertinent part: "The spouse of the defendant shall be a competent witness for the defendant in all criminal actions, but the failure of the defendant to call such spouse as a witness shall not be used against him." N.C.G.S. § 8-57(a) (2001). We have interpreted this statute to mean that the failure of defendant's wife to testify on his behalf "shall not be used to [his] prejudice," *State v. McCall*, 289 N.C. 570, 575, 223 S.E.2d 334, 337

(1976), and have held that "[t]he rule applies with equal force to the argument of counsel when evidence forbidden by statute is argumentatively placed before the jury and used to the prejudice of the defense," *State v. Thompson*, 290 N.C. 431, 447, 226 S.E.2d 487, 497 (1976). Where such an argument is made, the trial court should provide a prompt peremptory instruction that the jury should disregard the argument and that the failure of the defendant to call his wife should not be held against him. *State v. Helms*, 218 N.C. 592, 596-97, 12 S.E.2d 243, 246 (1940).

In the case at bar, the trial court failed to sustain defendant's initial objection when the prosecutor strayed into improper territory. However, as soon as the prosecutor began to develop this theme, defendant renewed his objection. The trial court sustained the objection and instructed the jury to disregard "that argument."

In light of the unequivocal requirement for a detailed peremptory curative instruction set out in *Helms*, we agree with defendant that the trial court's actions were insufficiently detailed and therefore error. However, the error is not prejudicial unless "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant." N.C.G.S. § 15A-1443(a). We note that every North Carolina Supreme Court case cited by defendant as to this issue was decided prior to the 1977 enactment of this statute. In the only cases cited by defendant that postdate the statute's enactment, *State v. Robinson*, 74 N.C. App. 323, 328 S.E.2d 309 (1985); *State v. Ward*, 34 N.C. App. 598, 239 S.E.2d 291 (1977), the North Carolina Court of Appeals ordered new trials but did not cite N.C.G.S. § 15A-1443. Because these cases did not include any analysis of the statutorily controlled standard of review, we find neither persuasive. In addition, unlike the case at bar, in neither *Robinson* nor *Ward* did the trial court give any curative instruction.

Our consideration of the entire record convinces us that defendant has failed to meet the burden established by the statute. Evidence of defendant's guilt was strong and included a confession. The jurors found all three submitted aggravating circumstances, but of the twenty-seven mitigating circumstances submitted, they found none that were statutory and only two that were nonstatutory. Although the trial court initially ruled incorrectly, it properly sustained the renewed objection before the prosecutor went much further. The court's curative instruction was ambiguous and incomplete, but

because a jury is presumed to follow a court's instructions, *see State v. Wiley*, 355 N.C. 592, 637, 565 S.E.2d 22, 52 (2002), we are reluctant to assume that it was also utterly ineffectual. Considering these factors together, we hold that defendant has failed to establish that a different verdict would have resulted if the trial court had sustained defendant's objection more promptly and given a properly detailed curative instruction. *See State v. Britt*, 320 N.C. 705, 709, 360 S.E.2d 660, 662 (1987) (even if error arose when defendant's wife was compelled to testify, in light of strength of State's case, no reasonable likelihood under N.C.G.S. § 15A-1443(a) that a different result would have been reached if the wife had not testified); *State v. Martin*, 105 N.C. App. 182, 189, 412 S.E.2d 134, 137 (no prejudicial error where prosecutor referred to the failure of the defendant's wife to testify because prosecutor was discussing her status as an employee of the defendant's company; court sustained the defendant's objection but did not provide curative instruction), *appeal dismissed and disc. rev. denied*, 331 N.C. 556, 418 S.E.2d 670 (1992). This assignment of error is overruled.

[34] Defendant contends that the trial court's instructions to the jury regarding the pecuniary gain aggravating circumstance, N.C.G.S. § 15A-2000(e)(6), were erroneous because the instructions allowed the jury to find the aggravating circumstance without finding that the motive for the murder was pecuniary gain. Defendant argues that the instructions were plain error, erroneous in law, and in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

During the capital sentencing proceeding, the trial court conducted an informal charge conference outside the presence of the jury in which the prosecutor requested that the trial court submit the (e)(6) aggravating circumstance to the jury. Defendant objected on the grounds that it would be inappropriate to submit that circumstance because the jury had convicted defendant of murder under the felony murder rule and because the murder in this case "was more of a murder-for-hire situation than a robbery situation." After considering arguments by both the prosecution and defense counsel, the trial court indicated that it would submit the aggravating circumstance. Thereafter, at the close of the evidence, the trial court conducted an official charge conference and reiterated its intention to submit the (e)(6) circumstance to the jury. Defendant's counsel then responded, "I don't have any objection to that." The trial court subsequently instructed the jury as follows:

> The second aggravating circumstance that you will consider is[,] was this murder committed for pecuniary gain? A murder is committed for pecuniary gain if the defendant, when he commits it, has . . . obtained, or intends or expects to obtain, money or some other thing which can be valued in money, either as compensation for committing it, or as a result of the death of the victim. If you find from the evidence beyond a reasonable doubt[] that when the defendant killed the victim, the defendant took money from the victim, 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. If you do not so find, or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance and will so indicate by having your foreperson write, "No," in that space.

The jury found the (e)(6) circumstance to exist.

Because defendant did not object to the trial court's instructions, we review for plain error. *State v. Bacon*, 337 N.C. 66, 99, 446 S.E.2d 542, 559 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995). "Under this standard, defendant must show that the instructions were erroneous and that absent the erroneous instructions, a jury probably would have returned a different verdict." *State v. Lucas*, 353 N.C. at 584, 548 S.E.2d at 723. "The error in the instructions must be 'so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him.' " *Id.* (quoting *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993)).

We previously have rejected virtually identical arguments as that raised by defendant here. *See State v. Davis*, 353 N.C. 1, 35-37, 539 S.E.2d 243, 266-67 (2000), *cert. denied*, 534 U.S. 839, 151 L. Ed. 2d 55 (2001); *State v. Bishop*, 343 N.C. at 556-57, 472 S.E.2d at 862-63; *State v. Bacon*, 337 N.C. at 99-100, 446 S.E.2d at 559-60; *State v. Jennings*, 333 N.C. 579, 620-22, 430 S.E.2d 188, 209-10, *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). Similarly, in this case, we decline to find plain error in the trial court's instructions.

PRESERVATION ISSUES

Defendant raises additional issues that he concedes have been decided against him by this Court. Defendant argues that the short-form murder indictment returned against him was invalid on its face

and that the trial court consequently lacked jurisdiction to try and to sentence him. However, we have consistently held that the short-form indictment is sufficient to charge a defendant with first-degree murder. *State v. Braxton*, 352 N.C. at 174, 531 S.E.2d at 437; *State v. Wallace*, 351 N.C. 481, 508, 528 S.E.2d 326, 343, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). Defendant claims the instruction that the murder was "especially heinous, atrocious, or cruel," given pursuant to N.C.G.S. § 15A-2000(e)(9), was unconstitutionally vague. The trial court submitted this aggravating circumstance to the jury pursuant to pattern jury instruction 150.10. We have repeatedly determined that the pattern jury instructions for the (e)(9) aggravating circumstance are not unconstitutionally vague and are proper. *State v. Syriani*, 333 N.C. 350, 388-92, 428 S.E.2d 118, 139-41, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993).

Defendant maintains the trial court erroneously submitted the aggravating circumstance that the felony was committed for pecuniary gain pursuant to N.C.G.S. § 15A-2000(e)(6), when the first-degree murder conviction is based solely on felony murder involving armed robbery. We have consistently upheld the submission of the (e)(6) aggravating circumstance in cases involving felony murder where armed robbery is the underlying felony. *State v. Cummings*, 353 N.C. 281, 303, 543 S.E.2d 849, 862-63, *cert. denied*, 534 U.S. 965, 151 L. Ed. 2d 286 (2001); *State v. Chandler*, 342 N.C. 742, 755, 467 S.E.2d 636, 644, *cert. denied*, 519 U.S. 875, 136 L. Ed. 2d 133 (1996). Defendant argues the trial court committed error by instructing the jury that in considering Issues Three and Four, the jurors *may* rather than *must* consider mitigating circumstances found in Issue Two of the "Issues and Recommendation as to Punishment" form. We have approved the use of the pattern jury instructions in this regard and have upheld similar language as being consistent with the requirements under the statute. *State v. Gregory*, 340 N.C. at 417-19, 459 S.E.2d at 668-69. Defendant contends the trial court erred when it instructed the jury that defendant had the burden to *satisfy* it as to the existence of mitigating circumstances. We have previously approved of similar instructions to the jury. *State v. Payne*, 337 N.C. 505, 531-33, 448 S.E.2d 93, 108-09 (1994), *cert. denied*, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995). Although defendant argues the North Carolina capital sentencing scheme, N.C.G.S. § 15A-2000, is vague and overbroad, we have consistently upheld the constitutionality of this procedure. *State v. Powell*, 340 N.C. 674, 695, 459 S.E.2d 219, 230 (1995), *cert. denied*, 516 U.S. 1060, 133 L. Ed. 2d 688 (1996). We have

considered defendant's arguments on these additional issues and find no compelling reason to depart from our prior holdings.

These assignments of error are overruled.

PROPORTIONALITY

[35] We turn now to the appropriateness of the death penalty. Defendant argues that the capital sentence should not stand because it was "imposed under the influence of passion, prejudice, or any other arbitrary factor." N.C.G.S. § 15A-2000(d)(2). In support of this, defendant first contends that the prosecutor's comments to the judge before trial show that racial prejudice was a part of the charging decision. Defendant also argues the prosecutor improperly considered in his charging decision an unrelated murder that occurred about the same time.

According to the record, the trial judge conferred with the prosecutor and the defense team before the trial began. The prosecutor explained that one of the reasons the case was being tried capitally was that he anticipated that three aggravating circumstances would apply. He went on to say:

> We have a Hispanic male [victim], as brutal a killing as it can be. We have another killing that happened about two or three days earlier that had to do with a school teacher that was stabbed in just a brutal, bloody killing that happened two or three days earlier. We thought we had, at one point, a mass murderer on our hands. And fortunately, it was two different people.

However, the prosecutor then added:

> In light of the amount of aggravating factors, the prior aspects of it, we just felt like, you know, for a lot of reasons, that it just would not, in apportionality-wise or fairness-wise, if we're going to try capital cases, this is a capital case that needs to be tried as capitally. It just—I feel like the situation calls for the ultimate penalty.

This exchange demonstrates that the prosecutor based his decision to seek the death penalty on the number of aggravating circumstances, the seriousness of the case, and the treatment of other similar cases. The prosecutor has discretion to consider numerous factors in determining whether a murder case should be tried capitally. *State v. Lineberger*, 342 N.C. 599, 603-04, 467 S.E.2d 24, 25-26 (1996). We do not believe that the prosecutor's mention of the vic-

tim's race or of an unrelated murder indicates that the charging decision was either driven by or tainted by improper factors.

Defendant next argues that the trial court's comments to defendant at the conclusion of the sentencing proceeding show that the sentence was imposed under the influence of passion and prejudice. After the court passed sentence, the trial court complimented all counsel for the professionalism demonstrated during trial. The judge then spoke to the defendant, saying:

> Mr. Barden, I feel like I would be remiss if I didn't say that even under the difficult situation of being here on trial you've conducted yourself well. You are to be commended for that because I know that it doesn't have to be that way. It's a difficult situation. I do appreciate that and I wish you good luck under very bad circumstances.

These comments reflect the experienced trial judge's awareness that capital defendants can be obstreperous, troublesome, and even dangerous at trial. We fail to see any impropriety whatsoever in the judge's humane words of encouragement to a defendant who has just been told he is going to die.

Defendant next contends that the prosecutor's comments about witnesses not called by defendant led the jury to consider arbitrary factors and that the prosecutor's introduction of the victim's character resulted in a verdict that was imposed under the influence of passion. We have considered these contentions earlier in this opinion and found no error. Upon further consideration in the context of N.C.G.S. § 15A-2000(d)(2), we do not find that these arguments by the prosecutor undermine the validity of the sentence.

Finally, defendant argues that the jury's failure to find twenty-five of the twenty-seven submitted mitigating circumstances was irrational and demonstrated that the verdict was imposed under the influence of passion and prejudice. While we are not privy to the jury's deliberations, our review of the record satisfies us that the jurors did not behave irrationally. The jury picked and chose among the submitted circumstances, indicating that each circumstance was individually considered. Moreover, the verdict form called for a "yes" response only if any juror found that a mitigating circumstance existed *and* had mitigating value. Thus, jurors may have found that submitted circumstances existed but did not have mitigating value. In the absence of any evidence that the jury failed to follow the court's

instructions, we decline to speculate as to the jury's rationale as to each circumstance.

[36] Although defendant has not raised a proportionality argument in his brief, N.C.G.S. § 15A-2000(d)(1) and (2) require that we undertake a review to determine whether the sentence of death is proportionate. We also consider whether the record supports the aggravating circumstances found by the jury. The State's brief includes an argument that the sentence was proportionate.

The jury's recommendation of death is supported by three aggravating circumstances. It found that defendant had committed a prior crime of violence, pursuant to N.C.G.S. § 15A-2000(e)(3). The record readily establishes this prior conviction, and the rape victim testified to the violence of the offense. The jury also found that the offense was committed for pecuniary gain, pursuant to N.C.G.S. § 15A-2000(e)(6). As noted above, the evidence fully supports this circumstance. Finally, the jury found that the murder was especially heinous, atrocious, or cruel, pursuant to N.C.G.S. § 15A-2000(e)(9). The evidence showed that defendant bludgeoned the victim in the head numerous times, apparently changing weapons during the course of the attack, and that defendant acknowledged that the victim may have been alive after the attack but took no steps to assist him. In addition, defendant instituted the attack only after the victim, who had already loaned defendant money once that night, refused to make a second loan of twenty dollars. Defendant's attack began after the victim turned his back to defendant to resume his duties at work. This evidence supports the jury's finding that the murder was especially heinous, atrocious, or cruel.

In conducting our proportionality review, we compare the case at bar with other appropriate cases, as defined in *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), and *State v. Bacon*, 337 N.C. at 103, 446 S.E.2d at 562. This review takes into account the particular facts and circumstances of each case, and no single factor is necessarily dispositive. The determination whether a sentence is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. at 198, 443 S.E.2d at 47.

This Court has found a death sentence disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341

S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373; *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). In only two of these cases did the jury find the murder to be especially heinous, atrocious, or cruel, and each of these cases is distinguishable from the case at bar. In *Stokes*, the seventeen-year-old defendant was the only one of three assailants to receive the death penalty. *State v. Stokes*, 319 N.C. at 19-27, 352 S.E.2d at 663-68. According to the warrants in the case at bar, defendant was forty-one years old at the time of the offenses and thus possessed the maturity to understand the significance of his acts. Because defendant in the case at bar acted alone, no other jury could have found that others involved in the assault deserved a life sentence. In *Bondurant*, the victim not only indicated remorse after shooting the victim, he took the victim to the hospital. *State v. Bondurant*, 309 N.C. at 692-95, 309 S.E.2d at 181-83. By contrast, defendant in the case at bar abandoned the victim, who may have been still alive, then took steps to hide his involvement in the offenses.

In addition, in none of the cases listed above was the defendant found to have committed a prior violent felony, pursuant to N.C.G.S. § 15A-2000(e)(3). This Court has held that such a finding of recidivism is a significant consideration in determining the proportionality of a death sentence. *State v. Harris*, 338 N.C. 129, 161, 449 S.E.2d 371, 387 (1994), *cert. denied*, 514 U.S. 1100, 131 L. Ed. 2d 752 (1995).

We believe the case at bar is significantly similar to *State v. Call*, 353 N.C. 400, 545 S.E.2d 190. In *Call*, the defendant lured the victim to a remote cornfield by asking for the victim's help. While the victim's back was turned, the defendant fatally beat the victim on the head with a shovel, then with an iron bar. The jury found as aggravating circumstances that the murder was committed during the course of a kidnapping, N.C.G.S. § 15A-2000(e)(5); that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and that the murder was part of a course of conduct in which 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). Although the jury also found two statutory mitigating circumstances and four nonstatutory mitigating circumstances, the jury recommended a death sentence. We held that the

death sentence was not disproportionate. *State v. Call*, 353 N.C. 400, 545 S.E.2d 190.

Based upon the facts of the case at bar and the treatment of other similar cases, we are satisfied that the death penalty recommended by the jury and ordered by the trial court is not disproportionate. As detailed above, the case is remanded for a *Batson* hearing. In all other respects, defendant received a fair trial and capital sentencing proceeding, free from prejudicial error.

REMANDED FOR *BATSON* HEARING; OTHERWISE NO ERROR.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 240, GREGORY R. HAYES, RESPONDENT

No. 139A01-2

(Filed 22 November 2002)

Judges— recommendation of removal from office dismissed— clear and convincing evidence standard

The Judicial Standards Commission's recommendation that respondent judge be removed from judicial office based on misconduct for alleged sexual advances toward a deputy clerk of court is not accepted and the proceeding is dismissed, because: (1) the evidence taken as a whole is equivocal, contradictory, and in many instances ambiguous; (2) the testimony of witnesses places the evidence in equipoise; and (3) the evidence does not establish by clear and convincing proof that respondent has pursued any course of conduct that demonstrates that he knowingly and willfully persisted in indiscretions and misconduct which our Supreme Court has declared to be, or which under the circumstances respondent should have known to be, acts which constitute willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

Justices ORR and MARTIN did not participate in the consideration or decision of this proceeding.

This matter is before the Supreme Court pursuant to N.C.G.S. § 7A-376 upon a recommendation by the Judicial Standards

Commission entered 16 April 2002 that respondent Gregory R. Hayes, a judge of the General Court of Justice, District Court Division, Twenty-Fifth Judicial District of the State of North Carolina, be removed from office. Considered in the Supreme Court 12 September 2002.

William N. Farrell, Jr., and James J. Coman, Special Counsel, for the Judicial Standards Commission.

Sigmon, Sigmon, Isenhower & Poovey, by W. Gene Sigmon and Nathaniel J. Poovey; and Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, P.A., by E. Fielding Clark, II, and Forrest A. Ferrell, for respondent-appellant.

WAINWRIGHT, Justice.

This proceeding is before the Court upon the recommendation of the Judicial Standards Commission that Gregory R. Hayes (respondent), a judge of the General Court of Justice, District Court Division, Twenty-Fifth Judicial District, be removed for willful misconduct in office and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of Canons 1, 2A, and 3A(3) of the North Carolina Code of Judicial Conduct. By letters dated 18 March 1999, 4 August 1999, and 24 September 1999, the Commission notified respondent that it had ordered a preliminary investigation into matters involving an equitable distribution case, sexual advances toward a deputy clerk of court, and acceptance of gifts and favors from attorneys who appeared before him, to determine whether formal proceedings should be instituted against him. The correspondence informed respondent of the matters to be investigated, that the investigation would remain confidential in accordance with N.C.G.S. § 7A-377 and Commission Rule 4, and that respondent had the right to present for the Commission's consideration any relevant material that he might choose.

More specifically, the alleged matter addressed in the letter dated 18 March 1999 was based upon a complaint filed with the Commission by Morganton, North Carolina, lawyer Larry A. Ballew. Ballew alleged improprieties in respondent's denial of his motion to continue an equitable distribution case (*Ross v. Ross*, Burke County file number 97 CVD 302) in which Ballew appeared as counsel. Ballew was later interviewed by an SBI agent concerning the matters relative to the *Ross* complaint. It appears from this interview with Ballew that the focus of the investigation shifted to matters concern-

ing claims by Tanya Lynn Isenhour, a deputy clerk in the Burke County Clerk's Office. Allegations as to respondent's actions toward Isenhour were addressed in the notice letter dated 4 August 1999 and are the subject of the instant proceeding. The allegations made by Ballew concerning the *Ross* case and the allegations of respondent's acceptance of gifts and favors from attorneys, as contained in the 24 September 1999 notice letter to respondent, were apparently dismissed by the Commission at the preliminary investigation stage, as no such allegations appear in the complaint filed subsequent to the investigation.

Special counsel to the Commission filed a verified complaint against respondent with the Commission on 14 September 2000. Respondent was served with a copy of the notice of complaint and complaint on 20 September 2000.

The complaint alleged in pertinent part the following:

> 3. The respondent has subjected a district court judge and a deputy clerk of court to verbal statements and physical acts unbecoming to him and demeaning to the dignity, integrity, and honor of the judicial office on the following occasions:
>
> a. While attending a party at Lake Hickory in the Summer of 1997, the respondent encountered Judge Nancy L. Einstein and her 13-year old daughter on the dock. The respondent, who had been drinking, hugged Judge Einstein and told her he had a "hard-on", indicating he was sexually aroused. The respondent's statement was made in the presence of and loud enough to be heard by Judge Einstein's 13-year old daughter.
>
> b. The respondent held court in Burke County on July 21, 22, and 24, 1998. After court concluded on July 21st, the respondent asked courtroom clerk Tanya L. Isenhour, who had begun employment as a deputy clerk of the Burke County Clerk of Superior Court two (2) months earlier, about her job satisfaction and marital status. The respondent followed these inquiries with specific questions related to whether she went out, where did she go, and what clothing, including underwear, did she wear when she went out. Isenhour told the respondent that her choice of underwear was none of his business. The respondent then asked Isenhour to go to the lake with him on July 24th, but she declined. On July 22nd, the respondent invited Isenhour to go to lunch with him, but she declined. Two (2) days later after court ended on

July 24th, the respondent renewed his invitation to Isenhour to go to the lake by asking her if she had brought her bathing suit. When Isenhour told the respondent she had no bathing suit with her because she was not going to go with the respondent, he suggested she just wear her bra and panties, but Isenhour again declined to go. The respondent did not renew his invitation but asked for a raincheck and again was refused by Isenhour.

The respondent next held court in Burke County on October 27, 28 and 30th, 1998. Isenhour served as the respondent's courtroom clerk for that period and went to his chambers after court on October 30th with continuance orders for his signature. The respondent was on the telephone at the time but signaled Isenhour to stay. When the respondent completed his call, Isenhour asked the respondent if he had missed being in Burke County. The respondent approached Isenhour and said, "I'll show you how much I missed you." The respondent then grabbed her hand in his and rubbed her hand against his genitals, grabbed and rubbed her genitals with his hand, and asked if she could tell that he missed her. Isenhour broke free and protested the respondent's actions, but the respondent approached her again and tried to hug her. When Isenhour pushed the respondent away, he retreated but offered his phone number and indicated he would like to date her and have sexual intercourse with her. Isenhour told the respondent that would not happen, and she knew all about him. The respondent demanded an explanation from her, blocked the door with his hand after grabbing her wrist, and prevented her from leaving until she explained herself.

4. The actions of the respondent constitute willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute and are in violation of Canons 1, 2A, and 3A(3) of the North Carolina Code of Judicial Conduct.

On 6 October 2000, respondent filed a verified answer, response, and defenses to the complaint, which provided in pertinent part as follows:

3. The initial allegations contained in Paragraph 3 are denied.

a. As to the allegations contained in Subparagraph 3(a) it is admitted that the Respondent, Judge Gregory R. Hayes, attended

a party at Lake Hickory in the summer of 1997 and Judge Nancy L. Einstein was present at the party. It is admitted that the Respondent, Judge Gregory R. Hayes had a social alcoholic drink or drinks as did most guests at the social function including the Complainant Nancy L. Einstein. It is specifically denied that the Respondent, Judge Gregory R. Hayes, hugged Nancy L. Einstein or made any off-color or inappropriate remark to or towards her or in the presence of her daughter. It is further specifically and emphatically denied that he made any remark to Nancy L. Einstein or anyone else concerning the physiological state of his anatomy or male private parts. The Respondent, Judge Gregory R. Hayes' wife was present with the Respondent, Judge Gregory R. Hayes during the entirety of the social function and nothing inappropriate was said or done by the Respondent, Judge Gregory R. Hayes. The remaining allegations contained in Subparagraph 3(a) are denied.

b. As to the allegations contained in Subparagraph 3(b) it is admitted that the Respondent, Judge Gregory R. Hayes as a Judge of the General Court of Justice held Court in Burke County on July 21, 22 and 24, 1998. It is admitted that the deputy courtroom clerk, Tanya L. Isenhour, had begun employment as a deputy clerk under the tenure of the then Clerk of Court, Iva Rhoney. Tanya L. Isenhour had begun her employment some two months earlier. It is admitted that there were conversations between Judge Gregory R. Hayes and the deputy clerk regarding her job satisfaction, her knowledge of the job and her duties and abilities as well as conversations concerning her work. The remainder of the allegations contained in Subparagraph 3(b) are denied.

As to the allegations contained in the last paragraph of Paragraph 3 of the Complaint, it is admitted that the Respondent, Judge Gregory R. Hayes held Court in Burke County on October 27, 28 and 30 in 1998 and that the Complainant deputy clerk served as Courtroom Clerk during that period. It is admitted that as a part of her official duties the Complainant deputy clerk, went into the Judge's Chambers with Continuance Orders for Judge Hayes' signature. It is specifically and emphatically denied that the Respondent, Judge Gregory R. Hayes made any inappropriate advances towards Tanya L. Isenhour or inappropriately approached her or said to her or anyone else "I'll show you how much I missed you", or had made any statement to her in that context. It is specifically and emphatically denied that the

Respondent, Judge Gregory R. Hayes had any physical contact with the Complainant deputy clerk, Tanya L. Isenhour. It is specifically denied that Judge Gregory R. Hayes made any sexual overtures or comments of a sexual nature to the deputy clerk, Tanya L. Isenhour or that the deputy clerk, Tanya L. Isenhour made any statements to him other than statements having to do with the official conduct of the Court's business. It is specifically denied that Judge Gregory R. Hayes made any demands upon the Complainant deputy clerk, Tanya L. Isenhour or that he blocked the door in any way or grabbed her wrist in any way or prevented her from leaving the Judge's Chambers.

4. As the offensive actions complained of did not take place, the conclusions drawn therefrom are specifically and emphatically denied. It is further denied that Judge Gregory R. Hayes took any action which would constitute willful misconduct in office or engaged in conduct which would be prejudicial to the administration of justice or conducted himself in such a manner that would bring the judicial office into disrepute or would be in any way in violation of any of the Canons of the North Carolina Code of Judicial Conduct.

. . . .

8. Judge Gregory R. Hayes is informed and believes and upon such information and belief alleges that Nancy L. Einstein, the deputy clerk, and Larry Ballew, a Morganton attorney, have allied themselves in the making, publishing, and filing of false or frivolous accusations for the common purpose, scheme, or design of attempting to have Judge Gregory R. Hayes wrongfully removed as a duly elected Judge of the General Court of Justice.

a. Larry Ballew, a Morganton attorney, and the complaining attorney in the Ross case filed a written Complaint against Judge Gregory R. Hayes. These charges were found to be unfounded or frivolous by the Commission.

b. Judge Gregory R. Hayes is informed and believes that the complaining deputy clerk is a client of the complaining attorney, Larry Ballew and was at the time that the deputy clerk initially filed or signed an affidavit alleging the false events.

c. Judge Gregory R. Hayes is informed and believes and upon such information and belief alleges that Nancy L. Einstein subsequent to defeat as a District Court Judge is going into the private

practice of law with or share offices with Larry Ballew, the complaining attorney in the Ross case and that they share a mutual dislike of him which predates the time of the false acts of which they have wrongfully accused him.

d. Judge Gregory R. Hayes is informed and believes that the Complainant deputy clerk is the political hiree of the defeated Clerk of Court Iva Rhoney. She was hired after the election in the waning days of the Rhoney administration. When she was hired she lacked the fundamental skills to perform the duties of her office. She has been reprimanded for inappropriate dress. Judge Gregory R. Hayes is further informed and believes that her charges in part are an attempt to keep a position for which she is not qualified.

On 10 October 2000, the Commission served respondent with a notice of formal hearing concerning the charges alleged. The Commission conducted the hearing on 16 and 17 November 2000. Respondent was present and was represented by his attorneys of record. The Commission first addressed allegations that respondent acted improperly toward a fellow judge at a private party and determined that there was not clear and convincing evidence to support these allegations. Accordingly, the Commission made no findings of fact, conclusions of law, or recommendation concerning these allegations. The Commission next addressed allegations of respondent's improper behavior toward Isenhour. In its recommendation entered 18 January 2001, the Commission found clear and convincing evidence that respondent's conduct constituted:

a. conduct in violation of Canons 1, 2A, and 3A(3) of the North Carolina Code of Judicial Conduct;

b. conduct prejudicial to the administration of justice that brings the judicial office into disrepute as defined in *In re Edens*, 290 N.C. 299, 226 S.E.2d 5 (1976); and

c. willful misconduct in office as defined in *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977).

The Commission then recommended that this Court remove respondent from office.

This matter was filed with this Court on 8 March 2001 and was first heard on 14 May 2001. We noted that the proceedings leading to the Commission's formal hearing in this matter produced numerous

controversies, including the quashing of a subpoena compelling the appearance of Larry A. Ballew, a resident of Georgia licensed to practice law in North Carolina, and the admission of evidence at the hearing concerning respondent's alleged verbal misconduct toward Judge Nancy Einstein at a private party.

As a result of the foregoing, in a mandate dated 7 June 2001, we remanded the matter to the Judicial Standards Commission for further proceedings. *In re Hayes*, 353 N.C. 511, 546 S.E.2d 376 (2001). Because the decision by this Court must rest on our own independent evaluation of the testimony from critical witnesses in this case, we instructed the Commission as follows:

> (1) The Commission shall videotape all testimony pertaining to the two alleged incidents involving the deputy clerk.
>
> (2) The Commission shall also videotape and consider all other relevant evidence, admissible under the Rules of Evidence, that bears upon the allegations made by the deputy clerk.
>
> (3) The Commission shall hear only evidence relevant to the allegations of the deputy clerk. The Commission, having previously determined that "there was not clear and convincing evidence to support the allegations" as to the alleged incident between respondent and Judge Einstein, should not consider evidence as to that allegation at the rehearing.
>
> (4) We reverse the decision to quash the subpoena for attorney Larry A. Ballew.

Id. at 515-16, 546 S.E.2d at 379.

On 18 February 2002, the Commission served respondent with a notice of rehearing. The Commission conducted the hearing on 27 and 28 February and 1 March 2002, after which the Commission, in its recommendation entered 16 April 2002, made the following finding of fact based on evidence as to Paragraph 3(b) of the complaint:

> 10. The respondent held court in Burke County on July 21, 22, and 24, 1998. Tanya L. Isenhour (Isenhour), a 22 year old female who began employment as a deputy clerk of the Burke County Clerk of Superior Court on May 19, 1998, served as the respondent's courtroom clerk. During the first two (2) days of that time period, the respondent engaged Isenhour in a conversation which he began with general inquiries about her marital sta-

tus and family and followed with specific inquiries about more personal, intimate matters, including whether and where did she go when she went out, what clothing did she wear when she went out, and whether she wore underwear when she went out. The respondent invited Isenhour to go to the lake with him on July 24th, but she declined and told him she would want to take her family if she were to go. After court ended on July 24th, the respondent renewed his invitation to Isenhour to go to the lake by asking her if she had brought her bathing suit. When Isenhour told the respondent she had no bathing suit with her because she was not going to go with the respondent, he suggested she could go in her underwear, but Isenhour again declined to go.

The respondent next held court in Burke County on October 27, 28, and 30, 1998. Isenhour served as the respondent's courtroom clerk for that period and went to his chambers after court on October 30th with continuance orders for his signature. The respondent was on the telephone at the time but signaled Isenhour to stay. When the respondent completed his call, Isenhour exchanged pleasantries with him and asked the respondent if he had missed being in Burke County. The respondent approached Isenhour and said, "I'll show you how much I missed you." The respondent then took her hand, placed her hand on his genitals, and rubbed her hand against his genitals; placed his other hand on her genitals and rubbed her genitals with his hand; and asked if she could tell that he missed her. Isenhour pushed the respondent away and exclaimed that he was going to cost her her job. The respondent approached her again and tried to hug her. At that point Isenhour told the respondent that she knew about his relationship with another deputy clerk. Blocking the door with one hand and holding Isenhour's wrist with the other hand, the respondent demanded that Isenhour explain how she learned of the relationship, prevented her from leaving until she revealed the source of her information, and warned her not to tell anyone what had just occurred, implying adverse consequences to her if she did so.

The Commission then concluded on the basis of clear and convincing evidence that respondent's conduct as found in finding of fact number 10 constituted:

a. conduct in violation of Canons 1, 2A, and 3A(3) of the North Carolina Code of Judicial Conduct;

b. conduct prejudicial to the administration of justice that brings the judicial office into disrepute as defined in *In re Edens*, 290 N.C. 299, 226 S.E.2d 5 (1976); and

c. willful misconduct in office as defined in *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977).

The Commission then recommended that this Court remove respondent from judicial office.

The Judicial Standards Commission is created by statute. N.C.G.S. § 7A-375 (2001). The Commission investigates complaints against sitting judges and candidates for judicial office. N.C.G.S. § 7A-377(a) (2001). Commission members act as jurors and make findings of fact. The Commission may compel the attendance of witnesses and the production of evidence; conduct hearings; and recommend to this Court what disciplinary action, if any, should be taken. *Id.* "The Commission serves 'as an arm of the Court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable.' " *In re Tucker*, 348 N.C. 677, 679, 501 S.E.2d 67, 69 (1998) (quoting *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978)). However, final authority to discipline judges lies solely with the Supreme Court. *In re Peoples*, 296 N.C. 109, 146-47, 250 S.E.2d 890, 911-12 (1978) (discussing the authority of the Commission and disciplinary proceedings), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). "[Sections 7A-376 and 7A-377] authorize and empower the Court, unfettered in its adjudication by the recommendation of the Commission, to make the final judgment whether to censure, remove, remand for further proceedings, or dismiss the proceeding." *Hardy*, 294 N.C. at 97-98, 240 S.E.2d at 373.

The Commission's recommendations are not binding upon this Court. *Nowell*, 293 N.C. at 244, 237 S.E.2d at 252. In reviewing the Commission's recommendations pursuant to N.C.G.S. § 7A-376, this Court acts as a court of original jurisdiction, rather than in its usual capacity as an appellate court. *Peoples*, 296 N.C. at 147, 250 S.E.2d at 912. We consider the evidence and then exercise independent judgment as to what discipline, if any, is appropriate. *Nowell*, 293 N.C. at 244, 237 S.E.2d at 252. "Each case arising from the . . . Commission is to be decided upon its own facts." *In re Kivett*, 309 N.C. 635, 664, 309 S.E.2d 442, 459 (1983).

The quantum of proof required in proceedings before the Commission is proof by clear and convincing evidence: "a burden

greater than that of proof of a preponderance of the evidence and less than that of proof beyond a reasonable doubt." *Nowell*, 293 N.C. at 247, 237 S.E.2d at 254.

> Removal of a judge is a matter of the most serious consequences.
>
> [The judge] is, thereby, not only deprived of the honor, power and emoluments of the office for the remainder of his term, but is also permanently disqualified from holding further judicial office in this State and G.S. 7A-376 expressly provides that he "receives no retirement compensation," regardless of how many years he has served with fidelity and distinction or how much he had paid into the State Retirement Fund pursuant to the provisions of the Retirement Act.

Hardy, 294 N.C. at 100-01, 240 S.E.2d at 374 (Lake, J., concurring in part and dissenting in part). Justice Lake added:

> The more serious consequence is that the people, who elected him to be their judge, are deprived of his services for the remainder of his term. It is not a light thing for this Court to assume the power to say to the people of North Carolina, "You have lawfully elected this judge, but we have determined that he cannot serve you."

Id. at 101, 240 S.E.2d at 374-75.

Respondent first argues that he was denied due process and a fair hearing before the Commission when four members of the Commission who had heard the previous proceeding and had voted to remove respondent failed to recuse themselves. Respondent notes that unbiased and objective fact-finders are critical when a case turns on the credibility of two antagonists, only one of whom is telling the truth. These same four members comprised the majority in recommending respondent's removal upon the rehearing. Respondent contends that although the Commission determined in the first hearing that the allegations concerning Judge Einstein were not supported by clear and convincing evidence, the Commission members were exposed to damaging collateral evidence that may have prejudiced their views.

Even though the matter is reviewed by this Court, fundamental due process and fundamental fairness are required at every stage and every junction of the proceeding. Respondent argues that the four members should have recused themselves because these members

had already recommended removal, and it would be very unlikely that these members would act fairly, impartially, and without a predisposition. Respondent further argues that for the four members to change their recommendation would require them to admit they were wrong the first time.

In addition, respondent argues that he was deprived of a fair hearing when the Commission denied respondent's request to conduct a *voir dire* of the members of the Commission. Respondent contends that the Commission's denial of this request made it impossible for respondent to determine if any of the members had any bias or prejudice that would impair their ability to render a fair and impartial recommendation.

The Commission responds that any alleged partiality by an individual member of the Commission is cured by the final scrutiny of this Court. The Judicial Standards Commission's enabling statute provides that "[i]n a particular case, if a member disqualifies himself, *or is successfully challenged for cause*, his seat for that case shall be filled by an alternate member selected as provided in this subsection." N.C.G.S. § 7A-375(c) (emphasis added). This statute contemplates that respondent has the right to have an opportunity to conduct a *voir dire* of members of the Commission in order to determine if any of the members should be challenged for cause.

In this case, while the better practice would have been for the Commission to allow a *voir dire* of its members to determine if any of them should be challenged for cause, this issue is not the basis on which we decide this matter.

Respondent next argues that he was denied his due process and equal protection rights guaranteed by the Constitutions of both North Carolina and the United States because the mechanism for censure and removal of a member of the judiciary is fundamentally flawed. In addition, respondent argues that the rules of the Judicial Standards Commission do not afford basic procedural guidelines within which to conduct a defense or to contest the Commission's evidence because of the lack of meaningful rules of evidence, procedure, and discovery.

Although respondent concedes that this Court has previously determined that the statutes governing the Judicial Standards Commission, N.C.G.S. ch. 7A, art. 30 (2001), are constitutional and comport with due process, *see, e.g.*, *Nowell*, 293 N.C. 235, 237 S.E.2d

246, he urges this Court to overrule these earlier cases. Respondent argues that the rules of the Judicial Standards Commission do not provide respondent or any similarly situated judge adequate basic procedural guidelines within which to conduct a defense, put forth evidence, conduct discovery, or otherwise prepare for a hearing. The Commission argues that respondent concedes that this Court has held that article 30 of chapter 7A of our General Statutes is constitutional and is not violative of due process, and argues that we should not overrule these precedential cases.

This Court has stated that review of a Judicial Standards Commission proceeding is "a most serious undertaking by this Court." *Kivett*, 309 N.C. at 673, 309 S.E.2d at 464. As noted above, this Court makes its own independent evaluation of the record evidence; finds the facts as they exist; makes conclusions of law based thereon; and makes the ultimate determination as to whether it should censure, remove, or decline to do either. *Nowell*, 293 N.C. at 246, 237 S.E.2d at 253. Thus, notwithstanding the fact that the Commission has made findings of fact and conclusions of law, this Court must review the record presented by the Commission and make its own independent findings and conclusions and decide the appropriate sanction, if any. The *Nowell* decision and its progeny recognize the constitutional deficiencies in the statutes governing the Judicial Standards Commission, but reconcile those deficiencies by relying on this Court as the ultimate finder of fact and arbiter of the truth. Caselaw makes clear that the obvious constitutional problems with the process are "cured" because the Commission makes only a "recommendation." *Nowell*, 293 N.C. at 244, 237 S.E.2d at 252-53; *see also Kivett*, 309 N.C. at 671, 309 S.E.2d at 463.

We recognize that the procedures in place for investigating judicial complaints are far from perfect. There are constant efforts underway to improve the process, and this Court is and remains amenable to rule changes and safeguards. Again, however, we do not feel that resolution of these issues is necessary for a proper determination of this matter. Furthermore, all the courts of this state, including the appellate courts, will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds. *See State v. Crabtree*, 286 N.C. 541, 543, 212 S.E.2d 103, 105 (1975).

Respondent finally argues that the witnesses gave conflicting testimony that, when subjected to routine methods of determining credibility, does not rise to the level of clear and convincing proof. Respondent contends that, based upon the evidence before the

Commission, there is not sufficient evidence of conduct prejudicial to the administration of justice bringing the office into disrepute as defined in *Edens*, 290 N.C. 299, 226 S.E.2d 5, or of willful misconduct in office as defined in *Nowell*, 293 N.C 235, 237 S.E.2d 246.

We briefly review the evidence. Respondent is a duly elected district court judge of North Carolina's Twenty-Fifth Judicial District. He was elected in 1994 and reelected without opposition in 1998.[1]

Isenhour began her employment with the Burke County Clerk's Office on 19 May 1998, when she was twenty-two years old. Isenhour was hired by Burke County Clerk of Court Iva Rhoney after Rhoney's defeat in the 1998 primary. Isenhour had no prior experience as a clerk. She had been terminated from her previous employment, Bauer Industries, for not coming to work. She remained unemployed from September 1997 until May 1998.

Isenhour alleged that on July 21, 22, and 24, 1998, respondent engaged her in inappropriate conversation regarding her dress and personal life. She testified that respondent invited her to a lake party on 24 July 1998, which invitation she declined. Isenhour admitted that bailiff Vernon Fleming and lawyer Talton Dark were present when this "lake invitation" conversation took place, but both Vernon Fleming and Talton Dark testified that they did not hear any conversation of this nature. Isenhour further admitted that she never told her immediate supervisor, Lynn Richards, or her boss, Clerk of Court Iva Rhoney, about this incident until she filed with the Commission her letter dated 30 June 1999. Isenhour stated that while respondent heard the *Ross* case in May 1998, respondent winked and smiled at her. Marjorie Mundy, an employee of the Administrative Office of the Courts sent to train Isenhour, and Richard Beyer, an attorney in the *Ross* case, testified that they did not witness any such conduct. Mundy further testified that knowing Mundy was new in the area, respondent was very helpful and that Mundy "saw nothing wrong at all." Mundy also testified that Isenhour dressed inappropriately and that her dresses were too short.

Isenhour also alleged that after court on 30 October 1998, while in chambers, respondent took Isenhour's hand and placed it on his private parts and with his other hand rubbed her genitals. Isenhour stated that respondent thereafter prevented her from leaving and warned her not to tell anyone what had transpired. Isenhour admitted

1. We also note that respondent was reelected in a contested, nonpartisan race in 2002.

on cross-examination that although the office for the trial court administrator and the district attorney was next door, she never screamed, but instead, after these alleged assaults occurred, waited for respondent to sign a stack of continuance orders. Isenhour did not report this incident to her supervisor, her boss, or even her boyfriend until 17 February 1999. This was the same day lawyer Ballew and respondent had a confrontation regarding the *Ross* case and the same day that Isenhour became upset after being admonished for using the bathroom adjacent to respondent's chamber. Isenhour admitted that when these alleged assaults took place, the doors to respondent's chamber were unlocked.

Respondent unequivocally denied the accusations made against him by Isenhour. Less than a year prior to Isenhour's filing the complaint, respondent convicted and sentenced her boyfriend for driving while impaired. Isenhour indicated during cross-examination that she talked with Ballew concerning her allegations against respondent. Ballew told Isenhour that if she filed a lawsuit, she would be a very rich woman. Justina Bryan, one of Isenhour's co-workers, testified that Isenhour got the idea of filing her complaint with the Commission from watching a television show. Isenhour told Bryan that because of her filing the complaint, "[A]fter I get through with Judge Hayes, I may not ever have to work another day in my life." Isenhour testified that the first time she wrote down what happened was on Saturday, 6 March 1999, one day after Ballew had written his letter to the Commission.

At the first hearing, Isenhour testified that Ballew told her, "After I get through with Judge Hayes on this matter, I'll never have to work again." At the rehearing, Isenhour testified specifically that Ballew did not make that statement, but rather, that he told Isenhour that if she filed a lawsuit, she could be a very rich woman. At the first hearing, Isenhour testified that during the "lake invitation" conversation of July 1998, respondent had told Talton Dark that Isenhour was coming in her bra and panties. At the second hearing, Isenhour changed her testimony to say that respondent hollered to Talton Dark that Isenhour was coming in a bikini. Dark testified that he never heard respondent holler that statement. Dark acknowledged, however, that he and respondent were friends and that respondent had encouraged him to return to Morganton when Dark lost his job.

Although Isenhour noted in her own handwriting on the skills section of her job application to the clerk's office that she could speak fluent German, she admitted on cross-examination that she did

not know fluent German. Isenhour further represented on the application that she knew sign language, but later admitted that she knew only the signed alphabet.

The Commission submits that there is clear and convincing evidence to support Isenhour's allegations because, in addition to the testimony of Isenhour, the Commission heard corroborating testimony from her co-workers. Justina Bryan testified that on the day in question, 30 October 1998, Isenhour appeared visibly upset and shaken. Fellow clerk Gwen Duplain testified similarly to Isenhour's emotional state, and bailiff Butch Jenkins testified that Isenhour asked him not to leave her alone with respondent. The Commission contends further that this Court, while not always accepting the recommendation of the Commission, has generally accepted the Commission's findings as to the credibility of witnesses. The Commission contends in its brief that it "observed [r]espondent's demeanor during the entire live proceedings and may have *observed clues concerning his credibility* which are not shown on the videotape."

This Court has a duty to remember and consider all of the evidence whether called to our attention by counsel or not, for all of the evidence is important. In the present case, we have scrutinized the record and videotapes of the proceedings, searching for any clues that might shed light on each witness' credibility. We found no such clues that proved or disproved Isenhour's claim. Moreover, because our analysis must be conducted pursuant to a clear and convincing standard of proof, we cannot base our decision on mere credibility "clues."

We also consider the North Carolina pattern jury instructions, which are based on decisions of this Court, for in this case we sit as fact-finders. The pattern instructions include the following:

> The highest aim of every legal contest is the ascertainment of the truth. Somewhere within the facts of every case, the truth abides, and where truth is, justice steps in garbed in its robes and tips the scales. In this case you have no friend to reward, you have no enemy to punish; you have no anger to appease or sorrow to assuage. Yours is a solemn duty to let your verdict speak the everlasting truth.

N.C.P.I.—Crim. 101.36 (1978).

The law requires [the Commission] to prove each element of this issue by evidence which is clear . . . and convincing. (On most issues in civil cases, the law only requires the parties to prove their issues by the greater weight of the evidence. That is not the situation, however, with this issue. Before [the Commission] is entitled to prevail, [it] must prove this issue by clear . . . and convincing evidence.)

Clear . . . and convincing evidence is evidence which, in its character and weight, establishes what [the Commission] seeks to prove in a clear . . . and convincing fashion. You shall interpret and apply the words "clear[]" . . . and "convincing" in accordance with their commonly understood and accepted meanings in everyday speech.

N.C.P.I.—Civil 101.11 (1987).

You are the sole judges of the credibility of each witness.

You must decide for yourselves whether to believe the testimony of any witness. You may believe all, or any part, or none of that testimony.

In determining whether to believe any witness you should use the same tests of truthfulness which you apply in your everyday lives. These tests may include: the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified; the manner and appearance of the witness; any interest, bias, or partiality the witness may have; the apparent understanding and fairness of the witness; whether the testimony of the witness is sensible and reasonable; and whether the testimony of the witness is consistent with other believable evidence in the case.

N.C.P.I.—Civil 101.15 (1994).

You are also the sole judges of the weight to be given to any evidence. By this I mean, if you decide that certain evidence is believable, you must then determine the importance of that evidence in the light of all other believable evidence in the case.

N.C.P.I.—Civil 101.20 (1994).

It is your duty to recall and consider *all* of the evidence introduced during the trial. If your recollection of the evidence differs

> from that which the attorneys argued to you, you should be guided by your own recollection in your deliberations.

N.C.P.I.—Civil 101.50 (1994) (emphasis added) (footnote omitted).

As we stated succinctly in *Kivett*, "[t]he review of this proceeding has been a most serious undertaking by this Court. The preservation of the due administration of justice and the integrity and independence of the judiciary is one of the most important responsibilities of this Court. History has taught that without it, all else fails." *Kivett*, 309 N.C. at 673, 309 S.E.2d at 464. "[T]he proper focus is on, among other things, the nature and type of conduct, the frequency of occurrences, the impact which knowledge of the conduct would likely have on the prevailing attitudes of the community, and whether the judge acted knowingly or with a reckless disregard for the high standards of the judicial office." *In re Martin*, 302 N.C. 299, 316, 275 S.E.2d 412, 421 (1981).

The testimony concerning this serious charge is in sharp conflict. Based upon our thorough review of the record, transcripts, videotapes, briefs, pertinent caselaw, and arguments presented by counsel, we are of the opinion that the evidence, taken as a whole, is equivocal, contradictory, and, in many instances, ambiguous. After all the evidence has been considered, this case is reduced to the question of precisely what happened, if anything, for a few minutes on the afternoon of 30 October 1998. The testimony of unimpeached witnesses for respondent, when weighed against the testimony of Isenhour, who was impeached, as well as the testimony of other unimpeached witnesses for the Commission, places the evidence in equipoise.

We conclude, therefore, that the evidence does not establish by clear and convincing proof that respondent has pursued any course of conduct that demonstrates that he "*knowingly and wilfully persist[ed] in indiscretions and misconduct* which this Court has declared to be, or *which under the circumstances [respondent] should [have known] to be*, acts which constitute wilful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute," *In re Martin*, 295 N.C. 291, 305-06, 245 S.E.2d 766, 775 (1978) (emphasis added), thereby constituting grounds for removal. *Id.*

For the reasons stated and in the exercise of our independent judgment on this record, we decline to accept the recommendation of the Commission. Therefore, this matter is hereby DISMISSED.

Justices ORR and MARTIN did not participate in the consideration or decision of this proceeding.

DEADWOOD, INC., PETITIONER v. NORTH CAROLINA DEPARTMENT OF REVENUE, RESPONDENT

No. 66PA02

(Filed 22 November 2002)

Taxation— gross receipts privilege tax assessment— live entertainment business versus moving picture shows— reasonable distinctions

A de novo review revealed that the Court of Appeals erred by concluding that the gross receipts privilege tax assessment under N.C.G.S. § 105-37.1 against plaintiff corporation's live entertainment business during the period of 1 January 1994 through 28 February 1997 violated its constitutional rights based on the differing tax treatments for live entertainment and moving picture shows, because reasonable distinctions exist between live musical performances and the type of entertainment produced in moving picture shows, including that: (1) the governmental authority and the society it represents incur greater risks and expense with live entertainment events than with a traditional moving picture show; and (2) more resources are required to ensure public safety at and around live entertainment events.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 148 N.C. App. 122, 557 S.E.2d 596 (2001), reversing an order entered 29 September 2000 by Griffin, J., in Superior Court, Martin County, which order affirmed a decision of the North Carolina Department of Revenue. Heard in the Supreme Court 11 September 2002.

Irvine Law Firm, PC, by David J. Irvine, Jr., for petitioner-appellee.

Roy Cooper, Attorney General, by Kay Linn Miller Hobart, Assistant Attorney General, for respondent-appellant.

LAKE, Chief Justice.

This case arises from the assessment of privilege taxes against Deadwood, Inc. by the North Carolina Department of Revenue for the period of 1 January 1994 through 28 February 1997. The essential question presented is whether the gross receipts privilege tax assessment against Deadwood's live entertainment business violates Article V, Section 2 of the North Carolina Constitution.

The facts of this case are undisputed. Deadwood is a North Carolina corporation engaged in the business of operating an entertainment facility in Bear Grass, North Carolina. Deadwood's facility opened in 1992 with a miniature golf course and a snack stand in operation. The facility has since grown to include a video-game room, a playground, a picnic area, an ice cream shop, a gift shop and a dance hall with live music on Friday and Saturday nights. Deadwood charged its patrons admission fees to these live music events.

On 1 May 1997, an auditor for the Department of Revenue examined Deadwood's records for the period of 1 January 1994 through 28 February 1997. The auditor determined that Deadwood had not reported or paid the gross receipts tax as required by N.C.G.S. § 105-37.1. On 13 May 1997, the Department sent a notice of tax assessment to Deadwood, which assessed $11,947 for gross receipts tax for the period of 1 January 1994 through 28 February 1997, $1,619 for interest, and $5,974 as a penalty, for a total of $19,540.

On appeal, the Secretary of Revenue waived the penalty but sustained the tax and interest assessment. Deadwood further appealed to the Tax Review Board and then to Superior Court, Martin County, both of which affirmed the decision.

Thereafter, Deadwood appealed the decision to the North Carolina Court of Appeals. That court reversed the order of the superior court and held that "because '[n]o class of property shall be taxed except by uniform rule,' . . . the gross receipts privilege tax assessment against Deadwood's live entertainment business during the period of 1 January 1994 through 28 February 1997 violated its constitutional rights." *Deadwood, Inc. v. N.C. Dep't of Revenue*, 148 N.C. App. 122, 127, 557 S.E.2d 596, 600 (2001) (quoting N.C. Const. art. V, § 2). On 9 May 2002, this Court allowed the Department of Revenue's petition for discretionary review.

The constitutional premise for Deadwood's legal argument is that the General Assembly did not base its tax classification on a reason-

able distinction and, therefore, violated Section 2 of Article V of the North Carolina Constitution. *See, e.g., Snyder v. Maxwell*, 217 N.C. 617, 9 S.E.2d 19 (1940). Deadwood further asserts that, because no reasonable distinction existed for this classification, the privilege tax in issue was not equally and uniformly applied to all subjects in the same classification. *See id.* Because Deadwood contends the administrative decision was affected by a legal error, we will review the record *de novo*. N.C.G.S. § 150B-51(b)(1), (c) (2001); *see also Dialysis Care of N.C. v. N.C. Dep't of Health & Human Servs.*, 137 N.C. App. 638, 529 S.E.2d 257, *aff'd per curiam*, 353 N.C. 258, 538 S.E.2d 566 (2000).

During the time period at issue in the instant case, "live entertainment" was not specifically taxed under article 2 of chapter 105 of the General Statutes. It was therefore governed by N.C.G.S. § 105-37.1, which then stated in pertinent part:

> Every person, firm, or corporation engaged in the business of giving, offering or managing any form of entertainment or amusement *not otherwise taxed* or specifically exempted in this Article, for which an admission is charged, shall pay an annual license tax of fifty dollars ($50.00) for each room, hall, tent or other place where such admission charges are made.
>
> In addition to the license tax levied above, such person, firm, or corporation shall pay an additional tax upon the gross receipts of such business at the rate of three percent (3%).

N.C.G.S. § 105-37.1 (amended 1999) (emphasis added). By contrast, "moving picture shows" were taxed differently and separate from all other forms of entertainment taxed under article 2 of chapter 105 of the General Statutes, including live entertainment. From 1989 to 1996, moving picture shows were required to pay a $200 tax for each room, hall or tent used. N.C.G.S. § 105-37 (1995) (repealed effective 1 July 1997).[1]

Although former N.C.G.S. § 105-37 has been repealed and N.C.G.S. § 105-37.1 has been amended since this action arose, the General Assembly has continued to classify "live entertainment" differently than "moving picture shows." *See* N.C.G.S. §§ 105-38.1, 105-37.1 (2002).

1. The current gross receipts tax on admissions to moving picture shows is found in N.C.G.S. § 105-38.1.

In its analysis, the Court of Appeals concluded that the General Assembly did not have a rational basis for taxing businesses which host live entertainment differently than "moving picture shows." We disagree and hold that a rational basis does exist for taxing "live entertainment" differently than "moving picture shows."

The power of the General Assembly to impose license taxes is undisputed, "and the right of classification is referred largely to the legislative will, with the limitation that it must be reasonable and not arbitrary." *Belk Bros. Co. of Charlotte v. Maxwell*, 215 N.C. 10, 14, 200 S.E. 915, 917, *cert. denied*, 307 U.S. 644, 83 L. Ed. 1524 (1939). Our state Constitution provides in part as follows:

> Only the General Assembly shall have the power to classify property for taxation, which power shall be exercised only on a State-wide basis and shall not be delegated. No class of property shall be taxed except by uniform rule, and every classification shall be made by general law uniformly applicable in every county, city and town, and other unit of local government.

N.C. Const. art. V, § 2. "The Legislature is sole judge of what subjects it shall select for taxation . . . , and the exercise of its discretion is not subject to the approval of the judicial department of the State." *Lacy v. Armour Packing Co.*, 134 N.C. 567, 573, 47 S.E. 53, 55 (1904), *aff'd*, 200 U.S. 226, 50 L. Ed. 451 (1906). In selecting subjects for taxation,

> narrow distinctions are sometimes invoked, and if founded on a rational basis and reasonably related to the object of the legislation, the courts will not say that a different result should have been reached or that the differentiation is arbitrary.

Leonard v. Maxwell, 216 N.C. 89, 96, 3 S.E.2d 316, 322, *appeal dismissed per curiam*, 308 U.S. 516, 84 L. Ed. 439 (1939). Such differences "must be relevant or pertinent as well as rational." *Id.* (citing *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 72 L. Ed. 770 (1928)).

The Court of Appeals' holding in the case at hand relied heavily on the opinion of this Court in *Snyder v. Maxwell*, 217 N.C. 617, 9 S.E.2d 19. In *Snyder*, the plaintiff challenged the validity of a privilege tax imposed on machines vending soft drinks, while machines vending items other than soft drinks were not taxed. *Id.* at 618, 9 S.E.2d at 20. Specifically, the plaintiff alleged that the General Assembly drew an unjustifiable distinction between these two classes of vending

machines. *Id.* at 619, 9 S.E.2d at 20. The plaintiff argued that because the law itself had selected the term "merchandise" as a classification, the Legislature had discriminated within that class against machines which solely vended soft drinks. *Id.* at 619, 9 S.E.2d at 20-21.

In *Snyder*, this Court set out two rules that the General Assembly must follow when classifying subjects for taxation. "First, the classification itself must be based upon a reasonable distinction. Second[, t]he tax must apply equally to all those within the class defined." *Id.* at 619, 9 S.E.2d at 21 (citations omitted). When reviewing the General Assembly's determination of a classification for taxation, "the widest latitude must be accorded to the Legislature in making the distinctions which are the bases for classification, and they will not be disturbed unless capricious, arbitrary, and unjustified by reason." *Id.* at 620, 9 S.E.2d at 21 (citing *Sproles v. Binford*, 286 U.S. 374, 76 L. Ed. 1167 (1932); *Whitney v. California*, 274 U.S. 357, 71 L. Ed. 1095 (1927), *overruled in part on other grounds by Brandenburg v. Ohio*, 395 U.S. 444, 23 L. Ed. 2d 430 (1969); *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 54 L. Ed. 883 (1910)). This Court further stated:

> The Legislature is not required to preamble or label its classifications or disclose the principles upon which they are made. It is sufficient if the Court, upon review, may find them supported by justifiable reasoning. In passing upon this the Court is not required to depend solely upon evidence or testimony bearing upon the fairness of the classification, if that should ever be required, but it is permitted to resort to common knowledge of the subjects under consideration, and publicly known conditions, *economic or otherwise*, which pertain to the particular subject of the classification.

Snyder, 217 N.C. at 620, 9 S.E.2d at 21 (emphasis added).

This Court reasoned that the distinctions between the two types of vending machines reasonably affected the value of the privilege because of the differences in profitability of the two machines. *Id.* at 621, 9 S.E.2d at 22.

> We think it will be unquestioned that the soft drink trade has achieved a unique place in the commercial world, both as to the volume of business, the certainty of sale in comparatively large volume and, therefore, the opportunity for gainful return attending the privilege of selling such merchandise.

Id. As a result, this Court upheld the Legislature's tax distinction in *Snyder*. Thus, even when the two subjects for classification are nearly identical, i.e., the sale of food and the sale of beverages from vending machines, the Legislature may nonetheless choose to tax them differently merely because one is more lucrative than the other.

The Court of Appeals in its analysis relied heavily upon *Snyder* for the proposition that, because there was "no 'unique place in the commercial world' as to the volume of business or sales generated by Deadwood's live entertainment business and movie theaters," there was "no rational justification for levying privilege taxes on live musical performances and not on movie theaters." *Deadwood*, 148 N.C. App. at 127, 557 S.E.2d at 600 (quoting *Snyder*, 217 N.C. at 621, 9 S.E.2d at 22). We consider this rationale to be a much too narrow view of the reality of the live entertainment business in general and Deadwood's business in particular as compared to the moving picture business. The court failed to recognize that, under the rationale of *Snyder*, the reviewing court may consider common knowledge, "*economic or otherwise*," pertaining to the subject of the tax classification. *Snyder*, 217 N.C. at 620, 9 S.E.2d at 21 (emphasis added). Upon consideration of all aspects of these two forms of entertainment, economic and otherwise, we conclude that reasonable distinctions do exist between live musical performances and the type of entertainment produced in moving picture shows.

Moving picture shows simply do not draw or place demands upon the public resources in the same way and to the same extent as live entertainment venues. For instance, live performances frequently generate a high volume of traffic which is not normally attributable to moving picture shows. Moving picture theaters normally have several showings each day of the week, whereas live entertainment events are traditionally conducted on a less frequent basis. As a result, moving picture shows customarily generate a steady yet smaller stream of traffic, while live entertainment events frequently attract substantially larger numbers of automobiles and people. This increased volume and concentration of attendees places a greater burden of crowd and vehicle control on public safety personnel within a short period of time. These conditions also create an increased risk and burden in regard to highway safety and fire protection.

Additionally, live performances often attract attendees from beyond the immediate vicinity, whereas moving picture shows typically draw a more local audience. It is not uncommon for live enter-

tainment events to attract people from throughout North Carolina and its neighboring states. People will rarely, if ever, drive such distances to see a moving picture in a theater. Deadwood concedes that, over time, it has grown to attract bands and customers from "farther and farther away." Furthermore, it is common for businesses which cater live entertainment to sell alcohol, but this rarely occurs at moving picture shows. Deadwood acknowledges it has a license to sell beer. Moreover, in economic terms, ticket prices for live entertainment are generally considerably higher than the cost of admission to a moving picture show.

In *Clark v. Maxwell*, 197 N.C. 604, 150 S.E. 190 (1929), *aff'd per curiam*, 282 U.S. 811, 75 L. Ed. 726 (1931), this Court upheld a tax classification more narrowly drawn than the one in the instant case. The plaintiff in *Clark* owned a one-ton truck and was in the business of transporting goods on the highways of North Carolina. *Id.* at 604-05, 150 S.E. at 191. The applicable statutory law at issue in *Clark* mandated that a delivery vehicle which traveled greater than fifty miles to its destination be taxed at a higher rate than a delivery vehicle which traveled less than fifty miles to its destination. *Id.* at 604, 150 S.E. at 191. The plaintiff contended he was not liable for the license tax because the tax was not uniformly applied in that it exceeded the amount imposed by other statutes on persons engaged in the same business, in violation of Section 3 of Article V of the North Carolina Constitution.[2] *Id.* at 605, 150 S.E. at 192. The plaintiff further contended that the enforcement of the statute deprived him of his property in violation of his due process and equal protection rights, "in that he [was] required by [the statute's] provisions to pay a larger sum of money as a license tax than [was] required of others engaged in the same business, and similarly situated." *Id.* at 606, 150 S.E. at 192. This Court disagreed and held that the classification was reasonable. *Id.* at 608, 150 S.E. at 193. "It cannot be said that it is unjust for the State to require a larger license tax to be paid by the licensee who acquires by his license the more valuable privilege, at a greater cost to the State." *Id.* at 607, 150 S.E. at 192. This Court concluded in *Clark*: " 'If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.' " *Id.* at 608, 150 S.E. at 193 (quoting *Brown-Forman Co.*, 217 U.S. at 573, 54 L. Ed. at 887).

2. The current version of Article V, Section 2 is similar to Article V, Section 3 as it existed in *Clark*, before the 1962 amendment.

This Court has sustained numerous tax classifications which rested on subtle distinctions. *See, e.g., Lenoir Fin. Co. v. Currie*, 254 N.C. 129, 118 S.E.2d 543 (upheld taxing installment paper dealers differently than banks which, in addition to their regular banking business, also deal in installment paper), *appeal dismissed sub nom. Lenoir Fin. Co. v. Johnson*, 368 U.S. 289, 7 L. Ed. 2d 336 (1961) (per curiam); *Leonard*, 216 N.C. 89, 3 S.E.2d 316 (upheld a tax on "retail merchants" where the Legislature exempted certain types of articles sold); *Great Atl. & Pac. Tea Co. v. Maxwell*, 199 N.C. 433, 154 S.E. 838 (1930) (upheld taxing businesses with one store in North Carolina differently than businesses with multiple stores in the state), *aff'd per curiam*, 284 U.S. 575, 76 L. Ed. 500 (1931); *Smith v. Wilkins*, 164 N.C. 135, 80 S.E. 168 (1913) (upheld taxing persons who traveled by foot at a higher rate than persons who traveled by vehicle); *Rosenbaum v. City of Newbern*, 118 N.C. 83, 24 S.E. 1 (1896) (upheld taxing dealers of second-hand clothing differently than everyone else, including dealers of new clothing).

In the instant case, as in all cases in which live entertainment is involved, the governmental authority and the society it represents incur greater risks and expense than with a traditional moving picture show, and because more resources are required to ensure public safety at and around live entertainment events, we conclude that reasonable distinctions exist for taxing moving picture shows differently than businesses which cater to live entertainment. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

MARGARET WRENN ANDERSON v. DR. DEAN GEORGE ASSIMOS, M.D., DR. R. LAWRENCE KROOVARD, M.D., DR. MARK R. HESS, M.D., WAKE FOREST UNIVERSITY PHYSICIANS, WAKE FOREST UNIVERSITY BAPTIST MEDICAL CENTER, THE MEDICAL CENTER OF BOWMAN GRAY SCHOOL OF MEDICINE AND NORTH CAROLINA BAPTIST HOSPITAL AND THE NORTH CAROLINA BAPTIST HOSPITALS, INCORPORATED

No. 621A01

(Filed 22 November 2002)

Appeal and Error; Medical Malpractice— Rule 9(j) certification requirements—constitutionality improperly considered

The certification requirements of Rule of Civil Procedure 9(j) apply only to medical malpractice cases in which the plaintiff seeks to prove that the defendant's conduct breached the requisite standard of care and do not apply to res ipsa loquitur claims. Therefore, where plaintiff asserted a medical malpractice claim based solely on res ipsa loquitur, the certification requirements of Rule 9(j) were not implicated, and the Court of Appeals erred in addressing the constitutionality of Rule 9(j) in this case.

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. 339, 553 S.E.2d 63 (2001), reversing and remanding an order of dismissal entered 14 December 1999 by Vosburgh, J., in Superior Court, Guilford County. Heard in the Supreme Court 10 September 2002.

Mary K. Nicholson for plaintiff-appellee.

Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr., Amanda L. Fields, and Robert A. Ford, for defendant-appellants.

North Carolina Chapter of the American Society of Healthcare Risk Management of the American Hospital Association, by Thomas L. Eure, Ken M. Nanney, and Ronald Burris, amicus curiae.

Faison & Gillespie, by O. William Faison, John W. Jensen, Jonathan C. Sauls, and Kristen L. Beightol, on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

Center for Constitutional Litigation, P.C., by Robert S. Peck, on behalf of the Association of Trial Lawyers of America; and the American Civil Liberties Union of North Carolina Legal Foundation, Inc., by Seth H. Jaffe, amici curiae.

Smith Anderson Blount Dorsett Mitchell & Jernigan, LLP, by James D. Blount, Jr., Michael W. Mitchell, Christopher G. Smith, and J. Mitchell Armbruster, on behalf of North Carolina Medical Society, North Carolina Hospital Association, the Medical Specialty Societies, North Carolina Medical Group Managers, Old North State Medical Society, and North Carolina Association of Physicians of Indian Origin; and Manning, Fulton & Skinner, P.A., by John B. McMillan, on behalf of North Carolina Citizens for Business and Industry and National Federation of Independent Business, amici curiae.

PER CURIAM.

The Court of Appeals concluded that Rule 9(j) of the North Carolina Rules of Civil Procedure violates Article I, Section 18 of the North Carolina Constitution and the Equal Protection Clauses of the North Carolina and United States Constitutions. *Anderson v. Assimos*, 146 N.C. App. 339, 553 S.E.2d 63 (2001).

A constitutional issue not raised at trial will generally not be considered for the first time on appeal. *State v. Nobles*, 350 N.C. 483, 495, 515 S.E.2d 885, 893 (1999); *Porter v. Suburban Sanitation Serv., Inc.*, 283 N.C. 479, 490, 196 S.E.2d 760, 767 (1973). Furthermore, the courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds. *State v. Crabtree*, 286 N.C. 541, 543, 212 S.E.2d 103, 105 (1975); *see Rice v. Rigsby*, 259 N.C. 506, 512, 131 S.E.2d 469, 473 (1963).

This Court may exercise its supervisory power to consider constitutional questions not properly raised in the trial court, but only in exceptional circumstances. *See, e.g., State v. Elam*, 302 N.C. 157, 161, 273 S.E.2d 661, 664 (1981); *Rice*, 259 N.C. at 511-12, 131 S.E.2d at 472-73; *see also* N.C. R. App. P. 2. Even so, constitutional analysis always requires thorough examination of all relevant facts. *State v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 359, 261 S.E.2d 908, 914, *aff'd per curiam on reh'g*, 299 N.C. 731, 265 S.E.2d 387, *and appeal dismissed*, 449 U.S. 807, 66 L. Ed. 2d 11 (1980). Thus, a constitutional question is addressed "*only when* the issue is squarely presented upon an adequate factual record and *only when* resolution of the issue is necessary." *Id.* To be properly addressed, a constitutional issue must be "definitely drawn into focus by plaintiff's pleadings." *Hudson v. Atlantic Coastline R.R. Co.*, 242 N.C. 650, 667, 89 S.E.2d 441, 453 (1955), *cert. denied*, 351 U.S. 949, 100 L. Ed. 1473 (1956). If

the factual record necessary for a constitutional inquiry is lacking, "an appellate court should be especially mindful of the dangers inherent in the premature exercise of its jurisdiction." *Fayetteville St.*, 299 N.C. at 358-59, 261 S.E.2d at 913.

Plaintiff's complaint asserts *res ipsa loquitur* as the sole basis for the negligence claim. Because the pertinent allegations have not been withdrawn or amended, the pleadings have a binding effect as to the underlying theory of plaintiff's negligence claim. *See Davis v. Rigsby*, 261 N.C. 684, 686, 136 S.E.2d 33, 34 (1964); *Bratton v. Oliver*, 141 N.C. App. 121, 125, 539 S.E.2d 40, 43, (2000), *disc. rev. denied*, 353 N.C. 369, 547 S.E.2d 808 (2001). Moreover, our review of the record shows that at the hearing in this matter plaintiff represented to the trial court that her negligence claim was based solely on *res ipsa loquitur*. This judicial admission is "binding in every respect." *Estrada v. Burnham*, 316 N.C. 318, 324, 341 S.E.2d 538, 543 (1986). Having made this representation, plaintiff cannot now assert a contradictory position, *Davis*, 261 N.C. at 686, 136 S.E.2d at 34, or " 'swap horses between courts in order to get a better mount,' " *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). Therefore, for purposes of this action, plaintiff's negligence claim is based solely on *res ipsa loquitur*.

Res ipsa loquitur claims are normally based on facts that permit an inference of defendant's negligence. *See, e.g., Kekelis v. Whitin Mach. Works*, 273 N.C. 439, 443, 160 S.E.2d 320, 322-23 (1968). The certification requirements of Rule 9(j) apply only to medical malpractice cases where the plaintiff seeks to prove that the defendant's conduct breached the requisite standard of care—not to *res ipsa loquitur* claims. N.C.G.S. § 1A-1, Rule 9(j) (2001). As plaintiff in this case asserts only a *res ipsa loquitur* claim, the certification requirements of Rule 9(j) are not implicated. Thus, the Court of Appeals erred in addressing the constitutionality of Rule 9(j) under these circumstances.

Accordingly, the decision of the Court of Appeals is vacated to the extent it concluded that Rule 9(j) violates Article I, Section 18 of the North Carolina Constitution and the Equal Protection Clauses of the North Carolina and United States Constitutions, and defendants' appeal is dismissed.

VACATED IN PART AND APPEAL DISMISSED.

STATE OF NORTH CAROLINA v. RONNIE HAYZE WILKERSON

No. 124A02

(Filed 22 November 2002)

Evidence— bare fact of prior convictions—absence of testimony by defendant—prejudicial error

The decision of the Court of Appeals affirming defendant's convictions for possession with intent to sell or deliver cocaine and trafficking in cocaine is reversed for the reason stated in the dissenting opinion that the trial court committed prejudicial error in permitting the State to introduce, through the testimony of a deputy clerk of court, the bare fact of defendant's prior convictions for cocaine offenses to show knowledge and intent when defendant did not testify.

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. 310, 559 S.E.2d 5 (2002), finding no error in the judgments entered 16 November 1995 by Greeson, J., in Superior Court, Rockingham County. Heard in the Supreme Court 15 October 2002.

Roy Cooper, Attorney General, by Daniel P. O'Brien, Assistant Attorney General, for the State.

Lisa Miles for defendant-appellant.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals.

REVERSED.

DOUGLAS JEFFREY LANDRY, EMPLOYEE v. US AIRWAYS, INC., EMPLOYER, RSKCO, CARRIER

No. 278A02

(Filed 22 November 2002)

Workers' Compensation— lifting and turning—shoulder injury—not compensable injury by accident

The decision of the Court of Appeals in this workers' compensation case is reversed for the reasons stated in the dissenting opinion that the Industrial Commission's findings were supported by competent evidence and in turn supported its conclusion that plaintiff did not sustain a compensable injury by accident when he suffered a shoulder injury at the time he lifted a mailbag and turned while unloading an aircraft because there were no unusual conditions likely to result in unexpected consequences.

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 150 N.C. App. 121, 563 S.E.2d 23 (2002), reversing an opinion and award entered 22 February 2001 by the North Carolina Industrial Commission and remanding for further proceedings. Heard in the Supreme Court 17 October 2002.

Law Offices of George W. Lennon, by George W. Lennon and Michael W. Ballance, for plaintiff-appellee.

Brooks, Stevens & Pope, P.A., by Michael C. Sigmon and Matthew P. Blake, for defendant-appellants.

PER CURIAM.

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

REVERSED.

STATE OF NORTH CAROLINA v. DULAINE LOTHARP

No. 106A02

(Filed 22 November 2002)

Assault— deadly weapon—disjunctive instruction

The Court of Appeals decision granting defendant a new trial on a charge of assault with a deadly weapon inflicting serious injury is reversed for the reason stated in the dissenting opinion that defendant was not denied a unanimous verdict by the trial court's instruction permitting the jury to return a guilty verdict if it found beyond a reasonable doubt that defendant intentionally beat the victim with his hands and feet and/or with a chain and that defendant's hands and feet and/or the chain were deadly weapons that inflicted serious injury.

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. 435, 559 S.E.2d 807 (2002), ordering a new trial after appeal from judgments entered 26 May 2000 by Beale, J., in Superior Court, Union County. Heard in the Supreme Court 14 October 2002.

Roy Cooper, Attorney General, by Robert M. Curran, Assistant Attorney General, for the State-appellant.

Marjorie S. Canaday for defendant-appellee.

Smith Moore LLP, by Julia F. Youngman, on behalf of the American Civil Liberties Union of North Carolina Legal Foundation, amicus curiae.

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion.

REVERSED.

VERNON v. LOWE

[356 N.C. 421 (2002)]

BEULAH VERNON v. MICHAEL LOWE AND BRENDA LOWE

No. 155A02

(Filed 22 November 2002)

Civil Procedure— nonjury trial—involuntary dismissal—insufficient findings of fact

The decision of the Court of Appeals upholding the trial court's order in a nonjury trial involuntarily dismissing plaintiff's action to quiet title is reversed for the reasons stated in the dissenting opinion that, although the trial court dismissed plaintiff's claim because plaintiff had not shown that "she is the fee simple owner of the real property," the appellate court is unable to determine the propriety of the order without findings of fact explaining the reasoning of the trial court.

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. 694, 559 S.E.2d 288 (2002), affirming an order of dismissal entered 31 March 2000, *nunc pro tunc* 8 September 1998, by McHugh, J., in Superior Court, Rockingham County. Heard in the Supreme Court 15 October 2002.

The Law Office of Herman L. Stephens, by Herman L. Stephens, for plaintiff-appellant.

No brief filed for defendant-appellees.

PER CURIAM.

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

REVERSED.

ANDREW H. AUSLEY, D/B/A AUSLEY APPRAISAL SERVICES v. BRYAN M. BISHOP

No. 287A02

(Filed 22 November 2002)

Damages and Remedies— two slander claims—one wrongly submitted—punitive damages—new trial not required

The decision of the Court of Appeals in this case is reversed for the reasons stated in the dissenting opinion that, although one of two slander counterclaims by defendant should not have been submitted to the jury in a bifurcated trial under N.C.G.S. § 1D-30, the trial court's instruction with respect to the issue of punitive damages that defendant must prove plaintiff acted with malice which was related to "one or both of the slanders" supports the jury's award of punitive damages based upon the slander claim that was upheld so that a new trial is not required on all issues relating to such claim.

Appeal pursuant to N.C.G.S.§ 7A-30(2) from the decision of a divided panel of the Court of Appeals, 150 N.C. App. 56, 564 S.E.2d 252 (2002), affirming in part and vacating in part a judgment entered 14 March 2000 by DeRamus, J.; reversing and remanding an order entered 1 August 2000 by Burke, J.; reversing in part and remanding an order entered 4 August 2000 by DeRamus, J., all in Superior Court, Forsyth County. Heard in the Supreme Court 17 October 2002.

Haywood, Denny & Miller, L.L.P. by John R. Kincaid for plaintiff-appellee.

Randolf M. James for defendant-appellant.

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion.

REVERSED.

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

STATE OF NORTH CAROLINA v. ERNEST G. HARGETT

No. 119PA02

(Filed 22 November 2002)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 148 N.C. App. 688, 559 S.E.2d 282 (2002), ordering a new trial after appeal of a judgment entered 28 September 2000 by Alford, J., in Superior Court, Craven County. Heard in the Supreme Court 14 October 2002.

Roy Cooper, Attorney General, by Sylvia Thibaut, Assistant Attorney General, for the State-appellant.

Rudolph A. Ashton, III, and Kirby H. Smith, III, for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. TOMMY LEE OSBORNE

No. 204A02

(Filed 22 November 2002)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 149 N.C. App. 235, 562 S.E.2d 528 (2002), finding no error in a judgment entered 18 August 2000 by Downs, J., in Superior Court, Watauga County. Heard in the Supreme Court 16 October 2002.

Roy Cooper, Attorney General, by T. Lane Mallonee, Special Deputy Attorney General, for the State.

Marjorie S. Canaday for defendant-appellant.

PER CURIAM.

AFFIRMED.

ZIMMERMAN v. EAGLE ELEC. MFG. CO.

[356 N.C. 425 (2002)]

WILDA KAY ZIMMERMAN, EMPLOYEE v. EAGLE ELECTRIC MANUFACTURING CO., EMPLOYER; ZURICH-AMERICAN INSURANCE COMPANY, CARRIER

No. 44PA02

(Filed 22 November 2002)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 147 N.C. App. 748, 556 S.E.2d 678 (2001), affirming an opinion and award entered 3 August 2000 by the North Carolina Industrial Commission. Heard in the Supreme Court 14 October 2002.

Law Offices of George W. Lennon, by George W. Lennon and Michael W. Ballance, for plaintiff-appellee.

Young Moore and Henderson P.A., by Dawn Dillon Raynor, for defendant-appellants.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

DEBRA RILEY v. LINDA DEBAER, TIM MILLER, INDIVIDUALLY; AND ATLANTIC BEHAVIORAL HEALTH SYSTEMS INC., NOW DOING BUSINESS AS CAROLINA REHABILITATION, AND PREVIOUSLY DOING BUSINESS AS TOTAL REHAB

No. 407A01-2

(Filed 22 November 2002)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 149 N.C. App. 520, 562 S.E.2d 69 (2002), vacating and remanding for dismissal an order entered 9 March 2000 by Manning, J., in Superior Court, Durham County. Heard in the Supreme Court 15 October 2002.

Browne, Flebotte, Wilson & Horn, PLLC, by Martin J. Horn, for plaintiff-appellant.

Newsom, Graham, Hedrick & Kennon, P.A., by William P. Daniell, for defendant-appellees Linda DeBaer and Atlantic Behavioral Health Systems, Inc.

PER CURIAM.

AFFIRMED.

FLORES v. ARCO

[356 N.C. 427 (2002)]

DAVID N. FLORES, ALFREDO CONTRERAS, AND JUAN RIVERA v. SOLTERO BALTIERRES ARCO A/K/A SOLTERO BALTIERRES ARCOS

No. 220A02

(Filed 22 November 2002)

Appeal pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 149 N.C. App. 972, 563 S.E.2d 99 (2002), dismissing as interlocutory an appeal from an order entered 31 January 2001 by Griffin, J., in Superior Court, Currituck County. Heard in the Supreme Court 16 October 2002.

Marcari Russotto & Spencer, P.C., by Donald W. Marcari, for plaintiff-appellees.

Hornthal, Riley, Ellis & Maland, L.L.P., by L. Phillip Hornthal, III, for unnamed defendant-appellant Government Employees Insurance Company.

PER CURIAM.

AFFIRMED.

STATE v. DIXON

[356 N.C. 428 (2002)]

STATE OF NORTH CAROLINA v. ROGER DALE DIXON

No. 262A02

(Filed 22 November 2002)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 150 N.C. App. 46, 563 S.E.2d 594 (2002), ordering a new trial after appeal from a judgment entered 3 November 2000 by Taylor (Kimberly S.), J., in Superior Court, Iredell County. Heard in the Supreme Court 17 October 2002.

Roy Cooper, Attorney General, by Anne M. Middleton, for the State-appellant.

Patricia L. Riddick for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION; AND ROY COOPER, ATTORNEY GENERAL—NORTH CAROLINA DEPARTMENT OF JUSTICE v. CAROLINA WATER SERVICE, INC. OF NORTH CAROLINA, AND CWS SYSTEMS, INC.

No. 267PA02

(Filed 22 November 2002)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 149 N.C. App. 656, 562 S.E.2d 60 (2002), vacating and remanding with instructions an order entered 6 November 2000 by the North Carolina Utilities Commission. On 11 July 2002, the Supreme Court allowed respondents' conditional petition for discretionary review as to additional issues. Heard in the Supreme Court 17 October 2002.

Robert P. Gruber, Executive Director, by James D. Little and Kendrick C. Fentress, Staff Attorneys, for petitioner-appellant/appellee Public Staff—North Carolina Utilities Commission; and Roy Cooper, Attorney General, by Gary R. Govert, Special Deputy Attorney General, and Margaret A. Force, Assistant Attorney General, intervenor-appellant/appellee.

Hunton & Williams, by Edward S. Finley, Jr., for respondent-appellants/appellees.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

YOLANDRA BEST AND ROY HUDSON, PETITIONERS v. DEPARTMENT OF HEALTH AND HUMAN SERVICES, JOHN UMSTEAD HOSPITAL, RESPONDENT

No. 277A02

(Filed 22 November 2002)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 149 N.C. App. 882, 563 S.E.2d 573 (2002), affirming an order entered 24 October 2000 by Jones (Abraham Penn), J., in Superior Court, Wake County. Heard in the Supreme Court 17 October 2002.

Grafstein & Walczyk, P.L.L.C., by Lisa Grafstein, for petitioner-appellee Roy Hudson; and Konrad Schoen for petitioner-appellee Yolandra Best.

Roy Cooper, Attorney General, by Richard E. Slipsky, Special Deputy Attorney General, for respondent-appellant.

Patterson, Harkavy & Lawrence, L.L.P., by Ann Groninger, on behalf of the American Civil Liberties Union of North Carolina Legal Foundation, Inc., and North Carolina Academy of Trial Lawyers, amici curiae; and Seth Jaffe, on behalf of the American Civil Liberties Union of North Carolina Legal Foundation, Inc.

PER CURIAM.

AFFIRMED.

MARIE DEROSIER, EMPLOYEE v. WNA, INCORPORATED/IMPERIAL FIRE HOSE COMPANY, EMPLOYER; AND THE TRAVELERS INSURANCE COMPANY, CARRIER

No. 249A02

(Filed 22 November 2002)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 149 N.C. App. 597, 562 S.E.2d 41 (2002), reversing an opinion and award entered by the North Carolina Industrial Commission on 7 September 2000 and remanding for further proceedings. Heard in the Supreme Court 16 October 2002.

Devore Acton & Stafford, P.A., by William D. Acton, Jr. for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Paul C. Lawrence and Terry L. Wallace, for defendant-appellees.

PER CURIAM.

AFFIRMED.

ABERNATHY v. SANDOZ CHEMICALS/CLARIANT CORP.

No. 496P02

Case below: 151 N.C. App. 252

Petition by defendants (Sandoz Chemicals/Clariant Corporation and The Travelers Insurance Company) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 21 November 2002. Motion by plaintiff to deny petition for discretionary review dismissed as moot 21 November 2002.

ALCHEMY COMMUNICATIONS CORP. v. PRESTON DEV. CO.

No. 80P02

Case below: 148 N.C. App. 219

Petition by defendant (Flora Development) for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

ANDERSON v. ASSIMOS

No. 621A01

Case below: 146 N.C. App. 339

Motion and amended motion by plaintiff to dismiss appeal and motion and amended motion by plaintiff to sanction appellants for failure to comply with the Rules of Appellate Procedure dismissed as moot 21 November 2002. Motion by amicus (North Carolina Academy of Trial Lawyers) for leave to submit affidavits dismissed as moot 21 November 2002. Motions by defendants to strike (portions of plaintiff appellee's brief), and to strike amicus curiae brief and attached appendix of the N.C. Academy of Trial Lawyers dismissed as moot 21 November 2002.

ANDREWS v. ADMINISTRATIVE OFFICE OF THE COURTS

No. 349P02

Case below: 150 N.C. App. 713

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002. Chief Justice Lake and Justice Martin recused.

BEST v. DEPARTMENT OF HEALTH & HUMAN SERVS.

No. 277A02

Case below: 149 N.C. App. 882

Petition by respondent for writ of supersedeas dismissed as moot and temporary stay dissolved 21 November 2002.

BEST v. WAYNE MEM'L HOSP., INC.

No. 69P02

Case below: 147 N.C. App. 628

Motion by plaintiffs to dismiss the appeal for lack of substantial constitutional question allowed 21 November 2002. Petition by defendant (Douglas M. Russell, M.D.) for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

BUCHANAN v. WEBER

No. 462P02

Case below: 152 N.C. App. 180

Motion by defendant for temporary stay allowed 31 October 2002. Petition by defendant for writ of supersedeas denied 21 November 2002 and temporary stay dissolved 21 November 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

BYRD v. ADAMS

No. 503P02

Case below: 152 N.C. App. 460

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

CARTIN v. HARRISON

No. 471P02

Case below: 151 N.C. App. 697

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

CONSECO FIN. SERVICING CORP. v. DEPENDABLE HOUSING, INC.

No. 285P02

Case below: 150 N.C. App. 168

Joint motion to withdraw petition for discretionary review allowed 19 November 2002.

DAVIS v. GENERAL MOTORS

No. 235P02

Case below: 149 N.C. App. 667

Petition by plaintiff pro se for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

DEPARTMENT OF TRANSP. v. BLUE

No. 40P02

Case below: 147 N.C. App. 596

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

DODDER v. YATES CONSTR. CO.

No. 517P02

Case below: 152 N.C. App. 477

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

FUTRELL v. RESINALL CORP.

No. 399A02

Case below: 151 N.C. App. 456

Motion by defendant for reconsideration of order granting discretionary review denied 4 November 2002.

GODFREY LUMBER CO. v. HOWARD

No. 486P02

Case below: 151 N.C. App. 738

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

HARRIS v. STAMEY

No. 474P02

Case below: 151 N.C. App. 747

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

HERRING v. KEASLER

No. 341P02

Case below: 150 N.C. App. 598

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

HILL v. TAYLOR

No. 195P02

Case below: 149 N.C. App. 488

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

HUNT v. TENDER LOVING CARE HOME CARE AGENCY, INC.

No. 548P02

Case below: 153 N.C. App. 266

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

IN RE AMERICA

No. 201P02

Case below: 149 N.C. App. 488

Petition by respondent, Gloria America, for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002. Petition by respondent, Roger America, Sr. for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

IN RE APPEAL OF MAHARISHI SPIRITUAL CTR. OF AM.

No. 506A02

Case below: 152 N.C. App. 269

Petition by appellant (Watauga County) for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

IN RE KENNEDY

No. 477P02

Case below: 151 N.C. App. 748

Petition by respondents (Jerry Draughon and Irma Jo Draughon) for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

IN RE STRATTON

No. 563P02

Case below: 153 N.C. App. 428

Petition by respondents, (Jack and Cathy Stratton) for writ of supersedeas and motion for temporary stay denied 4 November 2002. Motions by Petitioner (Mecklenburg County Department of Social Services) and Guardian ad litem to dismiss the appeal by respondents

(Jack and Cathy Stratton) for lack of substantial constitutional question allowed 21 November 2002. Petition by respondents (Jack and Cathy Stratton) for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002. Motion by respondents (Jack and Cathy Stratton) to reconsider denial of writ of supersedeas and motion for temporary stay dismissed 21 November 2002.

JOHNSON v. SOUTHERN TIRE SALES AND SERV.

No. 514A02

Case below: 152 N.C. App. 323

Petition by defendants for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 21 November 2002.

KANIPE v. LANE UPHOLSTERY

No. 435P02

Case below: 151 N.C. App. 478

Petition with supporting affidavits by defendants for reconsideration of the petition to this Court for review of the decision of the North Carolina Court of Appeals dismissed 21 November 2002.

LOVELACE v. CITY OF SHELBY

No. 559P02

Case below: 153 N.C. App. 378

Petition by defendant (City of Shelby) for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

McDONALD v. SKEEN

No. 473P02

Case below: 152 N.C. App. 228

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 October 2002. Conditional petition by plaintiff for discretionary review pursuant to G.S. 7A-31 dismissed as moot 29 October 2002.

McKYER v. McKYER

No. 505P02

Case below: 152 N.C. App. 477

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

MIDGETT v. N.C. DEP'T OF TRANSP.

No. 537P02

Case below: 152 N.C. App. 666

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 21 November 2002.

N.C. INS. GUAR. ASS'N v. INTERNATIONAL PAPER CO.

No. 484P02

Case below: 152 N.C. App. 224

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

NIX v. COLLINS & AIKMAN CO.

No. 438A02

Case below: 151 N.C. App. 438

Motion by plaintiff (Joint) to withdraw appeal allowed 21 November 2002.

PINNEY v. STATE FARM MUT. INS. CO.

No. 600P01

Case below: 146 N.C. App. 248

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002. Conditional petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

PITT & GREENE ELEC. MEMBERSHIP CORP. v. RASBERRY

No. 558P02

Case below: 153 N.C. App. 200

Motion by plaintiff to withdraw petition allowed 12 November 2002.

PITTS v. AMERICAN SEC. INS.

No. 369PA01

Case below: 356 N.C. 292

Motion by defendants (American Security Insurance Company and Standard Guaranty Insurance Company) for reconsideration pursuant to Appellate Rule 2 denied 14 November 2002. Motion by defendant (Wachovia Bank of North Carolina, N.A.) for reconsideration pursuant to Rule 2 denied 14 November 2002.

STATE v. BOWIE

No. 50A93-2

Case below: Catawba County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Catawba County, denied 21 November 2002.

STATE v. BRACEY

No. 465P02

Case below: 151 N.C. App. 749

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

STATE v. BUCKNER

No. 444A93-3

Case below: Gaston County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Gaston County, denied 21 November 2002.

STATE v. CARVER

No. 518P02

Case below: 146 N.C. App. 447

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 21 November 2002.

STATE v. COLT

No. 547P02

Case below: 153 N.C. App. 324

Motion by defendant for temporary stay denied 31 October 2002.

STATE v. GANT

No. 536P02

Case below: 153 N.C. App. 136

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

STATE v. GREEN

No. 529P02

Case below: 152 N.C. App. 719

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 21 November 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

STATE v. JOHNSON

No. 70P02

Case below: 148 N.C. App. 217

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

STATE v. KEMP

No. 567P02

Case below: 153 N.C. App. 231

Petition by defendant (Edward Earl McDowell) for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

STATE v. KEYS

No. 575P02

Case below: 153 N.C. App. 525

Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

STATE v. LAWRENCE

No. 585A97-2

Case below: Harnett County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Harnett County, denied 21 November 2002.

STATE v. LeGRANDE

No. 327P02-6

Case below: Stanly County Superior Court

Petition by defendant pro se for writ of certiorari to review the order of the Superior Court, Stanly County, denied 21 November 2002. Petition by defendant pro se for rehearing on discretionary review of order denying defendant's motion for appropriate relief denied 21 November 2002.

STATE v. LIPPARD

No. 533P02

Case below: 152 N.C. App. 564

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 21 November 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002. Petition by defendant for writ of certiorari

to review the decision of the North Carolina Court of Appeals denied 21 November 2002.

STATE v. McRAE

No. 540P02

Case below: 126 N.C. App. 227

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 21 November 2002.

STATE v. MOSES

No. 574A97-2

Case below: Forsyth County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Forsyth County denied 21 November 2002.

STATE v. MURPHY

No. 487P02

Case below: 152 N.C. App. 335

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

STATE v. PHILLIPS

No. 501A02

Case below: 152 N.C. App. 679

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 21 November 2002.

STATE v. PIMENTAL

No. 538P02

Case below: 153 N.C. App. 69

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

STATE v. SCOTT

No. 351P02

Case below: 150 N.C. App. 442

Motion by the Attorney General to dismiss the appeal for lack of substantial question allowed 21 November 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002. Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

STATE v. SCOTT

No. 508P02

Case below: 151 N.C. App. 750

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 21 November 2002.

STATE v. SIRACUSA

No. 573P02

Case below: 150 N.C. App. 441

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 21 November 2002.

STATE v. SMITH

No. 572P02

Case below: 153 N.C. App. 202

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 21 November 2002.

STATE v. SMITH

No. 593P02

Case below: 153 N.C. App. 813

Motion by plaintiff (State) for temporary stay allowed 21 November 2002.

STATE v. WADDELL

No. 557P02

Case below: 153 N.C. App. 202

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 21 November 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

STATE v. WILLIAMS

No. 264A90-6

Case below: Wayne County Superior Court

Petition by Attorney General for writ of certiorari to review the order of the Superior Court, Wayne County, allowed 21 November 2002. Justice Butterfield recused.

STATE v. WILLIAMS

No. 521PA02

Case below: 153 N.C. App. 192

Petition by Attorney General for writ of supersedeas allowed 21 November 2002. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 21 November 2002 as to issue number II only: "Did the indictment in this case sufficiently set forth the elements of the felony offense of habitual misdemeanor assault?"

STEEVES v. SCOTLAND CTY. BD. OF HEALTH

No. 551P02

Case below: 152 N.C. App. 400

Motion by respondents for temporary stay allowed 24 October 2002. Petition by respondents for writ of supersedeas denied and temporary stay dissolved 21 November 2002. Petition by respondents for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

TGC DEV. CO. v. AEGEAN LAND CO.

No. 520P02

Case below: 151 N.C. App. 602

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002.

VAUGHN v. CVS REVCO D.S., INC.

No. 641P01

Case below: 146 N.C. App. 751

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 November 2002. Conditional petition by plaintiff for discretionary review pursuant to G.S. 7A-31 dismissed as moot 21 November 2002.

STATE OF NORTH CAROLINA v. CHRISTENE KNAPP KEMMERLIN

No. 182A01

(Filed 20 December 2002)

1. Confessions and Incriminating Statements— motion to suppress—no formal arrest—no restraint on movement

The trial court did not err in a first-degree capital murder prosecution by denying defendant's motion to suppress her statement given to SBI special agents during an interview on 25 March 1999 even though defendant contends the conditions of the interview constituted a restraint on her freedom of movement to the degree associated with a formal arrest, because: (1) defendant was advised before the interview began that she was not under arrest and could leave at any time, and defendant admitted that she understood these instructions; (2) at no time during the interview was defendant restrained in her freedom of movement; (3) defendant was given ample opportunity to interrupt the interview to get something to eat or drink or to use the bathroom, but declined to do so; and (4) at the conclusion of the interview, defendant was not guarded by law enforcement officers but instead was allowed to move freely throughout the sheriff's department.

2. Confessions and Incriminating Statements— motion to suppress—handwritten statement—voluntariness

The trial court did not err in a first-degree capital murder prosecution by denying defendant's motion to suppress her handwritten statement resulting from the interview contemporaneous with her arrest on 26 March 1999 even though defendant contends it was simply another version of her 25 March 1999 statement that allegedly should have been suppressed, because: (1) even though it was a mere reduction to writing by an officer of defendant's earlier statement on 25 March 1999, it was admissible just as the 25 March 1999 statement was admissible; (2) the totality of the circumstances demonstrated that the handwritten statement was made voluntarily when defendant was advised of her Miranda rights and chose to waive them, at no point in time was defendant threatened or coerced, defendant never indicated that she was tired or wished to terminate the interview nor did she request the assistance of counsel, and defendant was not interrogated further although she remained at the sheriff's

department following the conclusion of her confession; and (3) defendant failed to reveal how she suffered any prejudice by the admission of both the 25 March and 26 March statements.

3. Jury— selection—capital trial—consideration of life sentence—bias

The trial court did not abuse its discretion in a first-degree capital murder prosecution by preventing defendant from exploring whether a prospective juror could consider a life sentence for premeditated murder given her personal knowledge of early release from life sentences for murder, because: (1) the trial court verified that all prospective jurors could and would impartially consider the evidence regarding mitigating and aggravating circumstances; (2) defendant was allowed to ask prospective jurors if they understood that some first-degree murders do not deserve the death penalty; (3) the pertinent prospective juror informed the court that she understood that not all first-degree murders merit death, she did not feel that her prior associations with murder would affect her ability to be fair and impartial in defendant's case, and she would not automatically vote for the death penalty upon conviction; and (4) the trial court's jury instructions during the penalty phase sufficiently cured any potential misconception regarding life imprisonment without parole.

4. Jury— selection—capital trial—excusal for cause—views on capital punishment—rehabilitation of juror

The trial court did not abuse its discretion in a first-degree capital murder prosecution by excusing for cause three prospective jurors on the grounds that each would be unable to return a sentence of death and by denying defendant's request to rehabilitate two of those prospective jurors, because: (1) a defendant may not rehabilitate a juror who has expressed unequivocal opposition to the death penalty in response to questions propounded by the prosecutor and the sentencing court; (2) a prospective juror is properly excused for cause when his answers on voir dire concerning his attitudes toward the death penalty, although equivocal, show when considered contextually that regardless of the evidence he would not vote to convict defendant if conviction meant the imposition of the death penalty; and (3) based on its own observations, the trial court found one of the prospective jurors was emotional and believed that the court felt she was lying, and that the prospective juror was uncertain about

her ability to refrain from allowing her personal views to affect her responsibilities as a juror.

5. Criminal Law— prosecutor's argument—defendant's confession

The trial court did not err in a capital first-degree murder prosecution by failing to intervene ex mero motu to prohibit the prosecutor's statements during closing arguments that the jury would not have heard defendant's confession unless the trial court had determined it was properly taken and reliable, because: (1) the prosecutor simply reminded the jury that no evidence could be presented to them without a determination that it was proper for them to hear, and whether the statement was trustworthy and credible remained a fact for the jury to decide; and (2) defendant has failed to show how the prosecutor's comments infected the trial with unfairness rendering the conviction fundamentally unfair.

6. Robbery— dangerous weapon—motion to dismiss—sufficiency of evidence—intent to deprive

The trial court did not err in a first-degree capital murder case by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon based on alleged insufficient evidence of the element of intent to deprive, because viewed in the light most favorable to the State the evidence showed that: (1) defendant and a coparticipant conspired to make the crime scene look like a robbery, and the coparticipant drove off in the victim's truck after killing defendant's husband and abandoned the vehicle three miles from defendant's residence; (2) abandonment of a vehicle, regardless of how near the abandonment is to the scene of the crime, places it beyond a defendant's power to return the property and shows a total indifference as to whether the owner ever recovers it; and (3) the evidence that the coparticipant took the vehicle and subsequently abandoned it near the crime scene was sufficient to show an intent to permanently deprive the victim of his property.

7. Constitutional Law— double jeopardy—first-degree murder by acting in concert—solicitation to commit murder—conspiracy to commit murder—not a lesser-included offense

The trial court did not err in a first-degree capital murder case by failing to vacate the convictions of solicitation to commit

murder and conspiracy to commit murder even though defendant asserts that both convictions merge with the conviction for first-degree murder by acting in concert and that punishment for both crimes allegedly violates double jeopardy, because: (1) the crime of solicitation requires counseling, enticing, or inducing another to commit a crime whereas this element is not required for acting in concert; (2) acting in concert requires actual or constructive presence at the crime which is not an element present in the definition of solicitation; (3) regarding defendant's contention that her conspiracy conviction also merged based on her allegation that her presence at the scene of the murder was incidental and unnecessary, defendant was not only present at the scene of the murder but she also let the coparticipant into her home knowing he was going to kill her husband and she also brought her husband into the room where he would be killed; (4) conspiracy is a separate offense from the substantive offense and therefore does not merge into the substantive offense; and (5) the requirement of an agreement which is an element of conspiracy is not a necessary element for murder by acting in concert.

8. Sentencing— capital—mitigating circumstances—accomplice or accessory with minor participation

The trial court did not err in a first-degree capital murder prosecution by failing to instruct the jury on the N.C.G.S. § 15A-2000 (f)(4) mitigating circumstance that defendant was an accomplice in or accessory to the capital felony committed by another person and her participation was relatively minor, because defendant has not met her burden of producing substantial evidence to warrant its submission.

9. Sentencing— capital—mitigating circumstances—impaired capacity to appreciate criminality of conduct—inability to conform conduct to law

The trial court did not err in a first-degree capital murder sentencing proceeding by failing to instruct the jury on the N.C.G.S. § 15A-2000 (f)(6) mitigating circumstance that defendant's capacity to appreciate the criminality of her conduct or to conform her conduct to the requirements of the law was impaired, because: (1) defendant's own expert testified that her mental or emotional disturbance did not prevent defendant from appreciating the criminality of her conduct and from controlling her conduct as required by law; and (2) defendant failed to offer any other substantial evidence of this circumstance.

10. Criminal Law— capital sentencing—prosecutor's improper questions and argument—right to jury trial—right not to testify—curative actions by court

The trial court took sufficient action to cure any possible prejudice from the prosecutor's comments on defendant's exercise of her right to a jury trial and her right not to testify while questioning defendant during a capital sentencing proceeding where the court identified the questions that were allegedly improper, instructed the jury on defendant's right to plead not guilty and told the jury that questions pertaining to this right could not be considered, and instructed the jury that defendant's exercise of her right not to testify could not be held against her. Furthermore, assuming arguendo that the prosecutor's jury argument in the capital sentencing proceeding contained improper references to defendant's exercise of her constitutional rights to plead not guilty and to not testify in the guilt-innocence phase, any possible prejudice was cured when the trial court ordered the remarks stricken from the record and instructed the jury that it "could not consider that argument as it relates to some issue on defendant's constitutional right," and any error would be harmless beyond a reasonable doubt because the jury had already found defendant guilty of first-degree murder, and the remarks do not refer to any aggravating circumstances proffered by the State or mitigating circumstances proffered by defendant.

11. Sentencing— death penalty—disproportionate

The trial court erred in a first-degree capital murder prosecution by sentencing defendant to the death penalty based on the fact that this crime does not rise to the level of those murder cases in which the death sentence has been found proportionate under N.C.G.S. § 15A-2000(d)(2), and defendant is sentenced to life imprisonment without parole because: (1) the evidence supporting the N.C.G.S. § 15A-2000(e)(6) aggravating circumstance that the murder was committed for pecuniary gain was weak; (2) defendant considered stopping the murder immediately prior to its occurrence; (3) defendant's codefendant received a life sentence without parole; and (4) the jury found three statutory mitigating circumstances and three nonstatutory mitigating circumstances.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Frye, J., on 17 October 2000 in Superior Court, Rockingham County, upon a jury verdict find-

ing defendant guilty of first-degree murder. On 6 August 2001, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to her appeal of additional judgments. Heard in the Supreme Court 9 September 2002.

Roy Cooper, Attorney General, by David Roy Blackwell, Special Deputy Attorney General, for the State.

Kathryn L. VandenBerg for defendant-appellant.

WAINWRIGHT, Justice.

On 5 April 1999, Christene Knapp Kemmerlin (defendant) was indicted for the first-degree murder of her husband, Donald Wayne Kemmerlin; for conspiracy to commit murder; for solicitation to commit murder; and for robbery with a dangerous weapon. Defendant was tried capitally before a jury at the 18 September 2000 session of Superior Court, Rockingham County. The jury found defendant guilty of all charges. Following a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder, and the trial court entered judgment in accordance with that recommendation. The trial court also sentenced defendant to consecutive sentences for the other convictions. For the reasons discussed herein, we conclude that the pre-trial issue, jury selection, guilt-innocence phase, and sentencing proceeding were free of prejudicial error but that the death sentence was disproportionate.

Evidence presented at trial showed that defendant and her husband rented a house from Charles A. Davis at 619 Madison Street in Reidsville, North Carolina. Davis lived near the Kemmerlins, at 625 Madison Street. At around 8:00 p.m. on 24 March 1999, defendant ran into Davis' trailer screaming that Wayne had been shot. Davis directed defendant to use his phone to call 911. Davis eventually took over the 911 call, and defendant returned to her home on foot. Davis completed the 911 call and drove to the Kemmerlin house.

Once inside the home, Davis observed Wayne Kemmerlin lying flat on his back on the floor. Davis checked for a pulse but could find none. Defendant called 911 a second time.

Sergeant Darryl M. Crowder of the Rockingham County Sheriff's Department was the first to respond to the scene at 8:13 p.m. After checking the residence to make sure no one else was present, Sergeant Crowder examined the body and found three to four gunshot wounds in the lower abdomen and one gunshot wound to the

right forearm. Defendant told Sergeant Crowder that a black male had shot her husband. She described the shooter as five foot ten inches tall, with a close-cut haircut and large lips. Defendant said the shooter was wearing a blue puffy coat and blue jeans. Defendant told Sergeant Crowder that she did not know the man.

According to defendant, the black male had come to the door and asked to use the phone because his car broke down. Defendant let the man in and went to get her husband. Defendant returned to the laundry room where she had been washing clothes. She heard the black male ask her husband what he owed him for using the phone. She then heard her husband say "No" at least twice. At that point, she heard shots fired and ran to Davis' home for help.

Sergeant Crowder found a ski mask in the kitchen but noted no signs of a struggle. Sergeant Crowder learned that the victim's company truck was missing from the scene. This truck was recovered a few hours later, having been abandoned approximately three to four miles from the Kemmerlin residence.

EMS personnel arrived shortly after Sergeant Crowder. Defendant asked one of the EMS paramedics if her husband was "going to make it." Although the body was still warm, the victim was not breathing, had no pulse, and appeared lifeless. CPR was administered but was unsuccessful.

Betty Jo Hurt, a nurse on duty in the emergency room at Annie Penn Hospital, was part of the team attempting to revive the victim. Despite their efforts, the victim was pronounced dead at 8:53 p.m. According to Hurt, defendant went to view the body and kept repeating, "I shouldn't have let him in."

Associate Chief Medical Examiner Karen Chancellor performed an autopsy on the victim's body on 25 March 1999. Doctor Chancellor concluded that gunshot wounds to the chest and back were the most likely cause of death.

Also on 25 March 1999, the Sheriff's Department received a phone call from Cynthia Vaughn Loftis indicating that defendant should be a suspect in the murder investigation. Ms. Loftis was concerned that her son, Jerry Loftis, might be in danger because defendant had been looking for him and he owed defendant money.

The police interviewed Jerry Loftis and learned that he had first met defendant through his girlfriend, Dori Gwynn, in the summer of

1998. Loftis admitted to beginning a sexual relationship with defendant at that time. In August 1998, upon learning that Loftis sold drugs, defendant gave Loftis money to buy drugs, sell them at a profit, and share the profit with her. Defendant also gave Loftis one hundred methadone pills to sell for her. Loftis never gave defendant any of the profits from the sale of drugs.

Defendant told Loftis that her husband was verbally and physically abusive to her. On several occasions, defendant asked Loftis if he knew someone who would kill her husband, Wayne, for the money she would receive from his insurance policy. Defendant told Loftis she would get $200,000 if Wayne was killed. When Loftis told defendant that he did know someone, defendant gave him $400.00 or $500.00 and instructed Loftis that the murder should be made to look like a robbery. Loftis, however, used the money to pay his bills and "party."

Defendant also asked Loftis himself about killing her husband. Additionally, she gave Loftis an assault rifle to sell and use the money to hire someone to kill her husband. In October 1998, Loftis was sent to prison, where he remained until late December 1998. When defendant learned that Loftis was out of prison, she began looking for him by contacting his friends and family members.

Also on 25 March 1999, Special Agent David Hedgecock of the North Carolina State Bureau of Investigation (SBI) interviewed Loftis' girlfriend, Dori Gwynn. Gwynn corroborated Loftis' earlier statements and told police that defendant had offered Gwynn and Loftis $5,000 if they would kill defendant's husband.

Following his interview with Gwynn, Agent Hedgecock interviewed defendant at the Rockingham County Sheriff's Department at 7:50 p.m. Hedgecock advised defendant that she was not under arrest and could terminate the interview at any time. Defendant told Hedgecock that she understood she was free to leave at any time.

Defendant began the interview by describing the events on the night her husband was killed, reiterating her earlier statement to police. The conversation then shifted to a discussion of defendant's marriage. Defendant told Agent Hedgecock that Wayne had hit her only three times during the marriage but had pushed her and verbally abused her as well. According to defendant, Wayne would get drunk and force her to have sex with him.

Agent Hedgecock asked defendant about her involvement with Jerry Loftis. Defendant acknowledged her sexual relationship with

Loftis but denied that Loftis had anything to do with Wayne's death. Defendant then became visibly upset and began to cry. She told Hedgecock that the person who shot Wayne was a black male named "Antone" but that she did not know his last name.

Defendant admitted to approaching Loftis about getting Wayne killed. Loftis told her he knew someone who would kill Wayne for $1,500. Defendant gave Loftis various amounts of money on several occasions, ultimately totaling $1,500. She raised $300.00 more because Loftis said he needed money to buy a gun. Defendant had no knowledge that Loftis ever tried to find someone to kill Wayne. Upon learning that Loftis was out of jail, defendant began looking for Loftis to get her money back. She thought Antone might know where Loftis was. Accordingly, she met with Antone and told him that she had given Loftis money to have Wayne killed and that Loftis had never done anything about it. Antone told defendant that he would find someone to kill Wayne.

Sometime in March 1999, defendant, bruised from a beating Wayne had given her, went to Antone's residence. Upon seeing the bruises, Antone became upset and told defendant to give him money to buy a gun and he would "handle it." Defendant gave Antone $150.00 on 22 March 1999 to pay for a gun.

Defendant and Antone agreed that Antone would kill Wayne the following evening, 23 March 1999, while defendant attended a candle party. Antone did not kill Wayne as planned but told defendant on 24 March 1999 that he would kill Wayne that night.

At around 5:45 p.m. on 24 March 1999, defendant paged Antone and told him she would be leaving work in about fifteen minutes. Defendant left work as planned and picked up Antone. Defendant dropped Antone off near a pawnshop and went to a tanning salon. After her tanning appointment, defendant drove to the Texaco station on Harrison Street in Reidsville, where she and Antone had planned to meet. Defendant dropped Antone off at a business near her house at 7:10 p.m. before driving home.

After a brief conversation with her husband, defendant began doing laundry. A short time later, the doorbell rang, and defendant answered it to find Antone standing there. Defendant told Antone, "No, this ain't going to work." Antone, however, continued to follow the plan and asked to use the phone because his car had broken down. Defendant told investigators that the rest of the events were

the same as she had initially described. The primary differences were: she admitted (1) that she knew the previously unidentified black male; (2) that she was involved in the events leading up to her husband's shooting; and (3) that after the shooting, she knelt beside Wayne's body and told him, "I'm sorry." Defendant, crying, told the investigators, "I can't believe I did it." Defendant told the investigators that she did not know that Antone was going to rob Wayne and that she had not spoken with Antone since the shooting.

During the interview, Agent Hedgecock asked defendant several times if she needed to use the bathroom or wanted anything to drink. Defendant was offered several breaks but declined. Defendant's interview concluded at 10:00 p.m.

Following the interview, defendant remained at the police station, and at 5:31 a.m. on 26 March 1999, Agent Hedgecock met with defendant again. Hedgecock informed defendant that she was under arrest for the murder of her husband and advised her of her rights. Defendant later led police to a residence where they could find Antone, who was subsequently identified as William Antone Johnson.

PRE-TRIAL ISSUE

[1] In her first assignment of error, defendant contends that the trial court erred in denying her motion to suppress the statement given to SBI special agents on 25 March 1999. Defendant argues the conditions of the interview constituted a restraint on her freedom of movement to the degree associated with formal arrest. Defendant additionally argues the trial court erred in admitting her 26 March 1999 statement as the product of the 25 March 1999 statement.

First, defendant argues her 25 March 1999 statement to SBI agents was given while she was in custody and should therefore have been suppressed because she was not given *Miranda* warnings. Defendant did not testify at the suppression hearing but presented an affidavit in support of her motion. Defendant alleged that the interviewer physically touched her with his hand and knees and otherwise crowded her. Defendant further alleged that she was denied permission to talk to her father and believed she was unable to freely leave.

At the suppression hearing, the State presented the testimony of SBI Special Agent David Hedgecock. Agent Hedgecock testified that he and Agent Peters began their interview of defendant at 7:50 p.m. on 25 March 1999 in a small interview room at the Rockingham

County Sheriff's Department. Agent Peters sat behind a desk taking notes, while Hedgecock and defendant sat face-to-face in chairs in front of the desk. Agent Hedgecock began the interview by informing defendant that she was not under arrest, was free to terminate the interview at any point, and could leave the Sheriff's Department at any time she wished. Defendant told Agent Hedgecock that she understood. The interview room was not large. At some point during the interview, Agent Hedgecock's knees touched defendant's knees and he placed a hand on her shoulder to comfort her.

Agent Hedgecock further testified that he asked defendant several times if she wanted anything to drink or needed to use the bathroom. Defendant declined to take any breaks during the interview. The interview lasted a little over two hours and concluded at 10:00 p.m. At the end of the interview, Agent Hedgecock asked defendant if she would like to be with her father, who had accompanied her to the station for the interview. Defendant declined, whereupon Agents Hedgecock and Peters left the room to consult with other officers. Defendant was not placed under arrest at this time, nor was a deputy assigned to stand guard over her. Agent Hedgecock later observed defendant smoking a cigarette while standing with her father in another part of the building, again not guarded by a deputy. Defendant was not formally placed under arrest until 5:31 a.m. on 26 March 1999, at which time she was advised of her *Miranda* rights. The trial court concluded as a matter of law that "defendant was not in custody at the time the defendant made an oral confession to the agents implicating her in the conspiracy and murder of her husband."

Whether an interrogation is conducted while a person is in custody requires the trial court to reach a conclusion of law, which is fully reviewable by this Court. *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992). " '[T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found.' " *State v. Golphin*, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (2000) (quoting *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

In determining whether an individual is in custody, this Court decides, based on the totality of circumstances, whether there was a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest. *Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977), *quoted in State v. Hoyle*, 325 N.C.

232, 241, 382 S.E.2d 752, 756 (1989); *see also State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405 ("[T]he definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest."), *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). In the present case, defendant was advised before the interview began that she was not under arrest and could leave at any time. At the time these instructions were given to her, defendant, by her own admission, understood them. At no time during the interview was defendant restrained in her freedom of movement. She had ample opportunity to interrupt the interview to get something to eat or drink, or to use the bathroom, but declined to do so. Moreover, at the conclusion of the interview, defendant was not guarded by law enforcement officers but instead was allowed to move freely throughout the Sheriff's Department. We therefore find no error in the trial court's conclusion that defendant was not in custody at the time of her oral statement to investigators on 25 March 1999.

[2] Defendant also argues that the handwritten statement resulting from the interview contemporaneous with her arrest on 26 March 1999 should have been suppressed along with the 25 March 1999 statement, because it was simply another version of the 25 March 1999 statement that defendant contends should have been suppressed. We agree that this statement was a mere reduction to writing by Agent Hedgecock of defendant's earlier statement, with a few minor modifications. However, because we have determined that the 25 March 1999 statement was properly admitted, we similarly conclude the handwritten statement was admissible.

Defendant additionally contends that the handwritten statement was involuntary. Defendant concedes that the trial court found as fact in the suppression hearing that defendant never indicated that she was tired or under duress, never refused to answer any of Agent Hedgecock's questions, and never requested a lawyer. Nonetheless, defendant asserts that the trial court's findings were incomplete because they contained no findings as to: (1) the length of time defendant had been without sleep, (2) the length of time she had been either waiting or under interrogation at the Sheriff's Department, and (3) her experience with the criminal justice system. Defendant further notes that the trial court failed to explicitly conclude that the statement was voluntary.

A trial court's conclusion regarding the voluntariness of a defendant's statement is fully reviewable on appeal. *State v. Hardy*, 339 N.C.

207, 222, 451 S.E.2d 600, 608 (1994). Upon review, this Court considers the totality of the circumstances. *Id.* The defendant's familiarity with the criminal justice system, length of interrogation, and amount of time without sleep are merely a few of many factors to be considered. *Id.* Other considerations include whether defendant was in custody, whether her *Miranda* rights were violated, whether she was held incommunicado, whether there were threats of violence, whether promises were made to obtain the confession, the age and mental condition of defendant, and whether defendant had been deprived of food. *State v. Hyde*, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001); *State v. Patterson*, 146 N.C. App. 113, 123, 552 S.E.2d 246, 254, *disc. rev. denied*, 354 N.C. 578, 559 S.E.2d 548 (2001). The presence or absence of any one of these factors is not determinative. *State v. Barlow*, 330 N.C. 133, 141, 409 S.E.2d 906, 911 (1991).

In the present case, the totality of the circumstances clearly demonstrates that the handwritten statement was made voluntarily. Defendant was advised of her *Miranda* rights and chose to waive them. At no point in time was defendant threatened or coerced. Defendant never indicated that she was tired or wished to terminate the interview, nor did she request the assistance of counsel. Although she remained at the Sheriff's Department following the conclusion of her confession, defendant was never interrogated further. Indeed, the record reveals she had no contact with investigators from the conclusion of her interview at 10:00 p.m. until the time she was arrested at 5:31 a.m. the next day.

We further note that while the trial court did not explicitly find that the handwritten statement was made voluntarily, the court did find that defendant "freely, knowingly, and voluntarily waived" her *Miranda* rights. The trial court further found that defendant's handwritten statement, made after the *Miranda* warnings, "[did] not violate her constitutional right of the United States []or the North Carolina constitution." We conclude that the trial court properly found that defendant's handwritten statement was voluntary.

In the alternative, defendant contends that if the handwritten statement made on 26 March 1999 was properly admitted, the admission of her earlier statement on 25 March 1999 was prejudicial. Defendant alleges that subtle differences in the two statements affected the jury's specific findings, as well as their overall impression of defendant. As her only example, defendant points to statements concerning spousal abuse. Defendant notes that the 25

March 1999 statement revealed that Wayne had hit defendant only three times during their marriage. The 26 March 1999 statement reads: "[M]y present husband Wayne Kemmerlin was also physically, verbally, and sometimes sexually abusive to me. He sometimes pushed me, or hit me in the face, and often made me have sex with him when he was drunk." According to defendant, if even one juror had believed her contention that spousal abuse, not pecuniary gain, motivated the killing, she would not have received a death sentence.

We note that the trial court admitted into evidence both the 25 March and the 26 March statements. Additionally, defendant testified at the sentencing proceeding in greater detail concerning the alleged physical and sexual abuse. The jurors were given several opportunities to hear evidence concerning spousal abuse and were able to make their own conclusions based on all of the evidence. We fail to see how defendant suffered any prejudice on this issue.

This assignment of error is overruled.

JURY SELECTION

[3] By assignment of error, defendant argues that the trial court erred in preventing defendant from exploring whether a prospective juror could consider a life sentence for premeditated murder given her personal knowledge of early release from life sentences for murder. Defendant contends that she was unable to adequately inquire into a potential bias from the juror's prior associations with two murders in which the defendants were released early. Defendant further argues that the trial court's refusal to allow her to question the prospective juror and to clarify the law deprived all prospective jurors of relevant and essential information necessary for a reliable sentencing determination, thereby creating risk of the arbitrary and capricious imposition of the death penalty. We find no error in the trial court's actions.

During *voir dire*, prospective juror Crystal Scales related prior associations with two separate murders in which the defendant was released after serving only a few years. Prospective juror Scales informed the court that her aunt had been murdered by the aunt's husband, who served only a few years in jail. Scales told the court that she did not believe the husband should have received the death penalty but "was in shock when he got out so soon." In addition, when prospective juror Scales was a teenager, a close friend was murdered. Scales informed the court that she felt at the time that the

murderer should have received the death penalty, but the murderer instead served less than five years.

Defendant attempted to ask prospective juror Scales if she understood what life imprisonment without the possibility of parole meant but was overruled by the trial court. Scales was ultimately passed by all counsel and sat on the jury. Defendant now contends that prospective juror Scales was not adequately examined by the trial court as to her ability to be an impartial juror in this case.

Trial judges are permitted broad discretion in regulating jury *voir dire*. *State v. Artis*, 325 N.C. 278, 295, 384 S.E.2d 470, 479 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990); *State v. Johnson*, 317 N.C. 343, 382, 346 S.E.2d 596, 618 (1986). To demonstrate reversible error, a defendant must show that the court abused its discretion in regulating jury selection and that the defendant was prejudiced thereby. *State v. Soyars*, 332 N.C. 47, 56, 418 S.E.2d 480, 486 (1992).

During *voir dire*, "the subject of parole eligibility and the meaning of 'life imprisonment' are irrelevant to the issues to be determined during the sentencing proceeding." *State v. Lee*, 335 N.C. 244, 268, 439 S.E.2d 547, 559, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994); *see also State v. McNeil*, 324 N.C. 33, 44, 375 S.E.2d 909, 916 (1989), *sentence vacated on other grounds*, 494 U.S. 1050, 108 L. Ed. 2d 756 (1990). Accordingly, we have found no abuse of discretion where trial courts refuse to allow defendants to question prospective jurors concerning misconceptions about parole. *Lee*, 335 N.C. at 268, 439 S.E.2d at 559; *McNeil*, 324 N.C. at 44, 375 S.E.2d at 916.

As was the case in *Lee* and *McNeil*, we find no abuse of discretion here in the trial court's refusal to allow defendant to question prospective juror Scales. The trial court verified that all prospective jurors, including Scales, could and would impartially consider the evidence regarding mitigating and aggravating circumstances. Additionally, defendant was allowed to ask the prospective jurors if they understood "that some first-degree murders don't deserve the death penalty." Prospective juror Scales also informed the court that (1) she understood that not all first-degree murders merit death, (2) she did not feel that her prior associations with murder would affect her ability to be fair and impartial in defendant's case, and (3) she would not automatically vote for the death penalty upon conviction.

Finally, during the penalty phase, the judge instructed the jury, of which Scales was a member, that upon a recommendation of a sen-

tence of life imprisonment, "the Court [would] impose a sentence of life imprisonment without parole." This instruction sufficiently cures any potential misconception regarding life imprisonment held by prospective juror Scales. Similarly, the trial court's instruction also corrected any perceived prejudicial impression in the minds of other jurors who heard prospective juror Scales' comments during *voir dire*. These instructions advised all jurors that life imprisonment without parole was an acceptable punishment for some first-degree murders and did not carry any opportunity for parole or early release.

This assignment of error is overruled.

[4] In her next assignment of error, defendant argues the trial court erred in excusing for cause prospective jurors Connie Williams, Mark Young, and Janet New on the grounds that each would be unable to return a sentence of death. Defendant further assigns error to the trial court's denial of defendant's request to rehabilitate prospective jurors Williams and Young.

The proper standard for determining whether a prospective juror can be excluded for cause because of the juror's views on capital punishment is whether those views would " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 420, 83 L. Ed. 2d 841, 849 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)) (emphasis omitted); *see also State v. Gregory*, 340 N.C. 365, 394, 459 S.E.2d 638, 654 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996); *State v. Syriani*, 333 N.C. 350, 369, 428 S.E.2d 118, 128, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). Challenge for cause must be based on more than the prospective juror's " 'general objections to the death penalty or expressed conscientious or religious scruples against its infliction.' " *Gregory*, 340 N.C. at 394, 459 S.E.2d at 654 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 522, 20 L. Ed. 2d 776, 784-85 (1968)).

However, "a prospective juror's bias for or against the death penalty cannot always be proven with unmistakable clarity." *State v. Miller*, 339 N.C. 663, 679, 455 S.E.2d 137, 145, *cert. denied*, 516 U.S. 893, 133 L. Ed. 2d 169 (1995). "[T]here will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Wainwright*, 469 U.S. at 425-26, 83 L. Ed. 2d at 852. Consequently, we ordinarily "defer to the trial court's judgment as to whether the

prospective juror could impartially follow the law." *State v. Morganherring*, 350 N.C. 701, 726, 517 S.E.2d 622, 637 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 322 (2000). "The trial court's decision to excuse a juror is discretionary and will not be disturbed absent an abuse of discretion." *State v. Blakeney*, 352 N.C. 287, 299, 531 S.E.2d 799, 810 (2000), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001).

Additionally, trial courts should be accorded great deference in their refusal to permit rehabilitation of a prospective juror. *State v. Cummings*, 326 N.C. 298, 307, 389 S.E.2d 66, 71 (1990). "[A] defendant may not 'rehabilitate a juror who has expressed unequivocal opposition to the death penalty in response to questions propounded by the prosecutor and the [sentencing] court.' " *State v. Smith*, 352 N.C. 531, 545, 532 S.E.2d 773, 783 (2000) (quoting *Cummings*, 326 N.C. at 307, 389 S.E.2d at 71), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360 (2001).

In the present case, the prosecutor questioned prospective juror Williams as follows:

> Q. Miss Williams, you indicated you had beliefs regarding the death penalty one way or the other?
>
> A. I don't feel that I could honestly put somebody to death.
>
> Q. How long have you held that belief?
>
> A. I've always felt that way.
>
> Q. On account of those beliefs and feelings, would you return a sentence of death even though the State proved things required of it beyond a reasonable doubt?
>
> A. If it was beyond a reasonable doubt, then I probably could, but it would have to be very—
>
> Q. You understand, Ma'am, that in any criminal case that the State is prosecuting that our burden of proof is beyond a reasonable doubt?
>
> A. Right.
>
> . . . .
>
> Q. Now, are you saying that you would hold the State to a higher burden of proof which is the law of this state, beyond a reasonable doubt, because this is a death penalty case?

A. I would hate to make that judgment is what I'm saying in regard[] to a person. I could not make that judgment in regard[] to a living person.

Q. With regard to the imposition of the death penalty?

A. Right.

Q. Would your views on the death penalty prevent or substantially impair the performance of your duties as a juror in accordance with the instructions given by the Court and your oath?

A. No.

Q. They would not?

A. Right.

Q. So, you would if the State proved what is required beyond a reasonable doubt, you'd be able to impose the death penalty?

A. If you proved it beyond a reasonable doubt.

. . . .

Q. And would you hold the State to a higher burden as to erase all doubt in your mind?

A. I'd have to have it all erased.

At this point, the prosecutor asked to excuse Williams for cause, and both the court and the prosecutor questioned her further:

THE COURT: Let me ask you, Miss Williams, if you have your own definition of what reasonable doubt is and then you heard the Court's definition of reasonable doubt. Would you set aside what your feelings are and what your definition is and follow the Court's instructions?

MISS WILLIAMS: Well, yes, I could do that.

. . . .

Q. Now, you have your own views on the death penalty?

A. Yes, sir.

Q. And what are those views?

A. I believe in the death penalty. I feel like I'm contradicting myself. I do believe in the death penalty. I do feel like if you com-

mitted a crime and you were sentenced to that, I agree that there should be that type of punishment. I'm just saying for me to sit on a jury as a juror and decide whether somebody lived or died, I could not do that myself.

Q. So, would it be fair to say that because of your feelings on the death penalty, regardless of the circumstances the State might prove to you, you would not vote in favor of the death penalty?

A. I could not.

. . . .

Q. And would your views of the death penalty prevent or substantially impair the performance of your duties as a juror in accordance with the instructions and your oath?

A. Yes, I guess it would.

[PROSECUTOR]: I offer her for cause.

THE COURT: I'm going to ask you one more question. If it came time to pronounce the verdict that the defendant was to receive the death penalty, if it came to that point and you had to stand up by yourself with all the other jurors sitting there, could you say the defendant is to receive a sentence of death?

MISS WILLIAMS: I could not do that.

Similarly, prospective juror Young was questioned by the prosecutor as follows, following an explanation of sentencing laws:

Q. Now knowing that, do you have any religious or moral objections against the death penalty?

A. Well, I agree it's not right to kill someone. I'm not sure I agree that it's any better for us to kill.

. . . .

Q. Would your views impede or hinder your ability to return a verdict of death?

A. It's a possibility.

Q. It's a possibility?

A. Uh-huh.

Q. Are you saying that no matter what the evidence or no matter what the circumstances present in this particular case that you would not be able to return a verdict of death if that were required under the law and the evidence that we presented?

A. It would be a difficult one.

Q. Could you do it?

A. I really don't know that.

Q. Do you think you'd have the strength to come into the courtroom if there was a unanimous decision of the jury that this defendant be sentenced to death and the other eleven are still sitting, as you are now, that you could stand up and say that she should be sentenced to death by yourself?

A. I don't think I could if it was required of me.

Q. It wouldn't be your decision only. Don't misunderstand. Everyone else would have to stand up, but individually we'd have to go down the row. Could you do that?

A. I don't think, at this point, I don't think I could.

. . . .

Q. Would you have to hear the evidence and the facts in the case before you could make a decision on that?

A. I just don't think that I would feel right with myself if I did personally.

. . . .

Q. Would your views on the death penalty that you stated a moment ago—I don't want to put words in your mouth.—prevent or impair the duties of your performance as a juror in accordance with the instructions as given to you by his Honor and the oath as a juror?

A. I think it would impair.

Prospective juror Young was then offered for cause, and the court inquired of him further as follows:

THE COURT: I'm going to go back. Let me ask you this: Are you saying that if you're required to sit as a juror in this case and if the juror is required to make a sentence recommendation, that

you have because of your personal beliefs against the death penalty, that you've already made up your mind to vote for life without parole and against the death penalty no matter what the evidence showed?

MR. YOUNG: (No reply).

THE COURT: There is no right or wrong answer.

MR. YOUNG: Yeah. I think yeah. I think that's true.

THE COURT: Okay, Let me ask you this: I take it, then, that due to your personal, moral, or religious beliefs that there are no circumstances under which you as a juror could ever consider voting in favor of a sentence of death?

MR. YOUNG: I would say so.

THE COURT: Is that a yes?

MR. YOUNG: Yes. Yes.

THE COURT: So, then is your view in opposition to the death penalty such that it would prevent or substantially impair your ability to perform your sworn duties as a juror?

MR. YOUNG: Yes, sir.

Finally, defendant argues prospective juror New should not have been excused for cause. New was questioned in part as follows:

[PROSECUTOR]: And would you automatically vote against the sentence of death without any regard to any evidence that developed at trial?

MISS NEW: I would not automatically do that, but it would be very hard for me to do that. I would not automatically do it. Like I said, I would do my duty. I would try to look at it as objectively as possible.

. . . .

[PROSECUTOR]: And if the defendant is convicted of first-degree murder, would you be able to consider as his Honor instructs you the death penalty under our law?

MISS NEW: I would be able to consider it.

[PROSECUTOR]: Would you be able to consider, as his Honor instructs you, life imprisonment without parole under our law?

MISS NEW: Yes.

[PROSECUTOR]: And would you automatically vote for a sentence of life imprisonment without parole?

MISS NEW: I would be inclined toward life . . . .

Following the prosecutor's first motion for cause, New was questioned further by both the trial court and defense counsel:

THE COURT: Let me ask you this: Could you set aside whatever your personal beliefs are against it and follow the law as given you by the Court, listen to the arguments of counsel, and then listen to the evidence and make your decision based on that?

MISS NEW: I would attempt to. To say that my personal beliefs would not filter in it, I'm saying that that would not happen, but I would try.

. . . .

. . . I mean, I feel the death penalty is wrong, but all I can do is try to consider it. I mean, I feel it's wrong, but I'll try to do what I'm supposed to do.

THE COURT: Yes, ma'am.

[DEFENSE COUNSEL]: If the jury were to unanimously find that the defendant was guilty of first-degree murder, you understand, then you would go to a second phase?

MISS NEW: Right.

[DEFENSE COUNSEL]: And after hearing certain evidence and hearing the law that the Judge tells you, he'll instruct you as to what the law is concerning capital punishment versus life imprisonment without parole. Um, do you believe that, that first the jury having found the defendant unanimously guilty, guilty of first-degree murder, if they do that, then going to the sentencing phase and listening to evidence and listening to the judge's instructions, would you automatically vote against the death penalty simply

because of your belief in opposition to the death penalty? And, remember, there is no right or wrong answer.

MISS NEW: I mean, I haven't heard this situation on this case. I would be inclined to vote against the death penalty. I just don't know.

. . . .

. . . I don't think I could put my personal feelings aside. I could try. I think it's a very personal decision. I mean it's a very personal decision to make about somebody and their life.

Ultimately, the trial court excused prospective juror New for cause with the following comments:

THE COURT: . . . This juror is excused. That as a reason of conscience, regardless of the facts and circumstances, she'll be unable to render a verdict with respect to the charge in accordance with 15A-1212(b).

Further her views concerning the death penalty would prevent or substantially impair her duty in the performance of a juror in accordance with the juror's oath.

Once prospective juror New was dismissed, the trial court made the following additional comments:

THE COURT: . . . Just for the record, the Court will note that the Court observed the demeanor and responses to both the State's inquiry, the Court's inquiry, and the defendant's inquiry, that the juror Miss New appeared to be emotional. I also inquired on the responses and could not tell from the Court's questions or State['s] and defendant's questions, but she appeared that maybe [we] believed that she was lying and I told her that that was not the case.

In light of that, her answers, that although her answers appeared to be equivocal, and ambiguous, the Court determined that she would be excused for cause based on her views against the death penalty and notes the objection and exception on the record and excused the juror in accordance with the Court's findings.

Defendant contends that prospective jurors Williams and Young gave ambiguous or conflicting responses that should have been clarified prior to the prospective jurors' excusals. Defendant also

asserts that the prosecutor's and the trial court's questioning was insufficient to determine whether the jurors were qualified and asserts that defense counsel was entitled to further questioning. With regard to prospective juror New, defendant contends that the trial court incorrectly found she was unable to return a verdict of death given her views, as defendant contends that New gave acceptable answers to the death-qualification questions. Defendant therefore contends that the excusal of prospective jurors Williams, Young, and New violated defendant's constitutional right to a fair and impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution.

With regard to prospective jurors Williams and Young, we note that "[a] prospective juror is properly excused for cause when his answers on *voir dire* concerning his attitudes toward the death penalty, although equivocal, show when considered contextually that regardless of the evidence he would not vote to convict the defendant if conviction meant the imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 324, 259 S.E.2d 510, 526 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980); *see also State v. Simmons*, 286 N.C. 681, 688-89, 213 S.E.2d 280, 286 (1975), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976); *State v. Avery*, 286 N.C. 459, 464, 212 S.E.2d 142, 149 (1975), *death sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1209 (1976). Although prospective jurors Williams and Young were both initially somewhat hesitant to express their views on capital punishment, ultimately both prospective jurors explicitly told the court that their views on the death penalty would prevent or substantially impair the performance of their duties as a juror. *See Wainwright*, 469 U.S. at 420, 83 L. Ed. 2d at 849. Prospective juror Williams stated that she could not vote for the death penalty, as it would violate her personal views on the death penalty. Likewise, prospective juror Young told the court that there were no circumstances under which he could ever consider voting in favor of a sentence of death. These statements represent an unmistakable commitment to automatically vote against the death penalty, regardless of the facts and circumstances which might be presented. *Witherspoon*, 391 U.S. at 522 n.21, 20 L. Ed. 2d at 785 n.21. Accordingly, the trial court properly excused prospective jurors Williams and Young and denied defendant's requests to rehabilitate them.

With regard to prospective juror New, we note that New never explicitly stated that her views regarding the death penalty would "prevent or substantially impair the performance of [her] duties as a

juror." *Wainwright*, 469 U.S. at 420, 83 L. Ed. 2d at 849. Nonetheless, prospective juror New consistently stated that she was inclined to vote for life imprisonment without parole. New indicated to the court that she would try to consider imposition of the death penalty but admitted that her personal beliefs might affect her decision. We again reiterate our deference to a trial court's judgment regarding a prospective juror's impartiality, as the trial court is able to observe a prospective juror's demeanor and behavior. *Id.* at 425-26, 83 L. Ed. 2d at 852-53; *Morganherring*, 350 N.C. at 726, 517 S.E.2d at 637. Based on its own observations, the trial court found that prospective juror New was emotional and believed that the court felt she was lying. Given the court's observations of prospective juror New, her clear inclination against the death penalty, and her uncertainty as to her ability to refrain from allowing her personal views to affect her responsibilities as a juror, we conclude that the trial court properly excused prospective juror New for cause.

This assignment of error is overruled.

GUILT-INNOCENCE PHASE

[5] In her next assignment of error, defendant contends the trial court erred in failing to intervene *ex mero motu* to prohibit the prosecutor's statements during closing arguments that the jury would not have heard defendant's confession unless the trial court had determined it was properly taken and reliable. We disagree.

In capital cases, counsel is permitted wide latitude in arguing to the jury and may argue facts in evidence and all reasonable inferences therefrom. *State v. Sanderson*, 336 N.C. 1, 15, 442 S.E.2d 33, 42 (1994). The control of jury arguments is within the discretion of the trial court and will not be reversed unless the remarks are "clearly calculated to prejudice the jury in its deliberations." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979). The Court in *Johnson* also noted

> 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.

Id.

In the present case, the prosecutor argued in his closing as follows:

> Now, in moving to her statement, before I say one thing about her statement, I'll say this: I'll argue and contend to you that if there were anything, one thing wrong with the way that statement was taken or the contents of that statement, you would have heard it. You wouldn't have heard that statement. Nothing's wrong with that statement. If there was something wrong with the statement or the way it was taken, you would not have heard it. It would never have gotten before you. There was nothing wrong with it. Nothing.

Defendant contends this argument is analogous to the prosecutor's argument in *State v. Allen*, in which this Court held that the prosecutor's statements during closing arguments violated N.C.G.S. § 15A-1230(a) because they placed prejudicial matters before the jury. *See State v. Allen*, 353 N.C. 504, 511, 546 S.E.2d 372, 376 (2001); *see also* N.C.G.S. § 15A-1230(a) (2001) (providing limitations on closing arguments to a jury). In the instant case, defendant argues that the trial court's failure to intervene had the same effect as if the trial court had explicitly expressed the opinion, thus leaving the jury with the impression that it need not consider defendant's contentions that details in the statement were inaccurate. Defendant further asserts that this impression could have affected the jury's findings regarding premeditation and conspiracy, resulting in a gross impropriety and abuse of discretion that could have affected the jury's determination at the guilt-innocence phase.

Defendant's reliance on *Allen* is misplaced. In *Allen*, the prosecutor stated during his closing arguments as follows:

> We told you in the beginning we didn't have an eyewitness, but we do have an eyewitness, we have Maria Santos. She's an eyewitness in this case and she spoke through you—to you through the words of Rafael Barros who talked to her that night. She described what she saw, how many people entered her house. And you heard her words through Officer Barros, because the Court let you hear it, because the Court *found* they were *trustworthy and reliable*. . . . If there had been anything wrong with that evidence, you would not have heard that.

Id. at 508, 546 S.E.2d at 374 (emphasis added). The prosecutor in *Allen* explicitly informed the jury of the trial court's opinion regarding the trustworthiness and reliability of the admitted statements. *Id.* at 509, 546 S.E.2d at 375. On appeal, this Court determined the statement violated N.C.G.S. § 15A-1222, which forbids the trial court from

" 'express[ing] during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury.' " *Id.* at 510-11, 546 S.E.2d at 375 (quoting N.C.G.S. § 15A-1222 (1999)).

Unlike the prosecutor in *Allen*, the prosecutor in the present case did not indicate to the jury that the trial court had found defendant's statement trustworthy or reliable. No mention was made of any evidentiary findings. The prosecutor simply reminded the jury that no evidence could be presented to them without a determination that it was proper for them to hear. Whether the statement was trustworthy and credible remained a fact for the jury to decide.

Allen is also distinguishable from the present case because defense counsel in *Allen* immediately objected to the prosecutor's statements. *See id.* at 508, 546 S.E.2d at 374. By overruling the defendant's objection, the trial court reinforced and ratified the prosecutor's argument. In the present case, defendant made no objection.

Defendant contends that the prosecutor's statements to the jury created extreme prejudice because defendant challenged specific details of her statement to SBI Special Agents Hedgecock and Peters in an attempt to create reasonable doubt. We find no such prejudice. Defendant was allowed to present evidence that the agents omitted portions of her statement and that the statement was taken while defendant was tired and in a coercive environment. The prosecutor never implied that the trial court rejected defendant's attacks on the statement or found the statement somehow lacking. The State merely fulfilled its duty "to strenuously pursue the goal of persuading the jury that the facts of the particular case at hand warrant imposition of the death penalty." *State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 41, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). Defendant has failed to show us how the prosecutor's comments infected the trial with unfairness and thus rendered the conviction fundamentally unfair. *See State v. Rose*, 339 N.C. 172, 202, 451 S.E.2d 211, 229 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

This assignment of error is overruled.

[6] Defendant next assigns error to the trial court's denial of her motion to dismiss the charge of robbery with a dangerous weapon. Defendant contends that because the State failed to sufficiently prove

the element of intent to deprive, her conviction for armed robbery should be vacated.

When considering a motion to dismiss, the trial court must determine whether "there is substantial evidence of each essential element of the crime." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998). We have defined substantial evidence as 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). In ruling on a motion to dismiss, the trial court is required to view the evidence in the light most favorable to the State, making all reasonable inferences from the evidence in favor of the State. *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001). 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.

With regard to the charge of robbery with a dangerous weapon, the State was required to prove "(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of a person is endangered or threatened." *Call*, 349 N.C. at 417, 508 S.E.2d at 518; *see also* N.C.G.S. § 14-87(a) (2001). The State must also demonstrate that the defendant had the intent to deprive the owner of his property at the time of taking. *State v. Richardson*, 308 N.C. 470, 474, 302 S.E.2d 799, 802 (1983). Intent may be inferred by demonstrating that defendant did not intend to return the property and was indifferent as to whether the owner ever recovered the property. *State v. Smith*, 268 N.C. 167, 172, 150 S.E.2d 194, 200 (1966).

The State's theory in the present case was that defendant acted in concert with Antone Johnson to take her husband's work truck from her residence. Defendant points to the lack of direct evidence regarding Johnson's intentions when he took the truck. Defendant argues instead that because the truck was abandoned in plain view, close to the residence, where it was likely to be found, Johnson lacked the total indifference to the owner's right to recover the truck that would be necessary to support an inference of intent to deprive. Instead, defendant contends that the evidence supports only two intentions: that Johnson took the truck to make the crime scene appear like a robbery and that Johnson used the truck to get away from the crime

scene to a place where he could safely escape. Defendant contends these intentions are insufficient to support a conviction for robbery with a dangerous weapon.

Viewed in the light most favorable to the State, the evidence shows that defendant and Johnson conspired to make the crime scene look like a robbery. Johnson drove off in the victim's truck after killing defendant's husband, abandoning the vehicle three miles from the Kemmerlin residence. Law enforcement officers later recovered the keys to the vehicle in nearby woods.

As defendant concedes in her brief, the intent to permanently deprive need not be established by direct evidence but can be inferred from the surrounding circumstances. *See State v. Barts*, 316 N.C. 666, 690, 343 S.E.2d 828, 843-44 (1986). We have also noted that the abandonment of a vehicle, regardless of how near the abandonment is to the scene of the crime, places it "beyond [a defendant's] power to return the property and shows a total indifference as to whether the owner ever recovers it." *Id.*; *see also State v. Mann*, 355 N.C. 294, 304, 560 S.E.2d 776, 783 (holding that where a defendant abandoned a vehicle in a subdivision near where the victim's body was found, there was sufficient evidence of intent to permanently deprive the owner of the vehicle), *cert. denied*, — U.S. —, — L. Ed. 2d — (Nov. 4, 2002) (No. 02-6059). Here, the evidence that Johnson took the vehicle and subsequently abandoned it near the crime scene was sufficient to show an intent to permanently deprive the victim of his property. Accordingly, we hold that the trial court did not err in denying defendant's motion to dismiss the robbery charge.

This assignment of error is overruled.

[7] In another assignment of error, defendant contends the trial court erred in failing to vacate the convictions of solicitation to commit murder and conspiracy to commit murder. Defendant asserts that both convictions merge with the conviction for first-degree murder by acting in concert and that punishment for both crimes violates double jeopardy. We hold that the crimes do not merge with the first-degree murder conviction.

The Double Jeopardy Clauses of both the United States Constitution and the North Carolina Constitution prohibit multiple punishment for the same offense. *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986); *see also* U.S. Const. amend. V; N.C. Const.

art. I, § 19. North Carolina has adopted a definitional test for determining whether a crime is in fact a lesser offense that merges with the greater offense. *State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 378-79 (1982), *overruled on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993); *State v. Westbrooks*, 345 N.C. 43, 56, 478 S.E.2d 483, 491 (1996). "[A]ll of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense." *Weaver*, 306 N.C. at 635, 295 S.E.2d at 379.

We have previously defined the crime of solicitation as "counseling, enticing or inducing another to commit a crime." *State v. Furr*, 292 N.C. 711, 720, 235 S.E.2d 193, 199, *cert. denied*, 434 U.S. 924, 54 L. Ed. 2d 281 (1977). Acting in concert, as applied to first-degree murder, requires "two persons join[ed] in a purpose to commit [murder]," where both persons are "actually or constructively present." *State v. Westbrook*, 279 N.C. 18, 41, 181 S.E.2d 572, 586 (1971), *death sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972). Under this theory, each person "is not only guilty as a principal if the other commits [murder], but he is also guilty of any other crime committed by the other in pursuance of the common purpose." *Id.*

Defendant cites *State v. Westbrooks*, in which we held that solicitation to commit murder is a lesser included offense of first-degree murder as an accessory before the fact. *Westbrooks*, 345 N.C. at 56-57, 478 S.E.2d at 491. Defendant acknowledges that our legislature has since abolished the distinction between first-degree murder as an accessory before the fact and first-degree murder as a principal. *See* N.C.G.S. § 14-5.2 (2001) ("All distinctions between accessories before the fact and principals to the commission of a felony are abolished. Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony."). Nonetheless, defendant contends that solicitation, accessory before the fact to murder, and acting in concert to commit murder are essentially a continuum of defendant's involvement in the murder, as all three involve defendant's enticing another to commit the murder. Because we have previously determined that solicitation merges into accessory before the fact, defendant contends we must also conclude that a conviction for solicitation may under some circumstances merge into a conviction for murder based upon a theory of acting in concert. Defendant asserts that because

her role in the present murder was minimal, the conviction for solicitation should be considered a lesser offense of murder by acting in concert.

We find no merit in defendant's argument, as defendant is asking us to use a factual rather than a definitional approach to whether her convictions merge, an approach we rejected in *Westbrooks*, 345 N.C. at 56, 478 S.E.2d at 491. The crime of solicitation requires counseling, enticing, or inducing another to commit a crime. *Furr*, 292 N.C. at 720, 235 S.E.2d at 199. This element is not required for acting in concert. Indeed, acting in concert requires actual or constructive presence at the crime, an element not present in the definition of solicitation. *Westbrook*, 279 N.C. at 41, 181 S.E.2d at 586. Because the crime of solicitation requires the element of enticement, an element not required for murder under a theory of acting in concert, we hold that solicitation is not a lesser included offense of murder by acting in concert. *Weaver*, 306 N.C. at 635, 295 S.E.2d at 379.

Defendant also argues that her conviction for conspiracy should merge with her conviction for first-degree murder by acting in concert. Defendant concedes that conspiracy is a separate offense from the completed crime that normally does not merge into the substantive offense. *See State v. Carey*, 285 N.C. 509, 513, 206 S.E.2d 222, 225 (1974). However, defendant contends that her case is analogous to *State v. Lowery*, in which we stated that a codefendant convicted of the substantive offense based solely on his participation in the conspiracy could not be punished for both conspiracy and the separate offense. *State v. Lowery*, 318 N.C. 54, 74, 347 S.E.2d 729, 743 (1986). In the present case, defendant contends the essence of her illegal behavior was in hiring Johnson to kill her husband and in planning and assisting him prior to the commission of the murder. As such, defendant contends she was convicted of murder solely on the basis of her conspiracy to commit murder because her presence at the scene of the murder was incidental and unnecessary.

We find no analogy between defendant's case and that of the codefendant in *Lowery*. We first note that the death sentence for the codefendant in *Lowery* was vacated on the basis of N.C.G.S. § 14-6, which has since been repealed by our legislature. Moreover, the evidence in *Lowery* showed that the codefendant was not present at the actual murder. *Id.* at 74, 347 S.E.2d at 742. The codefendant's murder conviction was predicated solely on his participation in the conspiracy. *Id.* In the present case, defendant was not only present at the scene of the murder (albeit in another room), but she also let

Johnson into her home knowing he was going to kill her husband and brought her husband into the room where he would be killed. We therefore conclude that defendant's presence at the scene of the murder was much more than incidental and unnecessary.

Accordingly, we find no merit in defendant's contention that her conspiracy conviction merged with her conviction for first-degree murder based on a theory of acting in concert. Conspiracy to commit murder requires the defendant to enter into an agreement with another person to commit murder with the intent to carry out the murder. *State v. Woods*, 307 N.C. 213, 219, 297 S.E.2d 574, 578 (1982). Evidence at trial established that defendant hired Johnson to kill her husband and planned and assisted him prior to the commission of the murder. This evidence is sufficient to support a conviction for conspiracy to commit murder. We see no reason to depart from our long-held rule that conspiracy is a separate offense from the substantive offense and as such does not merge into the substantive offense. *See Carey*, 285 N.C. at 513, 206 S.E.2d at 225. The requirement of an agreement, while necessary to sustain a conviction for conspiracy, is not a necessary element for murder by acting in concert, so defendant's conviction for conspiracy to commit murder does not merge into her conviction for murder by acting in concert. *See Weaver*, 306 N.C. at 635, 295 S.E.2d at 379.

This assignment of error is without merit.

CAPITAL SENTENCING PROCEEDING

Defendant next assigns error to the trial court's failure to instruct the jury on statutory mitigating circumstances she contends were supported by the evidence. Defendant contends that her due process and Eighth Amendment rights against cruel and unusual punishment were violated when the trial court failed to submit the (f)(4) and (f)(6) mitigating circumstances for the jury's consideration.

[8] Defendant first argues that the trial court erred in failing to submit the (f)(4) mitigator. *See* N.C.G.S. § 15A-2000(f)(4) ("The defendant was an accomplice in or accessory to the capital felony committed by another person and [her] participation was relatively minor."). After reviewing the record, we find no error in the trial court's refusal to submit the (f)(4) circumstance.

A trial court must submit any mitigating circumstance that is supported by substantial evidence. *State v. Strickland*, 346 N.C. 443, 463, 488 S.E.2d 194, 206 (1997), *cert. denied*, 522 U.S. 1078, 139 L. Ed. 2d

757 (1998). However, "defendant bears the burden of producing 'substantial evidence' tending to show the existence of a mitigating circumstance before that circumstance will be submitted to the jury." *State v. Rouse*, 339 N.C. 59, 100, 451 S.E.2d 543, 566 (1994), *cert denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995). "[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).

Defendant asserts that in *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), this Court recently found the (f)(4) circumstance inapplicable where the defendant is convicted of premeditated and deliberate murder, and requests that we reconsider *Roseboro* in light of *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44, *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997), *and cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). However, defendant overstates the holding in *Roseboro*, and we decline to revisit our *Roseboro* decision, which was based on the record in that case where the evidence would not support a finding that defendant was guilty of premeditated and deliberate murder on a theory of aiding and abetting or that defendant was an accomplice in or accessory to a capital felony committed by another person. *Roseboro*, 351 N.C. at 549-50, 528 S.E.2d at 10.

Defendant has not met her burden of producing substantial evidence to warrant submission of the (f)(4) mitigating circumstance. Contrary to defendant's assertions, the evidence recited above does not support this mitigating circumstance and this assignment of error is without merit. *See* N.C.G.S. § 15A-2000(f)(4).

[9] Defendant next asserts that the trial court committed prejudicial error by failing to submit to the jury the (f)(6) mitigating circumstance. *See* N.C.G.S. § 15A-2000(f)(6) (2001) ("The capacity of the defendant to appreciate the criminality of [her] conduct or to conform [her] conduct to the requirements of law was impaired."). Even though defendant withdrew her request for the (f)(6) circumstance, the trial court nonetheless reviewed the (f)(6) circumstance and concluded that it was not supported by substantial evidence. Consequently, the trial court declined to submit the (f)(6) impaired capacity mitigator, although it did allow defendant's request that the (f)(2) circumstance be submitted. *See* N.C.G.S. § 15A-2000(f)(2) ("The

capital felony was committed while under the influence of mental or emotional disturbance.").

With regard to the (f)(2) mitigating circumstance, we have previously stated:

> Defendant's mental and emotional state *at the time of the crime* is the central question presented by the (f)(2) circumstance. *State v. McKoy*, 323 N.C. 1, 28-29, 372 S.E.2d 12, 27 (1988), *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). The use of the word "disturbance" in the (f)(2) circumstance "shows the General Assembly intended something more . . . than mental impairment which is found in another mitigating circumstance." *State v. Spruill*, 320 N.C. 688, 696, 360 S.E.2d 667, 671 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 934 (1988).

State v. Geddie, 345 N.C. 73, 102-03, 478 S.E.2d 146, 161 (1996), *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 43 (1997). In contrast, regarding the (f)(6) mitigating circumstance, we have held that "this circumstance has only been found to be supported in cases where there was evidence, expert or lay, of some mental disorder, disease, or defect, or voluntary intoxication by alcohol or narcotic drugs, to the degree that it affected the defendant's ability to understand and control his actions." *Syriani*, 333 N.C. at 395, 428 S.E.2d at 142-43.

Our review of the entire record reveals that defendant failed to produce substantial evidence of the (f)(6) circumstance. Defendant's expert witness, Dr. John Warren, conducted psychological testing of defendant, examined defendant's mental-health records from the Rockingham County Mental Health Center, reviewed prior psychological evaluations including raw test data, and conducted face-to-face clinical interviews with defendant. Dr. Warren noted that defendant's childhood included sexual abuse and neglect. Dr. Warren also learned that defendant was upset because her stepson, Timmy, was coming to live with her and the victim. Defendant believed Timmy had sexually abused her daughter and was concerned this abuse would happen again. Dr. Warren noted that defendant's history made her "exquisitely and overly attuned to sexual issues in general and sexual abuse issues in particular." With this information, Dr. Warren described defendant's mental state at the time the murder was committed as follows:

> It's my opinion that she was under the influence of two disorders, one being the personality disorder which I diagnose as

borderline personality disorder and the second, the more acute or serious, if you will, disorder of major depressive disorder, and I support those diagnoses on the basis of prior psychological testing, my current testing, prior psychiatric and counsellor's [sic] evaluations, and my evaluations over three visits in a matter of six hours of contact with her.

The following exchange took place between Dr. Warren and the prosecutor upon cross-examination:

Q. Could you explain the borderline personality for the jury?

A. Personality disorders in general are longstanding and pervasive patterns of thinking and behaving that develop[] as a result of childhood trauma or inconsistencies generally, and borderline personality is arguably the more severe of the personality disorders because the nature of the disorder is extreme disruption in parent-child bonding and extreme instability in thinking and behavior as a grown adult would.

Q. Based upon her statement, do you think at the time this murder was committed the defendant was able to appreciate the criminality of her conduct?

A. Yes, I think she was.

Q. Do you think your diagnosis of the defendant would in any way impair the defendant's capacity to perform under the requirements of the law?

A. I think it would impair it somewhat, but not to the point of her being unable to do that.

Q. And based on her statement and your review of the notes and your conversation with her, do you think at the time that she opened that door, that Anton[e] Johnson murdered her husband, that she was under the influence of some type of—Well, do you think that she was affected or influenced by some type of disturbance?

A. By some kind of disturbance?

Q. Yes, sir.

A. In general I do, because I think that major key depression and borderline personality have been documented as occurring before and after the offense. So, I think she suffered from those

disorders, but if I understand your question, it was not to the level of impairing her ability to appreciate the wrongfulness. In other words, I think that her psychiatric disorders do give a context and a bigger picture of this woman, but I don't think and have not testified that it goes to the level of any type of insanity or to her mental capacity.

. . . .

Q. Your testimony earlier was that at the time Mr. Kemmerlin was killed, the defendant was able to appreciate the criminality of her conduct; is that correct?

A. Yes, sir. My evaluation is that she does have these two mental disorders, but they didn't arise to the level of any defense such as insanity or any issues as the inability to, you know, plan and that kind of thing; and also, that her ability to know right from wrong, appreciate wrongfulness and her ability to generally control her behavior while shaky and impaired at times were intact.

Based on this testimony, we conclude the trial court properly refused to submit the (f)(6) mitigator. The evidence shows that defendant was depressed and suffering from borderline personality disorder. Accordingly, defendant was under the influence of a mental or emotional disturbance. However, defendant's own expert testified that this disturbance did not prevent defendant from appreciating the criminality of her conduct and controlling her conduct as required by law. Because defendant offered no other substantial evidence of this circumstance, we hold that the trial court did not err in refusing to submit the (f)(6) mitigating circumstance.

This assignment of error is overruled.

[10] In her next assignment of error, defendant argues that the prosecutor committed misconduct and prejudicial constitutional error in commenting on defendant's exercise of her right to trial by jury and her right not to testify. Defendant contends that the trial court erred by failing to take sufficient action to cure the error.

"A criminal defendant may not be compelled to testify, and any reference by the State regarding [her] failure to testify is violative of [her] constitutional right to remain silent." *State v. Baymon*, 336 N.C. 748, 758, 446 S.E.2d 1, 6 (1994); *see also* U.S. Const. amend. V; N.C. Const. art. I, § 23; N.C.G.S. § 8-54 (2001). Any reference by the prosecutor to a criminal defendant's right not to testify is error. *State v.*

Reid, 334 N.C. 551, 554, 434 S.E.2d 193, 196 (1993). However, such a comment may be cured by "a withdrawal of the remark or by a statement from the court that it was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness." *State v. McCall*, 286 N.C. 472, 487, 212 S.E.2d 132, 141 (1975), *death sentence vacated*, 429 U.S. 912, 50 L. Ed. 2d 278 (1976); *see also Reid*, 334 N.C. at 556, 434 S.E.2d at 197. The trial court's curative instructions to the jury should occur promptly after the comment is made rather than in general jury charges of instruction. *State v. Gregory*, 348 N.C. 203, 210, 499 S.E.2d 753, 758, (holding that prosecutor's direct comments on a defendant's failure to testify were not cured by subsequent inclusion in the jury charge of an instruction regarding the defendant's right not to testify), *cert. denied*, 525 U.S. 952, 142 L. Ed. 2d 315 (1998); *State v. Monk*, 286 N.C. 509, 516-17, 212 S.E.2d 125, 131-32 (1975) (requiring instruction to be "prompt and explicit"). Even if the trial court fails to give a curative instruction, the court still must determine whether the error was harmless beyond a reasonable doubt. *State v. Warren*, 348 N.C. 80, 106, 499 S.E.2d 431, 445, *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998).

Similarly, a defendant also has a constitutional right to plead not guilty and is entitled to a jury trial. U.S. Const. amend. VI; N.C. Const. art. I, § 24; *State v. Langford*, 319 N.C. 340, 345, 354 S.E.2d 523, 526 (1987). Consequently, a prosecutor's reference to a defendant's failure to plead guilty is a violation of the defendant's constitutional right to a jury trial. "The court's failure to give a curative instruction after such a reference does not warrant a reversal, however, if the State shows that the error was harmless beyond a reasonable doubt." *State v. Larry*, 345 N.C. 497, 524, 481 S.E.2d 907, 923, *cert. denied*, 522 U.S. 917, 139 L. Ed. 2d 234 (1997); *see also* N.C.G.S. § 15A-1443(b) (2001).

Defendant first complains that the prosecutor improperly questioned her during sentencing. The following portion of the record appears relevant:

Q. Now, you sat here for four weeks, correct, during this trial?

A. Yes, sir.

Q. And you heard the evidence being presented, correct?

A. Yes, sir.

Q. And, and knowing full well that you were guilty, correct?

A. Yes, sir.

Q. Hoping, for some reason, this jury would set you free.

MR. BLITZER [DEFENSE COUNSEL]: Objection, Judge.

THE COURT: That's sustained.

MR. BLITZER: Move to strike. We need to approach, your Honor.

THE COURT: Y'all approach.

(Whereupon there is an off-the-record discussion).

THE COURT: All right. You can continue.

[PROSECUTOR]: Captain Adams, would you please stand.

(Captain Adams stands).

Q. Do you know that man, Ms. Kemmerlin?

A. Yes, I do.

Q. Tell the jury and the Court who he is.

MR. BLITZER [DEFENSE COUNSEL]: Objection.

MR. ETRINGER [DEFENSE COUNSEL]: Objection.

THE COURT: Y'all [the jurors] step out just a minute.

After the jurors left the courtroom, defense counsel requested an instruction regarding defendant's right not to testify and to plead not guilty. The jurors then returned, and the trial court repeated an earlier instruction:

> THE COURT: All right, ladies and gentlemen, earlier there may have been some questions asked concerning the length of the trial, and the fact that you heard evidence and whether or not the defendant was guilty which she responded to. That I want to inform you that you cannot consider that in your determination in the sentencing phase.
>
> As I indicated to you at the beginning of the trial, the defendant had entered a plea of not guilty, and under our system of justice, a defendant who pleads not guilty is not required to prove her innocence but is presumed to be innocent, and that's a constitutional right given by the U.S. Constitution and North Carolina Constitution.

> Furthermore, that presumption would remain with the defendant throughout the trial unless and until the jury selected to hear the case was convinced from the facts and the law, beyond a reasonable doubt, of the guilt of the defendant.
>
> Furthermore, under our constitution, the burden of proof is on the State to prove to you that the defendant is guilty beyond a reasonable doubt. Furthermore, I also indicated to you the defendant's constitutional right, that there was no burden or duty of any kind on the defendant. If she chose not to testify or offer any evidence, that you could not hold that against her, and that was her right as allowed by our constitution; and the mere fact that she had been charged with a crime is no evidence of guilt and that the charge is merely a mechanical, administrative way by which a person is brought to a trial.
>
> So, therefore, she has a constitutional right not to offer any evidence, and the fact that she chose that route could not be considered by you []or contemplated by you in your deliberations once you begin deliberating for this case.

Defendant contends that the prosecutor's statements violated defendant's due process rights, violated state law, and violated her right to have a capital sentencing determination without the influence of passion or prejudice as guaranteed in N.C.G.S. § 15A-2000(d)(2). Specifically, defendant argues that the trial court's attempt to cure the errors were insufficient because the court gave no immediate statement that the comments were improper. In support of her position, defendant cites the following *dicta* from *State v. Oates*, "[t]o be effective, the trial court's instruction should immediately follow the offensive remark and should explain why the remark was improper." 65 N.C. App. 112, 114, 308 S.E.2d 507, 508 (1983), *disc. rev. denied*, 315 S.E.2d 708 (1984).

In *Oates*, however, the trial court merely instructed the jury to "disregard counsel's statement." *Id.* More importantly, the only instruction provided to the jury was a general instruction during the jury charge on the defendant's right not to testify. *Id.* The court in *Oates* properly concluded that such an instruction was "insufficient to remove the prejudice because no reference was made to the offending argument, and the damage done by it remained unrepaired." *Id.* Viewed in this context, the requirement that the trial court's instruction be immediate simply reflects the well-established

rule that the trial court should instruct the jury shortly after an improper comment is made, rather than via general instructions during the jury charge. *See Gregory*, 348 N.C. at 210-11, 499 S.E.2d at 758; *Reid*, 334 N.C. at 556, 434 S.E.2d at 197. We therefore conclude that the trial court's instruction timely cured any possible prejudice.

Defendant also argues that the instruction given by the trial court was vague in describing defendant's constitutional rights, failed to address her right to a jury trial, addressed only indirectly her right not to testify, and gave an insufficient explanation of why the comments were improper. We reject each of these contentions. We have never required such specificity in the instructions, so long as the trial court states that the comment " 'was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness.' " *Reid*, 334 N.C. at 556, 434 S.E.2d at 197 (quoting *McCall*, 286 N.C. at 487, 212 S.E.2d at 141); *see also Monk*, 286 N.C. at 516, 212 S.E.2d at 131 ("Improper comment on defendant's failure to testify may be cured by an instruction from the court that the argument is improper followed by prompt and explicit instructions to the jury to disregard it.") In the present case, the trial court identified the questions that were allegedly improper and told the jury: "If [defendant] chose not to testify or offer any evidence, that you could not hold that against her, and that was her right as allowed by our constitution . . . ." Such an instruction was sufficient to cure the error.

Defendant also cites as error the following portions of the prosecutor's closing argument:

> [PROSECUTOR]: Now, during the guilt/innocence phase, the State put on evidence and the defense challenged every piece of that evidence. Every piece of it. They told you that the statement was coerced, that the agents planted in her head that Jerry Loftis was telling you something that wasn't true, that Dori Gwynn was telling you something that wasn't true.
>
> They told you that we had even proved that Anton[e] Johnson was the shooter, and I'll argue and contend to you that they even said Anton[e] Johnson was not the shooter, and what happened? The defendant gets on the witness stand and says it's all true. It's all true. Plan A: Let's hope we can confuse them.
>
> MR. BLITZER [DEFENSE COUNSEL]: Your Honor, can we approach, Judge?

THE COURT: All right, ladies and gentlemen, just for the record, you cannot consider that argument as it relates to some issue on the defendant's constitutional right. That cannot be considered in your determination.

MR. BLITZER: For the record, we object and move to strike that portion.

THE COURT: The motion to strike is allowed.

[PROSECUTOR]: We get to the guilt, get to the phase—now, we're at the sentencing phase. What's the defense now? The boogey-man made me do it?

Defendant contends that these statements were direct criticism of defendant's decisions to plead not guilty and to not testify at the guilt-innocence phase of trial. Although defendant notes that the trial court's instruction was immediate, defendant again argues that the instructions were vague regarding what was specifically improper.

We fail to see how the statements in issue were direct comments on defendant's rights to plead not guilty and to not testify on her own behalf. Assuming *arguendo* that the prosecutor's argument contained improper references to defendant's exercise of her constitutional rights, any possible prejudice was cured when the trial court ordered the remarks stricken from the record and instructed the jury that it "[could] not consider that argument as it relates to some issue on the defendant's constitutional right. That cannot be considered in your determination." We further note that any error would be harmless beyond a reasonable doubt because the remarks do not refer to any aggravating circumstances proffered by the State or mitigating circumstances proffered by defendant. "When the reference was made, the jury had already found defendant guilty of first-degree murder. There is no danger that the reference caused the jury to presume defendant's guilt or to regard [her] silence as indicative of guilt." *Larry*, 345 N.C. at 525, 481 S.E.2d at 923.

This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises seven additional issues that she concedes have been previously decided contrary to her position by this Court: (1) the trial court erred in using vague and overbroad language to define

the pecuniary gain aggravating circumstance at sentencing; (2) the trial court erred in denying defendant's continued objections to the prosecutor's questions staking out prospective jurors on their positions as to defendant's guilt and sentence, given that defendant did not personally shoot the victim; (3) the trial court erred in using inherently vague terms to define defendant's burden of proving mitigating circumstances; (4) the trial court erred in instructing the jury that mitigating circumstances must outweigh aggravating circumstances; (5) the trial court erred in instructing the jury such that jurors could disregard mitigating circumstances found in Issue Two when considering Issue Four; (6) the trial court erred in instructing the jury that it must be unanimous as to Issues One, Three, and Four; and (7) the murder indictment failed to include all of the elements of first-degree murder and failed to include the aggravating circumstances relied upon by the State.

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

PROPORTIONALITY REVIEW

[11] Having concluded that defendant's trial and capital sentencing proceeding were 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 sentence of death was based; (2) whether the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (2001).

After thoroughly examining the record, transcript, briefs, and oral arguments, we conclude the evidence supports the aggravating circumstance found by the jury. Further, we find no indication the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We turn then to our final statutory duty of proportionality review.

Our determination of whether the sentence of death is excessive or disproportionate requires us to "review all of the cases in the 'pool' of similar cases for comparison." *State v. Rogers*, 316 N.C. 203, 235, 341 S.E.2d 713, 732 (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). Such a review eliminates "the possibility that a person will be sentenced to die by the action of an aberrant jury." *Gregg v. Georgia*, 428 U.S. 153, 206, 49 L. Ed. 2d 859, 893 (1976); *State v. Williams*, 308 N.C. 47, 82, 301 S.E.2d 335, 356, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983). We have previously classified "the responsibility placed upon us by N.C.G.S. § 15A-2000(d)(2) to be as serious as any responsibility placed upon an appellate court." *State v. Jackson*, 309 N.C. 26, 46, 305 S.E.2d 703, 717 (1983). In carrying out our duties under the statute, "we must be sensitive not only to the mandate of the Legislature, but also to the constitutional dimensions of our review." *State v. Rook*, 304 N.C. 201, 236, 283 S.E.2d 732, 753 (1981), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982).

With the magnitude and seriousness of our task in mind, we have carefully reviewed the facts and circumstances of this case and have compared it to the other cases in the proportionality pool. Our exhaustive comparison of the cases has led us to conclude that, while the crime committed here was a tragic killing, it "does not rise to the level of those murder cases in which we have approved the death sentence upon proportionality review." *State v. Benson*, 323 N.C. 318, 328, 372 S.E.2d 517, 522 (1988).

The jury in the present case found only one aggravating circumstance, that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). Our review of the record reveals that the evidence supporting this aggravator is weak. Testimony suggesting that life insurance proceeds were a motive for the murder came from two witnesses, both of whom gave inconsistent statements. Although a change of beneficiary or an increase in the policy amount might be expected where a murder was committed for the pecuniary gain of collecting insurance, defendant made no such changes.

The jury also found three statutory mitigating circumstances: (1) the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (2) defendant aided in the apprehension of another capital felon, N.C.G.S. § 15A-2000(f)(8); and (3) the catchall mitigating circumstance that there existed any other circumstance arising from the evidence that any juror deems to have mitigating value, N.C.G.S. § 15A-2000(f)(9). The jury also found three nonstatutory mitigating circumstances: (1) defendant acknowledged her guilt to a law enforcement officer, (2) defendant was a victim of physical and emotional abuse by the victim, and (3) defendant was a victim of sexual abuse as a minor.

We do not find any one of these factors determinative of our proportionality consideration. Rather, our emphasis is on an " 'independent consideration of the individual defendant and the nature of the crime or crimes which [she] has committed.' " *State v. Anthony*, 354 N.C. 372, 455, 555 S.E.2d 557, 608 (2001) (quoting *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *and overruled on other grounds by State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543, *by State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995), *and by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517)), *cert. denied*, —— U.S. ——, 153 L. Ed. 2d 791 (2002). As such, we must "consider the totality of the circumstances presented in [defendant's] case and the presence or absence of a particular factor will not necessarily be controlling." *State v. Bondurant*, 309 N.C. 674, 694 n.1, 309 S.E.2d 170, 183 n.1 (1983).

This Court has conducted an exhaustive review of the record in analyzing whether defendant's death sentence is consistent with other cases in the proportionality pool. The differences between defendant's case and other cases in the pool are too numerous to list. However, among the factors persuasive to our determination are: (1) the weak evidence supporting the pecuniary gain aggravating circumstance, (2) the evidence that defendant considered stopping the murder immediately prior to its occurrence, (3) the fact that defendant's codefendant Antone Johnson received a life sentence without parole, and (4) the jury's finding of three statutory mitigating circumstances and three nonstatutory mitigating circumstances. We therefore conclude that the totality of the circumstances do not warrant imposition of the death penalty. To be sure, any murder is a horrendous and reprehensible act; however, when compared to other cases in the proportionality pool, we cannot say that the death sentence imposed in defendant's case is proportionate.

We therefore conclude as a matter of law that the death sentence imposed in this case is disproportionate under N.C.G.S. § 15A-2000(d)(2). Upon this holding, the statute requires that this Court sentence defendant to life imprisonment in lieu of the death sentence. Because the language of the statute is mandatory, we have no discretion in determining whether a death sentence should be vacated. *Jackson*, 309 N.C. at 47, 305 S.E.2d at 718. Accordingly, the death sentence is vacated, and defendant is hereby sentenced to imprisonment in the state's prison for the remainder of her natural life, without benefit of parole. The Clerk

of Superior Court of Rockingham County shall issue a commitment accordingly.

NO ERROR IN GUILT-INNOCENCE PHASE OR SENTENCING PROCEEDING; DEATH SENTENCE DISPROPORTIONATE; DEATH SENTENCE VACATED; AND SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE IMPOSED.

STATE OF NORTH CAROLINA v. KYLE O. BERRY

No. 389A01

(Filed 20 December 2002)

1. **Jury— selection—capital trial—qualification for both phases**

An assignment of error in a first-degree murder prosecution concerning potential jurors with reservations about the death penalty was not restricted to the sentencing proceeding even though defendant raised it in that context. A trial court may not select a panel for the guilt-innocence phase with the understanding that different jurors will be substituted at sentencing.

2. **Jury— selection—capital trial—reservations about death penalty—inconsistent answers**

The trial court did not abuse its discretion in a capital first-degree murder prosecution by excusing for cause a prospective juror whose answers were inconsistent but who could not state that he would follow the law if the evidence were circumstantial.

3. **Jury— selection—capital trial—reservations about death penalty—unalterable views**

The trial court did not abuse its discretion in a capital first-degree murder prosecution by excusing a potential juror for cause where she was unalterably opposed to the death penalty. Mere opposition does not disqualify a juror who can set aside her personal beliefs and follow the law; in this case, the court asked an additional question to determine that the opposition was unalterable.

4. Jury— selection—capital trial—reservations about death penalty—equivocal answers

The trial court did not abuse its discretion in a capital first-degree murder prosecution by excusing a potential juror for cause where the juror's responses on the death penalty were arguably equivocal, but his final answer indicates that the court properly interpreted his answers as unambiguous opposition to the death penalty regardless of the law or the evidence.

5. Evidence— prior crimes or acts—prior murder—admissible

The trial court did not err in a first-degree murder prosecution by admitting evidence of a prior murder where the court carefully studied the substance of the evidence, reviewed the applicable law, considered the arguments of counsel, determined that the probative value was not substantially exceeded by unfair prejudice, determined that the evidence was tendered to establish the permissible factors that defendant killed this witness to silence her, and gave limiting instructions.

6. Evidence— murder prosecution—gang membership—not prejudicial

There was no prejudicial error in a capital first-degree murder prosecution in an officer's testimony that this case was assigned to a "gang unit" where the attorneys and judge mistakenly thought that the door had been opened, but the witness made only a single brief reference and there was no indication that the outcome of the trial would have been any different without the testimony.

7. Evidence— gang nickname and involvement—not prejudicial

In light of evidence of defendant's guilt, there was no prejudicial error in a first-degree murder prosecution from evidence about defendant's gang nickname, testimony that a witness was afraid of defendant's friends, testimony that the victim was in a gang with defendant, testimony that a cellmate did not like to sleep with defendant in the room, and testimony that an EMT first saw defendant in a group which the EMT thought may have been up to no good.

8. Constitutional Law— effective assistance of counsel—concession of guilt—Harbison waiver—not conditional—insanity plea not pursued—concession still valid

The trial court in a capital first-degree murder prosecution was justified in assuming that a Harbison waiver remained valid throughout the trial where the waiver was given in anticipation of an insanity plea, defendant's opening argument admitted possible participation but argued insanity, and the insanity plea was not pursued after the prosecution revealed new evidence during the trial. Defendant did not expressly or impliedly condition his consent to acknowledge guilt upon presentation of an insanity defense and never formally withdrew his plea.

9. Discovery— criminal—statement revealed during trial—no sanctions

The trial court did not err during a capital first-degree murder prosecution by not imposing sanctions where the State revealed a statement during trial which defendant suggested would have changed the decision to enter an insanity plea. Defendant received the substance of this statement through another statement that was provided to defendant, and no *Brady* violation occurred.

10. Criminal Law— prosecutor's argument—impact on murder victim's family

The trial court in a capital first-degree murder prosecution did not abuse its discretion by overruling defendant's objection to the prosecutor's comments about the 16-year-old victim's age, her expression, the fact that her parents are left with only photographs and memories, and his speculation that the victim may have married and had children. The life the prosecutor posited for the victim was a conventional one.

11. Criminal Law— prosecutor's argument—vouching for another prosecutor

There was no prejudicial error in a capital first-degree murder prosecution where the prosecutor in his closing argument came perilously close to vouching for another prosecutor, but abandoned the argument after defendant's objection, even though the objection was overruled.

12. Criminal Law— prosecutor's argument—prior murder victim raped

There was no error in a capital first-degree murder prosecution where the prosecutor suggested in his closing argument that a prior murder victim had been raped. The prosecutor's argument was triggered by defendant's cross-examination of a witness, the focus of the prosecutor's argument was on information from the witness that was not known to the public, and the argument represented a permissible inference of motive rather than an appeal to passion.

13. Criminal Law— prosecutor's argument—acquittal putting others at risk

There was no prejudicial error in a capital first-degree murder prosecution in light of the evidence of defendant's guilt where the prosecutor improperly argued that an acquittal would put others at risk, but the improper comment consisted of a single sentence and was abandoned immediately.

14. Sentencing— capital—aggravating circumstance—course of conduct—instruction

There was plain error in a capital sentencing proceeding where the court's instruction on course of conduct allowed the jury to find the aggravating circumstance based on a prior murder without finding that the past and present murders were part of a course of conduct.N.C.G.S. § 15A-2000(e)(11).

15. Sentencing— capital—aggravating circumstances—overlapping

There was sufficient evidence in a capital sentencing proceeding to support the overlapping aggravating circumstances that the murder was committed to avoid arrest and that the murder was part of a course of conduct. Each circumstance was offered for a different purpose and there was separate and substantial evidence to support each circumstance individually. N.C.G.S. § 15A-2000(e)(11), N.C.G.S. § 15A-2000(e)(4).

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 30 March 2001 in Superior Court, New Hanover County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 14 October 2002.

Roy Cooper, Attorney General, by John H. Watters, Special Deputy Attorney General, for the State.

Thomas K. Maher for defendant-appellant.

EDMUNDS, Justice.

Defendant Kyle Berry was indicted for the first-degree murder of Margaret Theresa Fetter. He was convicted on the basis of premeditation and deliberation and sentenced to death.

The State presented evidence that Timothy Ratliff was eating at a McDonald's restaurant in Wilmington on 5 November 1998. He was approached by Bobby Autry, who asked for a cigarette. Autry, accompanied by Theresa Fetter, the victim, later returned to Ratliff and asked Ratliff to rent a motel room for him. They all drove to a Motel Six on Market Street, where Fetter provided funds to Ratliff. Ratliff entered the motel, rented a room, and gave the receipt to Fetter.

Later that same day, Erwin Hegwer received a telephone call from his step-grandson, Jon Malonee. In response to the call, Hegwer drove to the Motel Six, where he picked up Malonee, defendant, Autry, Josh Whitney, and Fetter. He dropped them off at the parking lot of the Food Lion grocery store at Seventeenth Street and South College Road in Wilmington. Malonee later called Hegwer again about 1:30 a.m. on 6 November 1998. Hegwer drove to New Hanover Regional Hospital, where he picked up Malonee, defendant, and Autry and took them back to the Motel Six. When he asked where "the girl" was, he was told that Whitney had driven her home.

Defendant and the others were at the hospital because defendant's hand had been lacerated. Emergency medical technicians (EMTs) had responded to the Food Lion parking lot at approximately 12:30 a.m. Defendant left a group of people, approached the EMT vehicle, and displayed the cut. A Wilmington police officer who had also responded asked defendant about the injury. Defendant reported that he had fallen behind the Food Lion while walking home from a friend's house. He could neither name the friend nor describe where the house was, and the officer was unable to find any glass or other material that might have caused the injury. The EMTs bandaged defendant's hand and transported him to the hospital, where he was examined by Dr. Thomas E. Parent, an orthopedic surgeon who specializes in hand surgery. Dr. Parent later operated on defendant's hand on 11 November 1998. It was Dr. Parent's opinion as an expert

in the field of orthopedic treatment and surgery that defendant's injury did not result from a fall, but was consistent with defendant having been cut by a knife.

Fetter's body was found on 24 November 1998. At that time, Autry was incarcerated in the New Hanover County jail. Autry had spoken with Wrightsville Beach Police Officer Hovie Pope on 23 November 1998, and as a result of the conversation, Pope checked Autry out of jail the next day. They drove to an area near Seventeenth Street and South College Road, where they walked down a trail into a wooded lot and observed a badly decomposed corpse. The body was near the SPEC day care center, not far from the Food Lion on Seventeenth Street and South College Road. Being unsure which agency had jurisdiction, Officer Pope called investigators from both the New Hanover Sheriff's Department and the Wilmington Police Department. When the investigators arrived, Officer Pope showed them pieces of pipe and a knife, all of which he had observed at the scene. Wilmington Police Detective Thomas Witkowski recovered a twenty-four-inch piece of pipe near the body and a forty-eight-inch piece of pipe at the back of a nearby parking area. He also discovered a folding knife with a red handle. SBI Agent Dennis Honeycutt sprayed the area with luminol, a chemical that reacts to blood, and saw indications of a blood trail near the point where the victim's body was found.

In a pocket of Fetter's pants, investigators found a receipt from the Motel Six dated 5-6 November 1998, in the name of Timothy Ratliff. The autopsy of Fetter's body was conducted by Dr. John Butts, who noted two cutting injuries to the left forehead. He also observed broken bones around the left eye and two breaks in the left jaw, which he characterized as blunt-force injuries. Indentations in the left rear of the victim's skull indicated to him that she had been twice struck with a sharp object. In addition, he observed injuries to the victim's hands, which he characterized as defensive wounds suffered as she tried to ward off blows. The victim's lungs showed signs of infection or pneumonia, indicating that the head injuries had not killed her outright. Dr. Butts' expert opinion was that she died as a result of blunt-force injuries.

Defendant made a number of statements to others about the murder. In so doing, he explained that he killed Fetter to keep her from talking about a murder he had previously committed on 17 or 18 September 1998. During a conversation with his friend David Surles, defendant said he had seen a woman, later determined to be Lisa

Maves, while at the beach. He related that the woman was upset, so he talked with her and had sex with her. Defendant then said that the woman afterwards was "freaking out," so he stabbed her in the head with a bottle. Defendant told Surles that Fetter knew about this earlier killing of Lisa Maves and that he slit Fetter's throat to keep her from telling about it. Defendant stated that he had dumped Fetter's body behind the SPEC building. In his court testimony about this conversation, Surles added that defendant's nickname, "Crazy K," came from "gang members and stuff."

Marvin Harper testified that while he was in the New Hanover County jail, he heard defendant and Josh Whitley talking about the killing of a young girl who was found on Highway 132. Harper also heard defendant say that he killed the girl found on Highway 132 because he knew she would testify against him about the girl on the beach.

Paul Venth testified that he had shared a jail cell with defendant in August and September 1999. Defendant told Venth about an incident when he and Jon Malonee were with a woman on the beach. When the woman became angry, defendant said he stabbed her in the side of the head, and the knife became stuck. He added that stabbing someone in the head was quick, efficient, and silent, and that the killing had made him feel good. Defendant related that he and Malonee put her body in the water but the tide washed it ashore. Defendant also stated that he killed Fetter to keep her from talking about the earlier murder and about other crimes of his with which she was familiar. Defendant said Fetter was led into the woods where Bobby Autry hit her first with a metal bar. When defendant tried to stab her, his folding knife closed over his fingers and cut his hand so badly that he had to go to the hospital. Defendant added that when he and others returned to the scene the next day, Fetter had apparently crawled a short distance, so they moved the body back and covered it with leaves.

Rachael Williams testified that she had been Fetter's friend. In October 1998, Fetter told Williams that she knew that Jon Malonee and defendant were involved in a murder at Wrightsville Beach and feared that they were going to try to kill her.

The State provided evidence to corroborate defendant's admissions that he had participated in the murder of Lisa Maves. Dr. John Almeida, an expert in forensic pathology, conducted the autopsy. He testified that Maves had two stab wounds to the

head, one of which had penetrated the brain. He also found symptoms of other blunt-trauma wounds to the head. In his opinion, Maves died as a result of the blunt trauma. He added that stab wounds to the head are unusual.

Defendant was indicted for the first-degree murder of Fetter. He was also indicted for the murder of Maves, but the trial court denied the State's motion to join the cases for trial. However, the court did permit the State to present evidence of the Maves killing during defendant's trial for the murder of Fetter. In preparation for trial, defense counsel filed notice of intent to rely on the defense of insanity. Accordingly, defendant was evaluated at Dorothea Dix Hospital in Raleigh. On 15 February 2001, defendant was picked up at Dix by officials of the New Hanover County Sheriff's Department for return to Wilmington. Despite being shackled, defendant escaped from the deputies' van when it reached Wilmington but was apprehended about an hour and a half later.

Although defendant had provided notice of a proposed defense of insanity and predicted such a defense to the jury during his opening statement, he did not present evidence during the guilt-innocence portion of his trial. On 23 March 2001, defendant was convicted of the first-degree murder of Theresa Fetter on the basis of premeditation and deliberation. The State did not offer additional evidence during the sentencing proceeding. Defendant presented evidence of mental disorders not amounting to insanity. Other evidence indicated that defendant suffered from substance-abuse problems and was impaired at the time of the offense. Defendant also adduced evidence that a head injury suffered in an earlier automobile accident had led to changes in his personality.

At sentencing, the jury found the aggravating circumstances that the murder was especially heinous, atrocious, or cruel; that the murder was part of a course of conduct including other crimes of violence against another person or persons; and that the murder was committed to prevent arrest or to effect defendant's escape. The jury also found the statutory mitigating circumstances that the murder was committed while defendant was under the influence of a mental or emotional disturbance and that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. In addition, the jury found six nonstatutory mitigating circumstances and the catchall mitigating circumstance. The jury then found that the mitigating circumstances were insufficient to outweigh the aggravating circum-

stances and recommended a sentence of death. Sentence was imposed on 30 March 2001.

JURY SELECTION ISSUES

[1] Defendant argues that the trial court improperly excused for cause three prospective jurors who expressed reservations about imposing the death penalty. We note at the outset that defendant has raised this assignment of error in the context of the sentencing proceeding, and one comment by defense counsel to the court during *voir dire* suggested that a juror might be qualified as to the guilt-innocence phase only. However, we have held that a trial court may not select for the guilt-innocence phase of a trial a panel of jurors, some of whom oppose the death penalty while others are not so opposed, with the understanding that different jurors, all of whom are unopposed to the death penalty, will be substituted for the sentencing proceeding. *State v. Bondurant*, 309 N.C. 674, 681-82, 309 S.E.2d 170, 175-76 (1983); *see also* N.C.G.S. § 15A-2000(a)(2) (2001). Accordingly, we will not restrict our consideration of this assignment of error to the sentencing proceeding.

A prospective juror may be excused for cause when "[a]s a matter of conscience, regardless of the facts and circumstances, [the juror] 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) (2001). A prospective juror is not disqualified for having strong feelings against the death penalty as long as the juror can put those feelings aside and apply the law. *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 907-08 (1993). However, where a prospective juror indicates that he or she cannot follow the law as given by the trial judge's instructions, it is error not to excuse that prospective juror. *State v. Hightower*, 331 N.C. 636, 641, 417 S.E.2d 237, 240 (1992).

> "[T]o determine whether a prospective juror may be excused for cause due to that juror's views on capital punishment, the trial court must consider whether those views would '["]prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.["]' *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985) [(quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980))]." *State v. Bowman*, 349 N.C. 459, 469-70, 509 S.E.2d 428, 435 (1998), *cert. denied*, [527] U.S. [1040], [144] L. Ed. 2d [802] (1999).

State v. Hedgepeth, 350 N.C. 776, 794, 517 S.E.2d 605, 616 (1999) (first through fourth alterations in original), *cert. denied*, 529 U.S. 1006, 146 L. Ed. 2d 223 (2000). A judge may excuse a prospective juror who has not been challenged by either party if the judge determines that grounds for a challenge for cause are present. N.C.G.S. § 15A-1211(d) (2001). Challenges for cause lie within the discretion of the trial court and are reviewed for abuse of discretion. *State v. Kennedy*, 320 N.C. 20, 28-29, 357 S.E.2d 359, 364 (1987).

[2] Defendant first contends that prospective juror Powell was improperly excused. When Powell initially was questioned by the court, he stated that he could follow the evidence and the law and that he thought the death penalty was an acceptable punishment. The prosecutor then used *voir dire* to walk Powell through a capital trial and sentencing proceeding, at the conclusion of which Powell reiterated that he thought he could fairly apply the law. The prosecutor next discussed the nature of circumstantial evidence and advised Powell that the State would present circumstantial evidence both to establish defendant's intent and also as to "other evidence." Referring to sentencing, Powell responded, "If there were no direct evidence, it was all circumstantial, I don't know if I could do that." The prosecutor continued:

> Q. So even if you were convinced, beyond a reasonable doubt, that he was—there was an aggravating factor—first of all, he was guilty.
>
> A. Okay.
>
> Q. And if you were convinced, beyond a reasonable doubt, that the aggravating factor existed and it outweighed the mitigating factors, and it was substantially sufficient to call for the death penalty, in a circumstantial evidence case, you would not be able to—
>
> A. No, I can't do that.

At that point, defense counsel then asked the court to provide prospective juror Powell with the pattern instruction on the difference between direct and circumstantial evidence. The prosecutor moved to strike Powell for cause. The court denied the State's motion, recited to the prospective juror the pattern instruction requested by defense counsel, and the colloquy continued:

[PROSPECTIVE JUROR POWELL]: For me to decide between life or death of an individual, I know what the law says.

THE COURT: Okay.

[PROSPECTIVE JUROR POWELL]: But I'm going to have to have some direct evidence. If it were 100 percent circumstantial, I don't think I could do that.

THE COURT: All right. I'm going to allow it for cause.

The court denied defendant's motion to rehabilitate prospective juror Powell.

We have held that there is no distinction between the weight to be given to direct and circumstantial evidence.

> Circumstantial evidence and direct evidence are subject to the same test for sufficiency, *State v. Sokolowski*, 351 N.C. 137, 143, 522 S.E.2d 65, 69 (1999), and the law does not distinguish between the weight given to direct and circumstantial evidence, *State v. Adcock*, 310 N.C. 1, 36, 310 S.E.2d 587, 607 (1984). " 'Premeditation and deliberation generally must be established by circumstantial evidence, because both are processes of the mind not ordinarily susceptible to proof by direct evidence.' " *Sokolowski*, 351 N.C. at 144, 522 S.E.2d at 70 (quoting *State v. Rose*, 335 N.C. 301, 318, 439 S.E.2d 518, 527, *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 883 (1994), *and overruled on other grounds by State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001)).

State v. Parker, 354 N.C. 268, 279, 553 S.E.2d 885, 894 (2001), *cert. denied*, —— U.S. ——, 153 L. Ed. 2d 162 (2002). Because the prospective juror was unable or unwilling to state that he would follow the law, the court properly allowed the motion to strike for cause. Although prospective juror Powell's answers were not consistent during *voir dire*, in that he sometimes stated that he could follow the law, while other times he qualified his answers by adding that he would require more than circumstantial evidence, "[t]he trial court has the opportunity to see and hear a juror and has the discretion, based on its observations and sound judgment, to determine whether a juror can be fair and impartial." *State v. Dickens*, 346 N.C. 26, 42, 484 S.E.2d 553, 561 (1997). In light of Powell's final assertion that he could not follow the law if the evidence were circumstantial, the trial court did not abuse its discretion in excusing him for cause.

[3] Defendant next contends that prospective juror Bixby was improperly excused for cause. When she was called into the jury box, the trial court commented on the fact that she was a teacher and asked her if she had heard the initial instructions given to all prospective jurors in the case. Bixby responded by pointing out potential scheduling conflicts:

> [PROSPECTIVE JUROR BIXBY]: . . . I didn't realize—you never mentioned how long this was going to take for the trial period, and I have reservations for school vacation which begins the 11th, and I also have an appointment for a sleep apnea test on the 25th and [2]6th of March that I've waited for since the beginning of January.
>
> THE COURT: Since the beginning of last June?
>
> A. January.
>
> Q. Last January, all right. All right, I've got one question I've got to ask before we go any further. What are Gold Wing Road Riders?
>
> A. Motorcycle club.
>
> Q. You're a member of a motorcycle gang?
>
> A. Uh-huh.
>
> Q. Okay.
>
> A. That's just a spark of my life.
>
> Q. Well, my brother is into that. I see here you do not believe in the death penalty.
>
> A. No.
>
> Q. Is that an unalterable belief?
>
> A. Yes. I'm Roman Catholic and I don't believe in it.
>
> THE COURT: All right. I'm going to excuse you for cause. You're free to go.
>
> [DEFENSE COUNSEL]: Objection. And motion to rehabilitate.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: Thank you.

THE COURT: Maybe we ought to say cause and personal hardship. That will make it look a bit better.

Defendant correctly points out that mere opposition to the death penalty does not disqualify a prospective juror if the juror can set aside his or her personal beliefs and follow the law. However, the court here asked an additional question and determined that prospective juror Bixby's opposition was unalterable. A prospective juror who will not follow the law may be excused for cause. "A juror is properly excused for cause based on his views on capital punishment if those views would prevent or impair the performance of his duties as a juror in accordance with his instructions and his oath." *State v. Richardson*, 346 N.C. 520, 529-30, 488 S.E.2d 148, 153 (1997) (citing *Wainwright v. Witt*, 469 U.S. at 424, 83 L. Ed. 2d at 851-52), *cert. denied*, 522 U.S. 1056, 139 L. Ed. 2d 652 (1998). Accordingly, the court did not abuse its discretion in excusing prospective juror Bixby for cause.

[4] Finally, defendant argues that prospective juror Smith was improperly excused for cause. When Smith was called to the jury box, the following exchange ensued:

THE COURT: All right, Mr. Smith, good afternoon.

[PROSPECTIVE JUROR SMITH]: Good afternoon.

Q. I see here from your jury questionnaire that you are telling me that you are opposed to capital punishment.

A. Yes.

Q. All right. Now, the State of North Carolina does not require its citizens to take one view or the other. You're free to believe ever how [sic] you want to on the issue of capital punishment, because it is a matter about which reasonable minds can differ. However, the law of this state is that, for first degree murder, some first degree murder, not every first degree murder, the state has declared that, for certain first degree murders, capital punishment is an appropriate punishment. Now, the test as to whether or not you can serve as a juror in this case is whether or not you can put aside your personal feelings and follow the law of this state as I give it to you in making a determination as to the guilt or innocence of this defendant. And then, if we reach the sentencing phase, to properly and fairly weigh both possible penalties, both the death penalty and life in prison without parole. So you're the only one that knows.

So can you follow the law, or are your feelings and your—or your moral tenets such that it would be impossible for you to follow the law?

A. Would you repeat that?

Q. I say, knowing that the law of North Carolina is that the death penalty is considered an appropriate punishment for some first degree murders, the question whether you're suitable for this case or not is not what you believe, but whether you can follow the law, in spite of what you believe. You know that. You're the only one that knows. I mean, can you set aside your personal beliefs against the death penalty in this particular case and base your decision on the law of North Carolina and the evidence that you hear from the witness stand?

A. I don't know.

Q. Okay. What do you think?

A. Based on what I believe?

Q. Yes, sir.

A. I believe that an individual that's found guilty should spend the rest of his life in prison.

Q. So, in other words, if you were on this jury and it got to the sentencing phase, you would automatically vote for life imprisonment without parole?

A. I believe I would.

Q. Okay. You could not even consider the other possibility of the death penalty?

A. It would probably be hard to consider.

Q. Okay. Well, hard is—I hope it's hard for everybody to consider, because it's serious, it's a serious decision; but the question is, can you fairly consider both possible punishments, or are your feelings such that you would automatically vote for life in prison?

A. I think I would possibly vote for life in prison.

Q. Regardless of what the evidence was?

A. I think I would.

Q. Okay. And regardless of what the law is?

A. I think I would.

Q. All right. Well, I appreciate your telling it to us just like it is.

THE COURT: And I think he is unequivocal in his opposition. I am going to excuse him for cause. Mr. Weber?

[DEFENSE COUNSEL]: Judge, we would like to object and move to rehabilitate and ask the court to inquire as to his ability to sit at guilt/innocence.

THE COURT: Okay. Well, your motion to rehabilitate is denied, but I will—Would you have any problem in just sitting in the guilt/innocence phase, knowing if you find him guilty, the next step is to determine punishment?

[PROSPECTIVE JUROR SMITH]: I think that I probably could, but you do understand that that would still be my stand?

THE COURT: I understand. Thank you very much.

The court's original questions correctly set out the law and a juror's responsibility to follow the law, even where it conflicted with the juror's individual beliefs. Although prospective juror Smith's answers are arguably equivocal in that he said only that he "thought" he would respond in a certain way, his final comment to the court about his "stand" indicates that the court properly interpreted his earlier answers as unambiguous opposition to the death penalty regardless of the law or evidence. *See State v. Syriani*, 333 N.C. 350, 371, 428 S.E.2d 118, 128-29, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). The experienced trial court was in the best position to observe this prospective juror and to evaluate his answers, *State v. Dickens*, 346 N.C. at 42, 484 S.E.2d at 561, and did not abuse its discretion in excusing Smith. This assignment of error is overruled.

GUILT-INNOCENCE ISSUES

[5] Defendant argues that the trial court erred in admitting irrelevant and unfairly prejudicial evidence relating to the slaying of Lisa Maves. Defendant's position is that the evidence was unnecessarily inflammatory, especially in light of defendant's tactical decision to concede at trial some participation in Fetter's murder.

Only relevant evidence is admissible. N.C.G.S. § 8C-1, Rule 402 (2001). Relevant evidence is "evidence having any tendency to make

the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2001). Even relevant evidence may be inadmissible if the probative effect of the evidence is substantially outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 403 (2001). However, the balancing of these factors lies "within the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling was 'manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Hyde*, 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001).

Even if a trial court concludes that evidence of a defendant's other crimes or bad acts is admissible under Rule 403, the court must then determine whether the evidence should be excluded pursuant to Rule 404, which 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). We have held that Rule 404(b) is a rule of inclusion, subject to the single exception that such evidence must be excluded if its *only* probative value is to show that defendant has the propensity or disposition to commit an offense of the nature of the crime charged. *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

The record shows that the trial court considered the admissibility of the evidence pertaining to Lisa Maves at the beginning of the trial. After the prosecutor made an oral proffer of the evidence, the court allowed defendant to be heard in opposition. The court then advised counsel that it had reviewed the relevant cases and concluded that the evidence was admissible pursuant to Rule 404(b). The court added that it would provide the jury with a limiting instruction at the proper time. Accordingly, when the prosecutor first introduced evidence related to Lisa Maves through witness David Surles, the court instructed as follows:

> Ladies and gentlemen, the State of North Carolina is starting to offer evidence of the conduct of the defendant which occurred before the offense for which he is being tried, okay. Now, this evidence is offered for a very limited purpose and may be considered by you only for that limited purpose. The purpose for which this evidence is offered is to establish the intent of the defendant, which is a necessary element of the crime charged in this case, as well as his motive and knowledge. It is the jury's responsibility to determine if this evidence does, in fact, show all or any or none of those things. You are to consider this evidence solely for the purpose of establishing the motive, intent, knowledge of the person or persons responsible for the death of [the victim]. All right.

The court gave similar instructions before the testimony of State's witnesses Marvin Harper and Paul Venth.

Based on this record, we find no error in the court's admission of the evidence. Although defendant correctly characterizes the evidence of the Maves murder as prejudicial, the test is whether the prejudice was unfair. *See* N.C.G.S. § 8C-1, Rule 403. The trial court showed exemplary caution in its handling of this evidence. It carefully studied the substance of the evidence, reviewed the applicable law, and considered the arguments of counsel before determining that the probative value of the evidence was not substantially exceeded by any unfairly prejudicial impact. After determining that Rule 403 did not require exclusion of the evidence, the court then considered whether the evidence was being offered for a proper purpose under Rule 404, to establish defendant's intent, motive, and knowledge. Defendant's comments to others that he killed Fetter to prevent her from talking about the Maves murder readily fits all three of these permissible purposes.

Defendant cites *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986), and *State v. Mills*, 83 N.C. App. 606, 351 S.E.2d 130 (1986), to support his argument that evidence of the Maves murder was not admissible. In *Morgan*, the defendant in a murder case claimed he shot the victim in self-defense. *State v. Morgan*, 315 N.C. at 631, 340 S.E.2d at 88. While conducting his recross-examination of the defendant, the prosecutor asked about a separate incident when the defendant had pointed his shotgun at others. *Id.* Apparently, the prosecutor did not seek a ruling on the admissibility of this evidence prior to trial, the trial court did not conduct a weighing test pursuant to Rule 403, and defendant did not request a limiting instruction. *Id.* at 632,

640, 340 S.E.2d at 88, 93. The State argued that the evidence rebutted the defendant's claim that he was acting in self-defense when he shot the victim. We held that it was error for the trial court to allow the prosecutor's cross-examination of the defendant, undertaken for the purpose of establishing that the defendant's character for violence negated his claim of self-defense. *Id.* at 639, 340 S.E.2d at 93. A similar scenario arose in *State v. Mills*, with the significant difference that the State sought to disprove the defendant's claim of self-defense by offering evidence of a prior assault by the defendant on the same victim. *State v. Mills*, 83 N.C. App. at 609-10, 351 S.E.2d at 132. The Court of Appeals, citing *Morgan*, held that the evidence was not admissible under Rule 404(b). *Id.* at 611-12, 351 S.E.2d at 133-34.

Morgan and *Mills* are distinguishable. In both those cases, the evidence was offered only to show that, at the time of the offenses in question, the defendant was acting in conformity with his aggressive character. In the case at bar, the evidence was tendered to establish the permissible factors that defendant knowingly and intentionally killed Theresa Fetter in order to silence her. This assignment of error is overruled.

[6] Defendant argues that the trial court improperly admitted prejudicial evidence that defendant was a member of a gang. Defendant cites the testimony of Wilmington Police Lieutenant Maultsby, who testified that the case was assigned to the "gang unit"; Surles' testimony that defendant had a gang nickname; Williams' testimony that the victim was in the gang; EMT Eric Kasulis' testimony that he first observed defendant at the Food Lion parking lot in a group that might have been up to no good; and Venth's testimony that he did not like being asleep in his cell with defendant.

Lieutenant Maultsby testified that after the victim's body was found, his agency assumed responsibility for the investigation. During his direct examination, the following exchange took place:

> [PROSECUTOR]: Okay. And did you—what did you do next?
>
> A. I stood by for a period of time to oversee the processing. I requested our ID technicians come out. Captain Carey, who was my supervisor, also arrived, and we discussed some other avenues as far as processing the crime scene. I know that Sergeant Clatty, who was assigned to the gang unit—
>
> [DEFENSE COUNSEL]: Objection, Judge. We need to voir dire this witness at this juncture.

THE COURT: Approach the bench.

(A BENCH CONFERENCE WAS HELD AS FOLLOWS:)[1]

THE COURT: All right, folks, this gang business has already been brought up because y'all said she had to get beat out of it.

[DEFENSE COUNSEL]: [Co-counsel] made the objection, not me.

[DEFENSE COUNSEL]: The door has been opened. I didn't know how far down the road with this gang thing we were going.

[PROSECUTOR]: Y'all opened the door.

THE COURT: We'll go some distance because the door is there.

[DEFENSE COUNSEL]: It's not in evidence. I realize that, but neither is the admission that you made in your opening statement as to [defendant's] sanity, but the jury knows it.

[DEFENSE COUNSEL]: We can't put the toothpaste back in the tube.

THE COURT: That's right.

THE COURT: You may answer the question.

Q. Go ahead, Officer Maultsby.

A. I had requested Sergeant Clatty, who is also assigned to our unit, to bring a video camera that they had acquired. We also contacted some members of the traffic unit who had some laser technology, for the purpose of getting accurate measurements, since this was a large wooded lot.

Defendant accurately argues that, despite everyone's mistaken recollections to the contrary during the bench conference, the door had not yet been opened because the earlier references to gang activity had taken place outside the presence of the jury. However, the transcript reveals that during his entire testimony, Lieutenant Maultsby made this single brief reference to gangs, and defendant objected immediately. Although the court overruled the objection, Lieutenant Maultsby never again spoke of gangs. In light of the fact that the witness did not testify that defendant was part of a gang or even make a direct connection between Sergeant Clatty's formal

1. Although it appears that the speakers may not be correctly identified in the following exchange, we have quoted from the official trial transcript.

assignment and his participation in this investigation, and the fact that Lieutenant Maultsby thereafter addressed only the details of the investigation, we are unable to hold that defendant has shown that the outcome of the trial would have been any different if this evidence had been excluded. *See* N.C.G.S. § 15A-1443(a) (2001); *see also State v. Williams*, 355 N.C. 501, 538, 565 S.E.2d 609, 631 (2002); *State v. Braxton*, 352 N.C. 158, 183, 531 S.E.2d 428, 442-43 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001).

[7] Defendant claims that witness Surles' testimony as to defendant's nickname was prejudicial. The record shows that the matter was first broached on cross-examination:

> [DEFENSE COUNSEL]: Now, Mr. Surles, you did know [defendant] good enough to know what his nickname is, don't you?
>
> A. Yes.
>
> Q. Okay. What's his nickname?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Overruled.
>
> A. Crazy K.
>
> [DEFENSE COUNSEL]: I have no further questions.
>
> THE COURT: Okay.
>
> **REDIRECT EXAMINATION BY [THE PROSECUTOR]:**
>
> Q. Do you know where he got the nickname?
>
> A. No, I do not.
>
> Q. How would you describe your friendship—
>
> ALTERNATE JUROR THREE: We couldn't hear the nickname.
>
> THE COURT: What did you say his nickname was?
>
> THE WITNESS: Crazy K.
>
> . . . .
>
> Q. How did you know his nickname is Crazy K?
>
> A. Just from past people.

Q. From past people?

A. Yes, sir.

Q. Did he ever call himself Crazy K?

A. Yes, sir.

Q. Did he tell you where it came from?

A. No, sir.

Q. Did you—who were these past people?

A. Past gang members and stuff.

Q. Whose gang members?

A. People that he associated with.

Q. Do you know if he was in a gang?

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

Q. What people did he associate with?

[DEFENSE COUNSEL]: Objection.

THE COURT: I think he can give names, if he's got them.

THE WITNESS: I can't remember exactly what names, but I know as far as the Crips.

Q. Who were the Crips?

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

[PROSECUTOR]: Your Honor, he opened the door.

THE COURT: Hmm.

[PROSECUTOR]: He asked about the nickname.

[DEFENSE COUNSEL]: All I asked about was the nickname.

THE COURT: That's right.

Q. Do you know what that nickname is—strike that. Do you know where the nickname comes from?

[DEFENSE COUNSEL]: Objection. He answered that already.

THE COURT: Approach the bench.

(A BENCH CONFERENCE WAS HELD AS FOLLOWS:)

THE COURT: All right, I thought I had previously ruled that we're not going to get into any extensive discussions of gang activity.

[PROSECUTOR]: Well, the nickname is a gang name. He opened the door. That's his gang name.

[DEFENSE COUNSEL]: He said he doesn't know where it came from.

THE COURT: He's answered that, then.

[PROSECUTOR]: If he knows it's a gang name, can we ask him that?

THE COURT: No. You've asked him if he knew where it came from and he said no.

[PROSECUTOR]: Okay.

THE COURT: So leave it alone.

(END OF BENCH CONFERENCE.)

This evidence indicates that defendant opened the door to questions about his nickname. Defendant had been asking what Surles knew of defendant's prior psychiatric hospitalizations, apparently in an attempt to tie the nickname to defendant's purported lack of mental stability. In so doing, he gave the State the opportunity to establish the source of the nickname. "[T]he law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself." *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981). When the prosecutor asked the names of the friends who imposed the nickname on defendant, Surles responded with the name of the gang itself. At this point, the judge properly sustained defendant's objection and put an end to this line of questioning. As above, we are unable to hold that defendant has shown that the outcome of the trial would have been any different if this evidence had been excluded. N.C.G.S. § 15A-1443(a). In addition, defendant objected to Surles' testimony that he was afraid of defendant's friends. The prosecutor asked Surles about his concerns, and Surles responded that he had not wanted to testify because he knew

the people defendant "hung out with" and did not want to "catch a bullet." The trial court overruled defendant's objection and denied his motion to strike. Although we agree with defendant that this evidence was inadmissible, in light of the evidence of defendant's guilt, we conclude that, as above, the outcome of the trial would have been the same even had this evidence been excluded.

We have also examined the other related testimony to which defendant now objects and find no error. Williams' testimony was to the effect that Fetter was involved with a gang that included defendant, but she did not know if Fetter was a member. Defendant's objection to this testimony was overruled. This evidence was relevant to show Fetter's relationship with defendant, and we fail to perceive that a different result would have been likely if the evidence had not been admitted. EMT Kasulis' testimony that he first saw defendant in a group that may have been up to no good represented no more than the witness' speculation. The trial court sustained defendant's objection to Venth's statement that he did not like being asleep while defendant was in the room, then allowed defendant's motion to strike that testimony. Jurors are presumed to follow the trial court's instructions. *State v. Nicholson*, 355 N.C. 1, 60, 558 S.E.2d 109, 148, *cert. denied*, — U.S. —, — L. Ed. 2d —, 71 U.S.L.W. 3237 (2002). This assignment of error is overruled.

[8] Defendant next argues that the trial court erred when it failed to determine that defendant consented to his attorneys' concession that he was guilty after he abandoned his insanity defense. 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), we held that a defendant receives ineffective assistance of counsel *per se* when counsel concedes the defendant's guilt to the offense or a lesser included offense without the defendant's consent. The record in the case at bar shows that prior to trial defendant executed a written waiver on 20 February 2001, which stated:

> I Kyle Berry have been told the risks involved with my defense of insanity to the charge of murder. I know such a defense admits many elements of the offense such as: my identification; my presence at the scene; my connection to co-defendants[;] and my possession of a weapon.
>
> I authorize my attorneys to proceed with this defense and conduct their questioning accordingly.

This waiver was signed by defendant and a witness.

Defendant was questioned by the court at the beginning of trial.

> [THE COURT]: Mr. Berry, I understand from your attorneys that in their openings and closings, you know, there may be statements made by them which could constitute an admission as to your participation in some of the events that are on trial here. I further understand that this [is] a trial strategy.
>
> Now, has this been discussed with you?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right. Now, do you understand what they're wanting to do, and do you concur in their assessment of trial strategy and in their actions?
>
> THE DEFENDANT: Yes, sir. They explained that to me.
>
> THE COURT: Okay. I think that takes care of that.

Shortly thereafter, defendant gave his opening statement in which he admitted through counsel that he was present at Fetter's murder and that he may have participated, but that because he was not legally sane, he was innocent. "He is to blame, as are three other people, but he is not guilty."

Two days later, defendant's counsel raised an objection to the court that they had just received from the prosecutor a recording of a police interview with an individual named Michael Walker and that the interview was not consistent with any statement that had been provided during pretrial discovery. In his recorded statement, Walker said that Jon Malonee stabbed Fetter in the head. Defendant represented to the court:

> Michael Walker's interview sounds nothing like any statements that I have seen in the discovery. Among other things, Michael Walker states that Jon Malonee stabbed [the victim] in the head, which is consistent, in part, with a video statement that our client gave to the police in February of '99. Now, had we been in possession of Michael Walker's tape-recorded statement, I am not real sure that we would have entered a notice of our intent to plead not guilty by reason of insanity, and I am not real sure that we would have submitted our client to an interview by a state psychiatrist up at Dorothea Dix and had him give the statement that he gave up there.

The court denied defendant's motions for sanctions and for a mistrial. In his closing argument at the guilt-innocence phase, defendant again argued through counsel that while the State may have proved an attempt to commit first-degree murder, he should be found not guilty or, at most, guilty of second-degree murder.

Although the parties dispute the exact nature of defendant's concessions and whether any discovery violation actually occurred, we believe the resolution of this issue may be found in the trial court's inquiry to defendant at the opening of the trial. This inquiry, quoted in full above, was general, and defendant did not expressly or impliedly condition his consent to acknowledge aspects of guilt upon presentation of an insanity defense. Neither *Harbison* nor any subsequent case specifies a particular procedure that the trial court must invariably follow when confronted with a defendant's concession, *see State v. McDowell*, 329 N.C. 363, 387, 407 S.E.2d 200, 213 (1991), although we have urged "both the bar and the trial bench to be diligent in making a full record of a defendant's consent when a *Harbison* issue arises at trial," *State v. House*, 340 N.C. 187, 197, 456 S.E.2d 292, 297 (1995). While the court's inquiry was brief, it was adequate to establish that defendant consented to the admissions made later by counsel during trial. This Court's opinion in *State v. Morganherring*, 350 N.C. 701, 517 S.E.2d 622 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 322 (2000), is not to the contrary. In *Morganherring*, the defendant submitted pretrial notice of intent to plead not guilty by reason of insanity, but formally withdrew that notice on the first day of trial and relied instead on a plea of not guilty as to murder but guilty as to the sex offenses. The defendant memorialized this change of strategy in a written *Harbison* statement. Although the written statement referred to an intent to rely on an insanity defense, counsel explained to the court that the statement was prepared before the insanity defense notice was withdrawn but that the defendant nevertheless consented to the admissions of fact to the jury. The trial court questioned the defendant, then allowed the trial to proceed. The defendant was convicted and argued on appeal that he had not understood that abandoning his insanity defense would allow the felony-murder rule to come into play to his detriment. This Court remanded the case for an evidentiary hearing, *State v. Morganherring*, 347 N.C. 393, 494 S.E.2d 399 (1997), then affirmed the trial court's finding that the defendant knowingly consented to the change of strategy and to admission of the facts alleged in the indictments, *State v. Morganherring*, 350 N.C. at 718-19, 517 S.E.2d at 632-33.

In contrast, defendant in the case at bar never formally withdrew his insanity plea and consequently never gave the trial court notice of the change of strategy. Moreover, defense counsel's words to the trial court were, at best, ambiguous in that counsel stated that he was "not real sure" defendant would have proceeded with an insanity defense if Walker's taped statement had been provided to him earlier. In the absence of notice by defendant that his *Harbison* waiver was conditioned upon maintaining his insanity defense, the trial court was justified in assuming that the waiver remained valid throughout trial. This assignment of error is overruled.

[9] Defendant's next assignment of error is related to the preceding one. He contends that the trial court erred in failing to impose meaningful sanctions when the prosecution delayed disclosure of information pursuant to *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). Defendant's position is that the prosecutor failed timely to reveal that Michael Walker had told investigators that Malonee had stabbed the victim. Defendant claims that he did not receive this information until after he was committed to a defense strategy based on insanity and that if the disclosure had been timely, he would have pursued a different defense.

The record indicates that Walker made a statement or statements in which he indicated that Malonee told him that he (Malonee) had stabbed a woman. The State invites the attention of this Court to the exhibits pertaining to this dispute, but no exhibits have been submitted to this Court, nor does the record suggest that the exhibits were introduced into evidence. Accordingly, we undertake our review on the basis of representations made by counsel. After the trial was under way, and after defendant had forecast to the jury that he would present an insanity defense, the prosecutor provided to defendant a copy of Walker's statement. Defendant advised the trial court that Walker's statement was new, that it was consistent with a statement defendant had earlier made to police, and that

> had we been in possession of Michael Walker's tape-recorded statement, I am not real sure that we would have entered notice of our intent to plead not guilty by reason of insanity, and I am not real sure that we would have submitted our client to an interview by a state psychiatrist up at Dorothea Dix and had him give the statement that he gave up there.

The prosecutor responded by stating:

> I'm not exactly clear whether [defense counsel] is saying Walker said Malonee stabbed [the victim] or the Maves woman. This is what we gave them, a statement from Jon Malonee, Jon had told him this. "Jon said he was stabbing her, and I don't know if that's Maves or [the victim], and it was like stabbing a watermelon. Jon said he had blood all over him. Jon said [defendant] was rubbing her on the chest and in between her legs. Jon said he and [defendant] took turns having their way with her and put her to sleep." The statement from Walker says Jon is not—Jon stabbed the girl at the beach. He is not sure if Jon stabbed the girl at the beach or [the victim], in reference to the watermelon. Jon told Mr. Walker that Bobby had spoke to a girl and so on and so forth, and that's what they've got.[2]

Defendant moved for sanctions and for a mistrial; both motions were denied.

It appears from the comments quoted above and from other remarks of counsel elsewhere in the record that the prosecutor provided defendant with the written statements of Malonee from which Walker's name had been redacted. In his statement, Malonee apparently reported that he had stabbed a woman. During trial, the prosecutor additionally provided defendant with Walker's own statement in the form of a videotape and audiotapes, which corroborated Malonee. After considering argument of counsel, the trial court reviewed Walker's material in chambers and reported:

> The first thing I need to address is defendant's motions under Brady. Yesterday, I conducted an in camera examination of the Walker videotape—well, really three specific audiotapes. With respect to the Walker video, it appears that Mr. Walker was talking about what a codefendant told him. The defendant was not present. However, after looking at all of it, there was nothing inconsistent with the evidence that has already been presented on the [victim's] case, and it was not, in my opinion, exculpatory, as to the [victim's] case; consequently, I find no violation of the Brady rules. With respect to the audiotapes, virtually the very same thing. The tapes basically were a rehash of what we've heard in court. Any new material, or material that was not in court or presented in court, does not rise to the level of exculpatory evidence as to the [victim's] case.

2. We have duplicated the punctuation as set out in the trial transcript. We observe from the context that alternative punctuation might more accurately reflect those portions of the prosecutor's words where he was quoting Walker's statement.

Accordingly, we conclude that defendant received the substance of Walker's statement when the prosecutor provided through discovery the statement of Malonee in which Malonee said that he had stabbed a female. We now determine whether this sequence of events constitutes a *Brady* violation.

The prosecution is required to turn over to a defendant favorable evidence that is material to the guilt or punishment of the defendant. *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215. Evidence is considered "material" if there is a "reasonable probability" of a different result had the evidence been disclosed. *Kyles v. Whitley*, 514 U.S. 419, 434, 131 L. Ed. 2d 490, 506 (1995). Although a *Brady* violation may not constitute error if the favorable evidence is provided in time for the defendant to make effective use of it, *State v. Call*, 349 N.C. 382, 399, 508 S.E.2d 496, 507 (1998), defendant here points out that opening statements had been made and the trial was under way when he was given Walker's statement, far too late to retreat from his original trial strategy.

Our review of the record satisfies us that no *Brady* violation occurred. During the course of pretrial discovery, defendant was provided Malonee's statement to the effect that he had stabbed a woman. Thus, defendant was aware of the substance of this statement in time to develop his trial strategy. *See State v. Strickland*, 346 N.C. 443, 456-57, 488 S.E.2d 194, 202 (1997), *cert. denied*, 522 U.S. 1078, 139 L. Ed. 2d 757 (1998). Walker's statement did no more than corroborate that Malonee told Walker the same thing he told police. Moreover, the evidence established that several individuals were involved in the attack on Fetter. Malonee's statement that he stabbed a woman is not inconsistent with defendant's participation in Fetter's murder. We do not perceive any reasonable probability of a different result if defendant had been provided this corroborating evidence earlier in the proceedings. This assignment of error is overruled.

[10] Defendant argues that the trial court erred in failing to sustain his objections to various portions of the prosecutor's closing argument in the guilt-innocence phase. We shall deal with these objections *seriatim*.

First, defendant contends that the prosecutor improperly argued about the impact of the crime on the victim and her family. His position is that this evidence should not have been allowed because the only issue before the jury was the defendant's state of mind at the time of the murder. The prosecutor argued as follows:

> I want you to look at that picture because, for all practical purposes, that's all that Margie and Carl Fetter have to remind them of Theresa, the pictures. Of course, the pictures will remind them of how it was taken, but the memory fades. The pictures will be there, the pictures of her smile, like that one there; the pictures of her frowning; the pictures when she wouldn't frown or smile because she had glasses—excuse me, braces; the pictures of her laughing with the family, doing this, doing that; the pictures that show a little girl that was 16 years old when she was killed; pictures that showed potential and promise and a future. She was 16. How many more years would she have lived? . . . Eighty something. Let's say 86, because I can subtract 16 from 80 pretty [well]. It's around 70. Seventy years, that's a lifetime in . . . human history where 70 years was not just one but two lifetimes. . . . Thirty-five years to be born and be raised and married and have children and grandchildren, and that's what Theresa was going to do. She was going to get—she was going to go out . . . [and] find her a boyfriend, maybe a boyfriend more like Jason Santana than the last one she had, and she was going to have children, like—
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: —like the ones that—the other grandchildren these folks have, more grandchildren for Carl and Margie to spoil and, if lucky, she would have had grandchildren of her own.

Because defendant made a timely objection:

> We must determine whether the trial court erred in overruling [the] objection.
>
> > We have consistently held that counsel must be allowed wide latitude in the argument of hotly contested cases. He may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his side of the case. Whether counsel abuses this privilege is a matter ordinarily left to the sound discretion of the trial judge, and we will not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury. . . . It is the duty of the trial judge, upon objection, to censor remarks not warranted by the evidence or the law and,

> in cases of gross impropriety, the court may properly intervene, *ex mero motu*.

State v. Covington, 290 N.C. 313, 327-28, 226 S.E.2d 629, 640 (1976) (citations omitted). In making our determination, we examine the full context in which the statements were made. *State v. Lloyd*, 354 N.C. 76, 113-14, 552 S.E.2d 596, 622-23 (2001).

State v. Barden, 356 N.C. 316, —, — S.E.2d —, —, 2002 WL 31628181, at *18 (Nov. 22, 2002) (No. 96A01). The comments relating to the victim's age and expression are well within the scope of appropriate argument, as is the fact that her parents are left only with photographs and memories. *See, e.g., State v. Nicholson*, 355 N.C. at 39-40, 558 S.E.2d at 136 (victim-impact testimony may include evidence of effect of victim's death on members of her family). Although the prosecutor's arguments that the victim might have married and had children was speculative, it was not excessive. The life the prosecutor posited for the victim if she had lived was a conventional one. Even assuming *arguendo* that this part of the argument was improper, we do not believe that the trial court abused its judgment in overruling defendant's objection.

[11] Next, defendant argues that one of the prosecutors improperly vouched for another prosecutor. This issue arose when the prosecutor responded to the portion of defendant's closing argument that challenged witness Venth's motive for testifying. Defense counsel argued:

> Paul Venth is the guy that says that he was testifying out of the goodness of his heart, yet the state introduced a document that shows that he had an assault case dismissed. He got a plea bargain. . . .
>
> You remember what Mr. Venth said. Oh, I'm doing this out of the goodness of my heart. But Hovie Pope, who is the arresting officer in Mr. Venth's case, as well, Hovie talked about possibly helping [Venth] out on an attempted robbery charge up in Suffolk County, New York.

The prosecutor responded by discussing Venth's written plea agreement. Phyliss Gorham, the assistant district attorney who negotiated Venth's plea agreement, was in the courtroom watching but had not been a participant in defendant's trial. The prosecutor pointed her out to the jury and said:

[PROSECUTOR]: You can talk about how I didn't do something, you can talk about how Cindy Locklear [co-prosecutor in the instant trial] didn't do something, but Phyllis Gorham is not going to put her name to something—

[DEFENSE COUNSEL]: Objection. Phyllis Gorham is not in evidence in this trial.

THE COURT: Overruled, overruled.

[PROSECUTOR]: And that's what this document says. Not only is Phyllis Gorham's name there, but Geoffrey Hosford, [Venth's] attorney's name, is there, and that man swore to it. There is no other plea bargain.

Although the prosecutor skirted perilously close to vouching for Gorham, defendant's objection, even though overruled, caused him to abandon that argument. Accordingly, we see no prejudicial error in the court's failure to sustain defendant's objection.

[12] Defendant next objects to suggestions by the prosecutor that Maves was raped. The record reflects that, during trial, the prosecution called Surles as a witness and asked him what defendant had said to him about Maves. After the court gave a limiting instruction explaining the purposes for which evidence of the Maves killing was being offered, the prosecutor asked Surles what defendant had told him. Surles answered:

[Defendant] told me about the first murder, that he was down at the beach and he was walking with some friends of his and he was—and he had saw a woman, and she was upset, that he had talked to her on the beach, had sex with her, and then she was, as the term goes, freaking out, and he stabbed her in the head with a bottle.

No mention of rape was made until defendant cross-examined Surles:

Q. Now, [defendant] told you that this woman that was killed at Wrightsville Beach, him and Jon raped, is that correct?

A. That's correct.

Q. You've learned a lot about this case since you became involved in it, haven't you?

A. Bits and pieces, yes.

Q. You've learned, haven't you, that there's absolutely no evidence that the girl that was found washed up at Wrightsville Beach had been raped, aren't you?

[PROSECUTOR]: Objection.

THE COURT: Overruled, if he knows. If you know, answer it; if you don't, tell him.

THE WITNESS: No, I do not.

Q. In any event, he said they raped the girl, is that correct?

A. That's correct.

The question whether Maves had been raped arose again during the prosecutor's closing argument when he said:

> He said, oh, she wasn't raped. David Surles says she wasn't raped. . . . But look at this. Lisa's panties. Again, information that no one would have had. He wasn't charged with any murder of Lisa Maves. There was no information that Lisa Maves's panties were torn. There also wasn't a rape kit done. We don't know if she was raped or not. The fact of the matter is, those panties were ripped and her short[s were] torn off her.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: Who knew that? Why would he have said rape? Maybe because somebody tried to rape her. Maybe because that's what got her mad—that's what got him mad . . . . Your [sic] heard Paul Venth, he said he killed her because something made him mad. He tried—ripped the shirt off, ripped her panties. She didn't want to be raped, so he killed her.

The prosecutor's argument was apparently triggered by defendant's cross-examination of Surles. The focus of the prosecutor's argument is less that Maves was raped than that Surles had information that was not known to the public and could only have been acquired by someone familiar with the event. In addition, defendant told Surles that he killed Maves because she "freaked out." The prosecutor's argument represents an effort to make sense of this statement by logically inferring a motive for the Maves murder. Such an inference is permissible when not an appeal to passion. *State v. Jones*, 355 N.C. at 135, 558 S.E.2d at 108.

[13] Finally, defendant argues that the prosecutor improperly appealed to the prejudices of the jury when he argued:

> Folks, right now you know he had his hand on that knife. Right now you know he put that knife in her skull. Right now you know he stabbed her eight times. And if that ain't an attempt to kill, if that ain't first degree murder, then cut him loose. Let him back out at Wrightsville Beach, let him back out at South College Road. If that's not first degree murder, let him go, but I'll tell you one thing, if you're a woman, if you're alone, if you're defenseless, don't be where he is.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: If you don't know now he's a murderer, then cut him loose. The law says if you are convinced, beyond a reasonable doubt, you will know. And if you know right now, you don't need to talk about it any more.

The State concedes that it cannot find any authority to suggest that this argument, to the effect that an acquittal would put others at risk, was proper. We agree that the court erred in overruling defendant's objection. However, in light of the evidence of defendant's guilt, the fact that the improper comment consisted of but a single sentence, and the prosecutor's immediate abandonment of that line of argument, we do not hold the error to be prejudicial. This assignment of error is overruled.

SENTENCING ISSUES

[14] Defendant argues that the trial court's instruction as to the (e)(11) aggravating circumstance was clearly erroneous. N.C.G.S. § 15A-2000(e) provides in pertinent part that

> [a]ggravating circumstances which may be considered shall be limited to the following:
>
> . . . .
>
> (11) 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). Here, the court instructed the jury as follows:

> The second possible aggravating circumstance which you may consider is number two. Was this murder part of a course of conduct in which the defendant engaged, and did that course of conduct include the commission by the defendant of other crimes of violence against another person or persons? If you find from the evidence, and beyond a reasonable doubt, that the defendant, together with others, murdered Lisa Maves, 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. If you do not so find, or have a reasonable doubt as to one or more of these things, you would not find this aggravating circumstance and would so indicate by having your foreperson write "no" in that space.

This instruction is erroneous because it allowed the jury to find the aggravating circumstance without also finding that the murder of Fetter was part of a course of conduct that included the earlier murder of Maves. The mere fact that one murder followed the other does not establish a course of conduct. Consequently, the instruction improperly relieved the burden on the State to prove each and every element of the (e)(11) aggravating circumstance. *See State v. Nobles*, 350 N.C. 483, 516, 515 S.E.2d 885, 905 (1999).

Because defendant did not object to this instruction, 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." *State v. Holden*, 346 N.C. 404, 435, 488 S.E.2d 514, 531 (1997), *cert. denied*, 522 U.S. 1126, 140 L. Ed. 2d 132 (1998). We have noted that events are more likely to be part of a course of conduct if they are close together in time. *State v. Cummings*, 332 N.C. 487, 510, 422 S.E.2d 692, 705 (1992). Here, the Fetter murder was committed seven weeks after the Maves murder. The two murders were similar in some respects but different in others. The State presented evidence that defendant's motive for killing Fetter was to silence her about the Maves murder. Although we have determined above that the evidence of the Maves murder was properly admitted, we remain advertent to the possibility that knowledge of this earlier murder could have an inflammatory effect on the jury. The trial court's cautionary instruc-

tions when evidence of the Maves murder was admitted during the guilt-innocence phase of the trial prevented that evidence from being unfairly prejudicial. By contrast, the instruction given during the sentencing proceeding allowed the jury to find the course of conduct aggravating circumstance solely on the basis that defendant had committed another murder, effectively negating the cautionary instructions given during the guilt-innocence phase. Because the sentencing instruction allowed the jury to disregard both the potentially attenuating effects of the passage of time on an alleged course of conduct and the differences between the two murders, while relieving the burden on the State of proving the required link between the two murders, we are satisfied that the instruction constituted plain error. Accordingly, we reverse defendant's sentence of death and remand to the trial court for a new sentencing proceeding.

Defendant has raised a number of additional issues related to sentencing. We address the single issue that we believe may recur in the same form at the resentencing hearing.

[15] Defendant argues that the trial court erred in instructing the jury as to both aggravating circumstance (e)(4), "[t]he capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody," N.C.G.S. § 15A-2000(e)(4), and aggravating circumstance (e)(11), "[t]he murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons," N.C.G.S. § 15A-2000(e)(11). Although we have held that a jury may not find two aggravating circumstances based upon the same evidence, *State v. Goodman*, 298 N.C. 1, 28-29, 257 S.E.2d 569, 587 (1979), we have also held that overlapping evidence may support more than one aggravating circumstance when there is also separate substantial evidence to support each circumstance, *State v. Parker*, 350 N.C. 411, 442, 516 S.E.2d 106, 126-27 (1999), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000).

First, we must determine whether sufficient evidence existed to support submission of each aggravating circumstance to the jury. Defendant's own statements provided sufficient evidence to support the (e)(4) circumstance. Although the murders here were several weeks apart, the (e)(11) circumstance was adequately supported by evidence that each victim had been stabbed in the head, that defendant had made efforts to hide each victim's body, and that defendant had participated with others in each murder. *See State v. Cummings*,

346 N.C. 291, 329, 488 S.E.2d 550, 572 (1997) ("In determining whether the evidence tends to show that another crime and the crime for which defendant is being sentenced were part of a course of conduct, the trial court must consider a number of factors, including the temporal proximity of the events to one another, a recurrent *modus operandi*, and motivation by the same reasons."), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998).

We must next determine whether this evidence is sufficiently substantial and separate to support submission of each aggravating circumstance. We note that the (e)(4) circumstance focuses on defendant's motive for killing Fetter, while the (e)(11) circumstance required the jury to review the objective facts of the two murders to determine whether the offenses constituted a course of conduct. This Court has held that a defendant's motive appropriately may be considered at sentencing. *State v. Oliver*, 302 N.C. 28, 62, 274 S.E.2d 183, 204 (1981). In *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981), we cited *Oliver* when a murder defendant argued that a trial court improperly submitted the two aggravating circumstances that the murder was committed for the purpose of resisting lawful arrest, N.C.G.S. § 15A-2000(e)(4), and that the murder was committed against a law enforcement officer who was engaged in the performance of his lawful duties, N.C.G.S. § 15A-2000(e)(8). *State v. Hutchins*, 303 N.C. at 354-55, 279 S.E.2d at 808-09.

> Of the two aggravating circumstances challenged by defendant here 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. There was no error in submitting both of these aggravating circumstances to the jury.

Id. at 355, 279 S.E.2d at 809.

We believe that *Hutchins* controls our analysis of this issue. As in *Hutchins*, each circumstance here was offered for a different purpose, and although the evidence supporting the circumstances does

overlap to a degree, nevertheless the State presented separate and substantial evidence to support each circumstance individually. This assignment of error is overruled.

The remaining sentencing issues argued by defendant pertain to the particular instructions provided to the sentencing jury. Because we do not foresee that these particular issues will arise in the same form on resentencing, we do not believe it necessary to address these issues in this opinion.

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

NO PREJUDICIAL ERROR IN GUILT-INNOCENCE PHASE; DEATH SENTENCE VACATED; REMANDED FOR NEW CAPITAL SENTENCING PROCEEDING.

STATE OF NORTH CAROLINA v. GEORGE MALCOLM CARROLL

No. 587A01

(Filed 20 December 2002)

1. **Criminal Law— defendant's decision not to testify—court's inquiry**

A capital first-degree murder defendant waived his right to testify, and the trial court's inquiry was adequate, where the court's inquiry sufficiently determined that defendant was intellectually capable of understanding his right to testify, had communicated with his attorneys, and had agreed with his attorneys that it was not in his best interest to testify.

2. **Homicide— felony murder—underlying assault—death resulting from separate strangulation—no merger**

The trial court did not err by submitting felony murder to the jury based on a felonious assault where defendant contended that the assault merged with the killing, but the victim died from a separate strangulation and not as a result of the assault.

3. Criminal Law— prosecutor's argument—defendant's expert testimony—ability to form intent

The trial court did not abuse its discretion in a capital first-degree murder prosecution by not censuring the prosecutor's closing arguments about an expert opinion as to whether defendant was capable of premeditation and deliberation. The evidence in the record supports the arguments and the prosecutor merely fulfilled his duty to present the State's case with vigor.

4. Criminal Law— diminished capacity—instructions

There was no plain error in a capital first-degree murder prosecution where defendant contended that the court's instructions on diminished capacity were inaccurate and misleading in that the instructions grouped intoxication, drug use, and lack of mental capacity together and used the term "lack of capacity" rather than "impaired capacity" or "diminished capacity." The pattern jury instruction given by the court made a finding of diminished capacity more likely in a single instruction and the phrase "lack of mental capacity" has been approved in a prior opinion and was used by defendant in his closing argument. Moreover, the State's evidence of premeditation and deliberation was overwhelming.

5. Criminal Law— voluntary intoxication—instructions—irrelevant to felony murder

There was no error in a capital first-degree murder prosecution where defendant contended that the trial court intimated an opinion during its instruction on voluntary intoxication by instructing the jury that a specific intent to kill is not required for felony murder or second-degree murder.

6. Evidence— hearsay—murder victim's statements to friend—state of mind

A murder victim's statements to a friend a few days before the murder about difficulties in her relationship with defendant were admissible to show the victim's state of mind rather than as a recitation of facts. Also, the limiting instruction was sufficient to prevent the jury from viewing the evidence as proof of defendant's bad character.

7. Jury— polling—two theories of first-degree murder

The trial court did not err by failing to poll each juror individually in the guilt phase of a first-degree murder prosecution to

determine if the verdict was unanimous as to each distinct theory of first-degree murder where the trial court's instructions made the jury fully aware of the requirement of a unanimous verdict on each theory of first-degree murder; the transcript unquestionably indicates that the jury unanimously found defendant guilty based on both malice, premeditation and deliberation and under the felony murder rule; the verdict sheet clearly represented the unanimous verdict based on both theories of first-degree murder; and, following the clerk's announcement that the jury unanimously found defendant guilty of first-degree murder on the basis of malice, premeditation and deliberation and under the felony murder rule, each juror individually affirmed that this was his or her verdict. It would strain reason to conclude that the jury's verdict was not unanimously based on both theories of first-degree murder.

8. Sentencing— capital—aggravating circumstances—prior violent felonies—Florida records

The trial court in a capital sentencing hearing properly admitted Florida records of a prior violent felony, and the evidence was sufficient for submission of the prior violent felony aggravating circumstance, where a court clerk testified that the Florida documents were signed and verified in a manner verifying their authenticity, and an expert testified that defendant's fingerprints matched the fingerprints of the defendant in the Florida case. N.C.G.S. § 15A-200(e)(3).

9. Sentencing— capital—nonstatutory mitigating circumstances—offer to plead guilty

The trial court did not err in a capital sentencing proceeding by not allowing defendant to offer evidence of the nonstatutory mitigating circumstance that he had accepted responsibility for the killing by offering to plead guilty to second-degree murder. The evidence was conflicting as to defendant's willingness to plead guilty to second-degree murder; assuming his willingness to plead guilty, this is evidence only of defendant's willingness to lessen his exposure to the death penalty or a life sentence. Finally, the court submitted the circumstances that defendant admitted involvement to law enforcement officers, provided valuable information, and expressed remorse.

10. Jury— polling of foreman on death penalty—sufficient

The trial court sufficiently polled the jury foreman to ascertain whether he agreed with a death sentence where the foreman signed the sentencing recommendation form; the clerk read the answers to the issues and asked the foreman if this was the unanimous recommendation of the jury; the clerk then asked the foreman if the recommendation was his own; and, although the clerk's questioning did not include a reference to the death penalty, Issue Four asks if the aggravating circumstances are sufficient to warrant the death penalty.

11. Sentencing— capital—death penalty proportionate

A death sentence was not disproportionate where the evidence fully supported the aggravating circumstances, there was no indication that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and this case was not substantially similar to any case in which the death penalty was found disproportionate. Defendant slapped the victim and struck her on the leg and face with a machete, which cut her head and caused her to bleed uncontrollably; the victim screamed and defendant carried her to a bed, where he put a bedsheet in her mouth and put his hands on her throat; and he attempted to burn the body and the home after she died.

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 29 May 2001 in Superior Court, Cumberland County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 16 October 2002.

Roy Cooper, Attorney General, by Gail E. Dawson, Special Deputy Attorney General, for the State.

Staples Hughes, Appellate Defender, by Constance E. Widenhouse, Assistant Appellate Defender, for defendant-appellant.

WAINWRIGHT, Justice.

On 26 March 2000, George Malcolm Carroll (defendant) was charged in a superseding indictment with one count of first-degree arson and with the first-degree murder of his live-in girlfriend, Debra Whitted; this indictment was further amended on 8 May 2001 in open

court. Defendant was also indicted on 26 March 2001 as an habitual felon. Defendant was tried capitally before a jury at the 14 May 2001 session of Superior Court, Cumberland County. At the conclusion of the State's evidence, the trial court dismissed the charges of first-degree arson and for habitual felon status. 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. The trial court entered judgment in accordance with that recommendation.

Evidence presented at trial showed that Whitted was retired from the military and lived on disability. She and defendant had been living together on and off for about a year and a half in a trailer at 239 Eleanor Avenue in Fayetteville, North Carolina. Whitted's best friend, Amanda McNeil, visited her regularly. On Monday, 15 November 1999, Whitted told McNeil that she wanted defendant out of her trailer. Whitted also complained of back problems to McNeil, and McNeil agreed to take her to the hospital the next morning.

McNeil arrived at Whitted's trailer the next morning, Tuesday, 16 November 1999, but found the door locked. After knocking on the door and getting no response, McNeil left. McNeil returned to the trailer at a later time and saw defendant walking out the door. She asked defendant where Whitted was, and defendant told her that she had gone to the hospital. Defendant never looked directly at McNeil when answering her and appeared to be "high" and acting "like a wild man."

Around 10:00 a.m. on 17 November 1999, defendant purchased seventy-seven cents' worth of gas from the Clinton Road Amoco. He told the attendant that he needed gas to cut the grass.

Whitted's niece, Tanisha Whitted, stopped by Whitted's trailer on Wednesday morning, 17 November 1999, but was unable to get anyone to come to the door. Tanisha returned to the trailer again after 11:00 a.m. and discovered that the trailer was on fire. Tanisha called 911 from a neighbor's house. Several neighbors tried to determine if Whitted was inside the trailer. However, because the front door was blocked by a stereo cabinet and the smoke from the fire was too heavy, they made it only a few steps inside before having to retreat.

The Fayetteville Fire Department responded to the call and discovered that two separate fires were burning, one small fire in the

den and a second, larger fire in the bedroom. Whitted's partially charred body was discovered on the bed. Evidence at the scene indicated that an accelerant had been used to start the fires. A machete was found on the living room floor.

Investigator Ralph Clinkscales of the Fayetteville Police Department arrived at the scene and began trying to locate defendant. At approximately 7:30 p.m. on 17 November, Clinkscales received a page from defendant's mother, indicating that defendant would turn himself in at a church on the corner of Monagan and Cumberland Streets. Clinkscales met with defendant at the church. Defendant told police, "Here I am. Please don't hurt me. I did not mean to hurt her. I know I'm in a lot of trouble for what I did." Defendant then began crying uncontrollably. Officers arrested defendant and took him to the Police Department.

Clinkscales and his partner read defendant his *Miranda* rights. Defendant signed a waiver of his rights and voluntarily began telling the officers what had happened.

According to defendant, on Monday, 15 November 1999, defendant and Whitted were drinking gin and beer when they got into an argument around 11:30 p.m. Defendant slapped Whitted with his hand and she began fighting him. Defendant picked up a machete, slapped Whitted on her leg with the flat side of the machete, and hit her in the face. Whitted moved to avoid another strike and the machete struck her in the back of the head. Defendant stated that "[b]lood poured out in a steady stream." Defendant placed Whitted on the couch, and Whitted asked him not to leave her. Blood started to flow from Whitted's nose and mouth and she started to scream. Defendant put his hand over Whitted's mouth and told her to be quiet.

Defendant carried Whitted into the bedroom and tried to quiet her screams by putting his hand on her neck and by putting a sheet around her neck. After a long time, Whitted became quiet and still. Defendant placed her in the bed and covered her with a blanket. Defendant began to think about how to get Whitted some help without being there, but he fell asleep. When defendant awoke, he realized that Whitted was dead.

Defendant cleaned himself up and left the trailer. He returned that evening and fell asleep on the couch. When he woke up, he decided to burn the trailer with Whitted's body in it. Defendant purchased gasoline and poured it over the victim, throughout the bed-

room, and in the living room. After first changing his clothes, defendant lit a piece of newspaper and set fire to the bedroom and then the living room. Defendant exited through the front door.

Associate Chief Medical Examiner Robert Thompson performed an autopsy on Whitted's body on 19 November 1999. Dr. Thompson opined that the cause of death was ligature strangulation, or strangulation using a rope or sheet wrapped around the neck and pulled taut. The victim also had a cut on the back of her head that pierced the scalp and cut into the bone. Dr. Thompson determined that this wound was not fatal. A toxicology report showed less than five percent saturation of carbon monoxide, an indication that Whitted was not alive at the time of the fire. The report also indicated no trace of alcohol, cocaine, or morphine.

GUILT-INNOCENCE PHASE

[1] In his first assignment of error, defendant contends that the trial court erred by concluding that defendant had waived his right to testify. Defendant asserts he did not knowingly waive his right to testify because the trial court's inquiry of him regarding his right to testify was inadequate.

Following closing arguments at the guilt-innocence phase of the trial, the trial court took a brief recess before instructing the jury. At the end of the recess, the trial court questioned defendant as follows:

> THE COURT: Before the jurors come back in, I need to make an inquiry of your client. Madam Clerk, would you swear the defendant.
>
> GEORGE MALCOLM CARROLL, having been first duly sworn, was examined and testified as follows:
>
> THE COURT: Mr. Carroll, I need to ask you a couple questions and you can consult with your attorneys before you answer them if you desire.
>
> THE DEFENDANT: Yes.
>
> THE COURT: First of all, how old are you?
>
> THE DEFENDANT: 40.
>
> THE COURT: How much education have you had?
>
> THE DEFENDANT: 14 years education.

THE COURT: Have you consulted with your attorneys concerning your right to testify in your own behalf?

THE DEFENDANT: Yes.

THE COURT: And have you decided not to testify in your own behalf?

THE DEFENDANT: Yeah, I think we came to that agreement, sir.

THE COURT: Do you feel that it is in your best interest not to testify in your own behalf?

THE DEFENDANT: I don't know, sir.

THE COURT: Based on your conversations with your attorneys, do you feel like it is in your best interest not to testify?

THE DEFENDANT: Well, I—well, at this point, no, sir, it's not to my best interest.

THE COURT: Okay. And you understand your full right to testify in any procedure?

THE DEFENDANT: Yes, I do, sir.

THE COURT: Thank you very much. You may have a seat. The Court finds the defendant knowingly, voluntarily, understandingly waived his right to testify on his own behalf at this stage in the proceedings, feels that it's in his best interest not to testify.

Defendant contends that his responses to the trial court's questions demonstrate he was unsure that it was in his best interest not to testify. Defendant therefore contends that the trial court was required to offer defendant the opportunity to testify or, at a minimum, to question him further. Defendant concedes that we have never required trial courts to inform a defendant of his right not to testify and to make an inquiry on the record indicating that any waiver of this right was knowing and voluntary. Nonetheless, defendant cites numerous cases from other jurisdictions as persuasive authority for us to adopt such a rule.

In the present case, the trial court exercised an abundance of caution in determining that defendant was aware of his right to testify. The court's inquiry sufficiently determined that defendant was intellectually capable of understanding his right to testify, had com-

municated with his attorneys, and had agreed with his attorneys that it was not in his best interest to testify. Defendant's later decision not to testify during the sentencing phase further supports the trial court's conclusion that defendant waived his right to testify on his own behalf. We therefore conclude that defendant waived his right to testify. We find no error in the trial court's actions.

This assignment of error is overruled.

[2] In his next two assignments of error, defendant argues that the trial court erred by submitting first-degree felony murder to the jury based on felonious assault as the underlying felony. According to defendant, because the assault on the victim was actually part of a continuous assault leading to her death, the assault was an integral part of the homicide and therefore merged with the killing. Defendant thus argues that the trial court erred in overruling defense counsel's objections to the submission of felony murder.

The trial court instructed the jurors as follows:

> I further charge that for you to find the defendant guilty of first degree murder under the first degree felony murder rule, the state must prove three things beyond a reasonable doubt. First, that the defendant committed assault with a deadly weapon inflicting serious injury. Assault with a deadly weapon inflicting serious injury is the intentional assaulting of a person by striking the person with a deadly weapon, a machete, which is a deadly weapon, inflicting serious injury upon that person.
>
> Second, that while committing assault with a deadly weapon inflicting serious injury the defendant killed the victim. A killing is committed in the perpetration or attempted perpetration for the 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.
>
> And third, that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred.

Defendant argues that the use of felonious assault as the underlying felony for his felony murder conviction is prohibited by the felony murder "merger doctrine" and results in an unjust appli-

cation of the felony murder statute, N.C.G.S. § 14-17 (2001). Defendant contends that where a felonious assault culminates in or is an integral part of the homicide, the assault necessarily merges with the homicide and cannot constitute the underlying felony for a felony murder conviction. In support of his position, defendant cites the following footnote from *State v. Jones*:

> Although this Court has expressly disavowed the so-called "merger doctrine" in felony murder cases involving a felonious assault on one victim that results in the death of another victim, *see, e.g., State v. Abraham*, 338 N.C. 315, 451 S.E.2d 131 (1994), cases involving a single assault victim who dies of his injuries have never been similarly constrained. In such cases, the assault on the victim cannot be used as an underlying felony for purposes of the felony murder rule. Otherwise, virtually all felonious assaults on a single victim that result in his or her death would be first-degree murders via felony murder, thereby negating lesser homicide charges such as second-degree murder and manslaughter.

353 N.C. 159, 170 n.3, 538 S.E.2d 917, 926 n.3 (2000).

Defendant argues that he engaged in one continuous assault on the victim that culminated in her death because the defendant's initial act of striking the victim with a machete cannot exist separately and independently from the acts causing Whitted's death. Defendant therefore contends that under *State v. Jones*, the merger doctrine would operate to prohibit a conviction for felony murder.

Defendant has misconstrued the language of *State v. Jones*. *Jones* precluded the use of assault as the underlying felony for a felony murder conviction only when there is a single assault victim who *dies as a result of the injuries incurred during the assault. See id.* The victim in defendant's case, however, did not die as a result of the assault with the machete. The blow to her head was not fatal. Rather, the cause of death was strangulation. As such, the assault was a separate offense from the murder. Accordingly, the trial court did not err in submitting a felony murder instruction to the jury because the felonious assault did not merge into the homicide.

These assignments of error are overruled.

[3] In his next assignment of error, defendant argues that the trial court erred by failing to censure the prosecutor's gross misconduct during closing argument. We find no such error.

In a capital case, counsel is allowed wide latitude in its arguments to the jury and may argue facts in evidence as well as all reasonable inferences therefrom. *State v. Sanderson*, 336 N.C. 1, 15, 442 S.E.2d 33, 42 (1994). "A jury argument is proper as long as it is consistent with the record and not based on conjecture or personal opinion." *State v. Robinson*, 336 N.C. 78, 129, 443 S.E.2d 306, 331-32 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995). The scope and control of arguments lies largely within the discretion of the trial court, 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.' " *State v. Rogers*, 355 N.C. 420, 462, 562 S.E.2d 859, 885 (2002) (quoting *State v. Johnson*, 298 N.C. 355, 368-69, 259 S.E.2d 752, 761 (1979)). While this Court will review a prosecutor's argument in a capital case where the defendant raised no objection at trial, "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." *Johnson*, 298 N.C. at 369, 259 S.E.2d at 761.

In the present case, defendant objects to the following statements made by the prosecutor in closing arguments:

> Process of the mind, let's talk about his mind briefly. You don't need to rebut something that doesn't need to be rebutted. Dr. Harbin said that that man was capable at the time to form the intent to kill in a simple method, simple plan. You don't have to plan it from here to here, just there (pointing at diagram of house). And he said strangulation is a simple plan. That man had the mental ability to do it and he did it.
>
> His only problem was a limited cognitive dysfunction because he was a little slow to react. His I.Q. wouldn't let him get into Harvard Medical School and he was mildly affected in his thinking. Well, he can pull off big cons and stuff and do all that and function in society doing what he chose to do. To keep her quiet through his thoughtful trial and error problem solving method, to use the words of the doctor, this man deliberately and thoughtfully in an intentional act, which is obvious by the means of which he killed her, committed premeditated murder.

Defendant argues that the prosecutor's comments were designed to prejudice the jury toward a finding that defendant's own expert

said he was capable of premeditated and deliberate murder. According to defendant, his expert in fact testified he was not capable of premeditated and deliberate murder. Defendant also argues that the prosecutor mischaracterized the evidence to persuade the jury that defendant was capable of premeditated and deliberate murder because defendant was capable of making a simple plan.

Defendant's expert, Dr. Harbin, testified that it was "unlikely" that defendant could premeditate and deliberate and that defendant's ability to form a fixed design to kill was "impaired." Dr. Harbin further testified that defendant was capable of forming a simple plan to kill and upon cross examination stated that strangulation "is not all that complex." This testimony leaves open the possibility that defendant's judgment, while impaired, left him capable of premeditation and deliberation. Additionally, Dr. Harbin testified on direct examination that defendant's IQ scores placed him in the "mildly impaired range or the low range of normal." According to Dr. Harbin, this intelligence level would make it difficult for defendant to attend any kind of graduate school. Regarding cognitive dysfunction in defendant, Dr. Harbin testified that "it was limited pretty much to mild impairment of memory, some significant impairments of what we call psychomotor speed." He further testified that defendant exhibited active trial-and-error solutions to most problems and was disinclined to plan ahead or think problems through before acting. On cross-examination, however, Dr. Harbin acknowledged that defendant was able to think about taking a shower after killing Whitted, changing his clothes after the murder, burning the clothes in the fire he set, and covering up his actions by telling Whitted's friend she had already gone to the doctor.

We conclude that the evidence in the record abundantly supports the arguments made by the prosecutor during his closing statements. The prosecutor merely fulfilled his duty "to present the State's case with earnestness and vigor and to use every legitimate means to bring about a just conviction." *State v. Stegmann*, 286 N.C. 638, 654, 213 S.E.2d 262, 274 (1975), *death sentence vacated*, 428 U.S. 902, 49 L. Ed. 2d 1205 (1976). Defendant has failed to show how the prosecutor's comments infected the trial with unfairness and thus rendered the conviction fundamentally unfair. *See State v. Rose*, 339 N.C. 172, 202, 451 S.E.2d 211, 229 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

This assignment of error is without merit.

[4] In his next assignment of error, defendant argues that the trial court's instructions to the jury regarding diminished capacity were erroneous and prejudicial because they contained an inaccurate and misleading statement of law. Defendant contends that these instructions intimated an opinion of the court that defendant should be found guilty of felony murder and that they denied defendant the full benefit of his defense.

The trial court instructed the jury regarding diminished capacity as follows:

> You may find there is evidence which tends to show that the defendant was intoxicated, drugged or lacked mental capacity at the time of the acts alleged in this case. Generally, voluntary intoxication or a voluntary drug condition is not a legal excuse for crime. However, if you find that the defendant was intoxicated, drugged or lacked mental capacity, you should consider whether this condition affected his ability to formulate the specific intent to kill which is required for conviction of first degree murder on the basis of premeditation and deliberation.
>
> In order for you to find the defendant guilty of first degree murder on the basis of premeditation and deliberation, you must find beyond a reasonable doubt that he killed the deceased with malice and in the execution of an actual specific intent to kill formed after premeditation and deliberation. If as a result of intoxication, a drug condition or lack of mental capacity the defendant did not have the specific intent to kill the deceased formed after premeditation and deliberation, he is guilty of first degree murder—excuse me, he is not guilty of first degree murder on the basis of premeditation and deliberation.
>
> The law does not require any specific intent to kill for the defendant to be guilty of the crime of first degree murder on the basis of felony murder or second degree murder. Thus, the defendant's intoxication or drug condition can have no bearing upon your determination of his guilt or innocence of these crimes.
>
> Therefore, I charge that if upon considering the evidence with respect to the defendant's intoxication, drug condition or lack of mental capacity you have a reasonable doubt as to whether the defendant formulated the specific intent to kill required for conviction of first degree murder on the basis of premeditation and deliberation, you will not return a verdict of

guilty of first degree murder on the basis of premeditation and deliberation.

Defendant contends this instruction was flawed in three respects: (1) the trial court diminished the importance of the evidence regarding defendant's intoxication, drug use, and impaired mental capacity by giving only a single instruction; (2) the usage of the language "lack of capacity" rather than "impaired capacity" or "diminished capacity" improperly suggested that the jury must find defendant entirely without capacity to premeditate or deliberate in order to consider this evidence; and (3) the third paragraph of the instructions intimates an opinion of the trial judge that the jury should find defendant guilty of felony murder.

With regard to defendant's first two objections, we note that defendant did not challenge the instruction on these grounds at trial. The trial court thus did not have the opportunity to consider or rule on these issues. *See* N.C. R. App. P. 10(b)(1). Indeed, defendant agreed with the trial court that such an instruction was proper. Defendant will not be allowed to complain on appeal absent a showing of plain error. *See* N.C. R. App. P. 10(c)(4); *see also State v. White*, 349 N.C. 535, 570, 508 S.E.2d 253, 275 (1998) (finding no error where defense counsel did not object when given the opportunity at the charge conference or after the charge was given and noting that defense counsel approved the instructions during the charge conference), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999); *State v. Penley*, 318 N.C. 30, 47, 347 S.E.2d 783, 793 (1986) (holding that the defendant waived the right to complain of jury instructions on appeal where he specifically objected to several portions of the instructions but not the portions complained of upon appeal).

A plain error is one "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. 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). Our review of the trial court's instruction reveals no plain error regarding defendant's mental capacity. The trial court delivered the appropriate pattern jury instruction on this issue, which groups intoxication, drug use, and lack of mental capacity together. N.C.P.I—Crim. 305.11 (1989). By including intoxication, drug use, and lack of mental capacity in the instruction, the trial court provided defendant the benefit of all his evidence. We disagree with defendant's contention that a single instruction diminished the significance of the evidence, as the instruction made it more likely

that the jury could have found all of the evidence sufficient to show diminished capacity. The State's overwhelming evidence of premeditation and deliberation, however, could not have been overcome by defendant's evidence of diminished capacity regardless of whether the evidence was considered under a single instruction or under multiple instructions.

Similarly, we cannot say that the trial court committed plain error in its use of the words "lack of capacity" rather than "impaired capacity" or "diminished capacity." The language "lack of capacity" appears in the pattern jury instructions that this Court approved in *State v. Mash*, 323 N.C. 339, 344, 372 S.E.2d 532, 535 (1988). Moreover, defendant referred to "lack of mental capacity" in his closing argument. We fail to see any error in the trial court's choice of the phrase "lack of capacity."

[5] Finally, defendant objects to the third paragraph of the jury instructions:

> The law does not require any specific intent to kill for the defendant to be guilty of the crime of first degree murder on the basis of felony murder or second degree murder. Thus, the defendant's intoxication or drug condition can have no bearing upon your determination of his guilt or innocence of these crimes.

Defendant contends that this paragraph intimates an opinion of the trial judge that the jury should find defendant guilty of felony murder. At the charge conference, defendant objected to the placement of this paragraph within the instruction concerning voluntary intoxication and lack of premeditation, preferring instead that the instruction be given earlier with the instructions for first-degree murder by premeditation and deliberation and felony murder. Defendant failed to raise the particular objection he now brings before us on appeal. " 'The theory upon which a case is tried in the lower court must control in construing the record and determining the validity of the exceptions.' " *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) (quoting *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982)). Defendant cannot raise this issue for the first time on appeal.

Nonetheless, we again review defendant's contention based on plain error. We note that the trial court expressly referred to the jury's determination of "guilt or innocence" in its instruction and informed

the jury on the effect of intoxication on both felony murder *and* second-degree murder. The trial court did nothing more than inform the jurors that defendant's intoxication was irrelevant to their determination of guilt or innocence of felony murder or second-degree murder. Moreover, the court instructed the jurors as follows:

> The law, as indeed it should, requires the presiding judge to be impartial. You are not to draw any inference from any ruling that I have made or any inflection in my voice or expression on my face or any question I have asked any witness or anything else that I may have said or done during this trial that I have an opinion or have intimated an opinion as to whether any part of the evidence should be believed or disbelieved, as to whether any fact has or has not been proved or as to what your findings ought to be. It is your exclusive province to find the true facts of the case and to render a verdict reflecting the truth as you find it.

We therefore reject defendant's contention that the jury may have misconstrued the trial court's instructions as requiring them to convict defendant of felony murder or to discount the evidence of impaired capacity.

This assignment of error is overruled.

[6] In his next assignment of error, defendant argues the trial court erred by admitting the victim's hearsay statements in violation of the Rules of Evidence and defendant's state and federal constitutional rights to confront the witnesses against him. Defendant further argues that the testimony was inadmissible regardless of its hearsay character because it was irrelevant and unfairly prejudicial evidence of defendant's bad character. *See* N.C.G.S. § 8C-1, Rules 401-04 (2001). We are not required to respond to defendant's constitutional objections because they were not raised at trial. *See Benson*, 323 N.C. at 322, 372 S.E.2d at 519.

Following a *voir dire*, the prosecutor was permitted to ask the victim's best friend, Amanda McNeill, about statements the victim made within a few days before the victim's death. McNeill testified that on 10 November 1999, Whitted told her, "[M]y man's a crack head and I wish he would leave." McNeill further testified, "[Y]ou could just look at her and tell that she was going through something." Whitted told McNeill that she had asked defendant to leave. Later, on 15 November 1999, one day before the murder, Whitted told McNeill

that she was tired of defendant taking her money to buy drugs and that she "wanted him gone."

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c). However, "[o]ut-of-court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Golphin*, 352 N.C. 364, 440, 533 S.E.2d 168, 219 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). In this instance, McNeill's testimony is admissible under the state-of-mind exception to the general prohibition on hearsay. *See* N.C.G.S. § 8C-1, Rule 803(3) (2001). Under this exception, a statement is admissible if it applies to a "declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." *Id.* This Court recently reviewed the law regarding this exception to the hearsay rule:

> "The victim's state of mind is relevant if it bears directly on the victim's relationship with the defendant at the time the victim was killed." *State v. Bishop*, 346 N.C. 365, 379, 488 S.E.2d 769, 776 (1997); *accord [State v.] Westbrooks*, 345 N.C. [43,] 59, 478 S.E.2d [483,] 493 [(1996)]. Moreover, we have also stated that "a victim's state of mind is relevant if it relates directly to circumstances giving rise to a potential confrontation with the defendant." *State v. McLemore*, 343 N.C. 240, 246, 470 S.E.2d 2, 5 (1996); *see also State v. McHone*, 334 N.C. 627, 637, 435 S.E.2d 296, 301-02 (1993) (state of mind relevant to show a stormy relationship between the victim and the defendant prior to the murder), *cert. denied*, 511 U.S. 1046, 128 L. Ed. 2d 220 (1994); *State v. Lynch*, 327 N.C. 210, 224, 393 S.E.2d 811, 819 (1990) (the defendant's threats to the victim shortly before the murder admissible to show the victim's then-existing state of mind); *State v. Cummings*, 326 N.C. 298, 313, 389 S.E.2d 66, 74 (1990) (the victim's statements regarding the defendant's threats relevant to the issue of her relationship with the defendant).

State v. King, 353 N.C. 457, 477, 546 S.E.2d 575, 591 (2001), *cert. denied*, 534 U.S. 1147, 151 L. Ed. 2d 1002 (2002).

The testimony in issue directly related to " 'circumstances giving rise to a potential confrontation with the defendant.' " *Bishop*, 346 N.C. at 379, 488 S.E.2d at 776 (quoting *McLemore*, 343 N.C. at 246, 470 S.E.2d at 5), *quoted in King*, 353 N.C. at 477-78, 546 S.E.2d at 591.

Defendant and Whitted were living together in her trailer. The statements demonstrated that Whitted was upset and wanted defendant to leave because Whitted was tired of defendant taking her money to buy drugs. Although she had asked him to leave, defendant remained. One day after Whitted's second statement to McNeill and six days after her first statement to McNeill, defendant beat and strangled Whitted in her home. Viewed in this context, the statements clearly indicate difficulties in the relationship prior to the murder. Accordingly, the statements are admissible not as a recitation of facts but to show the victim's state of mind.

Additionally, we find no prejudice in the admission of the statements. The trial court instructed the jury that the evidence was admissible "to prove [only] a certain state of mind of the deceased at the time" and not "to prove the truth of the conduct described in the statement." This limiting instruction was sufficient to prevent the jury from viewing the evidence as proof of defendant's bad character.

Defendant's assignment of error is without merit.

[7] In his next assignment of error, defendant argues the trial court committed plain error and structural error by failing to poll each juror individually to determine if the verdict was unanimous as to each distinct theory of first-degree murder.

Prior to the jury beginning deliberations, the trial court fully instructed the jury on both the premeditation and deliberation theory of first-degree murder and the felony murder rule. The trial court instructed the jury as follows:

> I instruct you that a verdict is not a verdict until all 12 jurors agree unanimously as to what your decision shall be. You may not render a verdict by majority vote.
>
> The verdict form sets out first degree murder both on the basis of malice, premeditation and deliberation and first degree murder under the felony murder rule and second degree murder on the basis of malice without premeditation and deliberation. In the event you should find the defendant guilty of first degree murder, please have your foreman indicate whether you do so on the basis of malice, premeditation and deliberation or under the felony murder rule.

The trial court sent the verdict sheet to the jury room with the jury. The verdict sheet provided, in pertinent part:

We, the jury, return as our unanimous verdict that the defendant, George Malcolm Carroll, is:

___ 1. Guilty of First Degree Murder

IF YOU FIND THE DEFENDANT GUILTY OF FIRST-DEGREE MURDER, IS IT

___ A. On the basis of malice, premeditation and deliberation?

___ B. Under the first degree felony murder rule?

The jury marked the verdict sheet in each appropriate place to unanimously find defendant guilty of first-degree murder on the basis of malice, premeditation and deliberation and under the first-degree felony murder rule.

Additionally, following jury deliberations and after the jury returned to the courtroom, the clerk stated, "The jury has returned as its unanimous verdict that the defendant, George Malcolm Carroll, as to file number 99 CRS 70909 is guilty of first degree murder on the basis of malice, premeditation and deliberation and under the first degree felony murder rule. Is this your unanimous verdict?" The jury foreman answered, "Yes, it is." The trial court then stated, "So say you all." All the jurors responded, "Yes."

The trial court then instructed the clerk to poll the jury. The clerk first asked the foreman:

THE CLERK: Robert Golden, the jury has returned as its unanimous verdict that the defendant, George Malcolm Carroll, is guilty of first degree murder. Is this your verdict?

JUROR NINE [GOLDEN]: Yes, it is.

THE CLERK: Do you still assent thereto?

JUROR NINE: Yes.

The clerk inquired of the remaining jurors in the same manner and each juror affirmed the unanimity of the verdict.

Defendant contends the clerk should have further inquired whether each juror individually found defendant guilty of first-degree murder both on the basis of malice, premeditation and deliberation and under the first-degree felony murder rule. At trial, defendant failed to object to the form of the poll.

Our extensive review of the record reveals that the trial court made the jury thoroughly aware of the requirement of a unanimous verdict on each theory of first-degree murder. The transcript unquestionably indicates that the jury unanimously found defendant guilty based on both malice, premeditation and deliberation and under the first-degree felony murder rule.

The jury's unanimous verdict based on both theories of first-degree murder was clearly represented on the verdict sheet. Moreover, following the clerk's announcement that the jury unanimously found defendant "guilty of first degree murder on the basis of malice, premeditation and deliberation and under the first degree felony murder rule," each juror individually affirmed that this was indeed his verdict. It would strain reason to conclude that the jury's verdict was not unanimously based on both theories of first-degree murder. Accordingly, the trial court properly polled the jury to ensure that the announced verdict was unanimous. *See* N.C.G.S. § 15A-1238 (2001) ("The poll may be conducted by the judge or by the clerk by asking each juror individually whether the verdict announced is his verdict."). Nothing more was required.

This assignment of error is overruled.

CAPITAL SENTENCING PROCEEDING

[8] In his next three assignments of error, defendant argues the trial court erred by allowing the jury to consider and find the aggravating circumstance that defendant had been previously convicted of another felony involving the use or threat of violence to another person. *See* N.C.G.S. § 15A-2000(e)(3) (2001). According to defendant, this aggravating circumstance was based solely on irrelevant and unreliable hearsay.

During the sentencing proceeding, the State called Diane Hix, a deputy clerk in Cumberland County, who identified several documents as certified copies of Florida Circuit Court records. Following defendant's objection, the trial court excused the jury and heard the following arguments:

> [DEFENSE COUNSEL]: Your Honor, Ms. Hix is a clerk of our superior court and she is familiar with documents generated by courts, but I'm not sure if she is the person who received this document or even that our clerk's office did. And I know that it's got stamping which represents to be from the State of Florida and it's got Janet Reno's name on it and file stamps and everything. But I

would object, Your Honor, based on the fact that there's no showing of where this came from. She is not the person who's received this document. And I'm not sure under what authority this is being requested to be admitted, Your Honor.

THE COURT: Mr. Hicks.

MR. HICKS [THE STATE]: Pretty straightforward under 902 of our rules of evidence which actually do not apply to a sentencing hearing. These are certified true copies. They are self-authenticating. The purpose of the clerk being up here is to show that's a standard procedure in the clerk's office to have true copy seals, and at this point, that's about all the questions I have for her. Frankly, I could have offered this without any testimony.

THE COURT: Let me look at it just a minute. I believe that's a correct statement of the law. Objection is overruled. Bring the jury back.

Hix then testified that the Florida records identified "Robert Fulton" as the defendant and that the documents included a set of fingerprints made pursuant to the judgment.

The State next called Kathleen Farrell, who was accepted by the trial court without objection as an expert in fingerprint identification. Farrell testified that she had compared the fingerprints in the Florida record to a set of defendant's prints. Farrell said defendant's prints were on a fingerprint card on permanent file in the Cumberland County Sheriff's Department. The card included defendant's name, the charges of first-degree murder and first-degree arson, a street address, and the date "11/17/1999." Farrell testified that fingerprint cards are kept in the ordinary course of business. The trial court allowed the fingerprint card to be admitted, with no objection from defendant.

Also without objection, Farrell testified that the fingerprints in the Florida record and the prints on the Cumberland County fingerprint card were made by the same person. Farrell then stated, again without objection, that the Florida judgment showed a robbery conviction for the defendant in that case. Farrell also read the summary paragraph from the Florida judgment, which indicated the defendant had punched the victim in the nose, knocked him to the ground, and continued to kick him repeatedly, and had then removed the victim's wallet before fleeing.

We conclude that the foregoing evidence was properly admitted to support the State's submission of the (e)(3) aggravating circumstance. The North Carolina Rules of Evidence do not apply in capital sentencing proceedings. N.C.G.S. § 8C-1, Rule 1101(b)(3) (2001); *State v. Hedgepeth*, 350 N.C. 776, 784, 517 S.E.2d 605, 610 (1999), *cert. denied*, 529 U.S. 1006, 146 L. Ed. 2d 223 (2000); *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). Instead, the trial court has discretion to admit any evidence relevant to sentencing. N.C.G.S. § 15A-2000(a)(3) (2001); *State v. Thomas*, 350 N.C. 315, 359, 514 S.E.2d 486, 513, *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999). Accordingly, the State is allowed to admit any evidence that substantially supports the death penalty. *State v. Brown*, 315 N.C. 40, 61, 337 S.E.2d 808, 824 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *and overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

In the present case, a court clerk testified that the Florida documents were signed and certified in a manner verifying their authenticity. The documents were thus shown to be reliable. Moreover, even if the Rules of Evidence were applied here, the documents could have been properly admitted. *See* N.C.G.S. § 8C-1, Rule 902 (2001) (providing the rules concerning self-authenticating documents).

Additionally, defendant did not object to Kathleen Farrell's expert testimony that defendant's fingerprints matched the fingerprints of the defendant in the Florida case. In our review of the record, we conclude the State fully established the reliability of the fingerprint card Farrell used to conduct her fingerprint comparison. Further, had the Rules of Evidence been applied here, the fingerprint card would have been clearly admissible. *See* N.C.G.S. § 8C-1, Rule 803(6) (the business records exception to the hearsay rule). Farrell's testimony was thus properly admitted to show that defendant had been previously convicted of another felony involving the use or threat of violence to another person under an assumed name.

We conclude that the trial court properly admitted the Florida records, in conjunction with Farrell's expert opinion, as reliable evidence relevant to the State's duty to prove its aggravating circumstances. Accordingly, the evidence was sufficient to support the trial court's submission of the (e)(3) aggravating circumstance to the jury.

These assignments of error are overruled.

[9] In his next assignment of error, defendant argues the trial court erred by refusing to allow defendant to offer evidence of the nonstatutory mitigating circumstance that defendant had accepted responsibility for the killing by offering to plead guilty to second-degree murder.

During the sentencing proceeding, defendant's attorney made a motion that the trial court allow defendant to present evidence that he was "willing to accept responsibility and take a plea . . . of 391 to 479 months and that he made that offer." Defendant's attorney conceded that this "would be considered part of a settlement conference and those kinds of issues are not normally accepted and are precluded from the case in chief." The trial court ruled, "I'm going to deny your motion to present that evidence. I do not think it's relevant, particularly in view of the fact that it is relative to pretrial negotiations concerning a case. I will let you make whatever proffer you want to make relative to that."

Defendant's attorney then acknowledged that the State had never made a plea offer, although plea negotiations had been ongoing throughout the case. Defendant's attorney further informed the court that defendant was willing to plead guilty to second-degree murder. The State countered that while the defense had made several suggestions concerning what the State should offer defendant, no one ever made clear whether "defendant ha[d] himself offered to take any time." After the trial court instructed the jury on sentencing, defendant's attorney reasserted his earlier motion. The trial court again denied the motion.

"In order for defendant to succeed on this assignment [of error], he must establish that (1) the nonstatutory mitigating circumstance is one which the jury could reasonably find had mitigating value, and (2) there is sufficient evidence of the existence of the circumstance to require it to be submitted to the jury." *Benson*, 323 N.C. at 325, 372 S.E.2d at 521. A trial court must submit a mitigating circumstance only if it is supported by substantial evidence. *State v. Laws*, 325 N.C. 81, 109, 381 S.E.2d 609, 626 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990). Substantial evidence is enough relevant evidence that a reasonable person would accept it as adequate to support a conclusion. *State v. Fullwood*, 329 N.C. 233, 236, 404 S.E.2d 842, 844 (1991).

In the present case, the evidence is at best conflicting as to defendant's willingness to plead guilty to second-degree murder.

From our review of the record, we can conclusively determine only that defendant's attorney tried repeatedly to obtain a plea offer from the State. Because the State never made an offer, we cannot know with certainty whether defendant would have indeed pled guilty to second-degree murder and accepted a plea agreement.

Assuming *arguendo* that defendant was willing to plead guilty to second-degree murder, this is evidence only of defendant's willingness to lessen his exposure to the death penalty or a life sentence upon a first-degree murder conviction. Defendant's willingness to accept a second-degree murder plea would be more likely a result of his assessment of the risk of trial than his willingness to accept responsibility for his actions. Indeed, defendant admitted to police that he was likely to get the death penalty for his crime. Moreover, defendant chose to plead not guilty and proceed to trial rather than enter a guilty plea and accept responsibility for the killing. Having made this choice, defendant cannot now complain that he should have been allowed to reveal during sentencing his hypothetical willingness to enter a guilty plea to a lesser crime.

Finally, the trial court did submit to the jury the nonstatutory mitigating circumstances that "[d]efendant at an early stage in the proceedings admitted his involvement in the capital felony to law enforcement officers," "[d]efendant's cooperation and the information he provided were valuable to law enforcement," "[d]efendant has expressed remorse for the murder," "[d]efendant told the officers through his mother where to find him and peacefully surrendered." The trial court also submitted to the jury the catchall mitigating circumstance. *See* N.C.G.S. § 15A-2000 (f)(9). Accordingly, the jury was given ample means to determine whether defendant had accepted responsibility for his actions.

In sum, the trial court properly refused to submit as a nonstatutory mitigating circumstance defendant's willingness to accept responsibility for his actions through a plea bargain.

This assignment of error is overruled.

[10] In his next assignment of error, defendant argues the trial court failed to adequately poll the jury foreman as to whether he personally voted to impose a death sentence.

The following portion of the sentencing hearing appears relevant:

THE COURT: Mr. Foreman, again I would ask if you would stand and for the record state your name, please.

JUROR NINE [FOREMAN]: Robert Golden.

THE COURT: Mr. Golden, has the jury reached a unanimous recommendation?

JUROR NINE: Yes, Your Honor, we have.

THE COURT: Okay. Would you send the envelope to the officer, please.

(Juror nine hands the envelope to the bailiff who hands it to the Court.)

THE COURT: You may have a seat. Thank you.

JUROR NINE: Thank you.

THE COURT: Madam Clerk, would you take the verdict or the recommendation.

THE CLERK: Will the foreman please stand. Mr. Foreman, the jury has returned as its answers to the issues and recommendation as to punishment as to the defendant, George Malcolm Carroll, in file number 99 CRS 70909 the following: As to issue one, yes; as to issue two, yes; as to issue three, yes; as to issue four, yes. The jury has returned as its recommendation that the defendant be sentenced to death. Is this the unanimous recommendation of the jury?

JUROR NINE: Yes, it is.

THE COURT: So say you all?

(Jurors say "yes.")

THE COURT: Would you poll the jury.

THE CLERK: Will the foreman please stand. Mr. Foreman, you have returned as to the answers to the issues and recommendation as to punishment as to the defendant, George Malcolm Carroll, in file number 99 CRS 70909 the following: As to issue one, yes; as to issue two, yes; as to issue three, yes; as to issue four, yes. Is this your recommendation? Do you still assent thereto?

JUROR NINE: Yes, I do.

THE COURT: You may have a seat.

THE CLERK: You may have a seat. Juror number one, Maurice Dinkins. The foreman—juror number one, the foreman, Maurice Dinkins, the foreman has returned as its answers to the issues and recommendation as to punishment as to the defendant, George Malcolm Carroll, in file number 99 CRS 70909 the following: As to issue one, yes; as to issue two, yes; as to issue three, yes; as to issue four, yes. The foreman has returned as its recommendation that the defendant be sentenced to death. Is this your recommendation?

JUROR ONE: Yes.

THE CLERK: Do you still assent thereto?

JUROR ONE: Yes.

The clerk then individually polled each remaining jury member in this same manner.

Individual polling of a jury is done to ensure that each juror agrees to the sentence recommended. N.C.G.S. § 15A-2000(b); *State v. Richmond*, 347 N.C. 412, 447, 495 S.E.2d 677, 697, *cert. denied*, 525 U.S. 843, 142 L. Ed. 2d 88 (1998). No specific polling method is required to establish this purpose. *State v. Spruill*, 320 N.C. 688, 697, 360 S.E.2d 667, 672 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 934 (1988).

In the present case, the jury poll completely established that every juror agreed with the imposition of the death penalty. The foreman signed the sentencing recommendation form, which indicated the jury's "yes" answers to Issues One, Two, Three and Four, as well as the recommendation of a death sentence. After the clerk read the answers to Issues One through Four and the death recommendation, the clerk asked the foreman if this was the unanimous recommendation of the jury. The foreman affirmed that it was. The clerk then asked the foreman if the recommendation was his own and the foreman affirmed that it was. Although the clerk's questioning of the foreman did not include a reference to the death sentence recommendation, Issue Four asks if the aggravating circumstances are sufficient to warrant the death penalty. Accordingly, we conclude the trial court sufficiently polled the jury foreman to ascertain whether he agreed with the death sentence.

This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises fourteen additional issues that he concedes have been previously decided contrary to his position by this Court: (1) the murder indictment unconstitutionally failed to allege all the elements of first-degree murder; (2) the trial court erred by submitting the N.C.G.S. § 15A-2000 (e)(9) aggravating circumstance to the jury under instructions that were unconstitutionally vague; (3) the trial court erred in its jury instructions by limiting consideration of the N.C.G.S. § 15A-2000 (f)(2) and (f)(6) mitigating circumstances to findings of certain specified causes and omitting other possible underlying causes, thereby unconstitutionally precluding the jury from considering the full scope of those mitigating circumstances; (4) the trial court erred in its jury instructions by conditioning the jury's consideration of the N.C.G.S. § 15A-2000 (f)(2) mitigating circumstance, thereby precluding the jury from considering the full mitigating scope of that circumstance; (5) the trial court erred by telling the sentencing jury that it must be unanimous to answer "no" at Issues One, Three, and Four on the issues and recommendation sheet; (6) the trial court erred in its instructions defining the burden of proof applicable to mitigating circumstances by using the terms "satisfaction" and "satisfy," thus permitting jurors to establish for themselves the applicable legal standard; (7) the trial court erred by instructing the jury to decide whether all nonstatutory mitigating circumstances have mitigating value; (8) the trial court erred by instructing the jury on a definition of mitigation that was unconstitutionally narrow; (9) the trial court erred by using the term "may" instead of "must" in sentencing Issues Three and Four; (10) the trial court erred in its penalty phase instructions which allowed each juror in deciding Issues Three and Four to consider only the mitigation found by that juror at Issue Two; (11) the trial court erred in allowing death-qualification of the jury by excusing for cause certain jurors who expressed an unwillingness to impose the death penalty; (12) the trial court erred in its jury instructions on Issue Three that allowed the jury to answer that issue "yes" and recommend a death sentence if it found that the aggravating and mitigating circumstances were of equal weight; (13) the trial court erred by submitting to the jury all of defendant's nonstatutory mitigating circumstances as a single list and by failing to instruct separately on each mitigating circumstance; and (14) the trial court erred by denying defendant's motions to preclude consideration of the death penalty and by sentencing defendant to death because the death penalty is cruel and unusual; the North Carolina capital sentencing scheme is imposed in a discriminatory manner, is

vague and overbroad, and involves subjective discretion; and the death sentence in this case was not supported by the evidence, was disproportionate, and was imposed under the influence of passion, prejudice, and other arbitrary factors.

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

[11] Having concluded that defendant's trial and capital sentencing proceeding were free from prejudicial error, we are required to review and determine: (1) whether the evidence supports the jury's finding of the aggravating circumstances upon which the sentence of death was based; (2) whether the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2).

In the present case, the jury convicted defendant of first-degree murder based on malice, premeditation and deliberation and under the first-degree felony murder rule. Following a capital sentencing proceeding, the jury found two aggravating circumstances: defendant had been previously convicted of another felony involving the use or threat of violence to another person, N.C.G.S. § 15A-2000(e)(3), and the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9).

The jury found all three statutory mitigating circumstances submitted for consideration: (1) the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (2) the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, N.C.G.S. § 15A-2000(f)(6); and (3) the catchall mitigating circumstance that there existed any other circumstance arising from the evidence that any juror deems to have mitigating value, N.C.G.S. § 15A-2000(f)(9). Of the seventeen nonstatutory mitigating circumstances submitted by the trial court, the jury found four to exist: (1) defendant did not have a positive male role model in his home while growing up, (2) defendant's stepfather introduced defendant to criminal activity at an early age, (3) defendant has a history of drug and alcohol abuse and has suffered

cognitive defects as a result of the drug and alcohol abuse, and (4) defendant's cooperation and the information he provided were valuable to law enforcement.

After thoroughly examining the record, transcript, briefs, and oral arguments, we conclude that the evidence fully supports the aggravating circumstances found by the jury. Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We turn then to our final statutory duty of proportionality review.

The purpose of proportionality review is to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Proportionality review also acts "[a]s a check against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). In conducting proportionality review, we compare the present case with other cases in which this Court concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

We have found the death sentence disproportionate in eight cases. *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *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 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. Defendant was convicted on the basis of malice, premeditation, and deliberation and under the first-degree felony murder rule. "The finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). Further, this Court has repeatedly noted that "a finding of first-degree murder based on theories of premeditation

and deliberation and of felony murder is significant." *State v. Bone*, 354 N.C. 1, 22, 550 S.E.2d 482, 495 (2001), *cert. denied*, — U.S. —, 152 L. Ed. 2d 231 (2002).

In the present case, following an argument, defendant slapped the victim and struck the victim on the leg and face with a machete. The machete cut the back of the victim's head and caused her to bleed uncontrollably. When the victim screamed, defendant carried her to her bed, where he put the bedsheet in the victim's mouth and put his hands on her throat to keep her quiet. After the victim died, defendant attempted to burn the victim's body and the home. We note here this Court's oft-cited proviso that "[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). In sum, the facts of the present case clearly distinguish this case from those in which this Court has held a death sentence disproportionate.

We also compare this case with the cases in which this Court has found the death penalty to be proportionate. *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although we review all cases in the pool of "similar cases" when engaging in our statutorily mandated duty of proportionality review, "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.*; *accord State v. Gregory*, 348 N.C. 203, 213, 499 S.E.2d 753, 760, *cert. denied*, 525 U.S. 952, 142 L. Ed. 2d 315 (1998). After thoroughly analyzing the present case, we conclude this case is more similar to cases in which we have found the sentence of death proportionate than to those in which we have found it disproportionate.

Whether a sentence of death is "disproportionate in a particular case ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). Therefore, based upon the characteristics of this defendant and the crime he committed, we are convinced the sentence of death recommended by the jury and ordered by the trial court in the instant case is not disproportionate or excessive.

Accordingly, we conclude that defendant received a fair trial and capital sentencing proceeding, free from prejudicial error. The judgment and sentence entered by the trial court must therefore be left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. JAMES LEWIS MILLSAPS

No. 210A01

(Filed 20 December 2002)

Homicide— first-degree murder—felony murder—premeditation and deliberation—failure to submit second-degree murder—premeditation and deliberation convictions vacated—resentencing for one felony murder

In a capital trial wherein defendant was found guilty of two counts of first-degree murder based on premeditation and deliberation and felony murder of each victim, with the murder of the other victim as the underlying felony, and defendant was sentenced to death for each murder, the trial court erred by failing to instruct on second-degree murder as a lesser offense included within premeditated and deliberate murder, and defendant's convictions based on premeditated and deliberate murders must be vacated. Accordingly, defendant's convictions for first-degree murder are validly based only on felony murder, the murder providing the underlying felony in each case constitutes an element of that murder and merges into that murder conviction, judgment must be arrested on one of the murders, and defendant is awarded a new sentencing hearing at which only one felony murder will be submitted and the (e)(5) aggravating circumstance, that the murder was committed while defendant was engaged in the commission of any homicide, may not be considered. N.C.G.S. § 15A-2000(e)(5).

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of death entered by DeRamus, J., on 22 November 2000 in Superior Court, Wilkes County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. Heard in the Supreme Court 11 September 2002.

Roy Cooper, Attorney General, by William B. Crumpler, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Anne M. Gomez, Assistant Appellate Defender, for defendant-appellant.

PARKER, Justice.

Defendant James Lewis Millsaps was indicted on 31 January 2000 for the first-degree murder of Rhoda Rousseau and of Lenna Lewis. He was tried capitally and was found guilty of first-degree murder on both counts based on premeditation and deliberation and felony murder of each victim, with the murder of the other victim as the underlying felony. Following a capital sentencing proceeding, the jury recommended that defendant be sentenced to death for each murder, and the trial court entered judgment accordingly.

The State's evidence tended to show that about 9:00 a.m. on 13 January 2000, Lenna Lewis and Rhoda Rousseau went to the home of their brother, Harold Harris, and his wife, Elizabeth, on Camp Joe Harris Road in Wilkes County. Harold, an elderly man with a history of debilitating health problems, had recently been discharged from the Veterans Administration Hospital and required substantial daily care from his family. With the help of Harold's sisters and defendant, Elizabeth tended to Harold's daily needs, such as bathing him, feeding him, transferring him from the bed to his wheelchair, changing his clothes, and administering his medications. However, as the demands of tending to Harold grew more taxing on the family, tension among family members became more palpable.

When defendant arrived at the Harris home shortly after the sisters had arrived, he helped move Harold from his bed to a wheelchair. Although defendant was Elizabeth's great-nephew, he had been raised by Harold and Elizabeth as a son since childhood.

At approximately 10:00 a.m., as members of the family started cleaning up from breakfast, defendant and Lenna went to her car for some trash bags. At the same time, Rhoda's daughter, Martenia Haley, who lived near the Harrises, heard Lenna exclaim in a frightened tone, "Don't. Please don't." Martenia then heard two gunshots. Elizabeth also heard a gunshot and went outside where she observed Lenna lying on the ground. When Elizabeth turned Lenna over, blood spewed onto Elizabeth's clothes. Elizabeth began screaming and ran to neighbors' homes seeking help. Martenia arrived at the Harris residence about two minutes after hearing the gunshots and observed

Lenna lying on the ground in the yard. Defendant told Martenia that Rhoda was all right and that he had already called 911. As defendant stood three or four feet away from Martenia, he pointed the handgun at her and said, "I ought to shoot you too."

Martenia's granddaughter, Kimberly Gibbs, also arrived at the scene shortly thereafter and was told by Elizabeth to check on Rhoda. Kimberly went into the house where she saw Harold sitting in his wheelchair. Harold was crying, and he told Kimberly that Rhoda had been shot and was lying on the other side of the kitchen counter. Kimberly then saw Rhoda lying on the kitchen floor; she was suffering from injuries to her hand and chest. The telephone receiver was lying on the kitchen counter. Kimberly called 911, told the dispatcher to send an ambulance, and reported that defendant had shot her great-grandmother. In the emergency room at Wilkes County Regional Medical Center, Rhoda was conscious; and she stated that defendant was responsible for the shooting. Rhoda's injuries required that she be transported to Wake Forest University Baptist Medical Center, where she died from the gunshot wounds. An autopsy performed on 21 January 2000 revealed a wound track indicating that the bullet first entered Rhoda's right wrist, continued through her wrist, and then passed through her right breast before lodging in her left back under the skin.

Saundra Brooks, the first EMT responder at the scene, determined that Lenna was already dead when she arrived. An autopsy was performed on 14 January 2000 and revealed three bullet wound tracks. Two bullets entered Lenna's back on the left side and exited the front portion of her neck. The bullet for the third track entered the left side of the victim's chest near her breast, crossed her body, and lodged under the skin on her right side. Lenna's death resulted from these wounds. The State Bureau of Investigation laboratory concluded that the bullets retrieved from both autopsies were fired from defendant's nine-millimeter semiautomatic pistol.

Dr. George Corvin, a forensic psychiatrist, testified for defendant. Based on his interviews with and testing of defendant, Dr. Corvin was of the opinion that defendant suffered from delusions of a prosecutory nature. Dr. Corvin testified that defendant's psychosis would have grossly impaired his ability to plan purposefully and intentionally with a full understanding of the nature and consequences of his acts and that defendant's ability to form the specific intent to kill was absent on that day.

On appeal defendant contends that his constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution; Article I, Sections 19, 23, 24, and 27 of the North Carolina Constitution; and North Carolina common law were violated in that the trial court (i) erred in failing to submit second-degree murder as a possible verdict to the jury; (ii) erred in submitting two first-degree murder convictions for the jury's consideration at sentencing; and (iii) erred in submitting the (e)(5) aggravating circumstance, *see* N.C.G.S. § 15A-2000(e)(5) (2001) (that the murder was committed while the defendant was engaged in the commission of any homicide). Defendant notes that the testimony of Dr. Corvin supported the submission of second-degree murder and further notes that the trial court stated that if it were charging on premeditation and deliberation only, it would submit and instruct on the lesser-included offense of second-degree murder. Defendant also urges that as a consequence of the trial court's error in failing to submit second-degree murder, the first-degree murder convictions premised on premeditation and deliberation are invalid. Accordingly, defendant's convictions for first-degree murder are based solely on felony murder; hence, the murder providing the underlying felony in each case becomes an element of that murder and merges with that murder conviction, thereby entitling defendant to a new sentencing hearing at which he is sentenced for only one first-degree murder conviction based on felony murder, and the State is precluded from using the other murder conviction to support the (e)(5) aggravating circumstance.

The State acknowledges that if the trial court's failure to submit second-degree murder was error, then defendant's merger analysis under felony murder is correct. However, the State vigorously contends that the trial court's refusal to submit second-degree murder was not error. The State further urges that if this Court concludes that the failure to submit second-degree murder was error, then the remedy should be that defendant be given a new trial on first-degree premeditated and deliberate murder only at which the State would again have the opportunity to prove premeditation and deliberation, which if found by the jury would enable the State to have the (e)(5) aggravating circumstance submitted to the jury during the sentencing proceeding.

Based on these contentions, the issues before the Court as to these assignments of error are (i) whether the trial court committed error by failing to submit second-degree murder; and (ii) if so, what remedy is appropriate.

At the outset we note certain well-settled principles applicable to first-degree murder. The crime is first-degree murder. Premeditation and deliberation and felony murder are theories which the State may use, pursuant to N.C.G.S. § 14-17, to convict a defendant of first-degree murder. However, a defendant is convicted of the crime, not of the theory. *State v. Thomas*, 325 N.C. 583, 593, 386 S.E.2d 555, 561 (1989). When a defendant is convicted of felony murder only, the underlying felony constitutes an element of first-degree murder and merges into the murder conviction. *State v. Silhan*, 302 N.C. 223, 262, 275 S.E.2d 450, 477 (1981), *overruled on other grounds by State v. Sanderson*, 346 N.C. 669, 488 S.E.2d 133 (1997). Consequently, if a defendant is convicted only of first-degree felony murder, the underlying felony cannot be used as an aggravating circumstance at the sentencing proceeding, *State v. Cherry*, 298 N.C. 86, 113, 257 S.E.2d 551, 567-68 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980); nor if convicted of the underlying felony can a defendant be sentenced separately for that felony, *State v. Wilson*, 345 N.C. 119, 122, 478 S.E.2d 507, 510 (1996). However, if a defendant is convicted of first-degree murder on the basis of both premeditation and deliberation and felony murder, then premeditated and deliberate murder alone supports the conviction; the underlying felony for felony murder can be used as an aggravating circumstance at sentencing, *State v. Silhan*, 302 N.C. at 262, 275 S.E.2d at 478 (relying on *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979)); and the defendant can receive separate sentences for both the first-degree murder conviction and the conviction, if any, for the underlying felony supporting felony murder. *State v. Wilson*, 345 N.C. at 122, 478 S.E.2d at 510.

The frequently quoted standard for deciding whether the trial court must instruct on and submit second-degree murder as a lesser-included offense of first-degree murder is as follows:

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

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

193, 344 S.E.2d 775 (1986). An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater. *State v. Conaway*, 339 N.C. 487, 514, 453 S.E.2d 824, 841, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995). In *State v. Warren*, the Court said:

> "It is a well established rule that when the law and evidence justify the use of the felony-murder rule, then the State is not required to prove premeditation and deliberation, and neither is the court required to submit to the jury second-degree murder or manslaughter unless there is evidence to support it."

292 N.C. 235, 242, 232 S.E.2d 419, 423 (1977) (quoting *State v. Swift*, 290 N.C. 383, 407, 226 S.E.2d 652, 669 (1976)), *quoted in State v. Wall*, 304 N.C. 609, 620, 286 S.E.2d 68, 75 (1982).

The application of this standard appears to have resulted in divergent lines of cases in the context of felony murder. In one group of cases, the Court has simply found that, applying the applicable evidentiary standard, the evidence did not support submission of a lesser-included offense. *See, e.g., State v. Williams*, 343 N.C. 345, 471 S.E.2d 379 (1996), *cert. denied*, 519 U.S. 1061, 136 L. Ed. 2d 618 (1997); *State v. Robinson*, 342 N.C. 74, 463 S.E.2d 218 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 793 (1996); *State v. Frye*, 341 N.C. 470, 461 S.E.2d 664 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996); *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). Another group of cases suggests that if any evidence is presented to negate first-degree murder, then the jury must be instructed on the lesser-included offenses supported by the evidence. *See, e.g., State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178 (1992); *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555; *State v. Williams*, 284 N.C. 67, 199 S.E.2d 409 (1973). Yet another group of cases holds or suggests *in dicta* that if the evidence supports a conviction based on felony murder, the failure to instruct on second-degree murder is not error or not prejudicial error. *See, e.g., State v. Wilson*, 354 N.C. 493, 556 S.E.2d 272 (2001); *State v. Robinson*, 342 N.C. 74, 463 S.E.2d 218; *State v. Quick*, 329 N.C. 1, 405 S.E.2d 179 (1991); *State v. Vines*, 317 N.C. 242, 345 S.E.2d 169 (1986); *State v. Wall*, 304 N.C. 609, 286 S.E.2d 68; *State v. Covington*, 290 N.C. 313, 226 S.E.2d 629 (1976).

We begin our discussion by examining some of these cases. In *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555, the defendant was

indicted for first-degree murder and was tried on the basis of felony murder only with the underlying felony being the discharging of a firearm into an occupied structure in violation of N.C.G.S. § 14-34.1. The Court held that the failure to instruct on involuntary manslaughter was error. The Court stated:

> Under North Carolina and federal law a lesser included offense instruction is required if the evidence "would permit a jury rationally to find [defendant] guilty of the lesser offense and acquit him of the greater." *Strickland*, 307 N.C. at 286, 298 S.E.2d at 654, quoting *Beck v. Alabama*, 447 U.S. 625, 635, 65 L. Ed. 2d 392, 401 (1980). The test is whether there "is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). Where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required. *State v. Peacock*, 313 N.C. 554, 330 S.E.2d 190 (1985).
>
> > It is well settled that "a defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternative verdicts." *State v. Palmer*, 293 N.C. 633, 643-44, 239 S.E.2d 406, 413 (1977). On the other hand, the trial court need not submit lesser included degrees of a crime to the jury "when the State's evidence is positive as to each and every element of the crime charged *and there is no conflicting evidence relating to any element of the charged crime.*"
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> *State v. Drumgold*, 297 N.C. 267, 271, 254 S.E.2d 531, 533 (1979), quoting *State v. Harvey*, 281 N.C. 1, 13-14, 187 S.E.2d 706, 714 (1972) (emphasis in original). Such conflicts may arise from evidence introduced by the State, *State v. Hicks*, 241 N.C. 156, 84 S.E.2d 545 (1954), or the defendant. They may arise when only the State has introduced evidence. *Peacock*, 313 N.C. 554, 330 S.E.2d 190; *Williams*, 284 N.C. 67, 199 S.E.2d 409.

State v. Thomas, 325 N.C. at 594, 386 S.E.2d at 561 (alteration in original). The dissent acknowledged that the defendant could have been entitled to have the lesser-included offense submitted if the first-degree murder charge had been submitted on the basis of both premeditated and deliberate murder and felony murder. *Id.* at 601-02, 605-06, 386 S.E.2d at 565-66, 568 (Mitchell, J. (later C.J.), dissenting).

In *State v. Quick*, 329 N.C. 1, 405 S.E.2d 179, the defendant was found guilty of first-degree murder on the basis of premeditation and deliberation and felony murder and was also convicted of robbery with a dangerous weapon. Following the jury's recommendation, the trial court sentenced the defendant to death for the first-degree murder conviction; the trial court also arrested judgment on the armed robbery conviction. On appeal the defendant contended that he was entitled to a new trial in that the trial court erred by failing to instruct on second-degree murder. Addressing this issue, the Court quoted the applicable standard from *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645; noted that evidence from a State's witness tended to show absence of premeditation and deliberation; held that the assignment of error was without merit; and found no prejudicial error in the guilt-innocence phase of the defendant's trial, but awarded the defendant a new sentencing hearing for error under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). The Court stated, " '[W]here the law and the evidence justify the use of the felony murder rule, the State is not required to prove premeditation and deliberation . . . .' " *State v. Quick*, 329 N.C. at 28, 405 S.E.2d at 196 (quoting *State v. Rinck*, 303 N.C. 551, 565, 280 S.E.2d 912, 923 (1981)) (second alteration in original). The Court then noted that in *Quick*, as in *State v. Covington*, 290 N.C. 313, 226 S.E.2d 629,

> [a]ll of the evidence tended to show that the murder of [the victim] was perpetrated during the course of an armed robbery. Such a killing is murder in the first degree and the trial judge was therefore not required to submit lesser included offenses to the jury for its consideration.
>
> [*State v. Covington*, 290 N.C.] at 346, 226 S.E.2d at 651. Stated another way, "[t]here is no evidence that decedent was killed other than in the course of the commission of the felony" of armed robbery. *State v. Rinck*, 303 N.C. at 565, 280 S.E.2d at 923.

State v. Quick, 329 N.C. at 28-29, 405 S.E.2d at 196 (first, second, and fourth alterations in original).

The next case to address the issue was *State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178, in which the defendant was convicted of first-degree murder on the basis of both premeditation and deliberation and felony murder with robbery with a dangerous weapon as the underlying felony for which the defendant was also convicted. Upon the jury's recommendation, the trial court sentenced the defendant to

life imprisonment for the first-degree murder conviction and also sentenced him for the robbery with a dangerous weapon conviction. On appeal this Court stated that "the jury could have concluded that defendant killed the victim with malice but without the premeditation and deliberation necessary for first-degree murder. It therefore was error for the trial court to refuse to instruct on second-degree murder." *Id.* at 459, 418 S.E.2d at 195. The Court held, however, that the defendant was not entitled to a new trial in that the jury based its verdict on both premeditation and deliberation and felony murder; and the conviction under the felony murder rule was without error. *Id.* The Court arrested judgment on the underlying felony. The dissent concluded that the defendant's evidence was insufficient to negate premeditation and deliberation. *Id.* at 461, 418 S.E.2d at 196-97 (Meyer, J., dissenting).

Most recently in *State v. Wilson*, 354 N.C. 493, 556 S.E.2d 272, the defendant was convicted of two counts of first-degree murder on the basis of both premeditation and deliberation and felony murder and was also convicted of robbery with a firearm and conspiracy to commit robbery with a firearm. The jury recommended life imprisonment for the murder convictions; and the trial court sentenced defendant to two consecutive sentences of life imprisonment, to forty years' imprisonment for the robbery with a firearm conviction, and to ten years' imprisonment for the conspiracy to commit robbery with a firearm conviction. On defendant's appeal this Court did not determine whether the failure to instruct on second-degree murder was in fact error; but, relying on *State v. Quick*, 329 N.C. 1, 405 S.E.2d 179, the Court concluded that if it be assumed *arguendo* that the evidence was sufficient to permit a jury rationally to determine that the defendant acted without premeditation and deliberation, defendant would be entitled to a second-degree murder instruction "only if evidence also tended to show that the murder was not committed in the course of the commission of a felony." *State v. Wilson*, 354 N.C. at 506, 556 S.E.2d at 281. After determining that the evidence would not permit a finding that the murder was not committed in the course of the commission of a felony, the Court concluded that "the trial court properly refused to instruct the jury on second-degree murder as a lesser-included offense to first-degree murder." *Id.* at 508, 556 S.E.2d at 282; *see also State v. Robinson*, 342 N.C. 74, 463 S.E.2d 218 (holding, where the defendant had been sentenced to death, that the evidence was insufficient to constitute affirmative evidence tending to negate premeditation and deliberation, but noting, with citation to *State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178, that even assuming

arguendo that the evidence was sufficient to negate premeditation and deliberation, the defendant was not prejudiced by the trial court's failure to instruct on second-degree murder in that the jury also found the defendant guilty of first-degree murder based on felony murder and the defendant would not be entitled to a new trial).

Our examination of the above-cited cases discloses that the following principles have evolved in our first-degree felony murder jurisprudence: (i) If the evidence of the underlying felony supporting felony murder is in conflict and the evidence would support a lesser-included offense of first-degree murder, the trial court must instruct on all lesser-included offenses supported by the evidence whether the State tries the case on both premeditation and deliberation and felony murder or only on felony murder. *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555. (ii) If the State tries the case on both premeditation and deliberation and felony murder and the evidence supports not only first-degree premeditated and deliberate murder but also second-degree murder, or another lesser offense included within premeditated and deliberate murder, the trial court must submit the lesser-included offenses within premeditated and deliberate murder irrespective of whether all the evidence would support felony murder. *State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178; *State v. Wall*, 304 N.C. 609, 286 S.E.2d 68; *see also State v. Vines*, 317 N.C. 242, 345 S.E.2d 169 (holding that the failure to submit second-degree murder and involuntary manslaughter was not prejudicial error where the trial court submitted premeditation and deliberation, voluntary manslaughter, and felony murder; and the jury did not find premeditation and deliberation). (iii) If the evidence as to the underlying felony supporting felony murder is not in conflict and all the evidence supports felony murder, the trial court is not required to instruct on the lesser offenses included within premeditated and deliberate murder if the case is submitted on felony murder only. *See State v. Covington*, 290 N.C. 313, 226 S.E.2d 629.

In the present case the State concedes that defendant's evidence supported submission of second-degree murder. However, relying on *State v. Quick*, 329 N.C. 1, 405 S.E.2d 179, and *State v. Wilson*, 354 N.C. 493, 556 S.E.2d 272, the State argues that, notwithstanding this evidence, the trial court's failure to instruct on second-degree murder was not error in that the evidence would not permit a rational juror to find that defendant did not commit felony murder. The State's position is that irrespective of whether the jury found that defendant committed first-degree premeditated and deliberate murder or

second-degree murder, it would still have found felony murder; and defendant would thus be guilty of first-degree murder.

The critical issue, however, is not whether the jury would have found felony murder, but rather whether defendant adduced any evidence negating premeditation and deliberation; if so, the trial court must instruct on the lesser-included offenses supported by the evidence. *See State v. Strickland*, 307 N.C. at 293, 298 S.E.2d at 658. While the State may rely on the felony murder rule to support a conviction for first-degree murder and is not required to submit premeditated and deliberate murder to prove first-degree murder, if the trial court instructs on premeditated and deliberate murder, it must instruct on all lesser-included offenses within premeditated and deliberate murder supported by the evidence. *See State v. Wall*, 304 N.C. at 620, 286 S.E.2d at 75.

In its brief the State emphasizes *State v. Wilson*, 354 N.C. 493, 556 S.E.2d 272, and argues that *State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178, is distinguishable on the evidentiary strength of the felony for felony murder. However, from our review of these two cases, we find nothing suggesting that the evidentiary strength of the felony murder in one is stronger than in the other. In *Phipps* the Court held that "the jury could have concluded that defendant killed the victim with malice but without the premeditation and deliberation necessary for first-degree murder. It therefore was error for the trial court to refuse to instruct on second-degree murder." *State v. Phipps*, 331 N.C. at 459, 418 S.E.2d at 195. The Court then stated that the defendant was not entitled to a new trial because "the jury based its verdict on both premeditation and deliberation and the felony murder rule. Defendant's first-degree murder conviction under the felony murder rule is without error and is therefore upheld." *Id.* In *Phipps* no evidence suggested that the murder was committed other than in the perpetration of robbery with a dangerous weapon. Nothing in the opinion suggests that the defendant even challenged the robbery with a dangerous weapon conviction. In *Wilson* the defendant was attempting to commit armed robbery at the time of the murder. The defendant's contention was that he had abandoned the plan to commit armed robbery at the time his codefendant committed the robbery, and the defendant therefore could not be convicted of the crime. The Court noted the evidence demonstrating that the defendant had not abandoned the plan and was thus guilty of armed robbery by acting in concert.

The State does not attempt to distinguish *State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178, and *State v. Quick*, 329 N.C. 1, 405 S.E.2d 179. Indeed, the two cases do not appear to be distinguishable. In both cases the defendant was convicted of premeditated and deliberate murder and felony murder with robbery with a dangerous weapon as the underlying felony, and in both cases the Court concluded that the evidence in the record negated premeditation and deliberation. In both cases the Court upheld the first-degree murder conviction based on felony murder. In *Phipps* the Court held the failure to instruct on second-degree murder to be error, though not error entitling defendant to a new trial, and arrested judgment on the robbery with a dangerous weapon conviction. In *Quick* the Court made no determination as to whether the failure to instruct on second-degree murder was error but merely held the assignment of error, that defendant was entitled to a new trial for the trial court's failure to instruct on second-degree murder, to be without merit. In this regard, to the extent the Court's statements in *Wilson* state that the Court in *Quick* indicated that the "trial court properly refused to instruct on second-degree murder," *State v. Wilson*, 354 N.C. at 506, 556 S.E.2d at 281, those statements are disavowed. Given the lack of evidence negating premeditation and deliberation in *Wilson*, we do not deem that case to be controlling in the present case.[1]

Based on the foregoing, we find merit in defendant's argument and hold that, given the evidence in this record, the trial court erred in failing to instruct on second-degree murder as a lesser offense included within premeditated and deliberate murder. Although a defendant is convicted of the crime of first-degree murder, not a theory, where the trial court instructs on both premeditated and deliberate murder and felony murder and where the evidence is sufficient to support submission of a lesser offense included within premeditated and deliberate murder, the trial court must instruct on the lesser-included offense. The State cannot have the benefit of a finding of premeditated and deliberate murder which the jury may or may not have found had it been properly instructed. Without a finding of premeditated and deliberate murder by the jury, defendant could have been sentenced only for a first-degree felony murder conviction. Defendant could not have been sentenced separately for the underly-

1. In *Wilson* the defendant testified that he did not consider running away when the clerk pulled a gun during the robbery attempt. Defendant further stated: "[W]henever I saw the gun, I was going to shoot back." Moreover, defendant shot at the clerk, and after the clerk ducked behind the counter, shot at the clerk again when the clerk reappeared. *State v. Wilson*, 354 N.C. at 501-02, 556 S.E.2d at 279.

ing felony, *State v. Wilson*, 345 N.C. at 122, 478 S.E.2d at 510; and the underlying felony could not have been used as evidence to support an aggravating circumstance, *State v. Cherry*, 298 N.C. at 113, 257 S.E.2d at 567-68. Inasmuch as this error affected the capital sentencing proceeding including the submission of the (e)(5) aggravating circumstance, we further conclude that the trial court's error in failing to instruct on the lesser offenses included within premeditated and deliberate murder was prejudicial. *See State v. Irwin*, 304 N.C. 93, 107, 282 S.E.2d 439, 449 (1981) (holding that if a reasonable possibility exists that the erroneous submission of an aggravating circumstance tipped the scales in the jury's determination that the aggravating circumstances were "sufficiently substantial" to justify imposition of the death sentence, the test for prejudicial error has been met). Accordingly, we must now decide the appropriate remedy for this error.

Defendant contends that his first-degree murder convictions are validly based only on felony murder and that under *State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178, the proper remedy is for the Court to arrest judgment on one of the murders and award defendant a new sentencing hearing at which only one murder conviction would be submitted and the (e)(5) aggravating circumstance, that the murder was committed while the defendant was engaged in the commission of any homicide, could not be considered. The State argues that since the evidence was sufficient to submit premeditated and deliberate murder and since defendant does not contest his first-degree murder convictions based on felony murder, the Court should grant a new trial on the issue of premeditated and deliberate murder only so that if the new jury finds defendant guilty based on premeditation and deliberation, the State can have the (e)(5) aggravating circumstance submitted at the sentencing proceeding. In support of its position, the State argues that this error is an instructional error, thereby making this case distinguishable from *State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987), *overruled on other grounds by State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44, *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997), *and cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998), in which the Court, holding that the evidence was insufficient to support submission of premeditated and deliberate murder and that the underlying felony merged with the murder for purposes of felony murder and could not be used as an aggravating circumstance, awarded the defendant a new sentencing hearing.

Although a life case, this Court's discussion in *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994), *overruled on other grounds by State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44, is instructive. In *Blankenship* the Court stated:

> Ordinarily a trial error committed in jury instructions would warrant a new trial on the issue affected by the instructions. Defendant, however, has been properly convicted of first-degree murders on a felony-murder theory. "Premeditation and deliberation is one theory by which one may be convicted of first-degree murder; felony murder is another such theory. Criminal defendants are not convicted or acquitted of theories; they are convicted or acquitted of crimes." *State v. Thomas*, 325 N.C. 583, 593, 386 S.E.2d 555, 560-61 (1989). Because defendant has been duly convicted of first-degree murders on a theory unaffected by the instructional error, we think it unnecessary, if not a violation of constitutional double jeopardy, to retry defendant for the same murders on the theory which was affected by the instructional error.
>
> The result is that the two verdicts against defendant for first-degree murder on the theory of felony murder are without error and are left undisturbed. Because we are sustaining defendant's convictions of first-degree murder only on a felony-murder theory, with kidnapping as the underlying felony, the kidnapping convictions merge with the murder convictions; and defendant may not be separately sentenced for kidnapping. *State v. Gardner*, 315 N.C. 444, 450-60, 340 S.E.2d 701, 706-12 (1986); *State v. Silhan*, 302 N.C. 223, 261-62, 275 S.E.2d 450, 477 (1981). Accordingly, we arrest judgment on defendant's two convictions for kidnapping.

State v. Blakenship, 337 N.C. at 563, 447 S.E.2d at 739 (footnote omitted); *cf. State v. Wilson*, 345 N.C. 119, 478 S.E.2d 507 (vacating verdicts based on premeditated and deliberate murder where the trial court did not instruct on acting in concert and the evidence would not support premeditated and deliberate murder as to the defendant's actions alone and arresting judgment on the underlying felony of robbery with a firearm supporting the defendant's convictions based on felony murder).

In *Blankenship* the Court observed in a footnote that the defendant did not seek a new trial on the murder charge but asked that the verdict of guilty based on premeditation and deliberation be set

aside. *State v. Blankenship*, 337 N.C. at 563 n.2, 447 S.E.2d at 739 n.2. Similarly, in this case defendant does not challenge his convictions based on felony murder but challenges only the convictions premised on premeditated and deliberate murder. Our research discloses no case, and the State has cited the Court to none, where the defendant has been convicted of first-degree murder on both theories and this Court upon a finding of error only in the defendant's conviction for premeditated and deliberate murder has ordered a new trial. The Court has consistently upheld the first-degree felony murder conviction, arrested judgment on the underlying felony, and either let the life sentence stand or awarded a new sentencing hearing. *State v. Wilson*, 345 N.C. 119, 478 S.E.2d 507; *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727; *State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178; *State v. Reese*, 319 N.C. 110, 353 S.E.2d 352. On this point we note that in *State v. Quick*, 329 N.C. 1, 405 S.E.2d 179, the trial court had arrested judgment on the robbery with a dangerous weapon conviction which was the underlying felony for felony murder, and the record reflects that this conviction was not used to support an aggravating circumstance at sentencing; this Court awarded a new sentencing hearing based on error under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369.

Consistent with our prior holdings, we conclude that defendant's first-degree murder convictions based on premeditated and deliberate murder should be vacated. Defendant has not challenged his felony murder convictions, and they remain undisturbed; but for sentencing purposes the felony murder conviction for the death of Lenna Lewis in case number 00CRS334 merges into defendant's felony murder conviction for the death of Rhoda Rousseau in case number 00CRS559; judgment for the felony murder conviction in case number 00CRS334 is arrested; and defendant is awarded a new capital sentencing proceeding in case number 00CRS559.

Inasmuch as defendant's convictions for felony murder are upheld, the Court deems it unnecessary to address defendant's remaining assignments of error.

No. 00CRS334, CONVICTION OF FIRST-DEGREE MURDER ON BASIS OF PREMEDITATION AND DELIBERATION VACATED; NO ERROR IN CONVICTION OF FIRST-DEGREE MURDER ON BASIS OF FELONY MURDER; FIRST-DEGREE FELONY MURDER—JUDGMENT ARRESTED.

No. 00CRS559, CONVICTION OF FIRST-DEGREE MURDER ON BASIS OF PREMEDITATION AND DELIBERATION VACATED; NO ERROR IN CONVICTION OF FIRST-DEGREE MURDER ON BASIS OF FELONY MURDER; FIRST-DEGREE FELONY MURDER—JUDGMENT VACATED AND REMANDED FOR NEW CAPITAL SENTENCING PROCEEDING.

LIBERTY MUTUAL INSURANCE CO. v. JUDY BASS PENNINGTON AND RICK PENNINGTON

No. 185PA01

(Filed 20 December 2002)

1. **Insurance— automobile—UIM—notification—statute of limitations**

Under N.C.G.S. § 20-279.21(b)(4), there is no requirement that a UIM carrier be notified of a claim within the limitations period applicable to the underlying tort action. The language of the statute is clear, and nothing therein suggests that the notification requirement is subject to the statute of limitations.

2. **Insurance— automobile—UIM—statute of limitations—action deriving from tort rather than statute**

The limitations period for actions on statutory liabilities does not apply to defendant's claim for UIM coverage because the carrier's liability derives from that of the tortfeasor.

3. **Insurance— automobile—UIM—failure to notify carrier of claim—good faith—material prejudice—issues of fact**

The trial court erred by granting summary judgment for plaintiff in an action to determine UIM coverage where the issue of whether defendants are barred through failure to comply with notice provisions of the policy is not ripe. There were issues of fact as to whether defendants acted in good faith in failing to promptly notify plaintiff of the UIM claim and whether there was material prejudice to plaintiff's ability to investigate and defend the claim.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a unanimous decision of the Court of Appeals, 141 N.C. App. 495, 541 S.E.2d

503 (2000), reversing and remanding an order for summary judgment entered 24 August 1999 by Farmer, J., in Superior Court, Wake County. Heard in the Supreme Court 16 October 2001.

Cranfill, Sumner & Hartzog, L.L.P., by Edward C. LeCarpentier III, for plaintiff-appellant.

Thompson, Smyth & Cioffi, L.L.P., by Theodore B. Smyth; and Pipkin, Knott, Clark and Berger, LLP, by Joe T. Knott, III, for defendant-appellees.

BUTTERFIELD, Justice.

Plaintiff Liberty Mutual Insurance Company instituted this action for declaratory judgment seeking an affirmation that the insurance policy issued to defendants Judy and Rick Pennington afforded defendants no underinsured motorist (UIM) coverage for injuries arising out of an automobile accident involving Judy Pennington and an underinsured motorist. The underlying facts are as follows: Judy Pennington and her daughter, Christy, were injured on 9 December 1993, when a truck driven by Clee Earp and owned by Blackburn Logging Company caused Judy's vehicle to collide with other vehicles. At the time of the accident, defendants were insured under an automobile liability policy issued by plaintiff, which provided UIM coverage pursuant to the provisions of N.C.G.S. § 20-279.21(b)(4).

On 5 June 1996, the Penningtons brought an action against Earp and Blackburn Logging (collectively, the tortfeasors) to recover damages for personal injuries sustained in the 9 December 1993 accident. The case underwent court-ordered mediation on 10 December 1997, at which time the Penningtons learned for the first time that $25,000/$50,000 were the limits of liability on the policy covering Blackburn Logging. The parties thereafter reached a tentative mediated settlement agreement wherein the tortfeasors' insurance provider agreed to tender its policy limits. However, immediately following the mediation, the Penningtons notified Liberty Mutual that they intended to seek coverage under their $50,000/$100,000 UIM policy because the liability limits under the tortfeasors' policy were insufficient to fully compensate the Penningtons for their damages. Prior to that time, the Penningtons had not informed Liberty Mutual of their personal injury action against the tortfeasors.

On 22 December 1997, the Penningtons' attorney sent written notice of the proposed settlement agreement to Liberty Mutual.

Liberty Mutual chose not to review the settlement documents or to advance $25,000 to the Penningtons in order to preserve its subrogation rights under N.C.G.S. § 20-279.21(b)(4). Instead, Liberty Mutual sought to avoid the Penningtons' UIM claim on the ground that notice thereof was untimely.

Plaintiff Liberty Mutual filed this action on 29 May 1998 requesting a judicial declaration that it was not required to provide UIM coverage to defendants because of their failure to comply with the notice provisions of the policy and to notify plaintiff of the UIM claim prior to the expiration of the three-year statute of limitations period set forth in N.C.G.S. § 1-52. Plaintiff and defendants filed cross-motions for summary judgment, and by order dated 24 August 1999, the trial court entered summary judgment for plaintiff. Specifically, the trial court concluded "that there is no genuine issue as to any material fact, which was specifically stipulated to by the parties during the hearing" and "that plaintiff . . . is entitled to judgment as a matter of law, declaring that its policy affords no underinsured motorist coverage for the [9 December 1993] accident."

Defendants appealed to the Court of Appeals, which unanimously reversed the entry of summary judgment by the trial court. The Court of Appeals held that N.C.G.S. § 20-279.21(b)(4) did not require an insured to notify her carrier of a claim for UIM coverage within the three-year statute of limitations applicable to the tortfeasor. The Court of Appeals further concluded that there remained issues of fact as to whether plaintiff was entitled to deny UIM coverage to defendants based on their failure to adhere to the notification provisions contained in the policy. Plaintiff then petitioned this Court for writ of certiorari to review the decision of the Court of Appeals, which we allowed on 3 May 2001.

I.

[1] Before proceeding to plaintiff's arguments, we think it useful to outline some predominant features of the North Carolina Motor Vehicle Safety and Financial Responsibility Act (commonly referred to as the Financial Responsibility Act), of which N.C.G.S. § 20-279.21(b)(4) is a part. As this Court recognized in *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989), "[t]he avowed purpose of the Financial Responsibility Act . . . is to compensate the innocent victims of financially irresponsible motorists." The Act is remedial in nature and is "to be liberally construed so that the beneficial purpose intended by its enactment may

be accomplished." *Id.* The purpose of the Act, we have said, "is best served when [every provision of the Act] is interpreted to provide the innocent victim with the fullest possible protection." *Proctor v. N.C. Farm Bureau Mut. Ins. Co.*, 324 N.C. 221, 225, 376 S.E.2d 761, 764 (1989).

Plaintiff contends that, pursuant to N.C.G.S. § 20-279.21(b)(4),[1] defendants had an obligation to notify plaintiff of their claim for UIM coverage within the three-year statute of limitations prescribed for personal injury actions, N.C.G.S. § 1-52(16) (1993) (amended 1996). Failure to do so, plaintiff argues, precluded defendants from recovering UIM benefits. The notification provision of N.C.G.S. § 20-279.21(b)(4) reads, in pertinent part, as follows:

> A party injured by the operation of an underinsured highway vehicle who institutes a suit for the recovery of moneys for those injuries and in such an amount that, if recovered, would support a claim under underinsured motorist coverage *shall give notice of the initiation of the suit to the underinsured motorist insurer* as well as to the insurer providing primary liability coverage upon the underinsured highway vehicle. Upon receipt of notice, the underinsured motorist insurer shall have the right to appear in defense of the claim without being named as a party therein, and without being named as a party may participate in the suit as fully as if it were a party.

N.C.G.S. § 20-279.21(b)(4), para. 4 (1993) (amended 1997) (emphasis added). The issue of whether notice of a UIM claim must be given within the statute of limitations governing the underlying tort action is one not previously considered by this Court. Resolution of this issue depends upon our construction of the notice requirement of N.C.G.S. § 20-279.21(b)(4). We set about this task pursuant to well-defined tenets of statutory interpretation.

The primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute. *Woodson v. Rowland*, 329 N.C. 330, 338, 407 S.E.2d 222, 227 (1991); *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763. "The legislative purpose of a statute is first ascertained by examining the statute's plain language." *Correll v. Division of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992).

1. N.C.G.S. § 20-279.21 and N.C.G.S. § 1-52 have been amended since the accident giving rise to this action. However, for purposes of this opinion, all references will be to the 1993 versions of the statutes, which were in effect at the time of the 9 December 1993 accident.

" 'Where the language of a statute is clear and unambiguous, there is no room for judicial construction[,] and the courts must give [the statute] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.' " *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) (quoting 7 Strong's North Carolina Index 2d *Statutes* § 5 (1968)).

With these principles in mind, we conclude that under N.C.G.S. § 20-279.21(b)(4), there is no requirement that the UIM carrier be notified of a claim within the limitations period applicable to the underlying tort action. The language of the statute is clear, and nothing therein suggests that the notification requirement is subject to a statute of limitations. To the contrary, the statute merely directs the insured to "give *notice of* the initiation of the suit to the underinsured motorist insurer." N.C.G.S. § 20-279.21(b)(4), para. 4 (emphasis added). The statute does not prescribe the type of notice, the content of the notice, or the method by which it is to be executed. The statute is similarly devoid of any particulars as to the time within which notice to the insurer must be provided. Given the lack of direction and specificity of N.C.G.S. § 20-279.21(b)(4) regarding the notification requirement, we cannot conclude that the failure to provide such notice within the statute of limitations applicable to the underlying tort action operates to bar recovery of UIM benefits.

Plaintiff notes, nonetheless, that under N.C.G.S. § 20-279.21(b)(4), the UIM carrier shall, upon receiving notice, have "the right to appear in defense of the claim" and to "participate in the suit as fully as if it were a party." *Id.* Plaintiff argues that "full" participation is impossible without prompt notice of the suit; therefore, the legislature must have intended to require that notice be given within the limitations period for the underlying action. Again, we do not believe that such a construction follows from a plain reading of N.C.G.S. § 20-279.21(b)(4). The statute simply affords the insurer the right to choose to fully participate in the underlying action at such time as the insurer receives notice of the suit. Contrary to plaintiff's contention, we find nothing in the aforementioned language to suggest that the insured is obligated to notify the UIM carrier of a claim within the statute of limitations applicable to the underlying action.

A comparison of the language of N.C.G.S. § 20-279.21(b)(4) to that of N.C.G.S. § 20-279.21(b)(3), which applies to uninsured motorist (UM) coverage, lends support to the construction we adopt

here. Under N.C.G.S. § 20-279.21(b)(3), all liability insurance policies are subject to the following:

> A provision that the insurer shall be bound by a final judgment taken by the insured against an uninsured motorist if the insurer has been *served with copy of summons, complaint* or other process in the action against the uninsured motorist by registered or certified mail, return receipt requested, or in any manner provided by law . . . . The insurer, *upon being served as herein provided, shall be a party to the action between the insured and the uninsured motorist* though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name. *The insurer, upon being served with copy of summons, complaint or other pleading, shall have the time allowed by statute in which to answer, demur or otherwise plead (whether the pleading is verified or not) to the summons, complaint or other process served upon it.* The consent of the insurer shall not be required for the initiation of suit by the insured against the uninsured motorist: Provided, however, no action shall be initiated by the insured until 60 days following the posting of notice to the insurer at the address shown on the policy or after personal delivery of the notice to the insurer or its agent setting forth the belief of the insured that the prospective defendant or defendants are uninsured motorists.

N.C.G.S. § 20-279.21(b)(3)(a) (emphasis added).

The differences between the two notification provisions is a clear indication that the legislature did not intend them to be given the same construction. N.C.G.S. § 20-279.21(b)(3) unequivocally requires that the UM carrier be served with a copy of the summons and complaint in order to be bound by a judgment against the uninsured motorist. Subsection (b)(3) further directs that upon service of process, the UM carrier shall become a party to the suit and shall have the time allowed by statute to file responsible pleadings. In sharp contrast, N.C.G.S. § 20-279.21(b)(4) does not specify the form, substance, or manner of the notice to be given the UIM carrier. Moreover, subsection (b)(4) does not mandate that the insurer become a party, but merely affords the insurer the option of full participation in the suit upon receipt of the notice. These key distinctions, we believe, illustrate the legislature's intent not to subject the notice provision of N.C.G.S. § 20-279.21(b)(4) to the applicable tort statute of limitations. Thus, we hold that defendants' claim for UIM

benefits was not barred by the three-year statute of limitations set out in N.C.G.S. § 1-52(16).

Furthermore, we believe that our interpretation of N.C.G.S. § 20-279.21(b)(4) is consistent with the remedial purpose of the Financial Responsibility Act and mirrors the characteristic differences between UM and UIM coverage. In the situation where a tortfeasor has no liability insurance coverage, the injured insured's UM carrier generally would be the only insurance provider exposed to liability for the insured's claim for damages. As such, it follows that the UM provider need be made a party to the suit and be served with a copy of the summons and complaint within the statute of limitations governing the underlying tort. The same is not true of the UIM carrier, which would become answerable for the insured's injuries only when the limits of the tortfeasor's liability coverage have been exhausted. *See* N.C.G.S. § 20-279.21(b)(4), para. 1 ("Underinsured motorist coverage is deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted."). In such a situation, the tortfeasor's liability carrier would be the party primarily responsible for defending the action brought by the injured insured. Thus, so long as the action against the tortfeasor is filed within the applicable statute of limitations, the insured's failure to notify her UIM carrier within the limitations period should not, without more, preclude her recovery of UIM benefits. This construction, we conclude, "provide[s] the innocent victim with the fullest possible protection." *Proctor*, 324 N.C. at 225, 376 S.E.2d at 764.

II.

[2] Plaintiff argues, in the alternative, that defendants' claim for UIM benefits is barred for failure to comply with the three-year statute of limitations applicable to liabilities "created by statute," N.C.G.S. § 1-52(2). This Court, however, rejected an analogous argument in *Brown v. Lumbermens Mut. Cas. Co.*, 285 N.C. 313, 204 S.E.2d 829 (1974).

In *Brown*, the plaintiff's intestate died as a result of an accident involving an uninsured motorist. The plaintiff did not file a cause of action against the tortfeasor (the uninsured motorist) within the two-year statute of limitations for wrongful death actions. However, within three years of the accident, the plaintiff instituted an action against his intestate's UM carrier to recover damages for the wrong-

ful death of the intestate. The plaintiff claimed that the action was timely filed because the three-year limitations period for contract actions controlled the UM claim. This Court disagreed, stating that the "[p]laintiff's right to recover against his intestate's insurer under the uninsured motorist endorsement is *derivative and conditional.*" *Id.* at 319, 204 S.E.2d at 834 (emphasis added). Further, we explained "that despite the contractual relation between plaintiff insured and defendant insurer, this action is actually one for the tort allegedly committed by the uninsured motorist." *Id.* Therefore, we held that the three-year contract statute of limitations did not apply and that the plaintiff's claim against the UM carrier was barred by the two-year statute of limitations applicable to wrongful-death actions.

The same reasoning applies to the case *sub judice.* This Court has recognized that, like the UM carrier, the UIM carrier's liability derives from that of the tortfeasor. *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 294, 378 S.E.2d 21, 25 (1989); *see also Buchanan v. Buchanan*, 83 N.C. App. 428, 430, 350 S.E.2d 175, 177 (1986) (holding that UIM carrier discharged as a matter of law, given derivative nature of carrier's liability, where plaintiff-insured executed release of claims against tortfeasor), *disc. rev. denied*, 319 N.C. 224, 353 S.E.2d 406 (1987). Thus, although plaintiff's liability to defendants arises, in part, from N.C.G.S. § 20-279.21(b)(4), "this action is actually one for the tort allegedly committed by the [underinsured] motorist." *Brown*, 285 N.C. at 319, 204 S.E.2d at 834. Therefore, the limitations period for actions on statutory liabilities does not apply to defendants' claim for UIM coverage.

III.

[3] Next, we consider plaintiff's claim that defendants forfeited their right to recover UIM benefits based on their failure to adhere to the explicit notice requirements of the policy. In pertinent part, the policy provides that the UIM claimant must "[p]romptly send [plaintiff] copies of the legal papers if a suit is brought." Further, the policy provides that "[a] suit may not be brought by an insured until 60 days after that person notifies [plaintiff] of their [sic] belief that the prospective defendant is an uninsured[/underinsured] motorist." Plaintiff, therefore, contends that the trial court was correct in awarding summary judgment to plaintiff and that the Court of Appeals erred in reversing the ruling of the trial court.

Summary judgment is an appropriate disposition 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) (2001). The purpose of the rule is to avoid a formal trial where only questions of law remain and where an unmistakable weakness in a party's claim or defense exists. *Dalton v. Camp*, 353 N.C. 647, 650, 548 S.E.2d 704, 707 (2001). This Court has recognized that deciding what constitutes a bona fide issue of material fact is seldom an easy task. *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002); *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999). Nonetheless, we have instructed that "an issue is genuine if it is supported by substantial evidence," *DeWitt*, 355 N.C. at 681, 565 S.E.2d at 146, which is that amount of relevant evidence necessary to persuade a reasonable mind to accept a conclusion, *id.* Further, we have said that "[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." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *DeWitt*, 355 N.C. at 681, 565 S.E.2d at 146. If the movant successfully makes such a showing, the burden then shifts to the nonmovant to come forward with specific facts establishing the presence of a genuine factual dispute for trial. *Lowe v. Bradford*, 305 N.C. 366, 369-70, 289 S.E.2d 363, 366 (1982). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton*, 353 N.C. at 651, 548 S.E.2d at 707. "All 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). Moreover, the duty of the trial court in considering a motion for summary judgment is strictly confined to determining whether genuine issues of material fact exist and does not extend to resolving such issues. *Alford v. Shaw*, 327 N.C. 526, 539, 398 S.E.2d 445, 452 (1990); *Ward v. Durham Life Ins. Co.*, 325 N.C. 202, 209, 381 S.E.2d 698, 702 (1989). In short, the court's function at this juncture is to find factual issues, not to decide them. *Alford*, 327 N.C. at 539, 398 S.E.2d at 452; *Ward*, 325 N.C. at 209, 381 S.E.2d at 702.

In *Great Am. Ins. Co. v. C.G. Tate Constr. Co.*, 303 N.C. 387, 399, 279 S.E.2d 769, 776 (1981), this Court articulated a

three-pronged test for determining whether late notice to an insurer bars recovery:

> When faced with a claim that notice was not timely given, the trier of fact must first decide whether the notice was given as soon as practicable. If not, the trier of fact must decide whether the insured has shown that he acted in good faith, *e.g.*, that he had no actual knowledge that a claim might be filed against him. If the good faith test is met the burden then shifts to the insurer to show that its ability to investigate and defend was materially prejudiced by the delay.

In the instant case, defendants concede that they did not notify plaintiff of the claim for UIM coverage as soon as practicable. Therefore, we proceed to the second prong of the *Tate* analysis—whether defendants' failure to timely notify plaintiff was in good faith.

Defendants' evidence tended to show that they did not promptly notify plaintiff of the underlying tort action or their claim for UIM coverage because they simply did not know that the at-fault motorist was underinsured. Defendants presented evidence that they first became aware of their potential UIM claim during the mediation conference on 10 December 1997, when Blackburn Logging's liability insurer informed defendants for the first time that its liability limits were $25,000/$50,000. Realizing that these limits were inadequate to fully compensate them for their damages, defendants immediately notified plaintiff of their intent to seek coverage under the UIM provisions of defendants' liability policy.

Plaintiff, on the other hand, contends that defendants can have no "good faith" excuse for failing to ascertain the logging company's liability limits at the outset of the underlying tort litigation. Plaintiff notes that under N.C.G.S. § 1A-1, Rule 26(b)(2), defendants were entitled to discover, and should have discovered, the logging company's liability insurance policy. In view of this conflicting evidence, we find there to be a genuine issue of fact as to whether defendants acted in good faith in failing to promptly notify plaintiff of the UIM claim. Moreover, we note that "summary judgment is rarely appropriate in actions . . . in which the litigant's state of mind, motive, or subjective intent is an element of plaintiff's claim." *Dobson v. Harris*, 352 N.C. 77, 87, 530 S.E.2d 829, 837 (2000).

We turn next to the third prong of the *Tate* test—whether the delay materially prejudiced plaintiff's ability to investigate and

defend the UIM claim. In determining whether the insurer has suffered material prejudice as a result of the delay, the following are among the relevant factors to be considered by the fact-finder:

> "the availability of witnesses to the accident; the ability to discover other information regarding the conditions of the locale where the accident occurred; any physical changes in the location of the accident during the period of delay; the existence of official reports concerning the occurrence; the preparation and preservation of demonstrative and illustrative evidence, such as the vehicles involved in the occurrence, or photographs and diagrams of the scene; the ability of experts to reconstruct the scene and the occurrence; and so on."

Great Am., 303 N.C. at 398, 279 S.E.2d at 776 (quoting *Great Am. Ins. Co. v. C.G. Tate Constr. Co.*, 46 N.C. App. 427, 437, 265 S.E.2d 467, 473 (1980)).

Plaintiff claims material prejudice to its ability to investigate and defend the UIM claim, in that it was precluded from participating in the extensive discovery conducted by the parties to the underlying tort action. Plaintiff asserts that the parties have already deposed all of the material witnesses, and if required to defend the suit, plaintiff will have to reconvene several of the witnesses' depositions at considerable expense. In addition, plaintiff argues that the untimely notice resulted in the insurer forfeiting its subrogation rights against the tortfeasors. Plaintiff contends that it was forced to relinquish such rights "in order to preserve the coverage denial at issue here." We note, however, that the third prong of the *Tate* test is not designed to determine whether the insurer has suffered material prejudice in any and all respects. Rather, the prejudice with which *Tate* is concerned is that relative to the ability of the insurer to investigate and defend the claim in question. *Id.* at 397-400, 279 S.E.2d at 775-77. Therefore, the loss of plaintiff's subrogation rights is not relevant to this issue and is not properly a consideration in determining whether plaintiff may avoid liability based on the untimely notice.

In opposition to plaintiff's showing, defendants show that the underlying tort action has yet to go to trial and that plaintiff still has time to conduct additional discovery, to take additional depositions, or to redepose those witnesses who have already been deposed. Furthermore, there is nothing in the record to show that the tortfeasors had received inadequate legal representation prior to plaintiff's receiving notice of the suit. Likewise, nothing in the record suggests

that witnesses have become unavailable or that material evidence has been made unattainable. Therefore, the record demonstrates neither the presence nor the absence of material prejudice as a matter of law. Accordingly, we hold that the issue of whether defendants are barred from recovering UIM benefits for failure to comply with the notice provisions of the policy is not yet ripe for summary judgment and that the trial court erroneously entered judgment in favor of plaintiff.

For the foregoing reasons, we hereby affirm the Court of Appeals' decision reversing the trial court's grant of summary judgment to plaintiff.

AFFIRMED.

LESLIE S. AUGUR v. RICHARD G. AUGUR

No. 218A02

(Filed 20 December 2002)

Declaratory Judgments— declining request for declaratory relief—abuse of discretion standard—constitutionality of Domestic Violence Act

The Court of Appeals erred by concluding that defendant was entitled to a ruling from the trial court on his counterclaim for declaratory judgment regarding the constitutionality of the Domestic Violence Act based on an actual controversy existing between the parties, because: (1) North Carolina trial courts are expressly accorded discretion under N.C.G.S. § 1-257 which created declaratory judgment relief, and our trial courts are in a better position than appellate courts, in some instances, to assess the appropriateness of particular legal relief; (2) N.C.G.S. § 1-257 provides that the trial court may decline to grant declaratory relief where it would not terminate the uncertainty or controversy giving rise to the proceeding; (3) at the time the trial court dismissed defendant's counterclaim, defendant had already received the relief sought which was removal of the domestic violence protection order against defendant and a finding that its imposition was unwarranted; and (4) the trial court's disposition had the effect of leaving defendant exactly where he was prior to the filing of plaintiff's complaint.

AUGUR v. AUGUR

[356 N.C. 582 (2002)]

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 149 N.C. App. 851, 561 S.E.2d 568 (2002), affirming in part and reversing and remanding in part a judgment entered 11 December 2000 by Cash, J., in District Court, Buncombe County. Heard in the Supreme Court 16 October 2002.

Pisgah Legal Services, Inc., by Anne Bamberger; and Amy E. Ray, for plaintiff-appellant.

Carter and Kropelnicki, P.A., by Steven Kropelnicki, Jr., for defendant-appellee.

MARTIN, Justice.

Plaintiff Leslie Augur and defendant Richard Augur married in 1981 and divorced in 1996. On 26 October 1999, plaintiff filed a complaint and motion for a domestic violence protection order (DVPO) against defendant pursuant to the provisions of the North Carolina Domestic Violence Act (DVA), N.C.G.S. ch. 50B (2001). Plaintiff alleged defendant had assaulted her the previous night and had demonstrated abusive behavior toward plaintiff and her children in the past.

The trial court entered an *ex parte* DVPO against defendant on 28 October 1999. The DVPO instructed defendant: (1) to "not assault, threaten, abuse, follow, harass . . . , or interfere with" plaintiff; (2) to stay away from plaintiff's residence and workplace; (3) to avoid all contact with plaintiff; and (4) to not possess or purchase a firearm during the next ten days.

On 1 November 1999, the trial court held a hearing where both parties were represented by counsel. At the hearing, defendant served plaintiff with an answer, a counterclaim for declaratory judgment as to the constitutionality of the DVA, and a motion to dismiss. Defendant's request for declaratory relief included the assertion that the provisions of the DVA are facially unconstitutional. At defendant's request, the trial court continued the hearing. A modified DVPO, without the firearm restriction, remained in effect until 15 November 1999 by mutual consent of the parties.

On 13 December 1999, the trial court ruled plaintiff had failed to show that any domestic violence had occurred and took under advisement the issues raised by defendant's counterclaim for declaratory relief. On 7 August 2000, the trial court entered an order dismissing plaintiff's complaint and denying defendant's counter-

claim as moot. On motion of the defendant, the trial court's judgment was set aside to afford the North Carolina Attorney General the opportunity to be heard on the constitutional issues raised by defendant's counterclaim, as required by N.C.G.S. § 1-260. The Attorney General ultimately agreed with the trial court's original disposition of the matter and declined the opportunity to be heard. Therefore, the trial court entered another judgment dated 11 December 2000, dismissing plaintiff's complaint and again denying defendant's request for declaratory judgment on mootness grounds. Defendant appealed to the Court of Appeals.

A divided panel of the Court of Appeals reversed the trial court order in part, remanding the case for consideration of the issues raised by defendant's counterclaim. *Augur v. Augur*, 149 N.C. App. 851, 561 S.E.2d 568 (2002). The Court of Appeals stated that the existence of an " 'actual controversy . . . both at the time of the filing of the pleading and at the time of the hearing' " is a prerequisite to the exercise of subject matter jurisdiction under North Carolina's version of the Uniform Declaratory Judgment Act (NCUDJA), N.C.G.S. §§ 1-253 to 1-267 (2001). *Augur*, 149 N.C. App. at 853, 561 S.E.2d at 570 (quoting *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 585, 347 S.E.2d 25, 30 (1986)) (alteration in original) (emphasis omitted). The Court of Appeals determined that an actual controversy existed between the parties both on 1 November 1999 and on 13 December 1999 because the merits of defendant's counterclaim for declaratory judgment could not be determined by dismissal of plaintiff's complaint. *Id.* at 854, 561 S.E.2d at 570. Therefore, defendant was entitled to a ruling on the constitutionality of the DVA. *Id.*

Judge Greene, in dissent, agreed that an actual controversy existed at the time defendant filed his counterclaim but stated that defendant was no longer affected by the DVA after dismissal of plaintiff's complaint. *Id.* at 855, 561 S.E.2d at 571 (Greene, J., dissenting). Since the validity of a statute can be " 'challenged [only] by a person directly and adversely affected' " by it, the dissent asserted that the trial court no longer had jurisdiction over defendant's counterclaim after plaintiff's complaint was dismissed. *Id.* (quoting *City of Greensboro v. Wall*, 247 N.C. 516, 519-20, 101 S.E.2d 413, 416 (1958)). Plaintiff appeals on the basis of the dissenting opinion. *See* N.C.G.S. § 7A-30(2) (2001).

At the outset, the parties agree that an actual controversy existed in the instant case at the time defendant filed his counterclaim. Therefore, for purposes of our discussion, we assume the court had

jurisdiction over defendant's counterclaim. *See In re Peoples*, 296 N.C. 109, 146, 250 S.E.2d 890, 911 (1978) (stating that once jurisdiction attaches, it is generally not ousted by subsequent events), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). When the trial court issued its order, it effectively declined to exercise its jurisdiction. Our initial inquiry, therefore, necessarily focuses on the trial court's authority to decline defendant's request for declaratory relief.

Section 1-257 of the NCUDJA, entitled "Discretion of court," provides: "[A] court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding . . . ." The NCUDJA became law in 1931, and section 1-257 is modeled after section 6 of the Uniform Declaratory Judgments Act (UDJA). *See* 12A U.L.A. 1 (1996) (noting the effective date and statutory citation for NCUDJA). *Compare* Uniform Declaratory Judgments Act § 6, 12A U.L.A. 302 (1996), *with* Act of March 12, 1931, ch. 102, sec. 5, 1931 Public Laws of N.C. 133, 134 (codified as amended at N.C.G.S. § 1-257) (demonstrating that the relevant language in N.C.G.S. § 1-257 is identical to section 6 of the UDJA).

In searching for guidance as to the meaning of section 1-257, we turn, as we have in other circumstances, to federal cases interpreting parallel federal provisions. *See, e.g., Department of Transp. v. Rowe*, 353 N.C. 671, 678, 549 S.E.2d 203, 209 (2001) (federal Due Process Clause caselaw persuasive but not controlling when analyzing the North Carolina Constitution), *cert. denied*, 534 U.S. 1130, 151 L. Ed. 2d 972 (2002); *State v. Thompson*, 332 N.C. 204, 219, 420 S.E.2d 395, 403 (1992) (same—Rules of Evidence); *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 655, 194 S.E.2d 521, 530-31 (1973) (same—state antitrust law).

Significantly, the federal declaratory judgment statute lacks an express provision empowering courts to decline a party's request for declaratory relief.[1] *See* 28 U.S.C. § 2201 (2000). Federal courts have long consulted the UDJA, however, when considering the question of a trial court's discretion to decline declaratory relief. *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 243, 97 L. Ed. 291, 295-96 (1952); *Gross v. Fox*, 496 F.2d 1153, 1155 n.10 (3d Cir. 1974); *Aetna Cas. &*

1. A discretionary provision was omitted from the federal statute in the interest of statutory brevity, not as part of any effort to deny federal courts the discretion to decline a request for declaratory relief. Edwin Borchard, *Declaratory Judgments* 313 (2d ed. 1941).

Sur. Co. v. Quarles, 92 F.2d 321, 324 (4th Cir. 1937). *See generally* 12 James W. Moore, et al., *Moore's Federal Practice* § 57 App.02[1] (3d ed. 2002) (the UDJA provides guidance as to the scope and function of the federal act). Because the North Carolina statute is based upon the UDJA, federal law is instructive when examining the discretion vested in our trial courts under section 1-257.

Despite the lack of a provision similar to section 6 of the UDJA within the federal declaratory judgment statute, federal trial courts are not obligated to issue declaratory judgments but rather do so in their discretion. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286-87, 132 L. Ed. 2d 214, 223 (1995); *Foundation for Interior Design Educ. Research v. Savannah Coll. of Art & Design*, 244 F.3d 521, 526 (6th Cir. 2001); *Aetna Cas. & Sur. Co. v. Ind-Com Elec. Co.*, 139 F.3d 419, 424 (4th Cir. 1998); *EMC Corp. v. Norand Corp.*, 89 F.3d 807, 810 (Fed. Cir. 1996), *cert. denied*, 519 U.S. 1101, 136 L. Ed. 2d 730 (1997). The federal declaratory judgment statute thus confers a power upon the court, not a right upon litigants. *Wilton*, 515 U.S. at 287, 132 L. Ed. 2d at 223 (quoting *Wycoff Co.*, 344 U.S. at 241, 97 L. Ed. at 294-95); *Beacon Constr. Co. v. Matco Elec. Co.*, 521 F.2d 392, 397 (2d Cir. 1975).

In contrast to the federal declaratory judgment statute, section 1-257 of the NCUDJA explicitly gives courts discretion to decline requests for declaratory relief. Moreover, other NCUDJA provisions speak to the "power" of courts to grant such judgments, not to any obligation to do so. N.C.G.S. § 1-253 (courts have the "power" to declare legal status); N.C.G.S. § 1-254 (courts have the "power" to construe and validate legal instruments); *see also* N.C.G.S. § 1-255 (describing those who may "apply" for declaratory relief). Thus, while federal courts have construed the federal act to allow trial courts to grant or decline declaratory relief in their discretion, the NCUDJA has explicitly accorded this discretion to our trial courts.

The United States Supreme Court has noted that trial courts are more adept than appellate courts at fact-finding, litigation supervision, and the application of facts to fact-dependent legal standards. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233, 113 L. Ed. 2d 190, 199 (1991). These "institutional advantages" make it appropriate for trial courts to have some degree of discretion to decline requests for declaratory relief:

> We believe it more consistent with the [declaratory judgment] statute to vest [trial] courts with discretion in the first instance,

> because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp. . . . [P]roper application of the abuse of discretion standard on appellate review can, we think, provide appropriate guidance to [trial] courts.

Wilton, 515 U.S. at 289, 132 L. Ed. 2d at 225 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948, 131 L. Ed. 2d 985, 996 (1995); *Miller v. Fenton*, 474 U.S. 104, 114, 88 L. Ed. 2d 405, 413 (1985)). Thus, federal trial courts have discretion to stay or dismiss an action seeking declaratory relief at any point before entry of judgment. *DeNovellis v. Shalala*, 124 F.3d 298, 313 (1st Cir. 1997); *Centennial Life Ins. Co. v. Poston*, 88 F.3d 255, 257 (4th Cir. 1996).

Similarly, our trial courts are in a better position than appellate courts, in some instances, to assess the appropriateness of particular legal relief, and therefore an abuse of discretion standard is applied to the trial court's decision to grant or deny relief. *State v. Julian*, 345 N.C. 608, 611, 481 S.E.2d 280, 282 (1997) (trial court is in a better position than appellate court to determine if a new trial is necessary); *Hill v. Hanes Corp.*, 319 N.C. 167, 179, 353 S.E.2d 392, 399 (1987) (granting of relief under Rule 60(b) requires resolution of questions more properly suited for trial courts); *cf. Stanback v. Stanback*, 287 N.C. 448, 459, 215 S.E.2d 30, 38 (1975) (upon a sufficient affidavit, granting of order compelling inspection of documents rests in the trial court's discretion). As demonstrated by the language of section 1-257, and more fully explained below, the propriety of declaratory relief in any particular situation depends upon whether it will actually resolve the controversy at hand. Our trial courts are well suited to conduct this inquiry under the NCUDJA.

Because North Carolina trial courts are expressly accorded discretion under the very statute creating the declaratory judgment remedy, N.C.G.S. § 1-257, and because trial courts are best positioned to assess the facts bearing on the usefulness of declaratory relief in a particular case, *compare Hill*, 319 N.C. at 179, 353 S.E.2d at 399, *with Salve Regina Coll.*, 499 U.S. at 233, 113 L. Ed. 2d at 199, the trial court's decision to decline a party's request for declaratory relief is reviewed under the abuse of discretion standard. *See Wilton*, 515 U.S. at 289, 132 L. Ed. 2d at 224.

The express language of section 1-257 necessarily guides the exercise of the trial court's discretion. The trial court may decline to grant declaratory relief where it "would not terminate the uncertainty

or controversy giving rise to the proceeding." N.C.G.S. § 1-257. The preeminent treatise on declaratory judgments sets forth two criteria to aid in the interpretation of this language. Borchard, *Declaratory Judgments* at 299. According to Professor Borchard, a declaratory judgment should issue "(1) when [it] will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding." *Id.* When these criteria are not met, no declaratory judgment should issue. *Id.* Thus, declaratory judgments should not be made " 'in the air,' or in the abstract, *i.e.* without definite concrete application to a particular state of facts which the court can by the declaration control and relieve and thereby settle the controversy." *Id.* at 306.

Similar criteria have guided the discretion of other courts in issuing declaratory relief. Federal courts have long cited to Borchard's treatise with approval when discussing the discretion of a trial court to enter declaratory judgment. *See, e.g., Wilton*, 515 U.S. at 288, 132 L. Ed. 2d at 224; *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 983 (10th Cir. 1994); *Natural Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency*, 966 F.2d 1292, 1299 (9th Cir. 1992); *Grand Trunk Western R.R. Co. v. Consolidated Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984); *McCorkle v. United States*, 559 F.2d 1258, 1263 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011, 54 L. Ed. 2d 755 (1978). State appellate courts have also interpreted their versions of the UDJA as according trial courts similar discretion. *See, e.g., Grimm v. County Comm'rs of Washington Cty.*, 252 Md. 626, 632, 250 A.2d 866, 869 (1969); *Allstate Ins. Co. v. Firemen's Ins. Co.*, 76 N.M. 430, 433-34, 415 P.2d 553, 555 (1966); *Sullivan v. Chafee*, 703 A.2d 748, 751 (R.I. 1997); *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 468 (Tex. 1995). Notably, our Court of Appeals has made recent use of Borchard's analysis. *Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co.*, 141 N.C. App. 569, 578, 541 S.E.2d 157, 163 (2000) (discussing Borchard's treatise), *disc. rev. denied*, 353 N.C. 370, 547 S.E.2d 433 (2001); *see also Farber v. N.C. Psychology Bd.*, — N.C. App. —, —, 569 S.E.2d 287, 299 (2002) (citing *Coca-Cola*, 141 N.C. App. at 577-79, 541 S.E.2d at 163-64).

Consideration of these well recognized principles leads us to conclude that section 1-257 permits a trial court, in the exercise of its discretion, to decline a request for declaratory relief when (1) the requested declaration will serve no useful purpose in clarifying or settling the legal relations at issue; or (2) the requested declaration will

not terminate or afford relief from the uncertainty, insecurity, or controversy giving rise to the proceeding. The trial court's decision to decline a request for declaratory relief will be overturned only upon a showing that it has abused its discretion, i.e., the recognized criteria have been ignored, or the decision is otherwise "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998).

Although our statute empowers a trial court to decline a request for declaratory relief under certain circumstances, section 1-257 should not be applied to thwart a properly presented constitutional challenge. Our courts are obligated to protect fundamental rights when those rights are threatened. *Corum v. University of N.C.*, 330 N.C. 761, 783, 413 S.E.2d 276, 290, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992). To that end, "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. art. I, § 18. Our State Constitution admonishes that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35. Therefore, where it " 'clearly appears either that property or fundamental human rights are denied in violation of constitutional guarantees,' " *Jernigan v. State*, 279 N.C. 556, 562, 184 S.E.2d 259, 264 (1971) (quoting *Roller v. Allen*, 245 N.C. 516, 518, 96 S.E.2d 851, 854 (1957)), and where a statutory provision is specifically challenged by a person directly affected by it, *id.* (citing *Wall*, 247 N.C. at 519-20, 101 S.E.2d at 416), declaratory relief as to the constitutional validity of that provision is appropriate. *Id.*; *see also Malloy v. Cooper*, 356 N.C. 113, 118, 565 S.E.2d 76, 79-80 (2002). In other words, when the requested declaration satisfies the recognized criteria we articulate above, the trial court has no discretion to decline the request. In any event, when the trial court exercises its statutory discretion, its action should be guided by the rule we have followed for many years: " '[C]ourts will not entertain or proceed with a cause merely to determine abstract propositions of law.' " *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 399, 474 S.E.2d 783, 787 (1996) (quoting *Peoples*, 296 N.C. at 147, 250 S.E.2d at 912).

In the instant case, the trial court properly declined defendant's request for issuance of declaratory relief. At the time the trial court dismissed defendant's counterclaim, defendant had already received the relief sought: removal of the DVPO and a finding that its imposition was unwarranted. The trial court concluded, as a matter of law,

that no domestic violence had occurred, and this determination exonerated defendant from any allegations of wrongdoing. The trial court's disposition had the effect of leaving defendant exactly where he was prior to the filing of plaintiff's complaint—free from the taint of wrongful accusation or legal detriment. *Cf. Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 593, 528 S.E.2d 568, 570 (2000) (voluntary dismissal by the plaintiff returns the plaintiff to the legal position enjoyed prior to filing of the complaint); N.C.G.S. § 50B-6 (DVA shall not be construed to grant any person legal status for any purpose other than those expressly discussed therein). It also eliminated the possibility that defendant may again become subject to the DVA based upon plaintiff's unfounded allegations. *See Whedon v. Whedon*, 313 N.C. 200, 210, 328 S.E.2d 437, 443 (1985) (involuntary dismissal acts as a final adjudication on the merits and ends a lawsuit); *see also* 2 G. Gray Wilson, *North Carolina Civil Procedure* § 41-1, at 33 (1995) (same). Therefore, the trial court's resolution eliminated any present or future legal effect the DVA might have on defendant as a result of plaintiff's complaint. Because defendant was not subject to the provisions of the DVA at the time the trial court addressed defendant's counterclaim and because he made no showing that he was threatened with further litigation under the DVA, a declaration as to the constitutionality of the DVA could not alter defendant's legal position. Thus, issuance of a declaratory judgment under these circumstances would have been improvident.

We have generally held that temporary restraining orders, such as the DVPO issued in the present case, may be issued to prohibit potentially wrongful acts and preserve the status quo pending judicial resolution of plaintiff's claim. *See Seaboard Air Line R.R. Co. v. Atlantic Coast Line R.R. Co.*, 237 N.C. 88, 94, 74 S.E.2d 430, 434 (1952); *Roberts*, 344 N.C. at 399, 474 S.E.2d at 787 (an injunction is available in any case where it may provide significant benefits that outweigh its disadvantages). Violation of many provisions of this DVPO could conceivably have led to criminal sanction. *See* N.C.G.S. § 14-277.3 (2001) (defining crime of stalking); *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967) (defining common-law crime of assault). Defendant obviously does not claim he was unconstitutionally restrained from engaging in criminally punishable behavior.

Defendant's counterclaim made various broadside attacks on the DVA but included no specific allegations as to how this particular defendant was unconstitutionally or adversely affected by its provisions in any significant way. At the time of the hearing on

defendant's counterclaim, none of defendant's rights were encumbered. Moreover, no specific anticipated encumbrances were described among the allegations of defendant's counterclaim. Because it was unnecessary to mount this broad constitutional attack on the DVA to protect defendant's rights, the trial court's constitutional examination of the DVA in this context would have been merely academic in nature.

As we have noted before, the DVA is an effort on the part of the duly elected legislature to respond to "the serious and invisible problem" of domestic violence. *State v. Thompson*, 349 N.C. 483, 486, 508 S.E.2d 277, 279 (1998) (discussing the impetus behind enactment of the DVA, Act of May 14, 1979, ch. 561, 1979 N.C. Sess. Laws 592). As such, a ruling upon the facial constitutionality of the DVA should be made only when necessary and then only in a clearly defined factual setting.

Defendant does not assign as error that the trial court abused its discretion, and we discern no abuse of discretion in the proceedings below. Although the order is, admittedly, phrased in terms of mootness, the trial court apparently realized that the broad declaratory ruling requested by defendant would serve no useful purpose in terminating the discrete controversy at hand. Since the trial court would reach the same conclusion as we have under the proper legal standard, remand is unnecessary. Accordingly, the decision of the Court of Appeals is reversed.

REVERSED.

STATE OF NORTH CAROLINA v. BRIAN ALEXANDER SCOTT

No. 598PA01

(Filed 20 December 2002)

1. Motor Vehicles— habitual driving while impaired—motion to dismiss—standard of review—substantial evidence

The Court of Appeals erred by applying the proof beyond a reasonable doubt standard of review in determining whether the trial court properly dismissed the habitual DWI charge under N.C.G.S. § 15A-1227(a)(3) after the return of a verdict of guilty

but before entry of judgment because the appropriate standard of review is whether there is substantial evidence of each essential element of the offense charged or of a lesser offense included therein, and of defendant's being the perpetrator of such offense.

2. Motor Vehicles— habitual driving while impaired—motion to dismiss—sufficiency of evidence

The Court of Appeals erred by affirming the trial court's dismissal of defendant's conviction of habitual driving while impaired under N.C.G.S. § 20-138.5, because substantial evidence existed for each essential element of DWI and viewing the evidence in a light most favorable to the State reveals a reasonable inference of defendant's guilt based on direct and circumstantial evidence presented by the State.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 146 N.C. App. 283, 551 S.E.2d 916 (2001), affirming dismissal of a conviction for driving while impaired entered by Bullock, J., on 14 October 1999 in Superior Court, Durham County. Heard in the Supreme Court 9 September 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.

Daniel Shatz for defendant-appellee.

Morrow Alexander Tash Kurtz & Porter, by Benjamin D. Porter, on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

BUTTERFIELD, Justice.

This case comes to us on discretionary review from a unanimous opinion of the Court of Appeals affirming the trial court's dismissal of defendant's conviction for driving while impaired (DWI). Defendant was indicted for DWI, habitual DWI, driving while license revoked (DWLR), carrying a concealed weapon, possession of a firearm by a felon, and being an habitual felon. A careful examination of the record reveals that defendant informed the trial court that he had authorized his counsel to stipulate to prior convictions of DWI and a prior felony larceny conviction. The record also reveals that there

was a clear understanding between defense counsel, the prosecutor, and the trial judge that there had been stipulations as to the DWI convictions and the felony larceny conviction pursuant to N.C.G.S. § 15A-928(c). The trial court proceeded with the trial accordingly. At the close of the State's case in chief, defendant moved to dismiss the charges because of insufficiency of the evidence. The trial court denied the motion. Defendant called three witnesses in his defense. At the close of all evidence, defendant did not move for dismissal or nonsuit.

The jury found defendant guilty of DWI and not guilty of carrying a concealed weapon. The parties disagree regarding the actual DWI charge upon which defendant was tried and convicted. Our careful review of the record confirms the State's argument that defendant was tried upon and found guilty of habitual DWI. Defendant pled guilty to the DWLR charge. Prior to proceeding with sentencing on the habitual DWI conviction, defendant moved to dismiss the DWI conviction based on insufficiency of the evidence. The trial court granted defendant's motion to dismiss. The order of 14 October 1999 references the offense as simply "driving while impaired." We have examined that portion of the transcript immediately after the jury returned its verdict of guilty. In the discussion between the prosecutor, defense counsel, and the trial judge regarding the habitual felon charge, the trial judge stated, "And you are saying habitual DWI is habitual felon, is the underlying charge to support the habitual felon?" Notwithstanding the clerical error in the order, the trial judge clearly intended to dismiss the habitual DWI charge.

The trial court subsequently sentenced defendant on the DWLR charge to which defendant pled guilty. The only issue before us is the dismissal of the habitual DWI charge. The Court of Appeals held that the State's appeal did not violate principles of double jeopardy. The Court of Appeals then addressed whether the trial court properly dismissed the habitual DWI charge. The Court of Appeals held that the trial court properly dismissed the charge and affirmed the actions of the trial court. From this determination, the State appeals.

The State raises two issues for our consideration: first, whether the Court of Appeals applied the correct standard of review in determining whether the trial court properly dismissed the habitual DWI charge, under N.C.G.S. § 15A-1227(a)(3), after the jury had returned a verdict of guilty but before entry of judgment; and second, whether there was sufficient evidence to sustain the jury's verdict of guilty. We first address the applicable standard of review.

[1] The Court of Appeals wrote, "As defendant refused to take the Intoxilyzer test, the State needed to prove beyond a reasonable doubt that defendant was impaired through his actions and words, and through other indicia that showed he was appreciably impaired. We conclude that the State has not met this burden." *State v. Scott*, 146 N.C. App. 283, 287, 551 S.E.2d 916, 919 (2001). The Court of Appeals then summarized the State's evidence against defendant. The Court of Appeals held that "this evidence, in and of itself, is not sufficient to prove beyond a reasonable doubt that defendant was appreciably impaired." *Id.* The State contends that the Court of Appeals erred in applying this "proof beyond a reasonable doubt" standard of review. We agree.

The Court of Appeals' holding requires the State to prove a defendant's guilt beyond a reasonable doubt in order to survive a motion to dismiss for insufficiency of the evidence after a jury has returned a verdict of guilty but prior to entry of judgment. The applicable statutory provision, which the trial court referenced in deciding the motion, is N.C.G.S. § 15A-1227(a)(3). The statute provides as follows:

> (a) A motion for dismissal for insufficiency of the evidence to sustain a conviction may be made at the following times:
>
> (1) Upon close of the State's evidence.
>
> (2) Upon close of all the evidence.
>
> (3) After return of a verdict of guilty and before entry of judgment.
>
> (4) After discharge of the jury without a verdict and before the end of the session.
>
> (b) Failure to make the motion at the close of the State's evidence or after all the evidence is not a bar to making the motion at a later time as provided in subsection (a).
>
> (c) The judge must rule on a motion to dismiss for insufficiency of the evidence before the trial may proceed.
>
> (d) The sufficiency of all evidence introduced in a criminal case is reviewable on appeal without regard to whether a motion has been made during trial, as provided in G.S. 15A-1446(d)(5).

N.C.G.S. § 15A-1227 (2001). The State invites us to compare other statutory post-verdict motions that address the sufficiency of the evi-

dence. However, a review of these statutes is not necessary to determine the issue before us. Therefore, we decline to address these statutes in the abstract and in hypothetical terms that would fall outside the scope of our review.

The State argues that the standard of review for a motion to dismiss should be uniform throughout the statute regardless of whether the motion is made at the close of the State's evidence, at the close of all the evidence, after return of a verdict of guilty and before entry of judgment, or after discharge of the jury without a verdict and before the end of the session. As this appears to be a case of first impression for this Court, we note that the doctrine of *stare decisis* requires us to hold that the standard of review to be applied to each provision in N.C.G.S. § 15A-1227 shall be uniform.

The legislature did not distinguish a motion to dismiss after the return of a verdict of guilty by setting it apart in another statute. Rather, the legislature included it within N.C.G.S. § 15A-1227 along with the other provisions. "Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole." *State ex rel. Comm'r of Ins. v. N.C. Auto. Rate Admin. Office*, 294 N.C. 60, 66, 241 S.E.2d 324, 328 (1978). We shall thus review this statute as a whole.

This Court has examined the standard of review for motions to dismiss in criminal trials. In *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980), this Court held:

> Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.
>
> If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.

Id. at 98, 261 S.E.2d at 117 (citations omitted). We reiterated this holding in *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993), and in *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). We find no compelling reason to depart from this standard of review. Therefore, the *Powell*

standard of review is appropriate for our examination of the evidence in the case *sub judice.*

[2] We now turn to the State's second issue, which addresses whether there was sufficient evidence to support the jury's verdict of guilty. In applying the standard of review for motions to dismiss as established in *Powell*, rather than the standard applied by the Court of Appeals in this case, we follow our holdings in *Barnes* and *Fritsch*. In *Fritsch*, we quoted the holding in *Barnes* and expanded upon it as follows:

> In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. *Id.* The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then " 'it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.' " *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (alteration in original) (quoting *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965)).

Barnes, 334 N.C. at 75-76, 430 S.E.2d at 918-19. "Both competent and incompetent evidence must be considered." *State v. Lyons*, 340 N.C. 646, 658, 459 S.E.2d 770, 776 (1995). In addition, the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence. *See State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982). The defendant's evidence that does not conflict "may be used to explain or clarify the evidence offered by the State." *Id.* When rul-

ing on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence. *See id.* at 67, 296 S.E.2d at 652.

Fritsch, 351 N.C. at 378-79, 526 S.E.2d at 455-56. Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781, *cert. denied*, — U.S. —, — L. Ed. 2d —, 71 U.S.L.W. 3317 (2002). Following these holdings, we now review the sufficiency of the evidence in this case.

Defendant was charged with habitual DWI under N.C.G.S. § 20-138.5. One element of habitual DWI is driving while impaired as defined in N.C.G.S. § 20-138.1, which, in pertinent part, provides:

> (a) Offense.—A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
>
> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more.

N.C.G.S. § 20-138.1(a) (2001). The State presented evidence that: (1) defendant was traveling at a speed in excess of sixty miles per hour; (2) defendant's vehicle had no motor vehicle tags; (3) defendant did not immediately stop after the arresting officer activated his red and blue lights and did not do so until after the officer accelerated to keep up with the vehicle and activated his airhorn more than once; (4) defendant did not stop in the rightmost lane of the four-lane highway, but rather stopped at a "T" intersection in such a manner that defendant's and the officer's cars blocked the intersection; (5) defendant left his vehicle and started toward the officer's vehicle before being ordered to return to his vehicle; (6) upon approaching defendant's vehicle, the officer smelled a strong odor of alcohol; (7) the officer observed an open container of beer in the passenger area of defendant's vehicle; (8) defendant's coat was wet from what appeared to the officer to be beer waste; (9) defendant's speech was slurred; (10) defendant refused to take the ALCO-SENSOR test; and (11) defendant refused the Intoxilyzer test. Defendant presented evidence to

contradict the State's evidence. Evidence in the record supporting a contrary inference is not determinative on a motion to dismiss. *Fritsch*, 351 N.C. at 382, 526 S.E.2d at 457.

Under the proper standard of review, substantial evidence existed for each essential element of DWI. Viewing the evidence in a light most favorable to the State, we conclude that a reasonable inference of defendant's guilt may be drawn from the direct and circumstantial evidence presented by the State. Such evidence was sufficient to support the jury's verdict of guilty. Accordingly, the Court of Appeals erred in affirming the trial court's dismissal of the DWI charge.

Defendant has filed a motion with this Court to amend the record on appeal to reflect additional orders from the Superior Court, Durham County. After this matter was docketed in the Court of Appeals, appellate defense counsel filed a motion in the Superior Court, Durham County, to dismiss the habitual DWI and habitual felon charges that were still reflected in the Durham County Clerk of Superior Court's computer records. Appellate counsel's argument for allowing this motion was premised on the same argument that he has presented to this Court: that defendant was not convicted of habitual DWI and that the trial judge dismissed the DWI charge, as reflected on the 14 October 1999 order with the clerical error. The presiding judge allowed the motion in an order dated 8 February 2001. The State gave notice of appeal from the 8 February 2001 order. Appellate defense counsel filed a motion to dismiss the State's appeal for failure to perfect it. The presiding judge, with the State's consent, entered an order dated 6 August 2001 dismissing the appeal. We have allowed defendant's motion to amend the record so that we may prevent any misunderstanding regarding entry of judgment upon remand. The orders of 8 February 2001 and 6 August 2001, whereby appellate defense counsel sought to dismiss the charges of habitual DWI and being an habitual felon, did not affect the State's appeal. As we have determined, the trial court intended, and did, dismiss the habitual DWI charge. When the trial court dismissed the habitual DWI charge, the habitual felon charge was automatically dismissed because it was predicated on the habitual DWI conviction. The orders, at most, corrected the Durham County computer records.

Based upon the foregoing, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the Superior Court, Durham County. Upon remand, the trial court is to

sentence defendant for the habitual DWI and may continue with any proceedings pertinent to the habitual felon charge.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. BELVIN E. WAGNER

No. 108A02

(Filed 20 December 2002)

1. **Drugs— felonious possession of drug paraphernalia— nonexistent crime**

   A charge of felonious possession of drug paraphernalia is not supported by any statute. Therefore, an indictment for felonious possession of drug paraphernalia was facially invalid, the trial court never had jurisdiction over this charge, and defendant's conviction for felonious possession of drug paraphernalia is void and is vacated.

2. **Sentencing— guilty plea and sentence set aside—greater sentence after trial—statutory violation**

   After defendant's plea of guilty of attempted possession of cocaine and his sentence of 101 to 131 months were set aside pursuant to his motion for appropriate relief, a sentence of 135 to 175 months imposed upon defendant's conviction at trial for attempted possession of cocaine was contrary to the mandate of N.C.G.S. § 15A-1335 that a defendant whose sentence has been successfully challenged cannot receive a more severe sentence for the same offense or conduct on remand. The fact that defendant's original conviction resulted from a negotiated plea rather than a finding of guilt by a jury is of no consequence.

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. 658, 560 S.E.2d 174 (2002), finding no error in judgments entered 17 October 2000 by Albright, J., in Superior Court, Forsyth County. Heard in the Supreme Court 12 September 2002.

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

J. Clark Fischer for defendant-appellant.

Rudolph, Maher, Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

North Carolina Prisoner Legal Services, Inc., by Kristin D. Parks, amicus curiae.

PER CURIAM.

Defendant Belvin Eugene Wagner was originally arrested without a warrant when he attempted to purchase cocaine during an undercover drug operation on 17 July 1998 in which undercover law enforcement officers used blanched macadamia nuts as fake crack cocaine. On 17 August 1998, based on an information, defendant entered a negotiated guilty plea to the offense of attempted possession of cocaine as an habitual felon. This plea bargain provided that defendant would receive a minimum sentence of 101 months' imprisonment based on his criminal history, which was calculated to be at level VI. The trial court entered judgment sentencing defendant to serve 101 to 131 months' confinement.

Defendant thereafter filed a motion for appropriate relief asserting that his record level had been improperly calculated as a level VI when in fact his criminal history resulted in a level V for sentencing purposes. Concluding that defendant's plea bargain and guilty plea were based on "the mutual mistake of all parties as to [defendant's] proper record level for sentencing purposes," the trial court on 10 May 2000, *nunc pro tunc* 2 May 2000, vacated and set aside defendant's guilty plea and the judgment entered thereon.

On 15 May 2000 defendant was indicted for (i) attempt to possess cocaine, (ii) felonious possession of drug paraphernalia, and (iii) being an habitual felon. The paraphernalia on which this charge was based, an antenna used as a crack pipe, was found on defendant's person on 17 July 1998, at the time defendant was originally arrested for attempted possession of cocaine. The prosecutor subsequently offered defendant a plea bargain of 101 to 131 months' imprisonment, the same sentence he had received before his plea was vacated. Defendant rejected this offer of plea. Defendant moved to dismiss the paraphernalia indictment, claiming unconstitutional vindictive prosecution and violation of N.C.G.S. § 15A-1335. Defendant's motion to dismiss was denied.

On 17 October 2000 a jury found defendant guilty of attempt to possess cocaine, felonious possession of drug paraphernalia, and

being an habitual felon. The trial court sentenced defendant at level VI to serve two consecutive 135- to 171-month sentences.

Before this Court defendant asserts that the Court of Appeals erred in upholding these convictions and sentences. Defendant again contends that the felony drug paraphernalia indictment after his successful motion for appropriate relief was based on unconstitutional vindictive prosecution and was in violation of N.C.G.S. § 15A-1335 and that the subsequent sentence for attempted possession of cocaine also violated N.C.G.S. § 15A-1335. Defendant does not challenge the trial court's finding of a record level VI for his criminal history.

[1] Initially, we note that a jurisdictional issue not raised in the Court of Appeals has been raised in this Court, namely, that the 15 May 2000 indictment for felonious possession of drug paraphernalia is invalid on its face in that the charge of felonious possession of drug paraphernalia is not supported by any statute, a fact that the State concedes. N.C.G.S. § 90-95(e)(3), cited in the indictment, does not pertain to drug paraphernalia. For a court to have jurisdiction, "a criminal offense [must] be charged in the warrant or indictment upon which the State brings the defendant to trial." *State v. Vestal*, 281 N.C. 517, 520, 189 S.E.2d 152, 155 (1972). Inasmuch as the indictment for felonious possession of drug paraphernalia was facially invalid, the trial court never had jurisdiction over this charge. Moreover, appellate jurisdiction is derivative of the trial court's jurisdiction. *State v. Earley*, 24 N.C. App. 387, 389, 210 S.E.2d 541, 543 (1975); *see also State v. Morgan*, 246 N.C. 596, 599, 99 S.E.2d 764, 766 (1957). Therefore, the Court of Appeals also lacked jurisdiction to hear defendant's appeal of the felonious possession of drug paraphernalia conviction.

Accordingly, for lack of jurisdiction in the trial court, defendant's conviction for felonious possession of drug paraphernalia is void and is vacated. Similarly, the opinion of the Court of Appeals as it pertains to the conviction for felonious possession of drug paraphernalia is vacated. Having vacated defendant's conviction for felonious possession of drug paraphernalia, we do not need to address defendant's assignment of error challenging the trial court's denial of his motion to dismiss based on vindictive prosecution.

[2] Defendant was also improperly sentenced for his conviction for attempt to possess cocaine. N.C.G.S. § 15A-1335 provides:

> When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

N.C.G.S. § 15A-1335 (2001). Pursuant to this statute a defendant whose sentence has been successfully challenged cannot receive a more severe sentence for the same offense or conduct on remand.

In this case, contrary to the State's contention, the fact that defendant's original conviction resulted from a negotiated plea bargain rather than a finding of guilty by a jury is of no consequence. This Court has held that "[a] plea of guilty, accepted and entered by the trial court, is the equivalent of conviction." *State v. Brown*, 320 N.C. 179, 210, 358 S.E.2d 1, 22, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). After defendant's plea and sentence were set aside pursuant to his motion for appropriate relief, a sentence of 135 to 175 months' imprisonment for defendant's conviction at trial for attempt to possess cocaine was contrary to the mandate of section 15A-1335 when defendant's original sentence was only 101 to 131 months' imprisonment for the same offense. *See State v. Hemby*, 333 N.C. 331, 336-37, 426 S.E.2d 77, 80 (1993).

This case is distinguishable from *State v. Wall*, 348 N.C. 671, 502 S.E.2d 585 (1998), in that the sentence defendant initially received pursuant to the plea agreement was a lawful mitigated sentence for a record level VI offender. Unlike the defendant in *Wall*, this defendant by his motion for appropriate relief did not seek specific performance of a plea bargain containing an unauthorized sentence. Under section 15A-1340.13(b),

> the court shall determine the prior record sentence for the offender pursuant to G.S. 15A-1340.14. The sentence shall contain a sentence disposition specified for the class of offense and prior record level, and its minimum term of imprisonment shall be within the range specified for the class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment.

N.C.G.S. § 15A-1340.13(b) (2001). In this case N.C.G.S. § 15A-1335 is an applicable statute requiring "another minimum sentence of imprisonment." *Id.*

In summary, for the reasons stated herein, defendant's conviction for felonious possession of drug paraphernalia and the Court of Appeals' decision as to that conviction are vacated. As to the judgment for attempted possession of cocaine, the decision of the Court of Appeals is reversed and remanded to that court for further remand to the trial court for resentencing in a manner not inconsistent with this opinion.

VACATED IN PART AND REVERSED AND REMANDED IN PART.

ANGELA SHAW v. WILLIAM J. MINTZ

No. 339A02

(Filed 20 December 2002)

Estates— negligence claim—personal representative not appointed—statute of limitations

The decision of the Court of Appeals in this case that a negligence claim against decedent's estate arising from an automobile accident would be barred by the statute of limitations is reversed for the reasons stated in the dissenting opinion in the Court of Appeals that N.C.G.S. §§ 1-22 and 28A-19-3 do not require a personal representative to be appointed before the plaintiff is entitled to a section 1-22 suspension of the statute of limitations.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 151 N.C. App. 82, 564 S.E.2d 593 (2002), affirming an order entered 13 February 2001 by Weeks, J., in Superior Court, Cumberland County. This case was determined on the briefs without oral argument pursuant to N.C. R. App. P. 30(f)(1).

Washington & Pitts, P.L.L.C., by Marshall B. Pitts, Jr., for plaintiff-appellant.

Walker, Clark, Allen, Grice & Ammons, L.L.P., by Scott T. Stroud, for defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals.

REVERSED.

STATE v. DEXTER

[356 N.C. 604 (2002)]

STATE OF NORTH CAROLINA v. AARON DEXTER

STATE OF NORTH CAROLINA v. RONALD EDWARD EVANS

STATE OF NORTH CAROLINA v. BRYON KEITH HOWARD

No. 390A02

(Filed 20 December 2002)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 151 N.C. App. 430, 566 S.E.2d 493 (2002), ordering a new trial after appeal of judgments entered 18 September 2000 by Hight, J., in Superior Court, Durham County. This case was determined on the briefs without oral argument pursuant to N.C. R. App. P. 30(f)(1).

Roy Cooper, Attorney General, by W. Richard Moore, Special Deputy Attorney General, as to defendant-appellee Aaron Dexter; Fred G. Lamar, Assistant Attorney General, as to defendant-appellee Bryon Keith Howard; and Gaines M. Weaver, Assistant Attorney General, as to defendant-appellee Ronald Evans; for the State-appellant.

Kevin P. Bradley for defendant-appellee Aaron Dexter.

Daniel Shatz for defendant-appellee Ronald Edward Evans.

D. Tucker Charns for defendant-appellee Bryon Keith Howard.

PER CURIAM.

AFFIRMED.

STATE v. SMITH

[356 N.C. 605 (2002)]

STATE OF NORTH CAROLINA v. CORNELIUS KEITH SMITH

No. 317A02

(Filed 20 December 2002)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 150 N.C. App. 317, 562 S.E.2d 899 (2002), affirming a judgment entered 6 March 2001 by Hooks, J., in Superior Court, Brunswick County. Heard in the Supreme Court 3 December 2002.

Roy Cooper, Attorney General, by Marvin R. Waters, Assistant Attorney General, for the State.

A. Michelle FormyDuval and Walter L. Jones for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. WILLIAM NOLAN PATTERSON

No. 307A02

(Filed 20 December 2002)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 150 N.C. App. 393, 563 S.E.2d 88 (2002), finding no error in judgments entered 18 August 2000 by Weeks, J., in Superior Court, Cumberland County. The case was calendared for argument in the Supreme Court 3 December 2002, but was determined on the briefs without oral argument upon the parties' joint motion for the Court to decide the case pursuant to N.C. R. App. P. 30(f)(1).

Roy Cooper, Attorney General, by Thomas O. Lawton III, Assistant Attorney General, for the State-appellee.

John T. Hall for defendant-appellant.

PER CURIAM.

AFFIRMED.

EASTERN CAROLINA INTERNAL MEDICINE, P.A. v. ANNA FAIDAS, M.D., AN INDIVIDUAL D/B/A COASTAL ONCOLOGY & HEMATOLOGY

No. 298A02

(Filed 20 December 2002)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 149 N.C. App. 940, 564 S.E.2d 53 (2002), affirming an order for summary judgment entered 23 January 2001 and an order entered 27 February 2001 denying a motion for a new trial or for amendment of the original order, both orders entered by Alford, J., in Superior Court, Craven County. Heard in the Supreme Court 4 December 2002.

Ward and Smith, P.A., by A. Charles Ellis and David B. Hawley, for plaintiff-appellee.

Glover & Petersen, by James R. Glover, for defendant-appellant.

PER CURIAM.

AFFIRMED.

DIANE ROBINSON v. MAYNARD BYRD

No. 511A01

(Filed 20 December 2002)

Appeal pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 145 N.C. App. 503, 550 S.E.2d 281 (2001), reversing and remanding orders entered 1 March 2000 and 7 April 2000 by DeVine, J., in District Court, Orange County. On 31 January 2002, the Supreme Court granted discretionary review of additional issues. Heard in the Supreme Court 14 May 2002.

J. Randolph Ward for plaintiff-appellant.

Martin and Martin, P.A., by J. Matthew Martin and Harry C. Martin; and Fisher Law Firm, P.A., by C. Douglas Fisher, for defendant-appellee.

PER CURIAM.

Justice BUTTERFIELD did not participate in the consideration or decision of this case. The remaining members of the Court were equally divided, with three members voting to affirm the decision of the Court of Appeals and three members voting to reverse. Therefore, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Reese v. Barbee*, 350 N.C. 60, 510 S.E.2d 374 (1999); *Nesbit v. Howard*, 333 N.C. 782, 429 S.E.2d 730 (1993).

AFFIRMED.

BARRETT L. CRAWFORD, TRUSTEE IN THE BANKRUPTCY OF JETER EDWARD GREENE, AND JETER EDWARD GREENE v. COMMERCIAL UNION MIDWEST INSURANCE COMPANY, GERALD BENFIELD, AND BENFIELD INSURANCE ENTERPRISES

No. 19A02

(Filed 20 December 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. 455, 556 S.E.2d 30 (2001), reversing and remanding an order for summary judgment entered 22 March 2000 and an order denying reconsideration entered 24 May 2000, both orders entered by Martin (Jerry Cash), J., in Superior Court, Burke County. Heard in the Supreme Court 3 December 2002.

Daniel Law Firm P.A., by Stephen T. Daniel and Warren T. Daniel, for plaintiff-appellees.

Young Moore and Henderson P.A., by Walter E. Brock, Jr., and Christopher A. Page, for defendant-appellant Commercial Union Midwest Insurance Company.

PER CURIAM.

Justice BUTTERFIELD did not participate in the consideration or decision of this case. The remaining members of the Court were equally divided, with three members voting to affirm the decision of the Court of Appeals and three members voting to reverse. Therefore, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Reese v. Barbee*, 350 N.C. 60, 510 S.E.2d 374 (1999); *Nesbit v. Howard*, 333 N.C. 782, 429 S.E.2d 730 (1993).

AFFIRMED.

AUBIN v. SUSI

No. 156P02

Case below: 149 N.C. App. 320

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 19 December 2002.

BELVERD v. MILES

No. 556P02

Case below: 153 N.C. App. 169

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 2 December 2002.

BOYCE & ISLEY, PLLC v. COOPER

No. 598P02

Case below: 153 N.C. App. 25

Motion for temporary stay allowed 27 November 2002 pending determination of defendants' petitions for discretionary review.

BREWER v. CABARRUS PLASTICS, INC.

No. 560A01

Case below: 146 N.C. App. 82

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 19 December 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 19 December 2002.

CAP CARE GRP., INC. v. McDONALD

No. 178P01-2

Case below: 149 N.C. App. 817

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

CAPITAL OUTDOOR, INC. v. GUILFORD CTY. BD. OF ADJUST.

No. 603A01-2

Case below: 152 N.C. App. 474

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

COLOMBO v. STEVENSON

No. 293PA02

Case below: 150 N.C. App. 163

Petition by defendants (George M. Stevenson, III and Susan Stevenson) for discretionary review pursuant to G.S. 7A-31 allowed 19 December 2002.

CUMMINS v. BCCI CONSTR. ENTERS.

No. 170P02

Case below: 149 N.C. App. 180

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

EDWARDS v. EDWARDS

No. 562P02

Case below: 152 N.C. App. 185

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 19 December 2002.

FARBER v. N. C. PSYCHOLOGY BD.

No. 546A02

Case below: 153 N.C. App. 1

Petition by petitioner 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 19 December 2002. Petition by petitioner for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 19 December 2002.

FENDER v. DEATON

No. 553P02

Case below: 153 N.C. App. 187

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002. Justice Parker recused.

HILL v. HILL

No. 688P01

Case below: 147 N.C. App. 313
356 N.C. 301

Motion by plaintiff for reconsideration of the dismissal of plaintiff's appeal denied 19 December 2002. Justice Martin recused.

IN RE BEER

No. 169P02

Case below: 149 N.C. App. 232

Petition by respondents (Gloria Lavada Beer and Fred William Beer for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

IN RE HAYES

No. 380P02

Case below: 151 N.C. App. 27

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 19 December 2002. Petition by respondent (Hayes) for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

IN RE HODGE

No. 555P02

Case below: 153 N.C. App. 102

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 19 December 2002. Petition by respondent (Hodge) for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

IN RE MITCHELL

No. 127A02

Case below: 148 N.C. App. 483

Petition by petitioner (Guardian ad Litem) for writ of supersedeas dismissed as moot 5 December 2002.

IN RE RHYNE

No. 639P02

Case below: 154 N.C. App. 477

Motion by plaintiff for temporary stay allowed 20 December 2002.

IN RE RIDDICK

No. 87P02

Case below: 147 N.C. App. 785

Petition by respondent (James Leron Riddick) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 19 December 2002.

KELLY v. WEYERHAEUSER CO.

No. 384P02

Case below: 150 N.C. App. 713

Motion by defendants to dismiss petition for discretionary review dismissed as moot 19 December 2002.

LAMBERTH v. McDANIEL

No. 133P02

Case below: 148 N.C. App. 406

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 19 December 2002.

LIPE v. STARR DAVIS CO.

No. 152P01

Case below: 142 N.C. App. 213
354 N.C. 363

Petition by defendants for rehearing under Rules 2 and 31 of the Rules of Appellate Procedure of defendants' petition for discretionary review dismissed 19 December 2002. Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals dismissed 19 December 2002. Justice Edmunds recused.

MARSHALL v. WILLIAMS

No. 552P02

Case below: 153 N.C. App. 128

Motion by defendants to dismiss appeal by plaintiffs for lack of substantial constitutional question allowed 19 December 2002. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

OWENBY v. YOUNG

No. 286PA02

Case below: 150 N.C. App. 412

Motion by plaintiff to dismiss defendant's appeal denied 19 December 2002.

PRICE v. BECK

No. 624P02

Case below: 153 N.C. App. 763

Petition by plaintiffs pro se (James E. Price, Sr., Olander Bynum and Kerry McPherson) for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

RUFFIN v. COMPASS GRP. USA

No. 348A02

Case below: 150 N.C. App. 480

Conditional motion by defendant to dismiss appeal allowed 3 December 2002.

SHARPE v. WORLAND

No. 21P02

Case below: 147 N.C. App. 782

Petition by defendant (Wesley Long Community Hospital, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002. Petition by defendant (Wesley Long Community Hospital, Inc.) for writ of supersedeas dismissed as moot and temporary stay dissolved 19 December 2002.

SIMPSON v. McCONNELL

No. 396PA02

Case below: 150 N.C. App. 713

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 19 December 2002 for limited purpose of remand to Court of Appeals for reconsideration in light of *Shaw v. Mintz*. Petition by defendant (Nationwide Mutual Insurance Company) for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

STATE v. AGER

No. 528A02

Case below: 152 N.C. App. 577

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 19 December 2002. Petition 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 19 December 2002.

STATE v. ALLAH

No. 590P02

Case below: 153 N.C. App. 524

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

STATE v. BECTON

No. 623P02

Case below: 154 N.C. App. 520

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 19 December 2002.

STATE v. BUCKNER

No. 444A93-3 and 4

Case below: Gaston County Superior Court

Petition by defendant pro se for rehearing on defendant's writ of certiorari for discretionary review of trial court's decision on defendant's motion for appropriate relief dismissed 19 December 2002. Petition by defendant pro se for writ of certiorari to review the order of the Superior Court, Gaston County, (Filed as Appeal of State Application for Writ of Habeas Corpus Pursuant to Chapter 17) dismissed 19 December 2002.

STATE v. BULLOCK

No. 445P02-2

Case below: 154 N.C. App. 234

Motion by Attorney General for temporary stay allowed 18 December 2002.

STATE v. CALLOWAY

No. 576P02

Case below: 153 N.C. App. 524

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

STATE v. CARTER

No. 319A93-3 and 4

Case below: Durham County Superior Court
Richmond County Superior Court

Motion by Attorney General to vacate the stay of execution allowed 6 December 2002. Petition by Attorney General for writ of certiorari to review the order of the Superior Court, Durham County denied 6 December 2002. Petition by Attorney General for writ of prohibition allowed 6 December 2002. Petition by defendant for writ of supersedeas denied 9 December 2002. Petition by defendant for writ of certiorari to review the order of the Superior Court, Rockingham County, denied 9 December 2002. Motion by defendant for stay of execution denied 9 December 2002.

STATE v. CHAPPELL

No. 9P01-3

Case below: 124 N.C. App. 671

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 19 December 2002. Justice Martin recused.

STATE v. CHESSON

No. 268P02

Case below: 150 N.C. App. 439

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 19 December 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

STATE v. CRUZ

No. 582P02

Case below: 153 N.C. App. 524

Notice of appeal by defendant pro se pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 19 December 2002. Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

STATE v. CUMMINGS

No. 4A95-4

Case below: Brunswick County Superior Court

Motion by defendant to stay decision on petition for writ of certiorari denied 19 December 2002. Petition by defendant for writ of certiorari to review the order of the Superior Court, Brunswick County denied 19 December 2002.

STATE v. DAVENPORT

No. 276A02

Case below: 150 N.C. App. 439

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 19 December 2002.

STATE v. DEXTER

No. 390A02

Case below: 151 N.C. App. 430

Petition by Attorney General for writ of supersedeas dismissed as moot and temporary stay dissolved 19 December 2002.

STATE v. DUNN

No. 606P02

Case below: 154 N.C. App. 1

Motion by Attorney General for temporary stay allowed 9 December 2002.

STATE v. FISHER

No. 574P02

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 19 December 2002.

STATE v. FORBES

No. 596P02

Case below: 153 N.C. App. 524

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 19 December 2002.

STATE v. GARNER

No. 64P02

Case below: 148 N.C. App. 216

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

STATE v. GOMEZ

No. 626P02

Case below: 153 N.C. App. 324

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals dismissed ex mero motu 19 December 2002. Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 19 December 2002.

STATE v. HARDY

No. 121P02

Case below: 149 N.C. App. 233

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

STATE v. HOBSON

No. 335P02

Case below: 150 N.C. App. 715

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 19 December 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

STATE v. JOHNSON

No. 570P02

Case below: 148 N.C. App. 405

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 19 December 2002.

STATE v. MAHAN

No. 342P02

Case below: 150 N.C. App. 717

Petition by Attorney General for writ of supersedeas dismissed 19 December 2002. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

STATE v. McCRAE

No. 447P02

Case below: 151 N.C. App. 601
356 N.C. 310

Motion by defendant pro se for reconsideration of the dismissal of his appeal and the denial of his petition for discretionary review dismissed 19 December 2002.

STATE v. PETERSON

No. 328A97-2 and 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 19 December 2002. Motion by Attorney General to lift order granting defendant's motion to hold petition for writ of certiorari in abeyance dismissed as moot 19 December 2002. Petition by defendant for writ of certiorari to review the order of the Superior Court, Richmond County, denied 19 December 2002.

STATE v. POWELL

No. 190A93-4

Case below: Cleveland County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Cleveland County, denied 19 December 2002.

STATE v. RAINEY

No. 637P02

Case below: 154 N.C. App. 282

Motion by Attorney General for temporary stay denied 19 December 2002. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002. Petition by Attorney General for writ of supersedeas denied 19 December 2002.

STATE v. REED

No. 587P02

Case below: 153 N.C. App. 462

Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002. Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 19 December 2002. Motion by defendant pro se to dismiss charges dismissed 19 December 2002.

STATE v. REID

No. 391P02

Case below: 151 N.C. App. 379

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 19 December 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

STATE v. ROBINSON

No. 602P02

Case below: 153 N.C. App. 813

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

STATE v. SEXTON

No. 595PA02

Case below: 153 N.C. App. 641

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 19 December 2002.

STATE v. SMITH

No. 534P02

Case below: 152 N.C. App. 514

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 19 December 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

STATE v. SMITH

No. 565P02

Case below: 153 N.C. App. 325

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

STATE v. SMITH

No. 593P02

Case below: 153 N.C. App. 813

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002. Petition by Attorney General for writ of supersedeas dismissed as moot and temporary stay dissolved 19 December 2002.

STATE v. STROUD

No. 46P02

Case below: 147 N.C. App. 549

Petition by defendant (Bonnie Stroud) for writ of certiorari to review the decision of North Carolina Court of Appeals denied 19 December 2002.

STATE v. THOMAS

No. 568P02

Case below: 153 N.C. App. 326

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 19 December 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

STATE v. WILSON

No. 605A02

Case below: 154 N.C. App. 127

Motion by Attorney General for temporary stay allowed 6 December 2002.

STATE v. WOOLRIDGE

No. 41PA02

Case below: 147 N.C. App. 685

Motion by Attorney General to deny petition for discretionary review denied 19 December 2002. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 19 December 2002.

VANHOY v. DUNCAN CONTRS., INC.

No. 564P02

Case below: 153 N.C. App. 320

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

WILLEY v. WILLIAMSON PRODUCE

No. 159A02

Case below: 149 N.C. App. 74

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 19 December 2002.

WILLIAMS v. INTERNATIONAL PAPER CO.

No. 523P02

Case below: 152 N.C. App. 720

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 25 November 2002.

THE NORTH CAROLINA STATE BAR v. ROBERT M. TALFORD, ATTORNEY

No. 24PA02

(Filed 28 February 2003)

1. Attorneys— discipline—appellate review

Appellate courts are not precluded from vacating or modifying a State Bar Disciplinary Hearing Commission sanction. A sanction will not be disturbed when it is the product of justified means, but the Supreme Court is obligated to modify or remand any judgment or discipline shown to be improperly imposed.

2. Administrative Law— whole record test—necessary steps

Under the whole record test, the steps necessary to deciding whether the lower body's decision has a rational basis in the evidence are whether there is adequate evidence to support the findings, whether the findings support the conclusions, and whether the findings and conclusions adequately support the ultimate decision. The test must be applied separately to ajudicatory phases and dispositional phases.

3. Administrative Law— appellate review—remedies

The Supreme Court has a broad array of remedies from which to chose in the wake of its whole record assessment of a lower body's decision.

4. Attorneys— discipline—escalating remedies—findings—suspension or disbarment—requirements

The statutory scheme for disciplining attorneys shows an intent to punish attorneys in an escalating fashion, with each level requiring particular circumstances for imposition, and the Disciplinary Hearing Commission must make written findings which satisfy the mandates of the whole record test and which are consistent with the statutory scheme. Suspension and disbarment require clear showings of how the attorney's actions resulted in actual or potential significant harm and of why suspension and disbarment are the only sanctions that can adequately protect the public from future transgressions by the attorney in question. N.C.G.S. § 84-28.

5. Attorneys— discipline—appellate review—whole record test—properly applied

The Court of Appeals properly applied the whole record test in considering the Disciplinary Hearing Commission's conclusion that an attorney had committed misconduct where the Court of Appeals answered in the affirmative all of the questions inherent in the whole record test.

6. Attorney— disbarment—insufficient basis

There was an inadequate rational basis in the evidence to support the Disciplinary Hearing Commission's decision to disbar an attorney for trust account practices and for failing to acknowledge wrongdoing where all clients received the funds to which they were entitled and neither clients nor creditors had complained. None of the DHC's discipline-related findings even address, much less explain, why disbarment is an appropriate sanction under the circumstances, and, on these facts, the parameters of N.C.G.S. § 84-28(c)(3)-(5) precluded imposition of any sanction that requires a showing of risk of significant potential harm to clients.

Justice BRADY 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, 147 N.C. App. 581, 556 S.E.2d 344 (2001), affirming in part and reversing and remanding in part an order entered by the Disciplinary Hearing Commission of the North Carolina State Bar on 14 March 2000. Heard in the Supreme Court 10 September 2002.

Carolin Bakewell for plaintiff-appellant.

Irving Joyner for defendant-appellee.

Roy Cooper, Attorney General, by Thomas R. Miller, Special Deputy Attorney General, on behalf of the North Carolina Real Estate Commission; and the North Carolina Real Estate Commission, by Blackwell M. Brogden, Jr., Chief Deputy Legal Counsel, and Pamela V. Millward, amicus curiae.

ORR, Justice.

This appeal arises out of a unanimous Court of Appeals decision that reversed a State Bar Disciplinary Hearing Commission (DHC) disbarment judgment against defendant, Robert M. Talford, a licensed attorney in North Carolina. The issues in the case, as submitted by the DHC, can be summarized as follows: (1) whether the Court of Appeals overstepped its designated appellate authority by reversing the DHC's decision to disbar defendant from practice, and (2) whether the Court of Appeals erred by deciding that the DHC's findings of fact failed to support its ultimate conclusion that defendant's misconduct warranted disbarment. For the reasons discussed below, we hold that the Court of Appeals acted within its scope of authority on both accounts. As a result, the Court of Appeals decision is affirmed.

Defendant was licensed by the North Carolina State Bar in 1976 and practiced law for twenty years in the Charlotte area, concentrating on civil litigation. He ran all facets of his practice himself, and kept no permanent employees. Defendant had maintained a trust account on behalf of his clients since 1978. In 1998, an audit of the account by the State Bar uncovered discrepancies in defendant's bookkeeping methods and practices. The results of the audit prompted the State Bar to file a misconduct complaint against defendant. On 25 February 2000, the DHC held a hearing to determine if defendant's alleged misconduct warranted disciplinary action.

At the hearing, a State Bar investigator testified in relation to defendant's bookkeeping practices for twelve clients. His testimony established that defendant had failed to keep a financial ledger and had not reconciled his trust account on a quarterly basis. Under the State Bar's rules governing attorney conduct, maintaining a written account of income and expenses and timely trust account reconciliations are among the duties required of all legal practitioners in the state. *See* Rev. R. Prof. Conduct N.C. St. B. 1.15-2, 2003 Ann. R. N.C. 642.

For his part, defendant admitted that he had not met his account reconciliation requirements and acknowledged that he failed to keep a written ledger of his income and expenses. However, he claimed that such actions were unnecessary, as he had maintained throughout the period a "visual reconciliation" of the client funds in question. Defendant also insisted that, without exception, all clients at issue had been paid what was due them. We note that neither side pre-

sented any evidence contradicting defendant's testimony about money disbursements to his clients. Nothing in the record indicates that any client or creditor had complained to the State Bar about defendant, or that any clients had failed to receive funds to which they were entitled.

In its order of 14 March 2000, the DHC made numerous and extensive findings of fact regarding defendant's representation of the twelve clients. The findings were similar for each client, and included circumstantial references indicating that defendant on several occasions: (1) had failed to deposit settlement checks, (2) had written checks for fees in excess of an amount that could be justified by written record, and (3) had written checks attributable to expenses for a case before depositing a settlement check in the case. The findings also showed that defendant could not identify the source of at least part of his trust account aggregate (approximately $37,000 in 1994) and that he had been dilatory in paying some of his clients' medical providers.

As a consequence of its findings, the DHC initially concluded that defendant: (1) had been grossly negligent in the management of his trust account, and (2) had benefitted from his own gross negligence. The DHC next concluded that the aggravating factors of defendant's actions (his pattern of misconduct, his refusal to acknowledge the wrongfulness of his accounting practices, etc.) outweighed the sole mitigating factor (no previous disciplinary record) and ordered him disbarred.

Upon defendant's appeal, made pursuant to N.C.G.S. § 84-28(h), the Court of Appeals reversed the portion of the DHC order that pertained to defendant's disbarment. This Court subsequently allowed the DHC's petition seeking review of the Court of Appeals' decision.

I.

[1] The DHC first contends that the Court of Appeals erred when it reviewed and vacated the portion of the DHC order that imposed the sanction of disbarment on defendant. In the DHC's view, the holdings of *N.C. State Bar v. DuMont*, 304 N.C. 627, 286 S.E.2d 89 (1982) (*DuMont II*), and its progeny have firmly established an unyielding principle that appellate courts have no authority to modify or change penalties ordered by the State Bar's disciplinary commission. We disagree.

The State Bar's power to oversee and police the actions of its membership stems from a legislative grant of authority as expressed in chapter 84, article 4 of our state's General Statutes. Within the confines of article 4, the General Assembly established specific rules outlining the scope of the State Bar's authority to discipline members of its ranks. *See* N.C.G.S. § 84-28 (2001). In addition to delineating the types of attorney misconduct that may warrant disciplinary action, *see* N.C.G.S. § 84-28(b) (subsection (b)), and the extent of sanctions that may be imposed, *see* N.C.G.S. § 84-28(c) (subsection (c)), the statute specifically provides an offending attorney "an appeal of right from any final order imposing [punishment]," N.C.G.S. § 84-28(h) (subsection (h)). Thus, defendant in the instant case, who was adjudged by the DHC to have committed misconduct under subsection(b), and who was sanctioned by the DHC with disbarment under subsection(c), is definitively among those attorneys guaranteed an appeal under subsection (h).

However, the DHC does not necessarily dispute defendant's right to appeal the disbarment order. Instead, it takes issue with the Court of Appeals' conclusion that "the imposition of disbarment was, on the facts of this case, an abuse of discretion." *N.C. State Bar v. Talford*, 147 N.C. App. 581, 595-96, 556 S.E.2d 344, 354 (2001). The DHC supports its position by contending that this Court's decision in *DuMont II* precludes an appellate court from either vacating or modifying a DHC-imposed sanction. In our view, the DHC not only misinterprets *DuMont II*, it ignores the plain language of the appeals provision of the disciplinary statute at issue. *See* N.C.G.S. § 84-28(h) (expressly providing an appeal of right from any order imposing sanctions). Moreover, the DHC's contention—that its sanctioning judgments are beyond reproach—seems to defy the well-established principles of appellate review. After all, if a sanctioned attorney cannot seek judicial review of the penalty imposed upon him, what would substitute as the aim of his appeal? The suggestion that this Court may somehow be positioned to recognize legal errors without benefit of recourse to correct them is, put plainly, an aberrant proposition that is unsupported by case law.

Ostensibly, the DHC premises its view on this Court's holding in *DuMont II*, a case involving Harry DuMont, an Asheville attorney who was sanctioned by the DHC for procuring the false testimony of a witness. In *DuMont II*, this Court reviewed a Court of Appeals decision as to whether an appellate court had the authority to change or modify a DHC-imposed sanction on an attorney. *DuMont II*, 304 N.C.

at 632, 286 S.E.2d at 92, *modifying and aff'g*, 52 N.C. App. 1, 277 S.E.2d 827 (1981) *(DuMont I)*. In *DuMont I*, when considering arguments aimed at vacating a DHC-imposed sanction in favor of another, the Court of Appeals held that it could "not find authority for this Court to modify or change the discipline ordered by the [DHC]." *DuMont I*, 52 N.C. App. at 25-26, 277 S.E.2d at 841-42. Upon subsequent review, this Court concluded: "We agree with the reasoning of the Court of Appeals and adopt its discussion of this issue . . . as our own." *DuMont II*, 304 N.C. at 632, 286 S.E.2d at 92.

Although the building blocks of the DHC's argument may seemingly indicate that this Court has adopted an uncompromising view recognizing the sanctity of DHC-imposed sanctions, a careful reading of the two cases reveals a far more limited perspective. In the sentence immediately preceding the one quoted from *DuMont I*, this Court, in *DuMont II*, made a subtle but significant addition to the holding of the lower court, rephrasing it to read as follows: "G.S. 84-28(h) does not give a reviewing court the authority to modify or change the discipline *properly* imposed by the Commission." *DuMont II*, 304 N.C. at 632, 286 S.E.2d at 92 (emphasis added) (recasting conclusion of the Court of Appeals to include the modifier "properly"). Thus, when a sanction imposed is the end product of a justified means—which, in cases of disciplinary actions against attorneys, is a means that comports with due process mandates and statutory guidelines that expressly include a right of appeal, *see generally id.*; *DuMont I*, 52 N.C. App. 1, 277 S.E.2d 827; N.C.G.S. § 84-28—this Court has stated that it will not disturb the result. *DuMont II*, 304 N.C. at 632, 286 S.E.2d at 92. However, as illustrated above, *this* Court has not held, and in fact cannot so hold, that it will defer to judgments of administrative bodies that are shown on appeal of right to be premised on grounds that do not comply with the aforementioned statutory requirements. In other words, as this Court is free to review all such judgments as needed, it is equally obligated to modify or remand any judgment (or discipline) shown to be *improperly* imposed. As a consequence, we reject the DHC's general contention that its sanctions are beyond the purview of the state's appellate courts, and we disavow any cases that might be construed in a fashion that suggests otherwise. *See, e.g., N.C. State Bar v. Whitted*, 82 N.C. App. 531, 347 S.E.2d 60 (1986), *aff'd per curiam*, 319 N.C. 398, 354 S.E.2d 501 (1987); *N.C. State Bar v. Wilson*, 74 N.C. App. 777, 330 S.E.2d 280 (1985).

II.

A.

[2] We next turn to DHC's other contentions, which focus on the type and scope of review conducted by the Court of Appeals. Although the DHC breaks down its arguments into individual segments, our discussion will address DHC's multiple concerns under the umbrella of a single issue: whether the Court of Appeals exceeded the bounds of proper review when it held that the DHC's ultimate conclusion of law (sanctioning defendant with disbarment) was not adequately supported by its findings of facts and preliminary conclusions of law. While we ultimately agree with the Court of Appeals' holding on this issue, we do so for other reasons, which are detailed below. As a result, we affirm the decision of the Court of Appeals as modified.

The same statute that authorizes the DHC to investigate and sanction attorney misconduct also guarantees punished defendants a right of appeal. N.C.G.S. § 28-24(b), (c), (h). Such appeals are conducted under the "whole record test," *DuMont II*, 304 N.C. at 643, 286 S.E.2d at 98-99 (establishing standard), which requires the reviewing court to determine if the DHC's findings of fact are supported by substantial evidence in view of the whole record, and whether such findings of fact support its conclusions of law, *id.* Such supporting evidence is substantial if a reasonable person might accept it as adequate backing for a conclusion. *Id.* The whole-record test also mandates that the reviewing court must take into account any contradictory evidence or evidence from which conflicting inferences may be drawn. *Id.* Moreover, in order to satisfy the evidentiary requirements of the whole-record test in an attorney disciplinary action, the evidence used by the DHC to support its findings and conclusions must rise to the standard of "clear[, cogent,] and convincing." *In re Suspension of Palmer*, 296 N.C. 638, 648, 252 S.E.2d 784, 790 (1979).[1] Ultimately, the reviewing court must apply all the aforementioned factors in order to determine whether the decision of the lower body, e.g., the DHC, "has a rational basis in the evidence."[2] *In re Rogers*,

1. The holding in *Palmer* established the evidentiary standard as "clear and convincing." In the following year, the State Bar modified its rules to comport with the holding, implementing the "clear, cogent, and convincing" evidentiary standard for its disciplinary proceedings. That same standard remains in effect today. 27 NCAC 1B .0114(u) (June 2002).

2. The whole-record test is similarly applied when a reviewing court examines whether the decision of a lower body is arbitrary and capricious. *See, e.g., CG&T Corp. v. Board of Adjust. of City of Wilmington*, 105 N.C. App. 32, 40, 411 S.E.2d 655, 660 (1992).

297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979); *see also General Motors Corp. v. Kinlaw*, 78 N.C. App. 521, 523, 338 S.E.2d 114, 117 (1985).

In deciding whether a lower body's decision has a rational basis in the evidence, this Court has approached the question in a variety of ways over the years. In some cases, the Court has considered whether the underlying factual circumstances of a case constituted enough evidence to support a lower body's disciplinary action. For example, in *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 233 S.E.2d 538 (1977), a case involving a teacher who was dismissed from his position for neglect of duty, this Court's review transcended the school board's expressed findings of fact to consider whether the underlying evidence offered at a hearing provided ample justification for the board's ultimate decision to terminate the teacher. In sum, the Court concluded that the testimony and other evidence presented at the hearing provided inadequate support for the board's order of termination.

A second group of cases reveals a more attenuated approach to the whole-record test, conducted under the guise of assessing whether the underlying evidence supports a finding of fact embodied within a lower body's order. For example, in *In re Moore*, 301 N.C. 634, 272 S.E.2d 826 (1981), a case involving a bar applicant who was denied a law license for failing to demonstrate sound moral character, this Court reviewed the record in an attempt to determine if there was adequate evidence to support the Board of Law Examiners' expressed finding that the applicant had committed acts that called his moral character into question. The Court ultimately concluded that the board's findings of fact were not adequately supported by the underlying evidence, and remanded the case for reconsideration.

In a third group of cases utilizing the whole-record test, this Court has reviewed the record in an effort to determine whether a lower body's findings of fact are adequate to support its conclusions of law. For example, in *State ex rel. Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau*, 292 N.C. 70, 231 S.E.2d 882 (1977), a case involving an insurance rate revision proposal, the Court concluded that the expressed findings of fact within the commissioner's order failed to support the commissioner's subsequent conclusions of law. As a result, the Court invalidated the commissioner's order.

In yet another group of cases reviewed in light of the whole record test, this Court combined elements of some or all of the three aforementioned approaches. For example, in *Rogers*, 297 N.C.

at 65-68, 253 S.E.2d at 922-24, a case involving another Bar applicant who was denied a law license on grounds of unfitness, this Court first determined that there was insufficient evidence supporting the Board of Law Examiners' expressed finding that the applicant committed the acts in question. The Court then concluded that the board's expressed findings of fact failed to support its ultimate conclusion of law: that the applicant was unfit to practice law in the state. *Id.* at 68, 253 S.E.2d at 924. This Court also utilized a similar approach—Do an order's findings of fact adequately support its conclusions of law?—as part of its analysis of *N.C. Fire Ins. Rating Bureau*, 292 N.C. at 81-84, 231 S.E.2d at 889-91.

From this group of cases reviewed under the whole-record test, we can glean that the following steps are necessary as a means to decide if a lower body's decision has a "rational basis in the evidence": (1) Is there adequate evidence to support the order's expressed finding(s) of fact? (2) Do the order's expressed finding(s) of fact adequately support the order's subsequent conclusion(s) of law? and (3) Do the expressed findings and/or conclusions adequately support the lower body's ultimate decision? We note, too, that in cases such as the one at issue, e.g., those involving an "adjudicatory phase" (Did the defendant commit the offense or misconduct?), and a "dispositional phase" (What is the appropriate sanction for committing the offense or misconduct?), the whole-record test must be applied separately to each of the two phases.

[3] As for the scope of our review, past cases demonstrate that this Court has a broad array of remedy options from which to choose in the wake of our assessment of a lower body's decision, its conclusions of law, its findings of fact, and any underlying evidence supporting those findings. For example, in *Moore*, this Court held that there was inadequate evidence supporting the Board of Law Examiners' expressed findings of fact. As a consequence, the Court remanded the case to the lower body, for further considerations. 301 N.C. at 647, 272 S.E.2d at 834. Significantly, the Court's holding did not limit the board's discretionary power to reimpose its original sanction. Thus, if, upon reconsideration, the board presented ample evidence to support its findings of fact and conclusions of law, and those findings and conclusions adequately supported its decision to reimpose the original sanction, the board would be free to do so. However, this Court has also expressly limited the sanction options available to a lower body upon its remand of a case for reconsideration. For example, in *Rogers*, the Court initially concluded that the

underlying evidence did not support the expressed findings of fact included in the Board of Law Examiners' order. Then, upon further assessment of the underlying evidence, the Court determined that the factual circumstances could not serve as adequate support for either the board's conclusions of law or its ultimate decision. As a consequence, the Court remanded the case to the board for further considerations not inconsistent with the Court's opinion. 297 N.C. at 65-68, 253 S.E.2d at 922-24. Thus, while the board was free to reconsider its position upon remand, it was precluded, as a matter of law, from reimposing its original judgment, which, when reviewed by this Court under the whole-record test, had been deemed definitively as a decision that lacked a rational basis in the evidence.

B.

[4] The question now before this Court is whether the disbarment sanction imposed by the DHC against defendant can survive appellate scrutiny under the whole-record test. We begin our analysis of the issue by noting the following pertinent facts: (1) defendant was investigated by the DHC for allegedly mismanaging his client trust accounts; (2) the DHC, after conducting a hearing, found that the evidence presented showed that defendant had indeed mismanaged those accounts by "fail[ing] to maintain proper trust records," "fail[ing] to preserve funds in a fiduciary capacity," failing to make timely deposits and dispersals of client funds, and "commingl[ing] client and personal funds"; and (3) there was no evidence presented that demonstrated or even intimated that any client or creditor of defendant had suffered economic losses as a consequence of defendant's recalcitrant bookkeeping practices. From these facts, the DHC concluded that defendant's "acts and omissions . . . were grossly negligent and committed in reckless disregard of his obligations under the [Rules of Professional Conduct]," a wrongdoing that qualifies as grounds for discipline under N.C.G.S. § 84-28(b)(2). The DHC then concluded—under the guise of its "Findings of Fact Regarding Discipline"—that the aggravating factors surrounding defendant's actions (his pattern of misconduct, his refusal to acknowledge his wrongdoing, and his apparent indifference to make any restitution) outweighed any mitigating factors in evidence (namely, defendant's clean disciplinary record). As a result, ostensibly by virtue of the powers granted the commission under N.C.G.S. § 84-28(c), the DHC ordered defendant disbarred.

The statutory scheme for disciplining attorneys is set out in N.C.G.S. § 84-28. Subsection (b) begins by defining the three types of

"acts or omissions by a member of the North Carolina State Bar . . . [that] constitute misconduct and *shall* be grounds for discipline." N.C.G.S. § 84-28(b) (emphasis added). Thus, the DHC's initial task is to determine whether an attorney's acts (or omissions) qualify as misconduct as defined by the statute. Such acts so qualify if they meet the criteria of one or more of three specific provisions set forth in the subsection—(b)(1) (conviction of, or a tender and acceptance of a plea of guilty or no contest to, a criminal offense showing professional unfitness), (b)(2) (a violation of the Rules of Professional Conduct in effect at the time of the act), and/or (b)(3) (knowing misrepresentation of any facts or circumstances surrounding any complaint, allegation, or charge of misconduct; failure to answer any formal inquiry or complaint issued by or in the name of the North Carolina State Bar in any disciplinary matter; or contempt of any council or committee of the North Carolina State Bar).[3] N.C.G.S. § 84-28(b).

Upon initially concluding that a person covered by the statute has committed misconduct (the adjudicatory phase), the DHC then must turn to subsection (c) in order to determine the appropriate sanction (the dispositional phase). Subsection (c) delineates a five-tiered descending scale of punishments, and includes a description of the attending circumstances attached to each one. Taken in reverse order of severity, we set forth the pertinent parameters of all five sanctions that may be imposed under the statute:

Subsection (c)(5), "Admonition," is the least serious punishment and results in "a written form of discipline imposed in cases in which an attorney has committed a minor violation of the Rules of Professional Conduct." Thus, the parameter of conduct that merits this discipline is a "minor violation of the Rules."

Subsection (c)(4), "Reprimand," is the next level of punishment, and it constitutes "a written form of discipline more serious than an admonition" and is "issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct, but the protection of the public does not require a censure." The subsection also describes generally the type of conduct reserved for reprimands. In such cases, the "attorney's conduct has caused harm or potential

3. The DHC concluded that defendant had violated the provisions of subsection (b)(2). Subsection (b) defines such a violation as "misconduct," and subsection (c) provides that any such misconduct "shall be grounds for" one of the five sanctions listed in the statute. N.C.G.S. § 84-28 (b), (c).

harm to a client, the administration of justice, the profession, or members of the public." Thus, in order to impose this sanction, the DHC must find harm or potential harm to the entities specified by virtue of the offending attorney's violation of the rules.

Subsection (c)(3), "Censure," is a "written form of discipline more serious than a reprimand" and is "issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession or members of the public, but the protection of the public does not require suspension of the attorney's license." This sanction is distinguished from a reprimand by virtue of a required showing that the misconduct either caused or threatened *significant* harm to the specified entities.

Subsection (c)(2), "Suspension [of an attorney's license]," is also a form of punishment imposed for misconduct that either results in or threatens *significant* harm to "a client, the administration of justice, the profession or members of the public." See N.C.G.S. § 84-28(c)(3) (under sanction of "censure," the factor of a need to protect the public is extended to subsection (c)(2), "[s]uspension"). Thus, when imposed, findings must be made explaining how the misconduct caused significant harm or threatened significant harm, and why the suspension of the offending attorney's license is necessary in order to protect the public.

Subsection (c)(1), "Disbarment," is the ultimate sanction that is reserved for cases in which an attorney's misconduct constitutes a threat so serious that the protection of the public demands that the offending attorney's license and practice be taken away.

Subsections (c)(2), "Suspension [of an attorney's license]," and (c)(1), "Disbarment," do not contain specific parameters under their respective headings. As a result, the DHC argues that those factors that are included in subsection (c) apply, if at all, only to the specific subsections in which they appear—namely, admonition, reprimand, and censure. In addition, because suspension and disbarment are without such expressed factors, the DHC contends that it is free to exercise its broad discretion to impose such sanctions without the benefit of further explanation. We disagree. In our view, the statutory scheme set out in N.C.G.S. § 84-28 clearly evidences an intent to punish attorneys in an escalating fashion keyed to: (1) the harm or potential harm created by the attorney's misconduct, *and* (2) a

demonstrable need to protect the public. Thus, we conclude that in order to merit the imposition of "suspension" or "disbarment," there must be a clear showing of how the attorney's actions resulted in significant harm or potential significant harm to the entities listed in the statute, *and* there must be a clear showing of why "suspension" and "disbarment" are the only sanction options that can adequately serve to protect the public from future transgressions by the attorney in question.

In sum, then, it is clear to this Court that each level of punishment in the escalating statutory scheme: (1) requires its own particular set of factual circumstances in order to be imposed, and (2) is measured in light of how it will effectively provide protection for the public. Thus, upon imposing a given sanction against an offending attorney, the DHC must provide support for its decision by including adequate and specific findings that address these two key statutory considerations. Certainly, there is a range of factual circumstances that the DHC may categorize as being within the parameters of any one level of punishment. However, the DHC's discretionary powers to fit a set of facts within a punishment level are not unbridled. At a minimum, the DHC must support its punishment choice with written findings that: (1) are consistent with the statutory scheme of N.C.G.S. § 84-28; and (2) satisfy the mandates of the whole-record test, as outlined in part II(A), *supra*.

C.

[5] In applying the whole-record test to the instant case, we note from the outset that neither party takes issue with the portion of the DHC order addressing the "adjudicatory phase" of the hearing. In its order, the DHC expressly concluded that defendant had violated the provisions of subsection (b)(2). Such a violation, under the expressed mandates of the subsection, "constitute[s] misconduct" and is, therefore, "grounds for discipline" as provided for in subsection (c). In its review of the DHC's order, the Court of Appeals held that there was a rational basis in the evidence supporting the DHC's decision that defendant had violated the Rules of Professional Conduct by commingling his personal funds with those of his clients. The Court of Appeals reached its conclusion by answering in the affirmative all three questions inherent to the whole-record test: (1) Did the underlying evidence support the DHC's findings of fact? (2) Did those findings of fact support the DHC's preliminary conclusions of law? and (3) Did those findings and preliminary conclusions adequately support its ultimate conclusion/decision (that defendant had

indeed commingled his funds with those of his clients)? Thus, the Court of Appeals' application of the whole-record test provided ample support for the DHC's decision pertaining to the "adjudicatory phase" of the order—namely, that defendant had indeed committed misconduct by violating N.C.G.S. § 84-28(b)(2).

[6] With the "adjudicatory phase" issue settled, we proceed to assess the "dispositional phase" of the DHC order. The question before us, then, is whether there was a rational basis in the evidence supporting the DHC's decision to impose on defendant the sanction of disbarment. In order to answer this question, we again turn to the whole-record test to determine if: (1) the underlying evidence adequately supports the DHC's findings of fact (concerning its choice of discipline), (2) the DHC's findings of fact adequately support its preliminary conclusions of law (concerning its choice of discipline), and (3) the DHC's findings of fact and preliminary conclusions adequately support its decision (to disbar defendant).

We begin our examination of the issue by noting that the DHC's findings of fact concerning discipline are limited to six conclusory statements about the aggravating and mitigating factors surrounding defendant's misconduct. None of its discipline-related findings of fact even address, much less explain, why disbarment is an appropriate sanction under the circumstances. *See* N.C.G.S. § 84-28(c); part II(B), *supra*, of this opinion (findings used to support an imposed sanction must include express references to the circumstantial factors attached to the imposed sanction, e.g., Did defendant's misconduct result in harm or significant harm, or did defendant's misconduct pose a threat of potential harm or potential significant harm, and does the protection of the public require the punishment as imposed?). Certainly, none of the DHC's discipline-related findings and conclusions expressly identify a particular harm, resulting from defendant's actions, that either impeded the administration of justice or was suffered by a client, the public, or the legal profession. The order also does not expressly address how defendant's failure to maintain accurate financial records might result in potentially significant harm to any of the four entities. Moreover, even if defendant's deficient bookkeeping methods somehow pose a self-evident risk of harm to clients, the DHC order is bereft of any assessment as to the extent of such risk, which is a key factor in determining an appropriate sanction. *See* N.C.G.S. § 84-28(c); part II(B), *supra*, of this opinion (differentiating between the potential for harm and the potential for significant harm is a key factor in determining the appropriate

sanction). The mere potential for harm to a client is a statutory factor that supports a reprimand, one of the lesser sanctions that may be imposed on an attorney by the DHC. However, in order to justify the imposition of a more severe sanction, such as censure, suspension, or disbarment, the attorney's misconduct must show either significant harm or the *potential* for *significant* harm. The portion of the DHC order pertaining to discipline assuredly does not expressly link defendant's conduct with such potential, and our review of both the underlying evidence and the DHC's findings and conclusions fails to find support for an inference of such potential. For while we may recognize that an attorney's pattern of commingling account funds necessarily creates the potential for harm to his clients, our review of a specific transgression must also encompass its context, duration, and result. In the instant case, defendant's pattern of commingling account funds from 1994 to 1998 was revealed during an audit ordered by the State Bar. Evidence presented at the subsequent disciplinary hearing established that defendant had merged his personal funds with client funds throughout the period. The evidence also showed that defendant had made several withdrawals from the merged account that were in excess of those funds to which he was entitled. Thus, to that point, defendant's pattern of commingling accounts certainly ran the risk of harming clients since his unauthorized use of client funds, even as an interim book-balancing measure, could well have resulted in the eventual loss of such funds. However, no evidence presented at the hearing showed that any client had indeed suffered such a loss. Defendant testified that all clients had received what was due them, and that no client or creditor testified to the contrary. In addition, no other evidence was proffered that would indicate that any of the dozen clients at issue had suffered financial setback as a result of defendant's accounting practices. Therefore, within the confines of defendant's circumstances, we can find no grounds—from among either the underlying evidence or the DHC's discipline-related findings of fact—that would support a conclusion that his misconduct resulted in either: (1) potential harm to clients beyond that attributable to any commingling of attorney and client funds, or (2) *significant* potential harm to clients.

Keeping in mind that the primary purpose of sanctioning offending attorneys is to protect the public, *see* N.C.G.S. § 84-28(c), we next examine whether defendant's disbarment serves as an appropriate means to achieve such an end. In other words, did defendant's actions—essentially, the commingling of personal and client funds for an extended period of time—mandate the ultimate sanction in

order to protect the public from the threats created by such ongoing commingling? *Id.*

While recognizing that the evidence establishes that defendant's bookkeeping practices carry a risk of potential harm, this Court's examination of the underlying evidence, conducted under the whole-record test, fails to find support for findings and conclusions that could serve as adequate justification for his disbarment. N.C.G.S. § 84-28(c) includes a five-tiered scheme of sanctions that escalate in severity depending on the attending circumstances. In the instant case, the underlying evidence would appear to support a conclusion that defendant's misconduct included the statutory circumstance of creating potential harm, which is an expressed factor attached to a reprimand, *see* N.C.G.S. § 84-28(c)(4), one of the lesser sanctions that may be imposed by the DHC. However, in order to impose a more severe sanction under the statute—censure, suspension, or disbarment—an attorney's misconduct must include attending circumstances that demonstrate: (1) a risk of *significant* potential harm, and (2) that the chosen sanction is necessary in order to protect the public. *See* N.C.G.S. § 84-28(c)(3)-(5). This Court has already determined that the attending circumstances of defendant's misconduct fail to evidence a risk of *significant* potential harm to clients. Thus, in our view, the expressed parameters of the statute preclude the DHC on the facts of this case from imposing on defendant any sanction that requires such a showing. As a result, this Court further concludes that: (1) the DHC exceeded its statutory authority by disbarring defendant for misdeeds that the evidence did not show carried with it a threat of *significant* potential harm to clients, and (2) the DHC's discipline-related findings of fact and conclusions of law fail to even address, much less demonstrate, why the sanction of disbarment is required in order to provide protection of the public.

We note that the Court of Appeals, in its initial review of this case, undertook an exhaustive review of the various sanctions imposed on offending attorneys in the past. *Talford*, 147 N.C. App. at 590-96, 556 S.E.2d at 351-54. The Court of Appeals noted that there were no cases resulting in the disbarment of an attorney for misconduct analogous to defendant's.[4] Our own review of prior cases involv-

4. Although the Court of Appeals referred to its examination of cases as part of its "proportionality" review, this Court expressly disapproves of any reference in the lower court's opinion that may suggest a "proportionality review" is included in an appellate court's examination of attorney disciplinary actions. Such actions are reviewed under the whole-record test, as described within the body of this opinion.

ing attorney disciplinary actions produced similar results, leading us to concur with the lower court's conclusion that the disbarment judgment imposed on defendant stands "as an aberration," *id.* at 595, 556 S.E.2d at 354, which must be reconsidered in light of the contextual analysis provided herein.

Thus, in sum, we hold as a matter of law that the three-part query of the whole-record test reveals that there is an inadequate "rational basis in the evidence" to support the DHC's decision to disbar defendant. *Rogers*, 297 N.C. at 65, 253 S.E.2d at 922. Because the DHC's order fails to provide either pertinent findings of fact or conclusions of law that address the statutory factors affecting its choice of discipline, its sanction-related findings and conclusions cannot serve as adequate support for its decision to disbar defendant. In addition, our independent review of the record fails to yield underlying evidence that would adequately support pertinent findings and/or conclusions that, in turn, could then serve as ample justification for a decision to disbar defendant under the circumstances. As a result, we affirm the holding of the Court of Appeals, and order that the Court of Appeals remand the case to the DHC for purposes of imposing a judgment that comports with the General Statutes of North Carolina as discussed in this opinion.

AFFIRMED AS MODIFIED.

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

IN THE MATTER OF APPEAL OF: THE GREENS OF PINE GLEN LTD. PARTNERSHIP FROM THE DECISION OF THE DURHAM COUNTY BOARD OF EQUALIZATION AND REVIEW REGARDING THE VALUATION OF CERTAIN REAL PROPERTY FOR TAX YEAR 1997

No. 681PA01

(Filed 28 February 2003)

1. Taxation— ad valorem—valuation—low-income housing—section 42 developments

The whole record test revealed that the Court of Appeals erred in an action to review the ad valorem tax valuation of a taxpayer's 26 U.S.C. § 42 low-income housing property by requiring

the income method of valuation or a combination of methods which account for the market effect of section 42 rent restrictions, because the taxpayer failed to show by competent, material, and substantial evidence that the assessed value of the pertinent property using the cost approach method exceeded its fair market value when: (1) taxpayers cannot adjust the value of their property by engaging in contractual agreements that reduce the income potential of their property below the fair market value; (2) unlike a governmental restriction such as zoning, section 42 restrictions do not diminish the property's value but instead balance tax credits allowed to the developer against rent restrictions imposed on the developer; (3) section 42 restrictions are freely entered contractual covenants and not governmental regulations; and (4) developers who choose to participate in the section 42 program voluntarily trade away revenue potential in order to finance the property's construction.

2. Taxation— ad valorem—square footage value

A case reviewing the ad valorem tax valuation of a taxpayer's 26 U.S.C. § 42 low-income housing property is remanded to the Court of Appeals for further remand to the North Carolina Property Tax Commission for the limited purpose of substituting in its final decision the correct square footage value for the pertinent property, and this action does not violate N.C.G.S. § 105-345.1 because the correct valuation was known before the hearing but was not considered at the hearing.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 147 N.C. App. 221, 555 S.E.2d 612 (2001), reversing the final decision of the North Carolina Property Tax Commission entered 19 June 2000. Heard in the Supreme Court 9 September 2002.

S.C. Kitchen, Durham County Attorney, by Curtis Massey, Assistant County Attorney, for appellant Durham County.

Parker, Poe, Adams & Bernstein L.L.P., by Charles C. Meeker and William H. McCullough, for taxpayer-appellee The Greens of Pine Glen.

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

Moore & Van Allen PLLC, by Susan Ellinger, Charles H. Mercer, Jr., and Marc C. Tucker, on behalf of the North Carolina Low Income Housing Coalition, amicus curiae.

EDMUNDS, Justice.

Respondent The Greens of Pine Glen, Limited Partnership (taxpayer), instituted this action against petitioner Durham County to review petitioner's ad valorem tax valuation of taxpayer's property, The Greens of Pine Glen, which is located in Durham, North Carolina. The North Carolina Property Tax Commission, sitting as the State Board of Equalization and Review, confirmed the valuation assigned by Durham County, but the Court of Appeals reversed and remanded the matter to the Commission for further proceedings. We hold that the Commission properly confirmed Durham County's appraisal of The Greens of Pine Glen. Accordingly, we reverse the Court of Appeals. In addition, we remand to the Court of Appeals for further remand to the North Carolina Property Tax Commission for the limited purpose of substituting in its final decision the correct square footage value for The Greens of Pine Glen.

The Greens of Pine Glen is a 168-unit apartment complex constructed in southwest Durham in 1996 pursuant to 26 U.S.C. § 42. This statute, which is part of the Internal Revenue Code and is commonly referred to as "section 42," provides substantial federal income tax credits as an incentive for developers to construct and operate housing for low-income families and individuals. 26 U.S.C. § 42 (2000). A potential tenant is eligible to rent a section 42 unit only if that tenant's income does not exceed sixty percent of the area's median income. *Id.* In exchange for the tax credits, developers agree to limit rents for a section 42 unit to no more than thirty percent of the sixty percent median income level. *Id.* In addition to the federal tax credit, North Carolina also provides state income tax credits to reward participation in the section 42 program (the program). N.C.G.S. § 105-129.16B (2001). Thus, section 42 tax credits fill the gap between the cost of developing the property and the reduced rents received from tenants, making section 42 construction projects attractive to developers.

Public agencies within each state administer the program and allocate the available federal and state tax credits. The North Carolina Housing Finance Agency, which is the responsible agency in this state, awards tax credits on the basis of several criteria, including the number of units built with rent restrictions and the overall

cost of construction. Taxpayer presented evidence that, in practice, section 42 developments are sufficiently desirable that interested developers compete for them. In fact, taxpayer's witness testified before the Commission that the number of applicants typically equals five times the available resources. Moreover, the high demand for such housing often results in a low vacancy rate. As a result, developers desiring the credits frequently agree to terms that exceed the minimum requirements of the program. In the case at bar, in order to maximize the credits available to it, taxpayer chose to construct one hundred percent of The Greens of Pine Glen as a section 42 program. In addition, taxpayer offered to extend the period of the restrictions beyond the mandatory fifteen years up to a total of thirty years. The rents taxpayer charges for its apartments are twenty-five to thirty percent below market rents for apartments of similar size, construction, and location, but are the maximum allowed for continued participation in the program.

Taxpayer's witness testified that developers of section 42 properties who receive an allocation from the North Carolina Housing Finance Agency almost always form a limited partnership with one or more limited or investor partners. The developer/general partner allocates the tax credits to the limited partners, which are typically Fortune 500 companies. Taxpayer's witness explained that the limited partners' interests lie solely in the tax credits for subsequent resale. In other words, the limited partners purchase a financial product.

The Greens of Pine Glen was developed through the creation of such a limited partnership. W.O. Brisben Companies, a for-profit company in the affordable housing field, became a one percent general partner with a ninety-nine percent limited partner, SunAmerica Housing Fund 213, a subsidiary of AIG Insurance. The partnership agreement allocated the tax credits allowed under section 42 to each partner commensurate with its ownership interest. The federal income tax credits allocated to the project were $822,006 per year for ten years, and the limited partner paid approximately $4,700,000 for its share of these credits. These funds were used to develop The Greens of Pine Glen, whose construction cost $10,800,000.

After construction was completed, Durham County in April 1997 sent taxpayer a tax appraisal that valued the property at $5,941,692. Durham County arrived at this value by using the income approach method of appraisal, which took into account the market impact of section 42 use and rent restrictions on the property. However, at that

time, Durham County used the cost approach method of appraisal to value restricted-rent properties and newly developed properties that did not have a rental history. The cost approach method of appraisal considers market rents and does not take into account rent restrictions. Consequently, owners of other restricted-rent properties suggested to Durham County tax officials that an error had been made when the income method was used to value The Greens of Pine Glen.

On 9 May 1997, Durham County delivered to taxpayer a revised appraisal of $7,488,350, based on the cost approach. Durham County later discovered that it had erred in calculating the property's square footage in its May 1997 appraisal and accordingly sent a corrected third appraisal to taxpayer in 1998, decreasing the appraised value to $7,250,050 for tax year 1998.

Taxpayer appealed Durham County's May 1997 appraisal to the Durham County Board of Equalization and Review, which affirmed the $7,488,350 value. Taxpayer then appealed to the Commission, which conducted a hearing on 13 and 14 April 2000. On 19 June 2000, in a split decision, the Commission confirmed Durham County's May 1997 appraisal.

Taxpayer appealed the Commission's decision to the North Carolina Court of Appeals. On 20 November 2001, the Court of Appeals issued a unanimous opinion reversing the Commission. After determining that Durham County overvalued The Greens of Pine Glen by using market rents to determine its value under the cost approach, *In re Appeal of Greens of Pine Glen Ltd. Part.*, 147 N.C. App. 221, 555 S.E.2d 612 (2001), the Court of Appeals held that The Greens of Pine Glen must be valued "using the income method or a combination of methods which account for the market effect of the section 42 [rent] restrictions," *id.* at 229-30, 555 S.E.2d at 618. Accordingly, the Court of Appeals remanded the matter for receipt of additional evidence on the property's value. *Id.* at 230, 555 S.E.2d at 618. On 6 March 2002, this Court allowed Durham County's petition for discretionary review.

[1] Petitioner Durham County contends that the Court of Appeals erred when it reversed and remanded the Commission's decision. Durham County argues that the Commission properly concluded that taxpayer failed to meet its burden to rebut the presumption that the county's appraisal was correct. We review decisions of the Commission pursuant to N.C.G.S. § 105-345.2. N.C.G.S. § 105-345.2

(2001). Questions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission's decision are reviewed under the whole-record test. N.C.G.S. § 105-345.2(b). Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the Commission. *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002). Under the whole-record test, however, the reviewing court merely determines " 'whether an administrative decision has a rational basis in the evidence.' " *In re Appeal of McElwee*, 304 N.C. 68, 87, 283 S.E.2d 115, 127 (1981) (quoting *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979)). Because the controlling issue in this case is whether the Commission properly accepted Durham County's method of valuing The Greens of Pine Glen rather than the method offered by taxpayer, we use the whole-record test to evaluate the conflicting evidence.

Ad valorem tax assessments are presumed to be correct. *Id.* at 75, 283 S.E.2d at 120. However, a taxpayer may rebut this presumption if it produces "competent, material and substantial" evidence establishing that: "(1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; AND (3) the assessment *substantially* exceeded the true value in money of the property." *In re Appeal of AMP, Inc.*, 287 N.C. 547, 563, 215 S.E.2d 752, 762 (1975). Thus, a taxpayer who is challenging an ad valorem tax assessment must satisfy a two-prong test by demonstrating that the means adopted by the tax supervisor was illegal or arbitrary and also that the valuation was unreasonably high. *Id.* If a taxpayer fails to present evidence sufficient to meet its burden as to either prong, the appeal fails. *Id.*

The Commission concluded Durham County adequately established that it appraised The Greens of Pine Glen in accordance with its duly adopted schedules of values, standards, and rules, and in a manner consistent with the county's appraisal of comparable properties. In addition, the Commission found that taxpayer failed to show by competent, material, and substantial evidence that the assessed value of The Greens of Pine Glen exceeded its fair market value. After reviewing the whole record and considering taxpayer's contentions, we agree with the Commission. Therefore, we reverse the Court of Appeals.

Durham County argues that taxpayer failed to satisfy its burden of establishing that the method of appraisal used was illegal or

arbitrary.[1] The North Carolina General Assembly requires that all property, real and personal, be assessed for taxation at its true value or use value as determined under section 105-283. N.C.G.S. § 105-284(a) (2001). The words "true value" are interpreted as meaning market value, "that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller." N.C.G.S. § 105-283 (2001). In determining the "true value" of real property, an appraiser must consider, among other things, its "replacement cost; cost; adaptability for residence, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value." N.C.G.S. § 105-317(a)(2) (2001). However, the general statutes nowhere mandate that any particular method of valuation be used at all times and in all places. In light of the innumerable possible situations that may arise, authorities that have the obligation of assigning a value to land sensibly are given discretion to apply the method that most accurately captures the "true value" of the property in question.

Section 105-317 has been interpreted as authorizing three methods of valuing real property: the cost approach, the comparable sales approach, and the income approach. *In re Appeal of Owens*, 144 N.C. App. 349, 353, 547 S.E.2d 827, 829, *appeal dismissed and disc. rev. denied*, 354 N.C. 361, 556 S.E.2d 575 (2001); *In re Appeal of Stroh Brewery Co.*, 116 N.C. App. 178, 186, 447 S.E.2d 803, 807 (1994) (citing Patrick K. Hetrick, Larry A. Outlaw & James A. Webster, Jr., *North Carolina Real Estate for Brokers and Salesmen*, ch. 16, at 604 (3d ed. 1986)); *City of Statesville v. Cloaninger*, 106 N.C. App. 10, 16, 415 S.E.2d 111, 115, *appeal dismissed and disc. rev. denied*, 331 N.C. 553, 418 S.E.2d 664 (1992). Although the income approach is generally considered the most reliable method for determining the market value of investment property, the cost approach is better suited for valuing specialty property or newly developed property and is often used when no other method will yield a realistic result. *In re Appeal of Belk-Broome Co.*, 119 N.C. App. 470, 474, 458 S.E.2d 921, 924 (1995), *aff'd per curiam*, 342 N.C. 890, 467 S.E.2d 242 (1996). The

1. Although the parties correctly note that the taxpayer may rebut the presumption of correctness of an assessment by showing that the method of valuation is either illegal or arbitrary, the Court of Appeals' opinion and taxpayer's brief to this Court focus almost entirely on the purported illegality of the method used here. In light of unrebutted evidence that Durham County used the cost approach to value other similar property, we believe that there is no suggestion that the method employed in the case at bar was arbitrary.

statute contemplates that the assessors and the Commission will consider which factors apply to each specific piece of property in appraising its true value. *See In re Ad Valorem Valuation of Prop. at 411-417 W. Fourth St.*, 282 N.C. 71, 81, 191 S.E.2d 692, 698 (1972).

Although both the income and the cost approaches are legal methods of valuation, the Court of Appeals held that the use of the cost approach was illegal under the circumstances of this case because that method does not consider income restrictions required by taxpayer's participation in the section 42 program. *In re Appeal of Greens of Pine Glen Ltd. Part.*, 147 N.C. App. at 229-30, 555 S.E.2d at 617-18. Accordingly, the Court of Appeals mandated that an appraiser of section 42 property must use the income approach or a combination of methods, including the income approach, that account for section 42 rent restrictions. *Id.* We begin by addressing this requirement.

This Court has consistently held that where the income approach is used, the valuation must be based on market rents, not contractually restricted rents. *In re Appeals of Southern Ry. Co.*, 313 N.C. 177, 190, 328 S.E.2d 235, 244 (1985); *In re Ad Valorem Valuation of Prop. at 411-417 W. Fourth St.*, 282 N.C. at 79-80, 191 S.E.2d at 698; *In re Ad Valorem Valuation of Prop. of Pine Raleigh Corp.*, 258 N.C. 398, 403, 128 S.E.2d 855, 859 (1963). In *Property of Pine Raleigh*, this Court considered the effect on tax valuation of a long-term lease that fixed the rental income the taxpayer could receive. The taxpayer argued that he had improvidently entered a lease under which the tenant payed a low rent, and as a result, the taxpayer was not receiving full value for his property. *In re Ad Valorem Valuation of Prop. of Pine Raleigh Corp.*, 258 N.C. at 400-01, 128 S.E.2d at 856-57. We held that when valuing real property in accordance with N.C.G.S. § 105-295 (now N.C.G.S. § 105-317), "the income referred to is not necessarily actual income. The language is sufficient to include the income which could be obtained by the proper and efficient use of the property." *Id.* at 403, 128 S.E.2d at 859. Accordingly, we held that taxpayers cannot adjust the value of their property by engaging in contractual agreements that reduce the income potential of their property below the fair market value. *Id.* at 404-05, 128 S.E.2d at 859-60.

We acknowledge that where two properties are taxed the same, the owner of the property that yields less income bears a proportionately higher tax burden than the owner of the property that produces a greater income. However, any such inequality is attributable to the

differences in the nature, use, and other characteristics of the properties, not to the taxing statute. *Id.* at 404, 128 S.E.2d at 860; *see also In re Ad Valorem Valuation of Prop. at 411-417 W. Fourth St.*, 282 N.C. at 78-80, 191 S.E.2d at 697-98 (holding that where contract rents produced a higher-than-market value, the appraiser could properly consider both the actual rental income and the market rental income). Therefore, this Court has held that "[i]f it appears that the income actually received is less than the fair earning capacity of the property, the earning capacity should be substituted as a factor rather than the actual earnings. The fact-finding board can properly consider both." *In re Ad Valorem Valuation of Prop. of Pine Raleigh Corp.*, 258 N.C. at 403, 128 S.E.2d at 859.

Like the long-term lease in *Property of Pine Raleigh*, which locked the property owner into a less-than-optimal rent, taxpayer's contractual agreement to section 42 rent restrictions meant The Greens of Pine Glen no longer earned the market rate in rents. Taxpayer voluntarily entered into such an agreement because of the substantial tax credits it received in return. Taxpayer could have built these apartments for rental on the open market, but it chose to be in the business of affordable housing in order to take advantage of the various federal and state incentives. Its participation in the section 42 program created another way to finance taxpayer's building project because the sale of the tax credits generated funds that taxpayer used to construct The Greens of Pine Glen. Therefore, taxpayer's participation in section 42 housing represented a business and economic decision, not unlike the long-term lease in *Property of Pine Raleigh.*

Moreover, even if Durham County valued The Greens of Pine Glen under the income approach as mandated by the Court of Appeals' holding, the "income" considered would not necessarily be actual income. Under *Property of Pine Raleigh*, if taxpayer received less than the fair earning capacity of The Greens of Pine Glen in rents, the fair earning capacity could control over or be considered along with the actual earnings. Therefore, even under the income approach of appraisal, Durham County and the Commission were not required as a matter of law to consider section 42 restrictions. Accordingly, taxpayer's contention that Durham County's method of appraisal was not legal because it did not consider the section 42 restrictions is insufficient to rebut the presumption that the appraisal was properly administered.

Taxpayer's arguments to the contrary are not persuasive. The Court of Appeals agreed with taxpayer's contention that section 42

restrictions are more analogous to governmental regulation than to freely entered contractual covenants. Taxpayer argued that the rent restrictions at bar resembled zoning provisions, which are routinely considered in appraising real property. However, this Court rejected such an equivalency when we held that "[a] zoning ordinance is not a contract between the municipality and its citizens . . . . It is subject to amendment or repeal at the will of the governing agency which created it." *McKinney v. City of High Point*, 239 N.C. 232, 237, 79 S.E.2d 730, 734 (1954). By contrast, when a state or governmental body becomes a party to a business contract, its rights and responsibilities are, with few exceptions, the same as those of individuals. *Smith v. State*, 289 N.C. 303, 310, 222 S.E.2d 412, 417 (1976). Therefore, governmental restrictions imposed as part of a state's police power are distinguishable from contractual agreements freely entered into between parties participating in arm's-length negotiations.

As detailed above, ample evidence was presented to establish that section 42 restrictions fall into the latter category. Unlike a governmental restriction such as zoning, section 42 restrictions do not diminish the property's value, but instead balance tax credits allowed to the developer against rent restrictions imposed on the developer. Because section 42 restrictions are freely entered contractual covenants, not governmental regulations, the Commission did not err in concluding that taxpayer may not artificially alter the value of its property below fair market value.

Although the Court of Appeals relied on *In re Appeal of Belk-Broome Co.*, 119 N.C. App. 470, 458 S.E.2d 921, for the proposition that the section 42 program represents a new and distinct market requiring the consideration of its contractual restrictions, *In re Appeal of Greens of Pine Glen Ltd. Part.*, 147 N.C. App. at 226-29, 555 S.E.2d at 616-18, we believe that *Belk-Broome* is distinguishable. In *Belk-Broome*, the taxpayer, a Belk department store that served as an anchor store for a mall, successfully challenged a final decision of the Commission that upheld the county's ad valorem tax appraisal of the Belk property using the cost approach method of valuation. The Commission concluded that the county correctly appraised the property based upon the "entire bundle of rights" without regard as to whether Belk had chosen to bargain some of those rights away. *In re Appeal of Belk-Broome Co.*, 119 N.C. App. at 476-77, 458 S.E.2d at 925. The Court of Appeals reversed and held that Belk "unquestionably carried its burden" of showing that the county's valuation was

improper and that the income approach should be the primary method for determining the value of anchor stores. *Id.* at 475, 480, 458 S.E.2d at 924, 927.

Under the Commission's interpretation, Belk, as an anchor store, both enhanced the square-foot value of other stores, and then was itself taxed at the enhanced rate. *Id.* at 479, 458 S.E.2d at 926. The Court of Appeals recognized that this enhanced tax was improper. Unlike stand-alone facilities, anchor stores hold a unique position in mall retail operations. *Id.* at 475-76, 458 S.E.2d at 925. Anchor stores both attract smaller stores to the mall and allow mall managers to charge increased rents to those smaller stores. Because the success of a shopping mall is dependent on the presence of anchor stores and because the developer can charge the smaller stores increased rents, the anchors are afforded discounted rents. Under these facts, the Court of Appeals held that it was improper for the Commission to use the cost approach method of valuation to equalize property values between the anchor store and the other surrounding stores in the mall. *Id.* at 476, 480, 458 S.E.2d at 925, 927.

Significant factual differences distinguish the case at bar from *Belk-Broome.* Unlike a mall anchor store, The Greens of Pine Glen does not attract or retain other taxable property, nor does its presence confer any greater value on associated or adjacent properties. Section 42 rent restrictions do not apply to all apartment complexes, and section 42 restrictive covenants are not standard in the apartment industry. Those developers who choose to participate in the section 42 program voluntarily trade away revenue potential in order to finance the property's construction. Accordingly, we conclude that the analysis in *Belk-Broome* is inapplicable here.

Because taxpayer failed to meet the first prong of the test by establishing that the Commission used a valuation method that was illegal or arbitrary, we need not address the second prong, whether the appraisal exceeded the "true value in money" of the property. In addition, because we reverse the opinion of the Court of Appeals on the basis of the application of the facts to the statute, we need not reach Durham County's contention that the Court of Appeals' opinion represented an unconstitutional infringement by the judiciary on the powers of the General Assembly. *State v. Creason*, 313 N.C. 122, 127, 326 S.E.2d 24, 27 (1985).

[2] Our review of the record reveals that although the property was reappraised in 1998 to correct an error in the May 1997 appraisal

caused by a miscalculation of the square footage of the property, the Commission considered only the uncorrected value in its 2000 Order. Durham County argues that this Court does not have authority to remand this case to the Commission for reconsideration based on the correct square footage. *See* N.C.G.S. § 105-345.1. However, our reading of that statute satisfies us that it addresses only evidence that becomes known after the hearing before the Commission. Here, the evidence (in the form of the corrected valuation) was known before the hearing but was not considered at the hearing. Thus, the Commission considered the incorrect square footage value in its decision.

Based upon the foregoing, we reverse the decision of the Court of Appeals. We also remand this matter to the Court of Appeals for further remand to the North Carolina Property Tax Commission for the limited purpose of substituting in its final decision the correct square footage value for The Greens of Pine Glen. *See* N.C.G.S. § 105-345.2(b).

REVERSED AND REMANDED.

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

ALFORD v. CATALYTICA PHARMS., INC.

[356 N.C. 654 (2003)]

BARRY E. ALFORD, W. SPUT ANDERSON, WILLIAM C. ANDERSON, C. TRACY BARNHILL, JR., DOUGLAS M. BLAKE, JAMES M. BOOTH, BOBBY J. BOYD, JR., J. ALAN BOYKIN, STEVE H. BOSWELL, RUBEN C. BUTLER, STEPHEN CANNON, R. BLAINE CARGILE, JR., ERNEST E. CARRAWAY, ERIC COOPER, TONY COUNCIL, KENNETH R. CREDLE, KELLY L. DARDEN, JR., WILLIAM R. DUPREE III, ADAM L. GARDNER, JR., DONALD M. GAY, CHRIS G. GEHRING, GORDON L. HAISLIP, KENDALL HARDEE, KEITH D. HARRIS, WILLIAM HUNTER, JR., JOHN JAMES, CHRIS JEFFERSON, MELVIN L. JENKINS, BILLY B. KING, WILLIAM D. KITTRELL, MITCHELL W. MANNING, JR., EDWARD MEYER, DAVID MIZELLE, MARK OSNOE, JONATHAN SCOTT PEELE, JAMES H. RASPBERRY, HARRY L. ROUSE, LEVON SHAW, MARGARET G. SHAW, JOHNNY R. SMITH, WILLIAM H.C. SMITH, PHILIP H. STALLS, JACKIE D. SUMMERLIN, JEANETTE T. TAFT, LEONARD A. THORN, JAMES W. TURNAGE, WAYNE P. TYNDALL, WILLIAM P. WARD, WILLIAM WEST, EDDIE WILLIAMS, AND EVANGELINE S. WILSON V. CATALYTICA PHARMACEUTICALS, INC., AND EASTERN OMNI CONSTRUCTORS PHARMACEUTICALS, INC.

No. 319A02

(Filed 28 February 2003)

Employer and Employee— *Woodson* claim—statute of limitations

A decision of the Court of Appeals that plaintiff's *Woodson* claim was barred by the one-year statute of limitations for intentional torts set forth in N.C.G.S. § 1-54(3) is reversed for the reason stated in the dissenting opinion that such a claim is not governed by the statute of limitations in N.C.G.S. § 1-54(3) but is governed by the catch-all three-year statute of limitations in N.C.G.S. § 1-52(5).

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 150 N.C. App. 489, 564 S.E.2d 267 (2002), affirming an order entered 22 February 2001 by Judge Howard E. Manning, Jr., in Superior Court, Wake County. Heard in the Supreme Court 4 December 2002.

Laura S. Jenkins, PC, by Laura S. Jenkins, for plaintiff-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Mark A. Ash and J. Mitchell Armbruster, for for defendant-appellee Catalytica Pharmaceuticals, Inc.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed and the case is remanded to the Court of Appeals for further remand to the Superior Court, Wake County, for proceedings not inconsistent with the dissenting opinion.

REVERSED AND REMANDED.

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

GUILFORD FINANCIAL SERVICES, LLC, PETITIONER v. THE CITY OF BREVARD, A MUNICIPAL CORPORATION, RESPONDENT

No. 295A02

(Filed 28 February 2003)

Zoning— subdivision plat—compliance with ordinance and regulations—entitlement to approval

The decision of the Court of Appeals in this case is reversed for the reasons stated in the dissenting opinion that a subdivision plat for affordable housing complied with a city's zoning ordinance and subdivision regulations, the city council's denial of the subdivision application was unsupported by competent, material and substantial evidence, and the applicant was entitled to approval of its subdivision plat.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 150 N.C. App. 1, 563 S.E.2d 27 (2002), vacating a judgment entered 2 November 2000 by Judge J. Marlene Hyatt in Superior Court, Transylvania County, and remanding the case with instructions. Heard in the Supreme Court 5 February 2003.

Smith Moore LLP, by James G. Exum, Jr., and Robert R. Marcus; and Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Craig D. Justus, for petitioner-appellant.

Ramsey, Hill, Smart, Ramsey & Pratt, P.A., by Michael K. Pratt; and James M. Kimzey, for respondent-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals.

REVERSED.

G. WILLIAM DOBO AND WIFE, BARBARA B. DOBO, PETITIONERS v. ZONING BOARD OF ADJUSTMENT OF THE CITY OF WILMINGTON AND CITY OF WILMINGTON, RESPONDENTS

No. 256A02

(Filed 28 February 2003)

Zoning— residential area—sawmill—accessory use

The decision of the Court of Appeals in the case is reversed for the reason stated in the dissenting opinion that landowners' use of a sawmill on residentially zoned property for nonindustrial and nonmanufacturing purposes did not violate a city zoning ordinance but was a permitted accessory use.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 149 N.C. App. 701, 562 S.E.2d 108 (2002), affirming an order entered 5 October 2000 by Judge Stafford G. Bullock in Superior Court, New Hanover County. On 27 June 2002, the Supreme Court granted discretionary review of additional issues. Heard in the Supreme Court 4 February 2003.

Kenneth A. Shanklin and Matthew A. Nichols for petitioner-appellants.

Thomas C. Pollard, City Attorney, and Dolores M. Williams, Assistant City Attorney, for respondent-appellees.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed and the case is remanded to the Court of Appeals for further remand to the Superior Court, New Hanover County, for proceedings not inconsistent with the dissenting opinion.

REVERSED AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

RICHARD ARP, EMPLOYEE v. PARKDALE MILLS, INCORPORATED, EMPLOYER, CAMERON M. HARRIS & COMPANY, THIRD PARTY ADMINISTRATOR

No. 311A02

(Filed 28 February 2003)

Workers' Compensation— injury while leaving work—climbing gate—unreasonable incidental activity—not arising out of and in course of employment

The decision of the Court of Appeals in this case is reversed for the reasons stated in the dissenting opinion that injuries received by plaintiff when he fell while attempting to climb over a seven and one-half foot high locked chain link and barbed wire gate leading to an employee parking lot did not arise out of and in the course of his employment because he engaged in an unreasonable incidental activity for egress from the employer's premises when the employer provided a safe and secured exit and the premises exception to the coming and going rule thus did not apply.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 150 N.C. App. 266, 563 S.E.2d 62 (2002), affirming an opinion and award entered by the North Carolina Industrial Commission on 7 March 2001. Heard in the Supreme Court 4 December 2002.

Grandy & Martin, PA, by Charles William Grandy, for plaintiff-appellee.

Alala Mullen Holland & Cooper, P.A., by H. Randolph Sumner and Jesse V. Bone, Jr., for defendant-appellants.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed and the case is remanded to the Court of Appeals for further remand to the North Carolina Industrial Commission for proceedings not inconsistent with the dissenting opinion.

REVERSED AND REMANDED.

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

AMANDA DIXON TUCKER AND JIMMY L. HODGES AND BECKY J. HODGES, PETITIONERS V. THE MECKLENBURG COUNTY ZONING BOARD OF ADJUSTMENT, MARSHALL GUS THOMAS, JR. AND RHONDA GOLDEN-THOMAS, RESPONDENTS

No. 68A02

(Filed 28 February 2003)

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. 52, 557 S.E.2d 631 (2001), reversing an order and judgment entered 31 July 2000 by Judge Robert P. Johnston in Superior Court, Mecklenburg County. On 27 June 2002, the Supreme Court granted discretionary review of additional issues. Heard in the Supreme Court 3 February 2003.

Kennedy Covington Lobdell & Hickman, L.L.P., by John H. Carmichael, for petitioner-appellants.

Ruff, Bond, Cobb, Wade & Bethune, L.L.P., by James O. Cobb, for respondent-appellee the Mecklenburg County Zoning Board of Adjustment.

Nelson Mullins Riley & Scarborough, L.L.P., by Paul J. Osowski, for respondent-appellees Marshall Gus Thomas, Jr., and Rhonda Golden-Thomas.

PER CURIAM.

As to the issue on direct appeal based on the dissenting opinion, we affirm the majority decision of the Court of Appeals. We conclude that the petition for discretionary review as to additional issues was improvidently allowed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

SLADE v. STADLER

[356 N.C. 659 (2003)]

PAULINE T. SLADE v. JAMES A. STADLER, INDIVIDUALLY, AND JAMES A. STADLER, D/B/A STADLER GREENHOUSES

No. 363A02

(Filed 28 February 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 150 N.C. App. 677, 564 S.E.2d 298 (2002), reversing a judgment entered 28 February 2001 by Judge Ronald L. Stephens in Superior Court, Alamance County. This case was determined on the briefs without oral argument pursuant to N.C. R. App. P. 30(f)(1).

Hemric, Lambeth, Champion & Moseley, P.A., by W. Phillip Moseley, for plaintiff-appellant.

Teague, Rotenstreich & Stanaland, L.L.P., by Stephen G. Teague, for defendant-appellees.

PER CURIAM.

AFFIRMED.

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

IN RE ROBERTS

[356 N.C. 660 (2003)]

IN THE MATTER OF: NICHOLAS R. ROBERTS AND THE BUNCOMBE COUNTY BOARD OF EDUCATION

No. 290PA02

(Filed 28 February 2003)

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal of right of a constitutional question pursuant to N.C.G.S. § 7A-30(1) to review a unanimous decision of the Court of Appeals, 150 N.C. App. 86, 563 S.E.2d 37 (2002), affirming an amended order entered 29 January 2001 by Judge C. Walter Allen in Superior Court, Buncombe County. Heard in the Supreme Court 5 February 2003.

Paul Louis Bidwell for petitioner-appellee.

Root & Root, P.L.L.C., by Allan P. Root, for respondent-appellant Buncombe County Board of Education.

Tharrington Smith, L.L.P., by Ann Majestic and Carolyn A. Waller, on behalf of the North Carolina School Boards Association, amicus curiae.

Jane R. Wettach and Brenda Berlin, on behalf of the Children's Education Law Clinic, The American Civil Liberties Union Legal Foundation of North Carolina, Inc., The North Carolina Justice and Community Development Center, The North Carolina Child Advocacy Institute, Legal Aid of North Carolina, Inc., The Council for Children, The Children's Law Center, Legal Services of the Southern Piedmont, The Child Advocacy Commission of Durham, North Carolina Central University School of Law Juvenile Law Clinic, The North Carolina Academy of Trial Lawyers, The North Carolina Association of Women Attorneys, amici curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED; APPEAL DISMISSED EX MERO MOTU.

GREGORY BRET BATDORFF v. NORTH CAROLINA STATE BOARD OF ELECTIONS; CITIZENS FOR TRUTH IN ELECTIONS, A POLITICAL COMMITTEE; AND WAKE COUNTY BOARD OF EDUCATION

No. 263PA02

(Filed 28 February 2003)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 150 N.C. App. 108, 563 S.E.2d 43 (2002), affirming an order of dismissal entered 5 February 2001 by Judge James C. Spencer, Jr., in Superior Court, Wake County. Heard in the Supreme Court 3 February 2003.

Stam, Fordham & Danchi, P.A., by Paul Stam, for plaintiff-appellant.

Roy Cooper, Attorney General, by Susan K. Nichols, Special Deputy Attorney General, for defendant-appellee North Carolina State Board of Elections.

Tharrington Smith, L.L.P., by Michael Crowell, for defendant-appellee Citizens for Truth in Elections.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

IN RE B.A.

[356 N.C. 662 (2003)]

IN THE MATTER OF: B.A., JUVENILE

No. 193PA02

(Filed 28 February 2003)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 149 N.C. App. 667, 562 S.E.2d 607 (2002), reversing and vacating in part and affirming in part an amended juvenile adjudication order entered 7 June 2000 and a juvenile disposition order entered 3 October 2000, both orders entered by Judge John W. Smith in District Court, New Hanover County, and remanding for a new disposition hearing. Heard in the Supreme Court 3 February 2003.

Roy Cooper, Attorney General, by Belinda A. Smith, Assistant Attorney General, for the State-appellant.

Smith, Smith & Harjo, by Jennifer Harjo, for juvenile-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

JEFFRIES v. MOORE

[356 N.C. 663 (2003)]

SHARN M. JEFFRIES v. TATJANA THOMAS MOORE AND CARL JONATHAN MOORE, JR.

No. 147PA02

(Filed 28 February 2003)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a decision of the Court of Appeals, 148 N.C. App. 364, 559 S.E.2d 217 (2002), reversing an order signed 1 June 2000 by Judge Alonzo B. Coleman, Jr., in District Court, Orange County, and remanding for further proceedings. Heard in the Supreme Court 4 February 2003.

Loftin & Loftin, P.A., by John D. Loftin, for plaintiff-appellee.

Coleman, Gledhill & Hargrave, P.C., by Leigh Peek, for defendant-appellants.

PER CURIAM.

WRIT OF CERTIORARI IMPROVIDENTLY ALLOWED.

WAYMAN HARRIS, EMPLOYEE v. THOMPSON CONTRACTORS, INC., EMPLOYER, AND UNITED STATES FIDELITY AND GUARANTY INSURANCE COMPANY, CARRIER

No. 122PA02

(Filed 28 February 2003)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 148 N.C. App. 472, 558 S.E.2d 894 (2002), affirming an opinion and award entered by the North Carolina Industrial Commission on 24 October 2000. Heard in the Supreme Court 3 February 2003.

The Roberts Law Firm, P.A., by Joseph B. Roberts, III, and Scott W. Roberts, for plaintiff-appellee.

Jones, Hewson & Woolard, by Lawrence J. Goldman, for defendant-appellants.

Roy Cooper, Attorney General, by Robert T. Hargett, Special Deputy Attorney General, on behalf of the North Carolina Department of Correction, amicus curiae.

N.C. Prisoner Legal Services, Inc., by Linda B. Weisel and Michael S. Hamden, amicus curiae.

PER CURIAM.

AFFIRMED.

STATE v. RAY

[356 N.C. 665 (2003)]

STATE OF NORTH CAROLINA v. ANDRA VENCENTA RAY

No. 166A02

(Filed 28 February 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 149 N.C. App. 137, 560 S.E.2d 211 (2002), affirming in part and reversing in part judgments entered 3 March 2000 by Judge Orlando F. Hudson, Jr., in Superior Court, Harnett County. Heard in the Supreme Court 4 February 2003.

Roy Cooper, Attorney General, by Thomas G. Meacham, Jr., Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Charlesena Elliott Walker, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
PARISH LORENZO MATTHEWS	)	

No. 654A01

Pursuant to N.C.G.S. § 15A-1418, defendant's Motion for Appropriate Relief filed in this Court on 24 September 2001 is allowed for the limited purpose of entering the following order:

Defendant's Motion for Appropriate Relief is hereby remanded to the Superior Court, Edgecombe County.

It is further ordered, within ninety days from the entry of this order, 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 3rd day of January, 2003.

Brady, J.
For the Court

ALAIMO FAMILY CHIROPRATIC v. ALLSTATE INS. CO.

No. 75P03

Case below: 155 N.C. App. 194

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

ATKINS v. KELLY SPRINGFIELD TIRE CO.

No. 10PA03

Case below: 154 N.C. App. 512

Motion by defendants for temporary stay allowed 14 January 2003 pending determination of defendants' petition for discretionary review.

BOND v. STATE

No. 143A95-5

Case below: Bertie County Superior Court

Application filed by petitioner for writ of habeas corpus denied 14 February 2003. Application by petitioner for amended writ of habeas corpus denied 19 February 2003. Application by petitioner for writ of habeas corpus denied 4 March 2003.

BRANCH v. HIGH ROCK REALTY, INC.

No. 404P02

Case below: 151 N.C. App. 244

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 January 2003.

BUCKEYE FIRE EQUIP. CO. v. GIBBY

No. 591P02

Case below: 153 N.C. App. 523

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina court of Appeals denied 27 February 2003.

CAVES v. N.C. DEP'T OF CORR.

No. 191P02

Case below: 149 N.C. App. 667

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

COFFMAN v. ROBERSON

No. 612P02

Case below: 153 N.C. App. 618

Petition by defendants (William Earl Roberson, M.D. and W. Earl Roberson, P.A.) for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

COUNCIL v. SLACK

No. 615P02

Case below: 153 N.C. App. 811

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

DAIMLERCHRYSLER CORP. v. KIRKHART

No. 112P02

Case below: 148 N.C. App. 572

Motion by defendants to dismiss plaintiff's petition for discretionary review denied 27 February 2003. Petition by plaintiff for writ of supersedeas denied 27 February 2003. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Temporary stay dissolved 27 February 2003. Conditional petition by defendants for discretionary review as to additional issues pursuant to G.S. 7A-31 dismissed as moot 27 February 2003. Motion by defendants' counsel to withdraw dismissed as moot 27 February 2003.

DAVIS v. McMILLIAN

No. 470P02

Case below: 152 N.C. App. 53

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

DEMPSEY v. JOHNNY'S MOBILE HOME SERV. OF ASHEVILLE, INC.

No. 645P02

Case below: 154 N.C. App. 520

Petition by defendant (Johnny's Mobile Home Service of Asheville) for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Justice Orr recused.

DEPARTMENT OF TRANSP. v. HILLIARD

No. 257P02

Case below: 149 N.C. App. 972

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 February 2003.

DONOHO v. CITY OF ASHEVILLE

No. 560P02

Case below: 153 N.C. App. 110

Petition by defendant (Western North Carolina Regional Air Pollution Control Agency) for discretionary review pursuant to G.S. 7A-31 denied 6 December 2002. Petition by defendant (City of Asheville) for discretionary review pursuant to G.S. 7A-31 denied 6 January 2003. Petition by defendant (City of Asheville) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 January 2003. Motion by plaintiffs to dismiss petition for discretionary review dismissed as moot 6 January 2003.

EASTERN OUTDOOR, INC. v. BOARD
OF ADJUST. OF JOHNSTON CTY.

No. 353A02

Case below: 150 N.C. App. 516

Notice of appeal by plaintiff pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 27 February 2003.

EVANS v. EVANS

No. 554P02

Case below: 153 N.C. App. 54

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 February 2003.

FISHER v. HOUSING AUTH. OF CITY OF KINSTON

No. 94PA03

Case below: 155 N.C. App. 189

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 27 February 2003.

FRANCINE DELANY NEW SCHOOL FOR CHILDREN, INC. v.
ASHEVILLE CITY BD. OF EDUC.

No. 324P02

Case below: 150 N.C. App. 338

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

FRAZIER v. McDONALD'S

No. 334P02

Case below: 149 N.C. App. 745

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 February 2003.

GAYNOE v. FIRST UNION CORP.

No. 620P02

Case below: 153 N.C. App. 750

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

HARTWELL v. MAHAN

No. 611P02

Case below: 153 N.C. App. 788

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

HOMEQ v. WATKINS

No. 39P03

Case below: 154 N.C. App. 731

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

HONEYCUTT v. HONEYCUTT

No. 502P02

Case below: 152 N.C. App. 673

Motion by defendant to dismiss plaintiff's petition for writ of supersedeas, motion to amend notice of appeal and motion to by-pass allowed 6 February 2003. Motion by defendant to withdraw petition for discretionary review allowed 6 February 2003. Motion by plaintiff for temporary stay denied 6 February 2003.

IN RE DECISION OF THE STATE BD. OF ELECTIONS

No. 619P02

Case below: 153 N.C. App. 804

Petition by petitioner (Barker) for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

IN RE LINEBERRY

No. 13P03

Case below: 154 N.C. App. 246

Petition by respondent (Lineberry) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 February 2003. Motion by Attorney General to dismiss appeal dismissed as moot 27 February 2003.

IN RE MILLS

No. 488P02

Case below: 152 N.C. App. 1

Petition by respondent (Richard N. Mills) for writ of certiorari to review the decision of the North Carolina court of Appeals denied 27 February 2003.

IN RE RHYNE

No. 639P02

Case below: 154 N.C. App. 477

Petition by Attorney General for writ of supersedeas denied 27 February 2003. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Temporary stay dissolved 27 February 2003. Conditional petition by respondent for discretionary review as to additional issues pursuant to G.S. 7A-31 dismissed as moot 27 February 2003.

JORDAN v. CIVIL SERV. BD. FOR THE CITY OF CHARLOTTE

No. 608P02

Case below: 153 N.C. App. 691

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

KEA v. N.C. DEP'T OF HUMAN RES.

No. 603A02

Case below: 153 N.C. App. 595

Motion by respondent to dismiss appeal based upon a constitutional question allowed 27 February 2003.

KROH v. KROH

No. 512P02

Case below: 152 N.C. App. 347

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

LOCUST v. PITT CTY. MEM'L HOSP., INC.

No. 643A02

Case below: 154 N.C. App. 103

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 27 February 2003.

LONG v. JOYNER

No. 61P03

Case below: 155 N.C. App. 129

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

MAROLF CONSTR., INC. v. ALLEN'S PAVING CO.

No. 52P03

Case below: 154 N.C. App. 723

Petition by petitioner for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 February 2003.

McCRARY v. BYRD

No. 131P02

Case below: 148 N.C. App. 630

Petition by unnamed defendant (Nationwide Mutual Insurance Company) for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Petition by unnamed defendant (Nationwide Mutual Insurance Company) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 February 2003.

MORGANHERRING v. STATE

No. 340A95-4

Case below: Wake County Superior Court

Application by petitioner for writ of habeas corpus denied 18 February 2003. Application by petitioner for writ of habeas corpus denied 19 February 2003. Application by petitioner for second amended writ of habeas corpus denied 25 February 2003.

MOSS v. TOWN OF KERNERSVILLE

No. 407P02

Case below: 150 N.C. App. 713

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

MYERS v. MUTTON

No. 84P03

Case below: 155 N.C. App. 213

Petition by plaintiff and petitioner (Faison & Gillespie) for writ of supersedeas and motion for temporary stay denied 11 February 2003.

N.C. STATE BAR v. GILBERT

No. 434A02

Case below: 151 N.C. App. 299

Petition by defendant for writ of supersedeas allowed 27 February 2003. 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 27 February 2003.

NATIONWIDE MUT. INS. CO. v. HAIGHT

No. 460P02

Case below: 152 N.C. App. 137

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

NEUGENT v. NEUGENT

No. 250P02

Case below: 149 N.C. App. 38

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 February 2003.

NEUSE RIVER FOUND., INC. v. SMITHFIELD FOODS, INC.

No. 67P03

Case below: 155 N.C. App. 110

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

NUNN v. ALLEN

No. 42P03

Case below: 154 N.C. App. 523

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Motion by plaintiff to dismiss petition denied 27 February 2003. Motion by plaintiff to deny petition dismissed as moot 27 February 2003.

OSMOND v. CAROLINA CONCRETE SPECIALTIES

No. 427P02

Case below: 151 N.C. App. 541

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

PAGE v. MANDEL

No. 641P02

Case below: 154 N.C. App. 94

Petition by defendant (Community General Health Partners, Inc. d/b/a Community General Hospital) for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

PEVERALL v. COUNTY OF ALAMANCE

No. 647P02

Case below: 154 N.C. App. 426

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

PHILLIPS v. WARREN

No. 532P02

Case below: 152 N.C. App. 619

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

PROVIDIAN NAT'L BANK v. BRYANT

No. 78P03

Case below: 155 N.C. App. 777

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

REICHHOLD CHEMS., INC. v. GOEL

No. 604P01

Case below: 146 N.C. App. 137

Motion by defendant to dismiss the appeal for lack of substantial constitutional question allowed 27 February 2003. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Conditional petition by defendant for discretionary review as to additional issues pursuant to G.S. 7A-31 dismissed as moot 27 February 2003.

ROYAL v. STATE

No. 592P02

Case below: 153 N.C. App. 495

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 6 January 2003. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 January 2003.

SEAGLE v. KENT-COFFEY MFG. CO.

No. 90P03

Case below: 155 N.C. App. 221

Petition by defendants (Singer Sewing Machine Company, The Singer Company, SSMC, Inc. and National Union Fire Insurance Company) for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Conditional petition by defendants (SSMC, Inc. and Constitution State Service Company) for discretionary review pursuant to G.S. 7A-31 dismissed as moot 27 February 2003.

SEYMOUR v. LENOIR CTY.

No. 516PA02

Case below: 152 N.C. App. 464

Petition by defendant (James Goff, Jr.) for discretionary review pursuant to G.S. 7A-31 allowed 27 February 2003. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Motion by all parties for leave to file voluntary dismissal with prejudice as to non-appealing defendant Lenoir County allowed 4 March 2003.

SHOCKLEY v. CAIRN STUDIOS, LTD.

No. 331P02

Case below: 149 N.C. App. 961

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Conditional petition by plaintiff for discretionary review pursuant to G.S. 7A-31 dismissed as moot 27 February 2003.

SIDDEN v. MAILMAN

No. 364P02

Case below: 150 N.C. App. 373

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 February 2003.

SMITH v. BARBOUR

No. 7P03

Case below: 154 N.C. App. 402

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 27 February 2003.

SMITH v. KEN NOWLIN TRUCKING

No. 475P02

Case below: 151 N.C. App. 749

Motion by defendants to dismiss petition for discretionary review allowed 27 February 2003.

SMITH v. RICHMOND CTY. BD. OF EDUC.

No. 321P02

Case below: 150 N.C. App. 291

Motion by petitioner to dismiss petition for discretionary review and petition for writ of certiorari with prejudice allowed 5 February 2003. Notice of appeal by petitioner pursuant to G.S. 7A-30 (substantial constitutional question) dismissed as moot 5 February 2003.

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 dismissed as moot 5 February 2003. Petition by petitioner for writ of certiorari to review the decision of the North Carolina Court of Appeals dismissed as moot 5 February 2003. Motion by petitioner to amend notice of appeal, petition for discretionary review, and petition for writ of certiorari dismissed as moot 6 February 2003.

STATE v. ANDERSON

No. 60A97-2

Case below: Wilkes County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Wilkes County, denied 27 February 2003.

STATE v. ARTHUR

No. 314P02

Case below: 150 N.C. App. 438

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. BARNES

No. 633P02

Case below: 154 N.C. App. 111

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. BARTLETT

No. 614P02

Case below: 153 N.C. App. 680

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 27 February 2003. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. BECTON

No. 623P02-2

Case below: 154 N.C. App. 520

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. BELL

No. 409P02

Case below: 149 N.C. App. 976

Petitions by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 February 2003.

STATE v. BELTRAN

No. 40P03

Case below: 150 N.C. App. 438

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 February 2003.

STATE v. BILLINGS

No. 216A96-2

Case below: Caswell County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Caswell County, denied 27 February 2003.

STATE v. BIVENS

No. 66P03

Case below: 155 N.C. App. 645

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. BOWIE

No. 50A93-3

Case below: Catawba County Superior Court

Application by petitioner for writ of habeas corpus denied 14 February 2003.

STATE v. BROTHERS

No. 358P02

Case below: 151 N.C. App. 71

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 27 February 2003. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. BUCKNER

No. 444A93-5

Case below: Gaston County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Gaston County, denied 27 February 2003.

STATE v. CARPENTER

No. 21P03

Case below: 155 N.C. App. 35

Motion by Attorney General for temporary stay allowed 17 January 2003. Petition by Attorney General for writ of supersedeas denied 27 February 2003. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Motion by defendant to vacate order granting State's motion for temporary stay allowed 27 February 2003. Conditional petition by defendant for discretionary review as to additional issues pursuant to G.S. 7A-31 dismissed as moot 27 February 2003.

STATE v. CATES

No. 29P03

Case below: 154 N.C. App. 737

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Motion by defendant to hold petition for discretionary review in abeyance pending decision by the U.S. Supreme Court denied 27 February 2003. Motion by defendant for order directing the North Carolina Court of Appeals to propose procedures to sit en banc denied 27 February 2003. Motion by defendant for remand denied 27 February 2003.

STATE v. CHAPMAN

No. 636P02

Case below: 154 N.C. App. 441

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. CHAVIS

No. 33A03

Case below: 154 N.C. App. 742

Motion by Attorney General to dismiss appeal allowed 27 February 2003.

STATE v. CHILDERS

No. 19P03

Case below: 154 N.C. App. 375

Petitions by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 February 2003.

STATE v. CHINA

No. 346P02

Case below: 150 N.C. App. 469

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 27 February 2003. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. CLEVELAND

No. 35P03

Case below: 154 N.C. App. 742

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 27 February 2003. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. COLE

No. 324A94-2

Case below: Camden County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Camden County, denied 27 February 2003. As to issue No. 9, denied 27 February 2003 without prejudice pending completion of trial court's hearing on retardation issue.

STATE v. COOPER

No. 594P02

Case below: 153 N.C. App. 524

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. CULPEPPER

No. 281P02

Case below: 149 N.C. App. 977

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. DAMERON

No. 425P02

Case below: 151 N.C. App. 599

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. DAMMONS

No. 613P02

Case below: 153 N.C. App. 812

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. DOSWELL

No. 600A02

Case below: 153 N.C. App. 812

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 27 February 2003.

STATE v. DOVE

No. 131P01-5

Case below: 153 N.C. App. 524

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 January 2003. Application by defendant for writ of habeas corpus denied 3 January 2003.

STATE v. DUDLEY

No. 443P02

Case below: 151 N.C. App. 749

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 27 February 2003. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. DUNN

No. 606P02

Case below: 154 N.C. App. 1

Petition by Attorney General for writ of supersedeas denied 27 February 2003. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Temporary stay dissolved 27 February 2003.

STATE v. GAY

No. 436P02

Case below: 151 N.C. App. 530

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. GRAHAM

No. 141P02

Case below: 149 N.C. App. 215

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 27 February 2003. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. HOLLAND

No. 354P02

Case below: 150 N.C. App. 457

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 February 2003.

STATE v. HORNSBY

No. 515P02

Case below: 152 N.C. App. 358

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 27 February 2003. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. HOWZE

No. 385P02

Case below: 151 N.C. App. 599

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 February 2003.

STATE v. HUFFMAN

No. 648P02

Case below: 154 N.C. App. 206

Motion by the Attorney General to dismiss appeal allowed 27 February 2003. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. HUNT

No. 5A86-7

Case below: Orange County Superior Court

Petition by Attorney General for writ of certiorari to review the decision of the Superior Court, Orange County, denied 16 January 2003. Petition for writ of prohibition by Attorney General denied 16 January 2003.

STATE v. IRVING

No. 55P03

Case below: 155 N.C. App. 222

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. JENKINS

No. 543P02

Case below: 153 N.C. App. 201

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 27 February 2003. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. JOHNSON

No. 601P02

Case below: 153 N.C. App. 812

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. JOHNSTON

No. 665A02

Case below: 154 N.C. App. 500

Motion by Attorney General to dismiss appeal allowed 27 February 2003.

STATE v. JONES

No. 439P02

Case below: 151 N.C. App. 317

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 27 February 2003. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. JORDAN

No. 25P03

Case below: 155 N.C. App. 146

Motion by Attorney General for temporary stay allowed 17 January 2003 pending determination of State's petition for discretionary review. Petition by Attorney General for writ of supersedeas denied 27 February 2003. Notice of appeal by Attorney General pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 27 February 2003. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Temporary stay dissolved 27 February 2003.

STATE v. MANEY

No. 440A02

Case below: 151 N.C. App. 486

Motion by Attorney General to dismiss appeal for lack of constitutional question allowed 27 February 2003.

STATE v. MARTIN

No. 649P02

Case below: 154 N.C. App. 521

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 27 February 2003. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. McNEIL

No. 36P03

Case below: 155 N.C. App. 540

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 27 February 2003. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. McPHERSON

No. 472P02

Case below: 151 N.C. App. 750

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. MORGANHERRING

No. 340A95-3

Case below: Wake County Superior Court

Petition by defendant for writ of mandamus denied 27 February 2003.

STATE v. OXENDINE

No. 372P02

Case below: 150 N.C. App. 670

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. POOLE

No. 12P03

Case below: 154 N.C. App. 419

Motion by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 February 2003.

STATE v. PREVATTE

No. 492A99-2

Case below: Stanly County Superior Court

Motion by defendant to reconsider direct appeal decision in light of the grant of certiorari in *State v. Hunt* denied 11 February 2003.

STATE v. RHUE

No. 323P02

Case below: 150 N.C. App. 280

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 27 February 2003. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Motion by defendant to serve interrogatories dismissed as moot 27 February 2003. Motion by defendant to appoint counsel denied 27 February 2003.

STATE v. RICE

No. 469P02

Case below: 151 N.C. App. 750

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 27 February 2003. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. SCOTT

No. 18A03

Case below: 155 N.C. App. 223

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 27 February 2003.

STATE v. SHORES

No. 22P03

Case below: 155 N.C. App. 342

Motion by Attorney General for temporary stay denied 17 January 2003. Petition by Attorney General for writ of supersedeas denied 27 February 2003. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. SPIVEY

No. 646P02

Case below: 154 N.C. App. 206

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 27 February 2003. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. ST. JOHN

No. 638P02

Case below: 154 N.C. App. 522

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. STOVAL

No. 27P03

Case below: 155 N.C. App. 223

Motion by Attorney General for temporary stay denied 17 January 2003. Petition by Attorney General for writ of supersedeas denied 27 February 2003. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. STRICKLAND

No. 631P02

Case below: 153 N.C. App. 581

Motion by Attorney General to deny the petition for writ of certiorari filed as a notice of appeal based on a substantial constitutional question allowed 27 February 2003.

STATE v. TERRY

No. 53P03

Case below: 155 N.C. App. 223

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. TOOMER

No. 60P03

Case below: 150 N.C. App. 441

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 February 2003.

STATE v. TRULL

No. 618P02

Case below: 153 N.C. App. 630

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Motion by the Attorney General to dismiss appeal allowed 27 February 2003.

STATE v. TUCKER

No. 6P03

Case below: 154 N.C. App. 653

Motion by Attorney General for temporary stay denied 8 January 2003. Petition by Attorney General for writ of supersedeas denied 27 February 2003. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. TUCKER

No. 113PA03

Case below: 156 N.C. App. —— (4 February 2003)

Motion by Attorney General for temporary stay denied 21 February 2003.

STATE v. URIBE

No. 661P02

Case below: 148 N.C. App. 218

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 February 2003.

STATE v. UVALLE

No. 430P02

Case below: 151 N.C. App. 446

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. VASSEY

No. 54P03

Case below: 154 N.C. App. 384

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. WIKE

No. 1P03

Case below: 154 N.C. App. 522

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. WILSON

No. 605A02

Case below: 154 N.C. App. 127

Petition by Attorney General for writ of supersedeas allowed 27 February 2003. Petition by Attorney General 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 27 February 2003.

STATE v. WILSON

No. 30P03

Case below: 155 N.C. App. 89

Motion by the Attorney General to dismiss the appeal by defendant (Wilson) for lack of substantial constitutional question allowed 27 February 2003. Petition by defendant (Wilson) for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. WILSON

No. 56P03

Case below: 155 N.C. App. 223

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. WORLEY

No. 492P02

Case below: 152 N.C. App. 719

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE v. YANCEY

No. 20P03

Case below: 155 N.C. App. 609

Motion by Attorney General for temporary stay allowed 17 January 2003. Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Petition by the Attorney General for writ of supersedeas denied 27 February 2003. Temporary stay dissolved 27 February 2003.

STATE ex rel. PILARD v. BERNINGER

No. 654P02

Case below: 154 N.C. App. 45

Petition by defendant (Blanca R. Berninger) for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

STATE PROPS., LLC v. RAY

No. 98P03

Case below: 155 N.C. App. 65

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Motion by plaintiff to expedite determination of petition for discretionary review dismissed 27 February 2003.

STEPHENSON v. BARTLETT

No. 94PA02-2

Case below: Johnston County Superior Court

Motion by plaintiffs for leave to withdraw appeal allowed 10 January 2003. Justice Orr recused.

SWISHER v. BOARD OF ADJUST. OF GREENSBORO

No. 219P02

Case below: 149 N.C. App. 234

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Justice Edmunds recused.

TAYLOR v. ABERNETHY

No. 171P02

Case below: 149 N.C. App. 263

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

TAYLOR v. STATE

No. 505A99-2

Case below: New Hanover County Superior Court

Application by petitioner for writ of habeas corpus denied 26 February 2003.

TAYLOR v. THE KING GRP., INC. (INTERIM HEALTHCARE OF RALEIGH-DURHAM, INC.)

No. 657P02

Case below: 154 N.C. App. 349

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

WEBB v. WEBB

No. 652P02

Case below: 153 N.C. App. 813

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 February 2003.

WHITACRE P'SHIP v. BIOSIGNIA, INC.

No. 617PA02

Case below: 153 N.C. App. 608

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 27 February 2003.

WHITAKER v. TOWN OF SCOTLAND NECK

No. 49PA03

Case below: 154 N.C. App. 660

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 27 February 2003.

WHITMIRE v. COOPER

No. 23P02-2

Case below: 153 N.C. App. 730

Motion by defendants to dismiss the appeal for lack of substantial constitutional question allowed 27 February 2003. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

WRIGHT v. SMITH

No. 374P02

Case below: 151 N.C. App. 121

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 27 February 2003.

PETITION TO REHEAR

AUSLEY v. BISHOP

No. 287A02

Case below: 356 N.C. 422

Petition by plaintiff to rehear pursuant to Rule 31 denied 27 February 2003. Justice Edmunds recused.

APPENDIXES

ORDER ADOPTING AMENDMENTS TO
RULES 7 AND 26 OF THE
RULES OF APPELLATE PROCEDURE

ORDER ADOPTING AMENDMENT TO RULE 21
OF THE RULES OF APPELLATE PROCEDURE

ORDER ADOPTING TECHNICAL CHANGES
TO APPENDIXES REGARDING
REQUIREMENT FOR AN INDEX AND
CONTENT OF TABLE OF AUTHORITIES
OF THE RULES OF APPELLATE
PROCEDURE

ORDER ADOPTING AMENDMENTS TO
RULE 3 OF THE GENERAL RULES OF
PRACTICE FOR THE SUPERIOR
AND DISTRICT COURTS

ORDER ADOPTING AMENDMENT TO RULES
OF CONTINUING JUDICIAL
EDUCATION, ADOPTED OCTOBER 24, 1988

ORDER ADOPTING AMENDMENTS TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

ORDER ADOPTING AMENDMENT TO RULE 25 OF THE GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

ORDER ADOPTING AMENDMENTS TO THE RULES FOR CUSTODY AND VISITATION MEDIATION IN NORTH CAROLINA

ORDER ADOPTING AMENDMENTS TO THE RULES FOR COURT-ORDERED ARBITRATION IN NORTH CAROLINA

ORDER ADOPTING AMENDMENTS TO THE RULES FOR THE DISPUTE RESOLUTION COMMISSION

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PROFESSIONAL LIABILITY INSURANCE

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE DISCIPLINE AND DISABILITY OF ATTORNEYS

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 LEGAL SPECIALIZATION

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING ORGANIZATIONS PRACTICING LAW

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING INTERSTATE AND INTERNATIONAL LAW FIRMS

AMENDMENT TO THE NORTH CAROLINA RULES OF PROFESSIONAL CONDUCT

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PROCEDURES FOR RULING ON QUESTIONS OF LEGAL ETHICS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PLAN OF LEGAL SPECIALIZATION

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PREPAID LEGAL SERVICE PLANS

AMENDMENT TO THE NORTH CAROLINA RULES OF PROFESSIONAL CONDUCT

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA BOARD OF LAW EXAMINERS

Order Adopting Amendments to Rules 7 and 26 of the Rules of Appellate Procedure

Rule 7(a)(1) is hereby amended by adding a second paragraph to read as follows:

In civil cases and special proceedings where there is an order establishing the indigency of a party entitled to appointed appellate counsel, the ordering of the transcript shall be as in criminal cases where there is an order establishing the indigency of the defendant as set forth in Rule 7(a)(2).

Rule 26(a)(1) is hereby amended to read as follows:

(1) Filing by Mail: Filing may be accomplished by mail addressed to the clerk, but is not timely unless the papers are received by the clerk within the time fixed for filing, except that motions, responses to petitions, and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service.~~, if first class mail is utilized.~~

Adopted by the Court in Conference this the 15th day of August 2002. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

Edmunds, J
For the Court

Order Adopting Amendment to Rule 21 of the Rules of Appellate Procedure

Rule 21(e) is hereby amended to read as follows:

(e) Petition for Writ in Post Conviction Matters; to Which Appellate Court Addressed. Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in G.S. 15A-1415(b) by persons who have been convicted of murder in the first degree and sentenced to ~~life imprisonment or~~ death shall be filed in the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases. In the event the petitioner unreasonably delays in filing the petition or otherwise fails to comply with a rule of procedure, the petition shall

be dismissed by the Court. In the event the petition is without merit, it shall be denied by the Court.

Adopted by the Court in Conference this the 15th day of August 2002. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

Edmunds, J
For the Court

Order Adopting Technical Changes to Appendixes Regarding Requirement for An Index and Content of Table of Authorities of the Rules of Appellate Procedure

Appendix B. Format and Style

Indexes is hereby amended to read as follows:

A brief or petition which is 10 pages or more in length ~~long or complex or which treats multiple issues,~~ and all Appendixes to briefs (Rule 28) and Records on Appeal (Rule 9) must contain an index to the contents.

Appendix E. Content of Briefs

Table of Cases and Authorities is hereby amended to read as follows:

This table should begin at the top margin of the page following the Index. Page references should be made to each citation of authority ~~the first citation of the authority in each question to which it pertains~~.

Adopted by the Court in Conference this the 15th day of August 2002. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

Edmunds, J
For the Court

Order Adopting Amendments to Rule 3 of the General Rules of Practice for the Superior and District Courts

Rule 3 is hereby amended to read as follows:

An application for a continuance shall be made to the presiding judge of the court in which the case is calendared.

~~When an attorney has conflicting engagements in different courts, priority shall be as follows: Appellate Courts, Superior Court, District Court, Magistrate's Court.~~

~~At mixed sessions, criminal cases in which the defendant is in jail shall have absolute priority.~~

The General Rules of Practice for the Superior and District Courts are amended by adding a new Rule 3.1 to read:

RULE 3.1 GUIDELINES FOR RESOLVING SCHEDULING CONFLICTS

(a) In resolving scheduling conflicts when an attorney has conflicting engagements in different courts, the following priorities should ordinarily prevail:

1. Appellate courts should prevail over trial courts.

2. Any of the trial court matters listed in this subdivision, regardless of trial division, should prevail over any trial court matter not listed in this subdivision, regardless of trial division; there is no priority among the matters listed in this subdivision:

—any trial or hearing in a capital case;

—the trial in any case designated pursuant to Rule 2.1 of these Rules;

—the trial in a civil action that has been peremptorily set as the first case for trial at a session of superior court;

—the trial of a criminal case in superior court, when the defendant is in jail or when the defendant is charged with a Class A through E felony and the trial is reasonably expected to last for more than one week;

—the trial in an action or proceeding in district court in which any of the following is contested:

—termination of parental rights,

—child custody,

—adjudication of abuse, neglect or dependency or disposition following adjudication,

—interim or final equitable distribution,

—alimony or post-separation support.

3. When none of the above priorities applies, priority shall be as follows: superior court, district court, magistrate's court.

(b) When an attorney learns of a scheduling conflict between matters in the same priority category, the attorney shall promptly give written notice to opposing counsel, the clerk of all courts and the appropriate judges in all cases, stating therein the circumstances relevant to resolution of the conflict under these guidelines. When the attorney learns of the conflict before the date on which the matters are scheduled to be heard, the appropriate judges are Senior Resident Superior Court Judges for matters pending in the Superior Court Division and Chief District Court Judges for matters pending in the District Court Division; otherwise the appropriate judges are the judges presiding over those matters. The appropriate judges should promptly confer, resolve the conflict, and notify counsel of the resolution.

(c) In resolving scheduling conflicts between matters in the same priority category, the presiding judges should give consideration to the following:

—the comparative age of the cases;

—the order in which the trial dates were set by published calendar, order or notice;

—the complexity of the cases;

—the estimated trial time;

—the number of attorneys and parties involved;

—whether the trial involves a jury;

—the difficulty or ease of rescheduling;

—the availability of witnesses, especially a child witness, an expert witness or a witness who must travel a long distance;

—whether the trial in one of the cases had already started when the other was scheduled to begin.

(d) Nothing in these guidelines is intended to prevent courts from voluntarily yielding a favorable scheduling position, and judges of all

courts are urged to communicate with each other in an effort to lessen the impact of conflicts and continuances on all courts.

Adopted by the Court in Conference this the 15th day of August 2002. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

Edmunds, J
For the Court

Order Adopting Amendment to Rules of Continuing Judicial Education, Adopted October 24, 1988

Rule II(C), Requirements is hereby amended to read as follows:

C. At least fifteen (15) ~~twenty (20)~~ of the thirty (30) hours required shall be continuing judicial education courses designed especially for judges and attended exclusively or primarily by judges. All Superior Court Judges are expected to attend the scheduled Superior Court Judges Conferences and the programs there presented. All District Court Judges are expected to attend the scheduled District Court Judges Conferences and the programs there presented.

Adopted by the Court in Conference this the 15th day of August 2002. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

Edmunds, J
For the Court

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendments to the North Carolina Rules of Appellate Procedure

Rules 26, 28, and 30 and Appendix B of the North Carolina Rules of Appellate Procedure are hereby amended as described below:

Rule 26(g) is amended to read as follows:

(g) *Documents Filed with Appellate Courts.*

(1) *Form of Papers~~; Copies~~.* Papers presented to either appellate court for filing shall be letter size (~~8 1/2~~ 8½ x 11") with the exception of wills and exhibits. All printed matter must appear in at least 12-point type on unglazed white paper of 16-20 pound substance so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The body of text shall be presented with double spacing between each line of text. No more than 27 lines of double-spaced text may appear on a page, even if proportional type is used. Lines of text shall be no wider than 6½ inches. The format of all papers presented for filing shall follow the additional instructions found in the Appendixes to these Appellate Rules. The format of briefs shall follow the additional instructions found in Appellate Rule 28(j).

(2) *Index required.* All documents presented to either appellate court other than records on appeal, which in this respect are governed by Appellate Rule 9, shall, unless they are less than 10 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and text books cited, with references to the pages where they are cited.

(3) *Closing.* The body of the document shall at its close bear the printed name, post office address, and telephone number of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record. If the document has been filed electronically by use of the official web site at www.ncappellatecourts.org, the manuscript signature of counsel of record is not required.

Rule 28(j) is amended to read as follows:

(j) *Page Limitations Applicable to Briefs Filed in the Court of Appeals.* ~~Principal briefs~~ Each brief filed in the North Carolina Court of Appeals, whether filed by an appellant, appellee, or amicus curiae, formatted according to Rule 26 and the Appendixes to these Rules, shall ~~be limited to 35 pages of text, exclusive of subject index, tables of authorities, and appendixes. Reply briefs, if permitted by this Rule shall be limited to 15 pages of text.~~ have either a page limit or a word-count limit, depending on the type style used in the brief:

(1) *Type.*

(A) *Type style.* Documents must be set in a plain roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined. Documents may be set in either proportionally spaced or nonproportionally spaced (monospaced) type.

(B) *Type size.*

1. Nonproportionally spaced type (e.g., Courier or Courier New) may not contain more than 10 characters per inch (12-point).

2. Proportionally spaced type (e.g., Times New Roman), must be 14-point or larger.

3. Documents set in Courier New 12-point type, or Times New Roman 14-point type will be deemed in compliance with these type-size requirements.

(2) *Document length.*

(A) *Length limitations on briefs filed in the Court of Appeals.* Every brief filed in the Court of Appeals, whether filed by an appellant, appellee, or amicus curiae, shall be subject to either a page limit or a word-count limit, depending on the type style used in the brief.

1. *Page limits for briefs using nonproportional type.* The page limit for a principal brief that uses nonproportional (e.g., Courier) type is 35 pages, and the page limit for a reply brief (if permitted by Appellate Rule 28(h)) is 15 pages. A page shall contain no more than 27 lines of double-spaced text of no more than 65 characters per line.

Covers, indexes, tables of authorities, certificates of service, and appendixes do not count toward these page limits. The Court may strike or require resubmission of briefs with excessive single-spaced passages or footnotes that are used to circumvent these page limits.

2. *Word-count limits for briefs in proportional type.* A principal brief that uses proportional type may contain no more than 8,750 words, and a reply brief (if permitted by Appellate Rule 28(h)) may contain no more than 3,750 words. Covers, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, and appendixes do not count against these word-count limits. Footnotes and citations in the text, however, do count against these word-count limits. Parties who file briefs in proportional type shall submit along with the brief, immediately before the certificate of service, a certification, signed by counsel of record, or, in the case of parties filing briefs pro se, by the party, that the brief contains no more than the number of words allowed by this rule. For purposes of this certification, counsel and parties may rely on word counts reported by word-processing software, as long as footnotes and citations are included in those word counts.

Rule 30(e)(3) is revised to read as follows:

~~(3) A decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered.~~

(3) An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case. If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that

would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to whom the citation is offered. This service may be accomplished by including the copy of the unpublished opinion in an addendum to a brief or memorandum. A party who cites an unpublished opinion for the first time at a hearing or oral argument must attach a copy of the unpublished opinion relied upon pursuant to the requirements of Rule 28(g) ("Additional Authorities"). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

Appendix B, Paragraph 2, is amended to incorporate technical changes as follows:

Papers shall be prepared using at least 12-point type ~~and spacing~~, so as to produce a clear, black image. Documents shall be set either in nonproportional type or in proportional type, defined as follows: Nonproportional type is defined as 10-character-per-inch Courier (or an equivalent style of Pica) type that devotes equal horizontal space to each character. Proportional type is defined as any non-italic, non-script font, other than nonproportional type, that is 14-point or larger. Under Appellate Rule 28(j), briefs in nonproportional type are governed by a page limit, and briefs in proportional type are governed by a word-count limit. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be approximately 6½ inches wide and 9 inches long. Tabs are located at the following distances from the left margin: ½", 1", 1½", 2", 4¼" (center), and 5".

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 7th day of October, 2002.

Adopted by the Court in Conference this the 3rd day of October, 2002. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

Edmunds, J.
For the Court

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendment to Rule 25 of the General Rules of Practice for the Superior and District Courts

Rule 25 of the General Rules of Practice for the Superior and District Courts is hereby amended to read as follows:

RULE 25. MOTIONS FOR APPROPRIATE RELIEF AND HABEAS CORPUS APPLICATIONS IN CAPITAL CASES

When considering motions for appropriate relief and/or applications for writs of habeas corpus in capital cases, the following procedures shalll be followed:

(1) All appointments of defense counsel should be made by the senior resident superior court judge in each district or the senior resident superior court judge's judicial designee;

(2) All requests for experts, *ex parte* matters, interim attorney fee awards, and similar matters arising prior to the filing of a motion for appropriate relief should be ruled on by the senior resident superior court judge or the senior resident superior court judge's designee;

(3) All motions for appropriate relief, when filed, should be referred to the senior resident superior court judge or the senior resident superior court judge's designee for that judge's review and administrative action, including, as may be appropriate, dismissal, calendaring for hearing, entry of a scheduling order for subsequent events in the case, or other appropriate actions; and

(4) Subsequent to direct appeal, an application for writ of habeas corpus shall not be used as a substitute for appeal and/or a motion for appropriate relief and is not available as a means of reviewing and correcting non-jurisdictional legal error. If the applicant has been sentenced pursuant to a final judgment issued by a competent tribunal of criminal jurisdiction (*i.e.*, by a trial court having subject matter jurisdiction to enter the sentence), the application for writ of habeas corpus shall be denied. In the event the application for writ of habeas corpus raises a meritorious challenge to the original jurisdiction of the sentencing court, and the writ is granted, the judge shall make the writ returnable before the senior resident superior court judge of the judicial district where the applicant was sentenced or the senior resident superior court judge's designee. In the event the application for writ of habeas corpus raises a meritorious non-jurisdictional challenge to the applicant's conviction and sentence, the judge shall immediately refer the matter to the senior resident superior court

judge of the judicial district where the applicant was sentenced or the senior resident superior court judge's designee for disposition as a motion for appropriate relief.

Adopted by the Court in Conference and effective this the 19th day of December 2002. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

Butterfield, J
For the Court

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendments to the Rules For Custody and Visitation Mediation in North Carolina

WHEREAS, section 7A-494, 50-13.1 of the North Carolina General Statutes authorized the Administrative Office of the Courts to establish a Custody and Visitation Mediation Program to provide statewide and uniform services in cases involving unresolved issues about the custody or visitation of minor children. Further, the Supreme Court of North Carolina is authorized to adopt rules governing this procedure and to supervise its implementation and operation through the Administrative Office of the Courts.

NOW, THEREFORE, the Rules for the Custody and Visitation Mediation Program are amended and adopted to read as attached hereto.

These Rules shall be promulgated by publication in the advance sheets of the Supreme Court and the Court of Appeals. They shall be effective on the 1st day of January, 2003.

Adopted by the Court in Conference this the 19th day of December, 2002.

Butterfield, J.
For the Court

Uniform Rules Regulating Mediation of Child Custody and Visitation Disputes Under the North Carolina Custody and Visitation Mediation Program.

Comment: *Legislation establishing a statewide Custody and Visitation Program in North Carolina required that the Administrative Office of the Courts "promulgate rules and regulations necessary and appropriate for the administration of the program" and that services provided be "uniform." G.S. 7A-494. Uniform rules will protect families receiving such services, will allow meaningful statistical comparisons to be made, and allow both mediators and the mediation program to be periodically reevaluated. The Program is to be established in phases throughout North Carolina, beginning on July 1, 1989.*

1. Goals of Mediation. The goals of custody and visitation dispute mediation are centered in the reduction of the stress and anxiety experienced by children in separation and divorce, by furnishing an alternative way for the parties to settle custody and visitation disputes. A trained mediator helps the parties reorganize the family, continue parenting their children despite separation, and begins an educational process which will allow parties to recognize and meet the needs of their children. Mediation provides a structured, confidential, nonadversarial setting which will help the parties make informed choices about matters involving their children, with the hope that such cooperative resolution will alleviate the acrimony between the parties, reducing attendant stress on both the parties and the child. A successful mediation will help the parties put a parenting plan in writing, will teach them to solve future problems without recourse to the courts, and thus reduce the stress of relitigation of custody and visitation disputes.

2. Purpose of Program. The Custody and Visitation Mediation Program is to provide the services of skilled mediators to further the goals set out above.

3. Definitions.

3.01. Mediation. A process whereby a trained, neutral third party acts to encourage and facilitate the resolution of a dispute without prescribing what the resolution should be.

3.02. Mediator. A trained, neutral third party who acts to encourage and facilitate the resolution of a dispute without prescribing what the resolution should be.

3.03. Parenting Agreement. A written agreement reached by the parties with the assistance of the mediator, which may be

presented to the court for approval and adoption as an order of the court.

4. Administration of Program. The Administrative Office of the Courts (AOC) is responsible for establishing the Program in the several judicial districts of the State, and is to promulgate rules and regulations for the administration of the program. The Director of the AOC shall appoint necessary staff to plan, organize, and administer the program on a statewide basis. The AOC is to cooperate with each Chief District Court Judge and other district personnel in implementation and administration of the program.

4.01. Employment of Mediators. Mediators are to be employed by the Chief District Court Judge of the judicial district, and are to be full or part-time employees.

4.02. In-House Contracts Permitted. When deemed appropriate by the AOC, the Chief District Court Judge may contract for delivery of mediation services, such contract to be approved by the Director. Such contracts are exempt from competitive bidding procedures under Chapter 143 of the General Statutes.

4.03. Administration of Funds. Funds appropriated by the General Assembly for the establishment and maintenance of mediation programs are to be administered by the AOC.

4.04. Multi-district Programs. The AOC may authorize all or part of a program in one district to be operated in conjunction with that of another district or districts.

4.05. Advisory Committee Established. The Director of the AOC shall appoint a Custody Mediation Advisory Committee of at least five members to advise the Custody Mediation Program. Members of the Committee are to receive the same per diem and travel expenses as members of State boards and commissions generally.

5. Local District Programs. Each local district program is to consist of a qualified mediator, or mediators, and such clerical staff as the AOC in consultation with the local program deems necessary.

6. Qualifications of Mediators. A person desiring to furnish mediation services must demonstrate that he or she:

1) Has at least a master's degree in psychology, social work, family counseling, or a comparable human relations discipline; and

2) Has completed at least 40 hours of training in mediation techniques by an instructor deemed qualified by the AOC; and

3) Has had professional training and experience relating to child development, family dynamics, or comparable areas; and

4) Meets such other criteria as specified by the AOC.

6.01. Initial Training Period. A person just beginning to furnish mediation services in the North Carolina Custody and Visitation Mediation Program shall satisfy the following requirements during an initial training period of 18-24 months following employment, unless some or all of the requirements are waived by the Director of the AOC or his designee:

Level I:

A. 18 Hours of Court Observations

(Note: Suggest that B and C occur prior to D)

B. 18 Hours of Custody Mediation Observation

C. 40 Hours of Divorce Mediation Training

D. 24 Hours of Co-Mediation

(Note: E and F begin simultaneously)

E. Minimum of 2 consecutive weeks/maximum of 4 consecutive weeks of internship in one district

F. 150 Mediation Sessions

G. Meetings/Additional Training: (As designated by the AOC)

Regional Meetings

Annual Training Meeting(s)

Trainee Progression Meetings

Level II:

A. 18 Hours of Co-Mediation (Note: To Be Completed Within 1st Quarter of Level II)

B. 150 Mediation Sessions

C. Meetings/Additional Training: (As designated by the AOC)

Regional Meetings

Annual Training Meeting(s)

Trainee Progression Meetings

Documentation is to be provided to the Chief District Court Judge and the AOC at the conclusion of each level of the Training Progression. (See Appendix B, Mediator Training Progression.)

6.02. Continuing Education. A mediator is to keep abreast of developments in the field through such professional journals and bulletins as are available; further, a mediator is to participate in at least 20 hours of continuing education each two years, in a program approved by the Director of the AOC or his designee. A mediator should also regularly participate as a co-mediator, preferably with mediators outside the mediator's judicial district.

6.03. Continuing Evaluation. The performance of a mediator should be regularly evaluated by the AOC. Results of such mediation performance evaluation will be shared with the Chief District Court Judge. Methods of evaluation may include:

- Observation through a one-way mirror;
- Videotaped sessions (with permission of the parties);
- Audio tape-recorded sessions (with permission of the parties);
- Co-mediations of the mediator and the evaluator;
- Review of written agreements for completeness and specificity.

6.04. Mediator Ethics. See Appendix B, Standards of Practice for Mediators in the North Carolina Mandatory Custody Mediation Program.

7.01. Referral to Mediation (Chapter 50 cases). All actions involving unresolved issues as to the custody or visitation of a minor child shall be ordered to mediation on such issues prior to the trial of the matter, unless the court waives mediation. Such actions include an action for custody or visitation in which no order has been previously entered, motions to modify orders previously entered, and actions to enforce custody and visitation orders. This mandatory referral procedure does not limit the right of the court to enter temporary and *ex parte* orders under the applicable statutory provisions, or to immediately enforce existing orders. The order of referral shall advise the parties that a show cause order may be issued, or other sanctions imposed, if they fail to appear at the orientation session, or the first mediation session. (See Appendix B, Brochure and form AOC-CV-632, Motion and Order to waive Custody Mediation.)

Comment: *In the opinion of the Advisory Committee, the mandatory provisions of G.S. 50-13.1(b), the statutory authority for this section, apply only to actions brought under the*

provisions of Chapter 50 of the General Statutes. Actions instituted under the provisions of the Juvenile Code, as found in Chapter 7B of the General Statutes, often include issues of placement and visitation at the dispositional stage; such issues may, in appropriate cases, be referred for mediation by a district court judge ***pursuant to rule 7.02****. Actions brought under the provisions of Chapter 50B of the General Statutes (Domestic Violence) are often inappropriate for mediation because they necessarily involve allegations of spousal abuse. If, however, the court finds the custody or visitation aspect of a domestic violence case to be appropriate for mediation, due consideration should be given to safety issues in the case. (See Appendix B, Domestic Violence Policy.)*

7.02. Referral of Placement Issues in Juvenile cases. In a judicial district in which the custody mediation program is in operation, cases in which juvenile(s) have been adjudicated to be abused, neglected, dependent, delinquent or undisciplined, may be referred to the program for mediation of any dispute over placement of the juvenile(s), provided the Chief District Court Judge in the district has determined that such referrals are appropriate and that available resources allow mediation of such cases. The Chief District Court Judge shall regularly monitor the number of cases referred to the program to ensure that resources allow continued referral of such cases.

In Districts where the Chief Judge has authorized referrals of such cases to mediation, a referral may be made upon the motion of the Court or upon the motion of any party. In the discretion of the Presiding Judge, an order of referral to mediation may be made. The Order of referral should identify the persons who are to participate in the mediation and shall designate the persons who are entitled to receive a copy of any agreement that is reached.

If an agreement is reached in mediation regarding the placement of the juvenile(s) in question, the mediator shall assist the participants in reducing the agreement to writing and shall ensure that each participant understands the written document. The mediator shall encourage each participant to review the agreement with their attorney prior to signing the same and shall afford them a reasonable opportunity to do so. After the agreement is signed by all participants, the mediator shall promptly furnish a copy to each party, attorney, and persons designated in the referral order for review prior to the dispositional hearing. After a hearing at which all parties have

a right to be heard, the court may incorporate the terms of said agreement in its dispositional order, provided it finds the same to be in the best interests of the juvenile(s).

8. Waiver of Mediation. On its own motion, or that of either party, the court may waive the setting of a contested custody or visitation matter for mediation. Good cause includes, but is not limited to, a showing of undue hardship to a party, an agreement between the parties for private mediation, allegations of abuse or neglect of the minor child, allegations of alcoholism, drug abuse, or spouse abuse, or allegations of severe psychological, psychiatric, or emotional problems. Where a party resides more than 50 miles from court, such distance shall be considered good cause. (See Appendix B, AOC-CV-632 Motion and Order to Waive Custody Mediation.)

9. Orientation. Prior to mediation, an orientation session shall be held at which the goals and procedures of the mediation process shall be explained to the parties to reduce apprehension and avoidance of the process. An intake form shall be completed. (See Appendix B, Sample Mediation Intake Form.) The parties shall be advised that if they fail to appear for the initial mediation session, an order to show cause might be issued and the non-appearing party could be found in contempt of the court.

10. Attendance at Mediation Sessions. The mediation process shall consist of no more than three sessions, each of which shall not exceed two hours in length. A party must attend the orientation and first mediation session before deciding to withdraw from the process. The number of sessions may be extended by agreement of the parties with the permission of the Chief District Court Judge.

11. Neutral Stance of Mediator. While a mediator is to be a neutral in promoting an agreement between the parties, the mediator is to be aware of the best interests of the children involved in the case. During the mediation process, the mediator is to help the parties avoid agreements which do not promote the best interests of the child.

12. The Mediation Process. The mediator should assist the parties in focusing on the needs of their child, the need to reorganize the family and use its strengths, the need to maintain continuity of relationships and stability in the child's life, and the options available to the parties which would accomplish those goals. The mediator should help the parties select from the range of options those which are sound and workable, in an effort to reach an agreement which will reduce the conflict in the family, benefiting both the parties and child.

12.01. Authority of Mediator. The mediator shall be in control at all times of the mediation process and the procedures to be followed in the mediation. The mediator may suspend the mediation session if it becomes unsafe for any of the participants, including the mediator.

12.02. Location. The mediation proceeding shall be held in a private and safe location.

12.03. Confidentiality. The mediation proceeding shall be confidential. Neither the mediator nor any party or other person involved in mediation sessions shall be competent to testify as to communications made during or in furtherance of such mediation sessions; provided, there is no privilege as to communications made in furtherance of a crime or fraud. An individual shall not, however, obtain thereby immunity from prosecution for criminal conduct or be excused from the reporting requirement of G.S. 7A-543 or G.S. 108A-102.

12.04. Parenting Plan. A detailed and clearly written parenting agreement, or parenting plan, is the desired end-product of the mediation process. (See Appendix B, Sample Parenting Agreement). The parenting plan may include a designation of the party having legal or physical custody, and what duties and responsibilities such designation includes. The plan should also include a complete schedule of the child's time with each party, including holidays, vacation time, and special events. Arrangements may be made for special day observance, such as birthdays. The need of the child to maintain relationships with persons with whom the child has a substantial relationship may be addressed.

The mediator should help the parties reduce their agreement to writing and ensure that each party understands the written document. *Before the parties sign the proposed agreement*, the mediator shall mail a copy of the proposed agreement to parties and counsel, encourage each parties to have their attorneys review the agreement with them prior to their signing the plan, and afford them a reasonable opportunity to do so. The mediator shall promptly submit the initial signed agreement, or any signed modification agreement to the court. An Order Approving Parenting Agreement (Appendix B, AOC-CV-631) is to be attached for the judge's signature. Signed copies will be provided to both parties and their attorneys. **Some of the procedures set forth in this rule may not be applicable to mediation of placement issues in Juvenile cases. Refer to rule 7.02 for procedures in mediation of placement issues in Juvenile cases.**

12.05. Plan Incorporated in Court Order. Where an initial signed agreement or a signed modification of that agreement is submitted to the court, it shall be incorporated in a court order unless the court finds good reason not to do so. (See Appendix B, AOC-CV-631, Order Approving Parenting Agreement.) When incorporated, the agreement is enforceable as is any other court order. Even though designated "parenting agreement," or some similar name, the incorporated agreement shall be considered a custody order or child custody determination within the meaning of Chapter 50A of the General Statutes, G.S. 14-320.1, G.S. 110-139.1, or other places where those terms appear. **Some of the procedures set forth in this rule may not be applicable to mediation of placement issues in Juvenile cases. Refer to rule 7.02 for procedures in mediation of placement issues in Juvenile cases.**

12.06. Termination of Mediation. After the parties have attended at least the orientation and first mediation session, either or both of the parties may decide not to participate further in the mediation process, and the mediator shall report to the court that no agreement was reached.

Either party may move to have the mediation proceedings dismissed and the action heard in court due to the mediator's bias, undue familiarity with a party, or other prejudicial ground. Further, if the mediator determines that the case is not suitable for mediation due to a power imbalance between the parties, the presence of child abuse or neglect, or other reason, the mediator may report to the court that the case was not resolved. (See Appendix B, AOC-CV-914M, Order to Calendar Custody or Visitation Dispute.)

Where an agreement is not reached, the custody mediation office may make available information on community resources for families and children involved in a family reorganization.

12.07. Return to Mediation. The mediator shall explain to the parties that the needs of their children change over time, and encourage them to return to mediation if they are unable to resolve any problems caused by that factor, or other changes in circumstances. (See Appendix B, Motion and Order to Return to Custody Mediation, AOC-CV-634.)

12.08. Other Participants. With the consent of all parties, the mediator may speak with the child, in an effort to assist the parties to assess the needs and interests of the child. **Refer to rule 7.02 for special rules regarding participants in mediation of placement issues in Juvenile cases.**

12.09. Caucus with Parties. Although it is generally desirable for the mediator to talk with the parties together, if there is no objection by either party, the mediator may caucus with each party.

12.10. Evaluation of Program. The Administrative Office of the Courts shall evaluate the program from time to time, and *shall* prepare a summary of the program activities to be included in the North Carolina Courts Annual Report of the Administrative Office of the Courts.

Comment: *In addition to evaluation of the statistics compiled and submitted by the various programs (See Appendix B, AOC-A-910M, Custody Mediation Monthly Report), user satisfaction might be monitored by the use of exit interviews, and follow-up questionnaires and telephone interviews in a sampling of cases at some time after the completion of the process.*

12.11. Complaint Procedure. The written orientation materials provided to the parties shall advise them how a complaint about the mediator, or mediation process, can be filed with the Chief District Court Judge of the judicial district. (See Appendix B, Brochure.)

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendments to the Rules For Court-Ordered Arbitration in North Carolina

WHEREAS, section 7A-37.1 of the North Carolina General Statutes authorized statewide court-ordered, nonbinding arbitration in certain civil actions, and further authorized the Supreme Court of North Carolina to adopt rules governing this procedure and to supervise its implementation and operation through the Administrative Office of the Courts.

NOW, THEREFORE, the Rules for Court-Ordered Arbitration are amended and adopted to read as attached hereto.

These Rules shall be promulgated by publication in the advance sheets of the Supreme Court and the Court of Appeals. They shall be effective on the 1st day of January, 2003.

Adopted by the Court in Conference this the 19th day of December, 2002.

Butterfield, J.
For the Court

RULES FOR COURT-ORDERED ARBITRATION IN NORTH CAROLINA

RULE 1. ACTIONS SUBJECT TO ARBITRATION

(a) By Order of the Court.

(1) District Court. All civil actions filed in the District Court Division are subject to court-ordered arbitration under these rules, except actions:

(i) Which are assigned to a magistrate, provided that appeals from judgments of magistrates are subject to court-ordered arbitration under these rules except appeals from summary ejectment actions and actions in which the sole claim is an action on an account;

(ii) In which class certification is sought;

(iii) In which a request has been made for a preliminary injunction or a temporary restraining order;

(iv) Involving family law matters including claims filed under N.C.Gen. Stat. chapters 50, 50A, 50B, 51, 52, 52B and 52C;

(v) Involving title to real estate;

(vi) Which are special proceedings; or

(vii) In which the sole claim is an action on an account.

(2) Superior Court. The Senior Resident Superior Court Judge may order any civil Superior Court action to arbitration, where the amount in controversy does not exceed $15,000, under these rules after the Court confers with the parties at a scheduling conference. The judge shall enter a written order, which finds that the action is appropriate for arbitration and that the amount in controversy does not exceed $15,000.

(b) Arbitration by Agreement.

(1) District Court. The parties in any other civil action pending in the District Court Division may, upon joint written motion, request to submit the action to arbitration under these rules. The Court may approve the motion if it finds that arbitration under these rules is appropriate, and the amount in controversy does not

exceed $15,000. The consent of the parties shall not be presumed, but shall be stated by the parties expressly in writing.

(2) **Superior Court.** The parties in any civil action pending in the Superior Court Division where the amount in controversy does not exceed $15,000 may, upon joint written motion, request to submit the action to arbitration under these rules. The Court may approve the motion if it finds that arbitration under these rules is appropriate, and the amount in controversy does not exceed $15,000. The consent of the parties shall not be presumed, but shall be stated by the parties expressly in writing.

(c) Exemption and Withdrawal From Arbitration. The Court may exempt or withdraw any action from arbitration on its own motion, or on motion of a party, made not less than 10 days before the arbitration hearing and a showing that: (i) the action is excepted from arbitration under Arb.Rule 1(a)(1) or (ii) there is a compelling reason to do so.

Administrative History

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989.
Amended: 8 March 1990—(a) and (d).
Amended: 1 January 2003—(a) through (d).

Comment

The purpose of these rules is to create an efficient, economical alternative to traditional litigation for prompt resolution of disputes in District Court. Subject to the opt-in of Superior Court cases under Arb.Rule 1(b), the rules provide for court-ordered arbitration of District Court actions because District Court actions are typically suitable for consideration in the manner provided in these rules and Superior Court actions are covered by another dispute resolution program. The $15,000 jurisdictional limit by statute and Arb.Rule 1 applies only to the claim(s) actually asserted, even though the claim(s) is or are based on a statute providing for multiple damages, e.g. N.C.Gen.Stat. §§ 1-538, 75-16. An arbitrator may award damages in any amount which a party is entitled to recover. These rules do not affect the jurisdiction or functions of the magistrates where they have been assigned such jurisdiction. Counsel are expected to value their cases reasonably without Court involvement.

"Family law matters" in Arb.Rule 1(a)(1)(iv) includes all family law cases such as divorce, guardianship, adoptions, juvenile matters, child support, custody, and visitation. "Summary ejectments" and "special proceedings", referred to in Arb.Rule 1(a)(vi), are actions so designated by the General Statutes.

RULE 2. ARBITRATORS

(a) Selection.

(1) The Court shall approve and maintain a list of qualified arbitrators, which shall be a public record. The parties may stipulate to an arbitrator on the Court's list within the first 20 days after the 60-day period fixed in Arb.Rule 8(b). If there is no stipulation, the Court shall appoint an arbitrator from the list and notify the parties of the arbitrator selected.

(2) Parties may choose an arbitrator who is not on the Court's list provided the arbitrator consents, the Court approves the choice, and the arbitrator otherwise meets all the requirements of Arb.Rule 2 with the exception of the requirement to complete the arbitrator training as prescribed by the Administrative Office of the Courts. The stipulation of agreement on an arbitrator, the arbitrator's consent, and the court order approving such stipulation shall be filed within the same 20-day period for choosing an arbitrator on the Court's list.

(b) Eligibility. An arbitrator shall be a member in good standing of the North Carolina State Bar and have been licensed to practice law for five years. The arbitrator shall have been admitted in North Carolina for at least the last two years of the five-year period. Admission outside North Carolina may be considered for the balance of the five-year period, so long as the arbitrator was admitted as a duly licensed member of the bar of a state(s) or a territory(ies) of the United States or the District of Columbia. In addition, an arbitrator shall complete the arbitrator training course prescribed by the Administrative Office of the Courts and be approved by the Chief District Court Judge for such service. Arbitrators so approved shall serve at the pleasure of the appointing Court.

(c) Fees and Expenses. Arbitrators shall be paid a $75 fee by the Court for each arbitration hearing when they file their awards with the Court. An arbitrator may be reimbursed for expenses actually and necessarily incurred in connection with an arbitration hear-

ing and paid a reasonable fee not exceeding $75 for work on a case not resulting in a hearing upon the arbitrator's written application to and approval by the Chief Judge of the District Court.

(d) Oath of Office. Arbitrators shall take an oath or affirmation similar to that prescribed in N.C.Gen.Stat. § 11-11, in a form approved by the Administrative Office of the Courts, before conducting any hearings.

(e) Arbitrator Ethics; Disqualification. Arbitrators shall comply with the Canons of Ethics for Arbitrators promulgated by the Supreme Court of North Carolina. Arbitrators shall be disqualified and must recuse themselves in accordance with the Canons.

(f) Replacement of Arbitrator. If an arbitrator is disqualified, recused, unable, or unwilling to serve, a replacement shall be appointed by the Court from the list of arbitrators.

Administrative History

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989.
Amended: 8 March 1990—(a) and (b).
Amended: 1 August 1995—(b).
Amended: 1 January 2003—(a), (b), (c), (e), and (f).

Comment

Under Arb.Rule 2(a) the parties have a right to choose one arbitrator from the list if they wish to do so, but they have *the burden of taking the initiative if they want to make the selection*, and they must do it promptly.

When assigning arbitrators to serve in cases, the Court is encouraged to regularly use all arbitrators on the Court's list as established in Arb.Rule 2(a).

The parties in a particular case may choose a person to be an arbitrator who is not on the list required by Arb.Rule 2(a)(1), provided that person consents, the choice is approved by the Chief District Court Judge, and the person otherwise meets the requirements of Arb.Rule 2. The stipulation of agreement on an arbitrator, the arbitrator's consent, and the order approving such stipulation and consent must be filed within the 20-day period mentioned in Arb.Rule 2(a)(1).

Under Arb.Rule 2(c) filing of the award is the final act at which payment should be made, closing the matter for the arbitrator. The

arbitrator should make the award when the hearing is concluded. Hearings must be brief and expedited so that an arbitrator can hear at least three per day. See Arb.Rule 3(n).

Payments and expense reimbursements authorized by Arb.Rule 2(c) are made subject to Court approval to insure conservation and judicial monitoring of the use of funds available for the program.

RULE 3. ARBITRATION HEARINGS

(a) Hearing Scheduled by the Court. Arbitration hearings shall be scheduled by the Court and held in a courtroom, if available, or in any other public room suitable for conducting judicial proceedings and shall be open to the public.

(b) Prehearing Exchange of Information. At least 10 days before the date set for the hearing, the parties shall exchange:

(1) Lists of witnesses they expect to testify;

(2) Copies of documents or exhibits they expect to offer in evidence; and

(3) A brief statement of the issues and their contentions.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing. Failure to comply with Arb.Rule 3(b) may be cause for sanctions under Arb.Rule 3(l). Each party shall bring to the hearing and provide to the arbitrator a copy of these materials. These materials shall not be filed with the Court or included in the case file.

(c) Exchanged Documents Considered Authenticated. Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian, or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(d) Copies of Exhibits Admissible. Copies of exchanged documents or exhibits are admissible in arbitration hearings.

(e) Witnesses. Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(f) Subpoenas. N.C.R.Civ.P. 45 shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

(g) Authority of Arbitrator to Govern Hearings. Arbitrators shall have the authority of a trial judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all contempt matters to the Court.

(h) Law of Evidence Used as Guide. The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.

(i) No Ex Parte Communications With Arbitrator. No ex parte communications between parties or their counsel and arbitrators are permitted.

(j) Failure to Appear; Defaults; Rehearing. If a party who has been notified of the date, time and place of the hearing fails to appear without good cause therefor, the hearing may proceed and an award may be made by the arbitrator against the absent party upon the evidence offered by the parties present, but not by default for failure to appear or by dismissing the case. If a party is in default for any other reason but no judgment has been entered upon the default pursuant to N.C.R.Civ.P. 55(b) before the hearing, the arbitrator may hear evidence and may issue an award against the party in default. The Court may order a rehearing of any case in which an award was made against a party who failed to obtain a continuance of a hearing and failed to appear for reasons beyond the party's control. Such motion for rehearing shall be filed with the Court within the time allowed for demanding trial de novo stated in Arb.Rule 5(a).

(k) No Record of Hearing Made. No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(l) Sanctions. Any party failing to attend an arbitration proceeding shall be subject to sanctions by the Court on motion of a party, report of the arbitrator, or by the Court on its own motion. These sanctions may include those provided in N.C.R.Civ.P. 11, 37(b)(2)(A)-37(b)(2)(D) and N.C.Gen.Stat. § 6-21.5.

(m) Proceedings in Forma Pauperis. The right to proceed in forma pauperis is not affected by these rules.

(n) Limits of Hearings. Arbitration hearings shall be limited to one hour unless the arbitrator determines at the hearing that more time is necessary to ensure fairness and justice to the parties.

(1) A written application for a substantial enlargement of time for a hearing must be filed with the Court and the arbitrator, if appointed, and must be served on opposing parties at the earliest practicable time, and no later than the date for prehearing exchange of information under Arb.Rule 3(b). The Court will rule on these applications after consulting the arbitrator if appointed.

(2) An arbitrator is not required to receive repetitive or cumulative evidence.

(o) Hearing Concluded. The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments the arbitrator permits have been completed. In exceptional cases, the arbitrator has discretion to receive post-hearing briefs, but not evidence, if submitted within three days after the hearing has been concluded.

(p) Parties Must Be Present at Hearings; Representation. All parties shall be present at hearings in person or through counsel. Parties may appear pro se as permitted by law.

(q) Motions. Designation of an action for arbitration does not affect a party's right to file any motion with the Court.

(1) The Court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in the award. Parties shall state their contentions regarding pending motions referred to the arbitrator in the exchange of information required by Arb.Rule 3(b).

(2) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the Court so orders.

Administrative History

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989.
Amended: 8 March 1990—(b), (j), (o), and (q).
Amended: 1 January 2003—(a), (b), (g), (j), (l), (n), (o), (p), and (q).

Comment

Good faith compliance with Arb.Rule 3(b) is required by professional courtesy and fairness as well as the spirit of these rules.

Failure to comply with Arb.Rule 3(b) may justify a sanction of limiting of evidence otherwise admissible under Arb.Rules 3(c)-3(f) and 3(g).

Arb.Rule 3(d) contemplates that the arbitrator shall return all evidence submitted when the hearing is concluded and the award has been made. Original documents and exhibits should not be marked in any way to identify them with the arbitration, to avoid possible prejudice in any future trial.

The purpose of Arb.Rule 3(n) is to ensure that hearings are limited and expedited. Failure to limit and expedite the hearings defeats the purpose of these rules. In this connection, note the option in Arb.Rule 3(b) for use of prehearing stipulations and/or sworn or unsworn statements to meet time limits.

Under Arb.Rule 3(o) the declaration that the hearing is concluded by the arbitrator formally marks the end of the hearing. Note Arb.Rule 4(a), which requires the arbitrator to file the award within three days after the hearing is concluded or post-hearing briefs are received. The usual practice should be a statement of the award at the close of the hearing, without submission of briefs. In the unusual case where an arbitrator is willing to receive post-hearing briefs, the arbitrator should specify the points to be addressed promptly and succinctly. Time limits in these rules are governed by N.C.R. Civ. P. 6 and N.C.Gen.Stat. §§ 103-4, 103-5.

Arb.Rule 3(p) requires that all parties be present in person or through counsel. The presence of the parties or their counsel is necessary for presentation of the case to the arbitrator. Rule 3(p) does not require that a party or any representative of a party have authority to make binding decisions on the party's behalf in the matters in controversy.

The rules do not establish a separate standard for pro se representation in court-ordered arbitrations. Instead, pro se representation in court-ordered arbitrations is governed by applicable principles of North Carolina law in that area. See Arb.Rule 3(p). Conformance of practice in court-ordered arbitrations with the applicable law, whatever it may provide, is ensured by providing that pro se representation be "as permitted by law."

Under Arb.Rule 3(q)(1), the Court will rule on prehearing motions which dispose of all or part of the case on the pleadings, or which relate to procedural management of the case. The Court will normally defer to the arbitrator's consideration motions addressed to the merits of a claim requiring a hearing, the taking of evidence, or exam-

ination of records and documents other than the pleadings and motion papers, except in cases in which an N.C.R.Civ.P. 12(b) motion is filed in lieu of a responsive pleading.

RULE 4. THE AWARD

(a) Filing the Award. The award shall be in writing, signed by the arbitrator and filed with the clerk within three days after the hearing is concluded or the receipt of post-hearing briefs, whichever is later.

(b) Findings; Conclusions; Opinions. No findings of fact and conclusions of law or opinions supporting an award are required.

(c) Scope of Award. The award must resolve all issues raised by the pleadings, may be in any amount supported by the evidence, shall include interest as provided by law, and may include attorney's fees as allowed by law.

(d) Copies of Award to Parties. The arbitrator shall deliver a copy of the award to all of the parties or their counsel at the conclusion of the hearing or the Court shall serve the award after filing. A record shall be made by the arbitrator or the Court of the date and manner of service.

Administrative History

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989.
Amended: 1 January 2003—(a), (c), and (d).

Comment

Ordinarily, the arbitrator should issue the award at the conclusion of the hearing. See Arb.Rule 4(a). If the arbitrator wants post-hearing briefs, the arbitrator must receive them within three days, consider them, and file the award within three days thereafter. See Arb.Rule 3(o) and its Comment. If the arbitrator deems it appropriate, the arbitrator may explain orally the basis of the award.

RULE 5. TRIAL DE NOVO

(a) Trial De Novo as of Right. Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial de novo as of right upon filing a written demand for trial de novo with the Court, and service of the demand on all parties, on an approved form within 30 days after the arbitrator's award has been served, or within 10 days

after an adverse determination of an Arb.Rule 3(j) motion to rehear. Demand for jury trial pursuant to N.C.R.Civ.P. 38(b) does not preserve the right to a trial de novo. A demand by any party for a trial de novo in accordance with this section is sufficient to preserve the right of all other parties to a trial de novo. Any trial de novo pursuant to this section shall include all claims in the action.

(b) Filing Fee. The first party filing a demand for trial de novo shall pay a filing fee equivalent to the arbitrator's compensation, which shall be held by the Court until the case is terminated. The fee shall be returned to the demanding party only upon written order of the trial judge finding that the position of the demanding party has been improved over the arbitrator's award. Otherwise, the filing fee shall be deposited into the Judicial Department's General Fund.

(c) No Reference to Arbitration in Presence of Jury. A trial de novo shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the Court's approval.

(d) No Evidence of Arbitration Admissible. No evidence that there have been arbitration proceedings or of statements made and conduct occurring in arbitration proceedings may be admitted in a trial de novo, or in any subsequent proceeding involving any of the issues in or parties to the arbitration, without the consent of all parties to the arbitration and the Court's approval.

(e) Arbitrator Not to Be Called as Witness. An arbitrator may not be deposed or called as a witness to testify concerning anything said or done in an arbitration proceeding in a trial de novo or any subsequent civil or administrative proceeding involving any of the issues in or parties to the arbitration. The arbitrator's notes are privileged and not subject to discovery.

(f) Judicial Immunity. The arbitrator shall have judicial immunity to the same extent as a trial judge with respect to the arbitrator's actions in the arbitration proceeding.

Administrative History

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989.
Amended: 8 March 1990—(a), (b), (e), and (f).
Amended: 1 January 2003 (a), (b), (c), and (d).

RULE 6. THE COURT'S JUDGMENT

(a) Termination of Action Before Judgment. Dismissals or a consent judgment may be filed at any time before entry of judgment on an award.

(b) Judgment Entered on Award. If the case is not terminated by dismissal or consent judgment, and no party files a demand for trial de novo within 30 days after the award is served, the clerk or the Court shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be served on all parties or their counsel.

Administrative History

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989.
Amended: 8 March 1990—(b).
Amended: 1 January 2003—(a) and (b).

Comment

A judgment entered on the arbitrator's award is not appealable because there is no record for review by an appellate court. A trial de novo is not an "appeal," in the sense of an appeal to the North Carolina Court of Appeals from Superior Court or District Court, from the arbitrator's award. By failing to demand a trial de novo the right to appeal is waived.

RULE 7. COSTS

(a) Arbitration Costs. The arbitrator may include in an award court costs accruing through the arbitration proceedings in favor of the prevailing party.

(b) Costs Denied if Party Does Not Improve Position in Trial De Novo. A party demanding trial de novo whose position is not improved at the trial may be denied costs in connection with the arbitration proceeding by the trial judge, even though that party prevails at trial.

Administrative History

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989.
Amended: 8 March 1990—(c).
Amended: 1 January 2003—(b) and (c).

RULE 8. ADMINISTRATION

(a) Actions Designated for Arbitration. The Court shall designate actions eligible for arbitration upon the filing of the complaint or docketing of an appeal from a magistrate's judgment and give notice of such designation to the parties.

(b) Hearings Rescheduled; 60 Day Limit; Continuance.

(1) The Court shall schedule hearings with notice to the parties to begin within 60 days after: (i) the docketing of an appeal from a magistrate's judgment, (ii) the filing of the last responsive pleading, or (iii) the expiration of the time allowed for the filing of such pleading.

(2) A hearing may be scheduled, rescheduled, or continued to a date after the time allowed by this rule only by the Court before whom the case is pending upon a written motion and a showing of a strong and compelling reason to do so.

(c) Date of Hearing Advanced by Agreement. A hearing may be held earlier than the date set by the Court, by agreement of the parties with Court approval.

(d) Forms. Forms for use in these arbitration proceedings must be approved by the Administrative Office of the Courts.

(e) Delegation of Nonjudicial Functions. To conserve judicial resources and facilitate the effectiveness of these rules, the Court may delegate nonjudicial, administrative duties and functions to supporting Court personnel and authorize them to require compliance with approved procedures.

(f) Definitions. "Court" as used in these rules means:

(1) The Chief District Court Judge or the delegate of such judge; or

(2) Any assigned judge exercising the Court's jurisdiction and authority in an action.

Administrative History

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989.
Amended: 8 March 1990—(a), (b), (d), and (f).
Amended: 1 January 2003—(a), (b), (c), (e), and (f).

Comment

One goal of these rules is to expedite disposition of claims filed in District Court. See Arb.Rule 8(a). The 60 days in Arb.Rule 8(b)(1) will allow for discovery, trial preparation, pretrial motions disposition and calendaring. A motion to continue a hearing will be heard by a judge mindful of this goal. Continuances may be granted when a party or counsel is entitled to such under law, e.g. N.C.R.Civ.P. 40(b); rule of court, e.g. N.C.Prac.R. 3; or customary practice.

Any settlement reached prior to the scheduled arbitration hearing must be reported by the parties to the Court official administering the arbitration. The parties must file dismissals or a consent judgment prior to the scheduled hearing to close the case without a hearing. If the dismissals or consent judgment are not filed before the scheduled hearing, the parties should appear at the hearing to have their agreement entered as the award of the arbitrator.

RULE 9. APPLICATION OF RULES

These Rules shall apply to cases filed on or after their effective date and to pending cases submitted by agreement of the parties under Arb.Rule 1(b) or referred to arbitration by order of the Court in those districts designated for court-ordered arbitration in accordance with G.S. §§ 7A-37 and 7A-37.1

Administrative History

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989.
Amended: 8 March 1990.
Amended: 1 January 2003.

Comment

A common set of rules has been adopted. These rules may be amended only by the Supreme Court of North Carolina. The enabling legislation, G.S. §§ 7A-37 and 7A-37.1, vests rule-making authority in the Supreme Court, and this includes amendments.

In the Supreme Court of North Carolina

Order Adopting Amendments to the Rules for the Dispute Resolution Commission

WHEREAS, section 7A-38.2 of the North Carolina General Statutes establishes the Dispute Resolution Commission under the Judicial Department and charges it with the administration of mediator certification and regulation of mediator conduct and de-certification, and

WHEREAS, N.C.G.S. § 7A-38.2(b) provides for this Court to implement section 7A-38.2 by adopting rules and regulations governing the operation of the Commission,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.2(b), the Rules for the Dispute Resolution Commission are hereby amended to read as in following pages. These Rules shall be effective on the 19th day of December 2002.

Adopted by the Court in conference the 19th day of December, 2002. The Appellate Division Reporter shall publish the Rules for the Dispute Resolution Commission in their entirety at the earliest practicable date.

Butterfield, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT FOR THE DISPUTE RESOLUTION COMMISSION

I. OFFICERS OF THE COMMISSION.

A. **Officers.** The Commission shall establish the offices of Chair, Vice-Chair, and Secretary/Treasurer.

B. **Appointment; Elections.**

1. The Chair shall be appointed for a two year term and shall serve at the pleasure of the Chief Justice of the North Carolina Supreme Court.

2. The Vice-Chair and Secretary/Treasurer shall be elected by vote of the full Commission and shall serve two year terms.

C. **Committees.**

1. The Chair may appoint such standing and *ad hoc* committees as are needed and designate Commission members to serve as committee chairs.

2. The Chair may~~, with approval of the full Commission,~~ appoint ex-officio members to serve on either standing or *ad hoc* committees. Ex-officio members may vote upon issues before committees but not upon issues before the Commission. Ex-officio members shall serve for a one-year term.

II. COMMISSION OFFICE; STAFF.

A. **Office.** The Chair, in consultation with the Director of the Administrative Office of the Courts, is authorized to establish and maintain an office for the conduct of Commission business.

B. **Staff.** The Chair, in consultation with the Director of the Administrative Office of the Courts, is authorized to appoint an Executive Secretary and to: (1) fix his or her terms of employment, salary, and benefits; (2) determine the scope of his or her authority and duties and (3) delegate to the Executive Secretary the authority to employ necessary secretarial and staff assistants, with the approval of the Director of the Administrative Office of the Courts.

III. COMMISSION MEMBERSHIP.

A. **Vacancies.** Upon the death, resignation or permanent incapacitation of a member of the Commission, the Chair shall notify the appointing authority and request that the vacancy created by the death, resignation or permanent incapacitation be filled. The appointment of a successor shall be for the former member's unexpired term.

B. **Disqualifications.** If, for any reason, a Commission member becomes disqualified to serve, that member's appointing authority shall be notified and requested to take appropriate action. If a member resigns or is removed, the appointment of a successor shall be for the former member's unexpired term.

C. **Conflicts of Interest and Recusals.** All members and ex-officio members of the Commission must:

1. Disclose any present or prior interest or involvement in any matter pending before the Commission or its committees for decision upon which the member or ex-officio member is entitled to vote.

2. Recuse himself or herself from voting on any such matter if his or her impartiality might reasonably be questioned; and

3. Continue to inform themselves and to make disclosures of subsequent facts and circumstances requiring recusal.

D. **Compensation.** Pursuant to N. C. Gen. Stat. § 138-5, ex-officio members of the Commission shall receive no compensation for their services but may be reimbursed for their out-of-pocket expenses necessarily incurred on behalf of the Commission and for their mileage, subsistence and other travel expenses at the per diem rate established by statutes and regulations applicable to state boards and commissions.

IV. MEETINGS OF THE COMMISSION.

A. **Meeting Schedule.** The Commission shall meet at least twice each year pursuant to a schedule set by the Commission and in special sessions at the call of the Chair or other officer acting for the Chair.

B. **Quorum.** A majority of Commission members shall constitute a quorum. Decisions shall be made by a majority of the members present and voting except that decisions to discipline or decertify a mediator or mediator training program shall require an affirmative vote of 8 members.

C. **Public Meetings.** All meetings of the Commission and minutes of such meetings shall be open and available to the public except that meetings or portions of meetings involving potentially adverse actions against mediators or mediation training programs may be treated as confidential.

D. **Matters Requiring Immediate Action.** If, in the opinion of the Chair, any matter requires a decision or other action before the

next regular meeting of the Commission and does not warrant the call of a special meeting, it may be referred to the Executive Committee. The Executive Committee may ~~be~~ considered the matter and ~~a~~ vote or take other action as appropriate ~~taken~~ by correspondence, telephone, facsimile, or other practicable method; provided, all formal action taken by the Executive Committee ~~Commission decisions taken are~~ is reported to the ~~Executive Secretary~~ Commission and included in the minutes of Commission proceedings.

V. COMIMISSION'S BUDGET.

The Commission, in consultation with the Director of the Administrative Office of the Courts, shall prepare an annual budget. The budget and supporting financial information shall be public records.

VI. POWERS AND DUTIES OF THE COMMISSION.

The Commission shall have the authority to undertake activities to expand public awareness of dispute resolution procedures, to foster growth of dispute resolution services in this State and to ensure the availability of high quality mediation training programs and the competence of mediators. Specifically, the Commission is authorized and directed to do the following:

A. Review and approve or disapprove applications of (1) persons seeking to have training programs certified; (2) persons seeking certification as qualified to provide mediation training; (3) attorneys and non-attorneys seeking certification as qualified to conduct mediated settlement conferences and (4) persons or organizations seeking reinstatement following a prior suspension or decertification.

B. Review applications as against criteria for certification set forth in the *Rules Implementing Mediated Settlement Conferences* (*Rules*) and as against such other requirements of the North Carolina Supreme Court Dispute Resolution Commission or the Commission which amplify and clarify those *Rules*. The Commission may adopt application forms and require their completion for approval.

C. Compile and maintain lists of certified trainers and training programs along with the names of contact persons, addresses, and telephone numbers and make those lists available upon request.

D. Institute periodic review of training programs and trainer qualifications and re-certify trainers and training programs that continue to meet criteria for certification. Trainers and training programs

that are not re-certified, shall be removed from the lists of certified trainers and certified training programs.

E. Compile and keep current a list of certified mediators, which specifies the judicial districts in which each mediator wishes to practice. Periodically disseminate copies of that list to each judicial district with a mediated settlement conferences program, and make the list available upon request to any attorney, organization, or member of the public seeking it.

F. Prepare and keep current biographical information on certified mediators who wish to appear in the Mediator Information Directory contemplated in the *Rules*. Periodically disseminate updated biographical information to Senior Resident Superior Court Judges, Chief District Court Judges, Clerks of Superior Court, and Trial Court Administrators in districts in which mediators wish to serve, and

G. Make reasonable efforts on a continuing basis to ensure that the judiciary, clerks of court, court administration personnel, attorneys, and to the extent feasible, parties to mediation, are aware of the Commission and its office and the Commission's duty to receive and hear complaints against mediators and mediation trainers and training programs.

VII. MEDIATOR CONDUCT.

The conduct of all mediators, mediation trainers and managers of mediation training programs must conform to the Standards of Professional Conduct adopted by the Commission and the standards of any professional organization of which such person is a member that are not in conflict nor inconsistent with the Commission's Standards. A certified mediator shall inform the Commission of any complaint filed against or disciplinary action imposed upon the mediator by any other professional organization. Failure to do so is a violation of these Rules. Violations of the Commission's Standards or other professional standards or any conduct otherwise discovered reflecting a lack of moral character or fitness to conduct mediations or which discredits the Commission, the courts or the mediation process may subject a mediator to disciplinary proceedings by the Commission. The Commission may, through a standing committee, render advisory opinions on questions of ethics submitted by certified mediators.

VIII. COMPLAINT AND HEARING PROCEDURES

A. Initiation of Complaints.

1. By the Commission. Any member of the Commission or its Executive Secretary may bring to the attention of the full Commission any matter concerning the character, conduct or fitness to practice as a mediator or any matter concerning a certified mediation training program. The Commission may authorize the Executive Secretary to conduct an inquiry, including gathering information and interviewing persons. The Executive Secretary shall seek to resolve the matter in a manner acceptable to all parties. After reviewing the report of the Executive Secretary, the Commission may authorize a complaint against a mediator, trainer or training program. The Chair of the Commission shall appoint a panel to conduct a hearing if a complaint is filed. Such hearing shall be conducted in accordance with procedures set forth in subsection D.

2. By a Citizen. Any person, including mediation participants, attorneys for participants, and interested third parties such as insurance company representatives, may file with the Commission a complaint involving the character, conduct or the fitness to practice of a mediator. Any person, including a training program participant, may file a complaint with the Commission against a certified mediation training program or against any individual responsible for conducting, administering or promoting such a training program.

B. Form.

All complaints shall be reduced to writing on a form approved by the Commission.

C. Preliminary Inquiry; Resolution; Action.

1. The Executive Secretary of the Commission shall seek to resolve the issues raised by complaints authorized by subsection A.(2), through contacts with the complaining party, the mediator, trainer, representative of the training program or others. The Executive Secretary may consult with the chair or any member of the Commission for guidance or assistance in the informal resolution of complaints. In the event the Executive Secretary is unable to resolve a complaint in a manner acceptable to all parties, the Executive Secretary shall forward a copy of the complaint and the written results of any investigation to the Chair. ~~for further consideration~~.

2. ~~The Chair or a member of the Commission appointed by the Chair shall determine whether a formal hearing is warranted or what other means or procedures should be followed to resolve the issues~~

~~raised by the complaint~~. The Chair shall appoint a panel of three Commission members to review the written complaint, any written response of the mediator to the complaint, any written response of the complaining party rebutting the mediator's response, and the report of the Executive Secretary to determine whether the allegations merit a hearing. The members of the panel shall disclose any conflicts of interest or other information bearing on their neutrality. Any challenge to the membership of the panel shall be addressed to the Chair who shall take appropriate action. The members of the panel may interview the complainant, the mediator or any other individual who has relevant information. Within sixty days of their appointment, the panel shall file a written report with the Chair stating whether the members have determined a hearing is merited. After reviewing the panel's recommendation, the Commission shall make the final determination as to whether a hearing will be conducted. If no hearing is to be held, a copy of the panel's report shall be forwarded to the complaining party and the mediator. If a hearing is to be conducted, the panel's report will be confidential.

D. **Hearings.**

1. Hearing Panel. If a hearing is to be held, the Chair of the Commission shall appoint a panel of three Commissioners. ~~to conduct the hearing.~~ Those appointed shall not have served on the review panel. ~~The three Commissioners~~ Those appointed shall make such disclosures as required by Section III.C. The panel shall elect one of its members to serve as Chair. ~~of the panel.~~

2. Notice. The Executive Secretary shall serve a copy of the written complaint on all parties along with notice of a date, time, location of the hearing and the names of panel members appointed to conduct the hearing. The hearing shall be held within sixty (60) days after the date notice is served.

3. Challenges. Any challenge to the membership of the panel shall be addressed to the Chair who shall take appropriate action.

4. Response. Within twenty (20) days after service of the complaint and notice of hearing, the person(s) or organization(s) that are the subject(s) of the complaint (designated as "respondents"), may file a written response, by hand-delivery or registered or certified mail, with the Executive Secretary at the office established by the Commission. The Chair of the Commission ~~and~~ or the Chair of the panel may grant the respondent ten additional days to respond ~~an extension of time for response for an additional ten (10) days~~ if good cause therefor is shown in a written application filed within the twenty (20) days allowed for response. Failure to file a timely

response may be considered by the hearing panel. Within ten (10) days after the response is served on the complaining party, he or she may file a reply to the response. The Chair of the Commission or the Chair of the panel may grant the complaining party five (5) additional days to reply to the response if good cause therefor is shown in a written application filed within the ten (10) days allowed for replying to the response.

E. **Hearing Procedures.**

1. By appointment with the Executive Secretary, parties may examine all relevant documents and evidence in the Commission office prior to the hearing. With the approval of the Executive Secretary, copies of relevant documents and evidence may be mailed to a requesting party or parties.

2. The specific procedure to be followed in a hearing shall be determined by the panel with the primary objective being a just, fair and prompt resolution of all issues raised in a complaint. The Rules of Evidence shall be relied on as a guide to that end but need not be considered binding. The panel shall be the judge of the relevance and materiality and weight of the evidence offered.

3. Neither the complainant nor any party shall have any *ex parte* communications with the members of the panel, except with respect to scheduling matters.

4. The panel may, in special circumstances and for good cause (especially, when there is no objection), permit an attorney to represent a party by telephone or receive evidence by telephone with such limitations and conditions as it may find just and reasonable.

5. No official transcript of the proceedings need be made. The panel may permit any party to record a hearing in any manner that does not interfere with the proceeding.

6. If the complainant falls to appear at a hearing or provide evidence in support of the complaint, it may be dismissed for want of prosecution and reinstated only on a showing of good cause for the default.

7. If a person or organization, the subject of a complaint, fails to appear at a scheduled hearing or to participate in good faith or to otherwise respond, the panel may proceed to a decision on the evidence before it.

F. **Panel Decision.**

1. A panel may dismiss a complaint at any point in the proceedings and file a written report stating the reason for the dismissal.

2. If after a hearing, a majority of the panel finds there is substantial and competent evidence to support the imposition of sanctions against a mediator or any person or organization, the panel may recommend to the full Commission imposition of one or more appropriate sanctions, including the following:

a. written admonishment;

b. additional training to be completed;

c. restriction on types of cases to be mediated in the future;

d. suspension for a specified term;

e. decertification; or

f. imposition of costs of the proceeding.

3. If there is a finding that the complaint was frivolous or made with the intent to vex or harass the person or training program complained about, the Commission may assess costs of the proceeding against a complaining party.

4. The Chair of the panel shall promptly forward a written report of the panel's decision and recommendation, if any, to the Executive Secretary who shall, in turn, mail copies to the Chair and to the parties by registered or certified mail.

IX. COMMISSION DECISION.

A. Final action on any panel recommendation for discipline or adverse personnel action is reserved for Commission decision.

B. If a decision is made or an agreement reached limiting a mediator's service to specified types of cases or to suspend or decertify a mediator, trainer or training program, the Executive Secretary shall notify, appropriate judicial districts in writing of the sanction. If a training program's certification is suspended or revoked, the Executive Secretary shall remove that program from the list of certified training programs.

C. All decisions of the Commission are public records.

X. INTERNAL OPERATING PROCEDURES.

A. The Commission may adopt and publish internal operating procedures and policies for the conduct of Commission business.

B. The Commission's procedures and policies may be changed as needed on the basis of experience.

In the Supreme Court of North Carolina

Order Adopting Amendments to the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases

WHEREAS, section 7A-38.4A of the North Carolina General Statutes establishes a program in district court to provide for settlement procedures to expedite settlement of equitable distribution and other family financial cases, and

WHEREAS, N.C.G.S.§ 7A-38.A(a) provides for this Court to implement section 7A-38.4A by adopting rules and amendments to rules

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.4(a), Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases are hereby amended to read as in the following pages. These amended Rules shall be effective on the 21st of November, 2002.

Adopted by the Court in conference the 21st day of November, 2002. The Appellate Division Reporter shall publish the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases in their entirety, as amended through this action, at the earliest practicable date.

Butterfield, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

RULE 1. INITIATING SETTLEMENT PROCEDURES

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.

Pursuant to G.S. 7A-38.4A, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent any party to a district court case involving family financial issues, including equitable distribution, child support, alimony, post-separation support action, or claims arising out of contracts between the parties under G.S. 50-20(d), 52-10, 52-10.1 or 52 B shall advise his or her client regarding the settlement procedures approved by these Rules and, at or prior to the scheduling conference mandated by G.S. 50-21(d), shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. ORDERING SETTLEMENT PROCEDURES.

(1) Equitable Distribution Scheduling Conference. At the scheduling conference mandated by G.S. 50-21(d) in an equitable distribution action, or at such earlier time as specified by local rule, the Court shall include in its scheduling order a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, other settlement procedure conducted pursuant to these rules, unless excused by the Court pursuant to Rule 1.C.(6) or by the Court or mediator pursuant to Rule 4.A.(2).

(2) Scope of Settlement Proceedings. All other financial issues existing between the parties when the equitable distribution settlement proceeding is ordered, or at any time thereafter, may be discussed, negotiated or decided at the proceeding. In those districts where a child custody and visitation mediation program has been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules only in those cases in which the parties and the mediator have agreed to include them and in which the parties have been exempted from, or have fulfilled the program requirements. In those districts where a child custody and visitation mediation program has not been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules with the agreement of all parties and the mediator.

(3) Authorizing Settlement Procedures Other Than Mediated Settlement Conference. The parties and their attorneys are in the best position to know which settlement procedure is appropriate for their case. Therefore, the Court shall order the use of a settlement procedure authorized by Rules 10-12 herein or by local rules of the District Court in the county or district where the action is pending if the parties have agreed upon the procedure to be used, the neutral to be employed and the compensation of the neutral. If the parties have not agreed on all three items, then the Court shall order the parties and their counsel to attend a mediated settlement conference conducted pursuant to these Rules.

The motion for an order to use a settlement procedure other than a mediated settlement conference shall be submitted on an AOC form at the scheduling conference and shall state:

(a) the settlement procedure chosen by the parties;

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral;

(d) that all parties consent to the motion.

(4) Content of Order. The Court's order shall (1) require the mediated settlement conference or other settlement proceeding be held in the case; (2) establish a deadline for the completion of the conference or proceeding; and (3) state that the parties shall be required to pay the neutral's fee at the conclusion of the settlement conference or proceeding unless otherwise ordered by the Court. Where the settlement proceeding ordered is a judicial settlement conference, the parties shall not be required to pay for the neutral.

The order shall be contained in the Court's scheduling order, or, if no scheduling order is entered, shall be on an AOC form. Any scheduling order entered at the completion of a scheduling conference held pursuant to local rule may be signed by the parties or their attorneys in lieu of submitting the forms referred to hereinafter relating to the selection of a mediator.

(5) Court-Ordered Settlement Procedures in Other Family Financial Cases. Any party to an action involving family financial issues not previously ordered to a mediated settlement conference may move the Court to order the parties to participate in a settlement procedure. Such motion shall be made in writing, state the reasons why the order should be allowed and be served on the non-moving party. Any objection to the motion or any request for hearing shall be filed in writing with the Court within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion and notify the parties or their attorneys of the ruling. If the Court orders a settlement proceeding, then the proceeding shall be a mediated settlement conference conducted pursuant to these Rules. Other settlement procedures may be ordered if the circumstances outlined in subsection (3) above have been met.

(6) Motion to Dispense With Settlement Procedures. A party may move the Court to dispense with the mediated settlement conference or other settlement procedure. Such motion shall be in writing and shall state the reasons the relief is sought. For good cause shown, the Court may grant the motion. Such good cause may include, but not be limited to, the fact that the parties have participated in a settlement procedure such as non-

binding arbitration or early neutral evaluation prior to the court's order to participate in a mediated settlement conference or have elected to resolve their case through arbitration under the Family Law Arbitration Act (G.S. 50-41 et seq.) or that one of the parties has alleged domestic violence. The Court may also dispense with the mediated settlement conference for good cause upon its own motion or by local rule.

RULE 2. SELECTION OF MEDIATOR

A. SELECTION OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY AGREEMENT OF THE PARTIES. The parties may select a certified family financial mediator certified pursuant to these Rules by agreement by filing with the Court a Designation of Mediator by Agreement at the scheduling conference. Such designation shall: state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules.

In the event the parties wish to select a mediator who is not certified pursuant to these Rules, the parties may nominate said person by filing a Nomination of Non-Certified Family Financial Mediator with the Court at the scheduling conference. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience, or other qualifications of the mediator; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation, if any. The Court shall approve said nomination if, in the Court's opinion, the nominee is qualified to serve as mediator and the parties and the nominee have agreed upon the rate of compensation.

Designations of mediators and nominations of mediators shall be made on an AOC form. A copy of each such form submitted to the Court and a copy of the Court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

B. APPOINTMENT OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY THE COURT. If the parties cannot agree upon the selection of a mediator, they shall so notify the Court

and request that the Court appoint a mediator. The motion shall be filed at the scheduling conference and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall be on an AOC form.

Upon receipt of a motion to appoint a mediator, or in the event the parties have not filed a designation or nomination of mediator, the Court shall appoint a certified family financial mediator certified pursuant to these Rules under a procedure established by said Judge and set out in local order or rule.

The Dispute Resolution Commission shall furnish for the consideration of the District Court Judges of any district where mediated settlement conferences are authorized to be held a list of those certified family financial mediators who request appointments in said district. Said list shall contain the mediators' names, addresses and phone numbers and shall be provided in writing or on the Commission's web site.

C. **MEDIATOR INFORMATION DIRECTORY.** To assist the parties in the selection of a mediator by agreement, the Chief District Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all mediators certified pursuant to these Rules who wish to mediate in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Court in such county and the office of the Chief District Court Judge or Trial Court Administrator in such county or, in a single county district, in the office of the Chief District Court Judge or said judge's designee.

D. **DISQUALIFICATION OF MEDIATOR.** Any party may move a Court of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. WHERE CONFERENCE IS TO BE HELD. The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree to a location, the mediator shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date. The mediator is authorized to assist the parties in establishing a discovery schedule and completing discovery.

The Court's order issued pursuant to Rule 1.A.(1) shall state a deadline for completion of the conference which shall be not more than 150 days after issuance of the Court's order, unless extended by the Court. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION. A party, or the mediator, may move the Court to extend the deadline for completion of the conference. Such motion shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the motion, said party shall promptly communicate its objection to the Court.

The Court may grant the request by entering a written order setting a new deadline for completion of the conference, which date may be set at any time prior to trial. Said order shall be delivered to all parties and the mediator by the person who sought the extension.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set during the conference, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery,

the filing or hearing of motions, or the trial of the case, except by order of the Court.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(b) Attorneys. At least one counsel of record for each party whose counsel has appeared in the action.

(2) Any person required to attend a mediated settlement conference shall physically attend until such time as an agreement has been reached or the mediator, after conferring with the parties and their counsel, if any, declares an impasse. No mediator shall prolong a conference unduly.

Any such person may have the attendance requirement excused or modified, including allowing a person to participate by phone, by agreement of both parties and the mediator or by order of the Court. Ordinarily, attorneys for the parties may be excused from attending only after they have appeared at the first session.

B. FINALIZING BY NOTARIZED AGREEMENT, CONSENT ORDER AND/OR DISMISSAL. The essential terms of the parties' agreement shall be reduced to writing as a summary memorandum at the conclusion of the conference unless the parties have reduced their agreement to writing, have signed it and in all other respects have complied with the requirements of Chapter 50 of the General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to the its terms.

Within thirty (30) days of reaching agreement at the conference, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate. In the event the parties fail to agree on the wording or terms of a final agreement or court order, the mediator may schedule

another session if the mediator determines that it would assist the parties.

C. **PAYMENT OF MEDIATOR'S FEE.** The parties shall pay the mediator's fee as provided by Rule 7.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES

If any person required to attend a mediated settlement conference fails to attend without good cause, the Court may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party to the action seeking sanctions, or the Court on its own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law. (See also Rule 7.F. and the Comment to Rule 7.F.)

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) **Control of Conference.** The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court ~~upon the recommendation of the Dispute Resolution Commission~~, which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) **Private Consultation.** The mediator may communicate privately with any participant during the conference. However, there shall be no *ex parte* communication before or outside the conference between the mediator and any counsel or party on any matter touching the proceeding, except with regard to scheduling matters. Nothing in this rule prevents the mediator from engaging in *ex parte* communications, with the consent of the parties, for the purpose of assisting settlement negotiations.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.4A(j);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) **Disclosure.** The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) **Declaring Impasse.** It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) **Reporting Results of Conference.** The mediator shall report to the Court, or its designee, using an AOC form, within 10 days of the completion of the conference, whether or not an agreement was reached by the parties. If the case is settled or otherwise disposed of prior to the conference, the mediator shall file the report indi-

cating the disposition of the case, the person who informed the mediator that settlement had been reached, and the person who will present final documents to the court.

If an agreement was reached at the conference, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the persons designated to file such consent judgment or dismissals. If partial agreements are reached at the conference, the report shall state what issues remain for trial. The mediator's report shall inform the Court of the absence without permission of any party or attorney from the mediated settlement conference. The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the mediator to provide statistical data in the report for evaluation of the mediated settlement conference program.

Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the court and sanctions.

(5) Scheduling and Holding the Conference. The mediator shall schedule the conference and conduct it prior to the conference completion deadline set out in the Court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless changed by written order of the Court.

(6) Informational Brochure. Before the conference, the mediator shall distribute to the parties or their attorneys a brochure prepared by the Dispute Resolution Commission explaining the mediated settlement conference process and the operations of the Commission.

(7) Evaluation Forms. ~~The mediator shall distribute to the parties and their attorneys at the conference an evaluation form prepared by the Dispute Resolution Commission. All participants are encouraged to fill out and return the forms to the mediator to further the mediator's professional development~~. At the mediated settle-

ment conference, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per party with additional copies distributed upon request. The evaluation is intended for purpose of self-improvement and the mediator shall review returned evaluation forms.

RULE 7. COMPENSATION OF THE MEDIATOR AND SANCTIONS

A. BY AGREEMENT. When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator.

B. BY COURT ORDER. When the mediator is appointed by the Court, the parties shall compensate the mediator for mediation services at the rate of $125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $125, which accrues upon appointment and shall be paid if the case settles prior to the mediated settlement conference or if the court approves the substitution of a mediator selected by the parties for a court appointed mediator.

C. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the parties or ordered by the Court, the mediator's fee shall be paid in equal shares by the parties. Payment shall be due and payable upon completion of the conference.

D. INABILITY TO PAY. No party found by the Court to be unable to pay a full share of a mediator's fee shall be required to pay a full share. Any party required to pay a share of a mediator fee pursuant to Rule 7.B. and C. may move the Court to pay according to the Court's determination of that party's ability to pay.

In ruling on such motions, the Judge may consider the income and assets of the movant and the outcome of the action. The Court shall enter an order granting or denying the party's motion. In so ordering, the Court may require that one or more shares be paid out of the marital estate.

Any mediator conducting a settlement conference pursuant to these rules shall accept as payment in full of a party's share of the mediator's fee that portion paid by or on behalf of the party pursuant to an order of the Court issued pursuant to this rule.

E. POSTPONEMENT FEES. As used herein, the term "postponement" shall mean rescheduling or not proceeding with a settlement conference once a date for the settlement conference has been scheduled by the mediator. After a settlement conference has been scheduled for a specific date, a party may not postpone the conference without good cause. A conference may be postponed only after notice to all parties of the reason for the postponement, payment to the mediator of a postponement fee as provided below or as agreed when the mediator is selected, and consent of the mediator and the opposing attorney.

In cases in which the court appoints the mediator, if a settlement conference is postponed without good cause within seven (7) business days of the scheduled date, the fee shall be $125. If the settlement conference is postponed without good cause within three (3) business days of the scheduled date, the fee shall be $250. Postponement fees shall be paid by the party requesting the postponement unless agreed to by the parties. Postponement fees are in addition to the one-time, per case administrative fee provided for in Rule 7.B.

F. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status or the inability to pay his or her full share of the fee to promptly move the Court for a determination of indigency or the inability to pay a full share, shall ~~subject that party to the contempt power of the court~~ constitute contempt of court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by the court.

DRC COMMENTS TO RULE 7

DRC Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

DRC Comment to Rule 7.C.

If a party is found by the Court to have failed to attend a family financial settlement conference without good cause, then the

Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 7.E.

Though FFS Rule 7.E. provides that mediators "shall" assess the postponement fee, it is understood there may be rare situations where the circumstances occasioning a request for a postponement are beyond the control of the parties, for example, an illness, serious accident, unexpected and unavoidable trial conflict. When the party or parties take steps to notify the mediator as soon as possible in such circumstances, the mediator, may, in his or her discretion, waive the postponement fee.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

DRC Comment to Rule 7.F.

If the Family Financial Settlement Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. FFS Rule 7.F. is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.E. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as family financial mediators. For certification, a person must have complied with the requirements in each of the following sections.

A. Training and Experience.

1. Be an Advanced Practitioner member of the Association for Conflict Resolution who is subject to requirements equiva-

lent to those in effect for Practitioner Members of the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution; or

~~2. Have completed a 40 hour family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9 and have additional experience as an attorney and/or judge of the General Court of Justice for at least four years who is either:~~

2. Be an attorney and/or judge for at least five years who is either:

(a) a member in good standing of the North Carolina State Bar, pursuant to Title 27, N.C. Administrative Code. The N.C. State Bar, Chapter 1, Subchapter A, Section .0201(b) or Section .0201(c)(1), as those rules existed January 1, 2000; or

(b) a member similarly in good standing of the Bar of another state; demonstrates familiarity with North Carolina court structure, legal terminology and civil procedure; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney;

~~Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule.~~

and who has completed either:

(c) a 40 hour family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9; or

(d) a 16 hour supplemental family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9, after having been certified as a Superior Court mediator by that Commission.

B. If not licensed to practice law in one of the United States, have completed a six hour training on North Carolina legal

terminology, court structure and civil procedure provided by a trainer certified by the Dispute Resolution Commission.~~:~~ ; and have observed with the permission of the parties as a neutral observer two mediated settlement conferences ordered by a Superior Court, the North Carolina Office of Administrative Hearings, Industrial Commission or the US District Courts for North Carolina, and conducted by a certified Superior Court mediator.

C. Be a member in good standing of the State Bar of one of the United States as required by Rule 8.A. or have provided to the Dispute Resolution Commission three letters of reference as to the applicant's good character and experience.~~ as required by Rule 8.A.~~

~~D. Have observed with the permission of the parties five mediated settlement conferences as a neutral observer:~~

~~(1) three of which shall be settlement conferences involving custody or family financial issues conducted by a mediator who is certified pursuant to these rules, who is an Advanced Practitioner Member of the Association for Conflict Resolution and subject to requirements equivalent to those in effect for Practitioner Members of the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution, or who is an A.O.C. mediator.~~

~~(2) two of which may be mediated settlement conferences ordered by a Superior Court, the North Carolina Office of Administrative Hearings, Industrial Commission or the US District Courts for North Carolina, and conducted by a certified Superior Court mediator.~~

D. Have observed with the permission of the parties two mediated settlement conferences as a neutral observer which involve custody or family financial issues and which are conducted by a mediator who is certified pursuant to these rules, who is an Advanced Practitioner Member of the Association for Conflict Resolution and subject to requirements equivalent to those in effect for Practitioner Members of the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution, or who is an A.O.C. mediator.

E. Demonstrate familiarity with the statutes, rules, and standards of practice and conduct governing mediated settlement conferences conducted pursuant to these Rules.

F. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. Applicants for certification and recertification and all certified family financial mediators shall report to the Commission any criminal convictions, disbarments or other disciplinary complaints and actions as soon as the applicant or mediator has notice of them. Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule.

G. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission.

H. Pay all administrative fees established by the Administrative Office of the Court in consultation with the Dispute Resolution Commission.

I. Agree to accept as payment in full of a party's share of the mediator's fee as ordered by the Court pursuant to Rule 7.

~~**J.** Agree to be placed on at least one district's mediator appointment list and accept appointments unless the mediator has a conflict of interest which would justify disqualification as mediator.~~

J.K. Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include advanced divorce mediation training, attendance at conferences or seminars relating to mediation skills or process, and consultation with other family and divorce mediators about cases actually mediated. Mediators seeking recertification beyond one year from the date of initial certification may also be required to demonstrate that they have completed 8 hours of family law training, including tax issues relevant to divorce and property distribution, and 8 hours of training in family dynamics, child development and interpersonal relations at any time prior to that recertification.) Mediators shall report on a Commission approved form.

Certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Dispute Resolution

Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

Certification of mediators who have been certified as family financial mediators by the Dispute Resolution Commission prior to the adoption of these Rules may not be revoked or not renewed solely because they do not meet the experience and training requirements in Rule 8.

~~The Dispute Resolution Commission may certify applicants who satisfy the requirements of Rule 8.B. and 8.D. within six (6) months of the adoption of these Rules if they have satisfied, on the date of the adoption of these Rules, all other requirements of Rule 8 as it existed immediately prior to the adoption of these Rules.~~

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators certified pursuant to ~~these rules~~ Rule 8.A.2.(c) shall consist of a minimum of forty hours of instruction. The curriculum of such programs shall include the subjects in each of the following sections:

(1) Conflict resolution and mediation theory.

(2) Mediation process and techniques, including the process and techniques typical of family and divorce mediation.

(3) ~~Knowledge of e~~Communication and information gathering skills.

(4) Standards of conduct for mediators including, but not limited to the Standards of Professional Conduct adopted by the Supreme Court.

(5) Statutes, rules, and practice governing mediated settlement conferences conducted pursuant to these Rules.

(6) Demonstrations of mediated settlement conferences with and without attorneys involved.

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and dis-

putants, which simulations shall be supervised, observed and evaluated by program faculty.

(8) An overview of North Carolina law as it applies to custody and visitation of children, equitable distribution, alimony, child support, and post separation support.

(9) An overview of family dynamics, the effect of divorce on children and adults, and child development.

(10) Protocols for the screening of cases for issues of domestic violence and substance abuse.

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing ~~mediated settlement conferences~~ family financial settlement procedures in North Carolina.

B. Certified training programs for mediators certified pursuant to Rule 8.A.2.(d) shall consist of a minimum of sixteen hours of instruction. The curriculum of such programs shall include the subjects listed in Rule 9.A. There shall be at least two simulations as specified in subsection (7).

~~B.~~C. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states or approved by the Association for Conflict Resolution (ACR) with requirements equivalent to those in effect for the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule. The Dispute Resolution Commission may require attendees of an ACR approved program to demonstrate compliance with the requirements of Rule 9.A.(5) and 9.A.(8). either in the ACR approved training or in some other acceptable course.

~~C.~~D. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts in consultation with the Dispute Resolution Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES.

Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Court may order the use of those procedures listed in Rule 10.B. unless the Court finds: that the parties did not agree upon the procedure to be utilized, the neutral to conduct it, or the neutral's compensation; or that the procedure selected is not appropriate for the case or the parties. Judicial settlement conferences may be ordered only if permitted by local rule.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES.

In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) **Neutral Evaluation** (Rule 11), in which a neutral offers an advisory evaluation of the case following summary presentations by each party.

(2) **Judicial Settlement Conference** (Rule 12), in which a District Court Judge assists the parties in reaching their own settlement, if allowed by local rules.

(3) **Other Settlement Procedures** described and authorized by local rule pursuant to Rule 13.

The parties may agree to use arbitration under the Family Law Arbitration Act (G.S. 50-41 et seq.) which shall constitute good cause for the court to dispense with settlement procedures authorized by these rules (Rule 1.C.6).

C. General Rules Applicable to Other Settlement Procedures.

(1) **When Proceeding is Conducted.** The neutral shall schedule the conference and conduct it no later than 150 days from the issuance of the Court's order or no later than the deadline for completion set out in the Court's order, unless extended by the Court. The neutral shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the neutral shall select a date and time for the conference. Deadlines for completion of the confer-

ence shall be strictly observed by the neutral unless changed by written order of the Court.

(2) **Extensions of Time.** A party or a neutral may request the Court to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. The Court may grant the extension and enter an order setting a new deadline for completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(3) **Where Procedure is Conducted.** Settlement proceedings shall be held in any location agreeable to the parties. If the parties cannot agree to a location, the neutral shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

(4) **No Delay of Other Proceedings.** Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

(5) **Inadmissibility of Settlement Proceedings.** Evidence of statements made and conduct occurring in a settlement proceeding conducted under this section shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim, except in proceedings for sanctions or proceedings to enforce a settlement of the action. No settlement agreement reached at a settlement proceeding conducted pursuant to these Rules shall be enforceable unless it has been reduced to writing and signed by the parties and in all other respects complies with the requirements of Chapter 50 of the General Statutes. However, no evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, or other neutral conducting a settlement proceeding under this section, shall be compelled to tes-

tify or produce evidence concerning statements made and conduct occurring in a mediated settlement conference or other settlement procedure in any civil proceeding for any purpose, including proceedings to enforce a settlement of the action, except to attest to the signing of any of these agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators, and proceedings to enforce laws concerning juvenile or elder abuse.

(6) No Record Made. There shall be no stenographic or other record made of any proceedings under these Rules.

(7) Ex Parte Communication Prohibited. Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(8) Duties of the Parties.

(a) Attendance. All parties and attorneys shall attend other settlement procedures authorized by Rule 10 and ordered by the Court.

(b) Finalizing Agreement. If agreement is reached during the proceeding, the essential terms of the agreement shall be reduced to writing as a summary memorandum unless the parties have reduced their agreement to writing, signed it and in all other respects have complied with the requirements of Chapter 50 of the General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to its terms. Within 30 days of the proceeding, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate.

(c) Payment of Neutral's Fee. The parties shall pay the neutral's fee as provided by Rule 10.C.(12), except that no payment shall be required or paid for a judicial settlement conference.

(9) Sanctions for Failure to Attend Other Settlement Procedures. If any person required to attend a settlement proceeding fails to attend without good cause, the Court may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, neutral fees, expenses and loss of earnings incurred by persons attending the conference.

A party to the action, or the Court on its own motion, seeking sanctions against a party or attorney, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

(10) Selection of Neutrals in Other Settlement Procedures.

Selection By Agreement. The parties may select any person whom they believe can assist them with the settlement of their case to serve as a neutral in any settlement procedure authorized by these rules, except for judicial settlement conferences.

Notice of such selection shall be given to the Court and to the neutral through the filing of a motion to authorize the use of other settlement procedures at the scheduling conference or the court appearance when settlement procedures are considered by the Court. The notice shall be on an AOC form as set out in Rule 2 herein. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

If the parties are unable to select a neutral by agreement, then the Court shall deny the motion for authorization to use another settlement procedure and the court shall order the parties to attend a mediated settlement conference.

(11) Disqualification of Neutrals. Any party may move a Court of the district in which an action is pending for an order disqualifying the neutral; and, for good cause, such

order shall be entered. Cause shall exist, but is not limited to circumstances where, if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) Compensation of Neutrals. A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time. The parties shall not compensate a settlement judge.

(13) Authority and Duties of Neutrals.

(a) Authority of Neutrals.

(i) Control of Proceeding. The neutral shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the Proceeding. The neutral shall make a good faith effort to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral. In the absence of agreement, the neutral shall select the date and time for the proceeding. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(b) Duties of Neutrals.

(i) The neutral shall define and describe the following at the beginning of the proceeding:

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(l) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral and the participants;

(ii) Disclosure. The neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(iii) Reporting Results of the Proceeding. The neutral shall report the result of the proceeding to the Court in writing within ten (10) days in accordance with the provisions of Rules 11, 12 and 13 herein on an AOC form. The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the neutral to provide statistical data for evaluation of other settlement procedures.

(iv) Scheduling and Holding the Proceeding. It is the duty of the neutral to schedule the proceeding and conduct it prior to the completion deadline set out in the Court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral unless said time limit is changed by a written order of the Court.

Rule 11. RULES FOR NEUTRAL EVALUATION

A. NATURE OF NEUTRAL EVALUATION. Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of the merits of the case, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case, after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. PRE-CONFERENCE SUBMISSIONS. No later than twenty (20) days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evalua-

tor with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Court.

D. REPLIES TO PRE-CONFERENCE SUBMISSIONS. No later than ten (10) days prior to the date established for the neutral evaluation conference to begin, any party may, but is not required to, send additional written information to the evaluator responding to the submission of an opposing party. The response furnished to the evaluator shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator, if he or she deems it necessary, may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) Evaluator's Opening Statement. At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The facts that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the parties.

(2) **Oral Report to Parties by Evaluator.** In addition to the written report to the Court required under these rules, at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of the merits of the case, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefor. The evaluator shall not reduce his or her oral report to writing and shall not inform the Court thereof.

(3) **Report of Evaluator to Court.** Within ten (10) days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, whether or not an agreement was reached by the parties, and the name of the person designated to file judgments or dismissals concluding the action.

H. **EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS.** If all parties at the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions. If the parties do not reach a settlement during such discussions, however, the evaluator shall complete the neutral evaluation conference and make his or her written report to the Court as if such settlement discussions had not occurred. If the parties reach agreement at the conference, they shall reduce their agreement to writing as required by Rule 10.C.(8)(b).

RULE 12. JUDICIAL SETTLEMENT CONFERENCE

A. **Settlement Judge.** A judicial settlement conference shall be conducted by a District Court Judge who shall be selected by the Chief District Court Judge. Unless specifically approved by the Chief District Court Judge, the District Court Judge who presides over the judicial settlement conference shall not be assigned to try the action if it proceeds to trial.

B. **Conducting the Conference.** The form and manner of conducting the conference shall be in the discretion of the settle-

ment judge. The settlement judge may not impose a settlement on the parties but will assist the parties in reaching a resolution of all claims.

C. **Confidential Nature of the Conference.** Judicial settlement conferences shall be conducted in private. No stenographic or other record may be made of the conference. Persons other than the parties and their counsel may attend only with the consent of all parties. The settlement judge will not communicate with anyone the communications made during the conference, except that the judge may report that a settlement was reached and, with the parties' consent, the terms of that settlement.

D. **Report of Judge.** Within ten (10) days after the completion of the judicial settlement conference, the settlement judge shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, whether or not an agreement was reached by the parties, and the name of the person designated to file judgments or dismissals concluding the action.

RULE 13. LOCAL RULE MAKING

The Chief District Court Judge of any district conducting settlement procedures under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.4, implementing settlement procedures in that district.

RULE 14. DEFINITIONS

(A) The word, Court, shall mean a judge of the District Court in the district in which an action is pending who has administrative responsibility for the action as an assigned or presiding judge, or said judge's designee, such as a clerk, trial court administrator, case management assistant, judicial assistant, and trial court coordinator.

(B) The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by AOC. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

(C) The term, Family Financial Case, shall refer to any civil action in district court in which a claim for equitable distribution, child support, alimony, or post separation support is made, or in which there are claims arising out of contracts between the parties under GS 50-20(d), 52-10, 52-10.1 or 52B.

RULE 15. TIME LIMITS

Any time limit provided for by these rules may be waived or extended for good cause shown. Time shall be counted pursuant to the Rules of Civil Procedure.

In the Supreme Court of North Carolina

Order Adopting Amendments to the Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions

WHEREAS, section 7A-38.1 of the North Carolina General Statutes establishes a program in superior court to provide for settlement procedures to expedite settlement of superior court civil actions, and

WHEREAS, N.C.G.S. 7A-38.1(c) provides for this Court to implement section 7A-38.1 by adopting rules and amendments to rules

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.1(c), Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions are hereby amended to read as in the following pages. These amended Rules shall be effective on the 21st of November, 2002.

Adopted by the Court in conference the 21st day of November, 2002. The Appellate Division Reporter shall publish the Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions in their entirety, as amended through this action, at the earliest practicable date.

Butterfield, J.
For the Court

REVISED RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

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RULE 1. INITIATING SETTLEMENT EVENTS

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.

Pursuant to G.S. 7A-38.1, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules.~~, including binding or non-binding arbitration as permitted by law [see, for example, N.C.G.S. § 7A-37.1, Arb. Rule1(b).]~~

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent any party to a superior court case, shall advise his or her client(s) regarding the settlement procedures approved by these Rules and shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

~~B~~.C. INITIATING THE MEDIATED SETTLEMENT CONFERENCE IN EACH ACTION BY COURT ORDER.

(1) **Order by Senior Resident Superior Court Judge.** The Senior Resident Superior Court Judge of any judicial district may, by written order, require all persons and entities entified in Rule 4 to attend a pre-trial mediated settlement conference in a ~~any~~ civil action except an action in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license.

(2) **Motion to authorize the use of other settlement procedures.** The parties may move the Senior Resident Superior Court Judge to authorize the use of some other settlement procedure allowed by these rules or by local rule in lieu of a mediated settlement conference, as provided in G.S. 7A-38.1(i). Such motion shall be filed within 21 days of the order requiring a mediated settlement conference on an AOC form, and shall include:

(a) the type of other settlement procedure requested;

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral;

(d) that the neutral and opposing counsel have agreed upon the selection and compensation of the neutral selected;

(e) that all parties consent to the motion.

If the parties are unable to agree to each of the above, then the Senior Resident Superior Court Judge shall deny the motion and the parties shall attend the mediated settlement conference as originally ordered by the Court. Otherwise, the court may order the use of any agreed upon settlement procedures authorized by Rules 10-12 herein or by local rules of the Superior Court in the county or district where the action is pending.

~~(2)~~(3) **Timing of the order.** The Senior Resident Superior Court Judge shall issue the order requiring a mediated settlement conference as soon as practicable after the time for the filing of answers

has expired. Rules 1.C.(4) ~~B.(3)~~ and 3.B. herein shall govern the content of the order and the date of completion of the conference.

~~(3)~~(4) **Content of order.** The court's order shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on an AOC form.

~~(4)~~(5) **Motion for court ordered mediated settlement conference.** In cases not ordered to mediated settlement conference, any party may file a written motion with the Senior Resident Superior Court Judge requesting that such conference be ordered. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections to the motion may be filed in writing with the Senior Resident Superior Court Judge within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

~~(5)~~(6) **Motion to dispense with mediated settlement conference.** A party may move the Senior Resident Superior Court Judge to dispense with the mediated settlement conference ordered by the Judge. Such motion shall state the reasons the relief is sought. For good cause shown, the Senior Resident Superior Court Judge may grant the motion.

~~(6) **Motion to authorize the use of other settlement procedures.** A party may move the Senior Resident Superior Court Judge to authorize the use of some other settlement procedure in lieu of a mediated settlement conference. Such motion shall state the reasons the authorization is~~

~~requested and that all parties consent to the motion. The Court may order the use of any agreed upon settlement procedure authorized by Supreme Court or local rules. The deadline for completion of the authorized settlement procedure shall be as provided by rules authorizing said procedure or, if none, the same as ordered for the mediated settlement conference.~~

~~C.~~D. INITIATING THE MEDIATED SETTLEMENT CONFERENCE BY LOCAL RULE.

(1) **Order by local rule.** In judicial districts in which a system of scheduling orders or scheduling conferences is utilized to aid in the administration of civil cases, the Senior Resident Superior Court Judge of said districts may, by local rule, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in any civil action except an action in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license.

(2) **Scheduling orders or notices.** In judicial districts in which scheduling orders or notices are utilized to manage civil cases and for all cases ordered to mediated settlement conference by local rule, said order or notice shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(3) **Scheduling conferences.** In judicial districts in which scheduling conferences are utilized to manage civil cases and for cases ordered to mediated settlement conferences by local rule, the notice for said scheduling conference shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to

select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(4) **Application of Rule 1.C.** The provisions of Rule 1.C.(2), (5) and (6) shall apply to Rule 1.D. except for the time limitations set out therein.

(5) **Deadline for completion.** The provisions of Rule 3.B. determining the deadline for completion of the mediated settlement conference shall not apply to mediated settlement conferences conducted pursuant to Rule 1.D. The deadline for completion shall be set by the Senior Resident Superior Court Judge or designee at the scheduling conference or in the scheduling order or notice, whichever is applicable. However, the completion deadline shall be well in advance of the trial date.

(6) **Selection of mediator.** The parties may select and nominate, or the Senior Resident Superior Court Judge may appoint, mediators pursuant to the provisions of Rule 2., except that the time limits for selection, nomination, and appointment shall be set by local rule. All other provisions of Rule 2. shall apply to mediated settlement conferences conducted pursuant to Rule 1.D.

(7) **Use of other settlement procedures.** The parties may utilize other settlement procedures pursuant to the provisions of Rule 1.C.(2) and Rule 10. However, the time limits and method of moving the court for approval to utilize another settlement procedure set out in those rules shall not apply and shall be governed by local rule.

RULE 2. SELECTION OF MEDIATOR

A. SELECTION OF CERTIFIED MEDIATOR BY AGREEMENT OF ~~THE~~ PARTIES. The parties may select a mediator certified pursuant to these Rules by agreement within 21 days of the court's order. The plaintiff's attorney shall file with the court a Notice of Selection of Mediator by

Agreement within 21 days of the court's order, however, any party may file the notice. Such notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on an AOC form.

B. NOMINATION AND COURT APPROVAL OF A NON-CERTIFIED MEDIATOR. The parties may select a mediator who does not meet the certification requirements of these Rules but who, in the opinion of the parties and the Senior Resident Superior Court Judge, is otherwise qualified by training or experience to mediate the action and who agrees to mediate indigent cases without pay.

If the parties select a non-certified mediator, the plaintiff's attorney shall file with the court a Nomination of Non-Certified Mediator within 21 days of the court's order. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and opposing counsel have agreed upon the selection and rate of compensation.

The Senior Resident Superior Court Judge shall rule on said nomination without a hearing, shall approve or disapprove of the parties' nomination and shall notify the parties of the court's decision. The nomination and approval or disapproval of the court shall be on an AOC form.

C. APPOINTMENT OF MEDIATOR BY THE COURT. If the parties cannot agree upon the selection of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the Senior Resident Superior Court Judge appoint a mediator. The motion must be filed within 21 days after the court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall be on an AOC form. ~~The motion shall state whether any party prefers a certified attorney mediator, and if so, the Senior Resident Judge shall appoint a certified attorney mediator. The motion may state that all parties prefer a certified, non attorney mediator, and if so, the Senior Resident Judge shall appoint a certified non-~~

~~attorney mediator if one is on the list of certified mediators desiring to mediate cases in the district. If no preference is expressed, the Senior Resident Judge may appoint a certified attorney mediator or certified non-attorney mediator.~~

Upon receipt of a motion to appoint a mediator, or in the event the plaintiff's attorney has not filed a Notice of Selection or Nomination of Non-Certified Mediator with the court within 21 days of the court's order, the Senior Resident Superior Court Judge shall appoint a mediator, certified pursuant to these Rules, under a procedure established by said Judge and set out in Local Rules ~~or other written document~~. Only mediators who agree to mediate indigent cases without pay shall be appointed.

The Dispute Resolution Commission shall furnish for the consideration of ~~the~~ Senior Resident Superior Court Judge(s) ~~of any district where mediated settlement conferences are authorized to be held, the names, addresses and phone numbers of those certified mediators who want to be appointed in said district~~ a list of those certified superior court mediators who request appointments in said district. Said list shall contain the mediators' names, addresses and telephone numbers and shall be provided in writing or on the Commission's web site.

D. MEDIATOR INFORMATION DIRECTORY. To assist the parties in the selection of a mediator by agreement, the Senior Resident Superior Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all certified mediators who wish to mediate cases in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Superior Court in such county.

E. DISQUALIFICATION OF MEDIATOR. Any party may move the Senior Resident Superior Court Judge of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. WHERE CONFERENCE IS TO BE HELD. Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the courthouse or other public or community building in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

The court's order issued pursuant to Rule 1.C.(1) shall state a deadline for completion for the conference which shall be not less than 120 days nor more than 180 days after issuance of the court's order. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION. A party, or the mediator, may request the Senior Resident Superior Court Judge to extend the deadline for completion of the conference. Such request shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the request, said party shall promptly communicate its objection to the office of the Senior Resident Superior Court Judge.

The Senior Resident Superior Court Judge may grant the request by setting a new deadline for the completion of the conference, which date may be set at any time prior to trial. Notice of the Judge's action shall be served immediately on all parties and the mediator by the person who sought the extension and shall be filed with the court.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other pro-

ceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) **Parties.**

(i) All individual parties.

(ii) Any party that is not a natural person or a governmental entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action;

(iii) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

(b) **Insurance company representatives.** A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each such carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of such carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

(c) Attorneys. At least one counsel of record for each party or other participant, whose counsel has appeared in the action.

(2) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.C. or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(a) By agreement of all parties and persons required to attend and the mediator; or

(b) By order of the Senior Resident Superior Court Judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.

B. **NOTIFYING LIEN HOLDERS.** Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify said lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request said lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.

C. **FINALIZING AGREEMENT.** If an agreement is reached ~~in~~ at the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

D. **PAYMENT OF MEDIATOR'S FEE.** The parties shall pay the mediator's fee as provided by Rule 7.

E. **RELATED CASES.** Upon application by any party or person, the Senior Resident Superior Court Judge may order that an attorney of record or a party in a pending Superior Court Case or a representative of an insurance carrier that may be liable for all or any part of a claim pending in Superior Court shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance

ordered pursuant to this rule. Any such attorney, party or carrier representative that properly attends a mediation conference pursuant to this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issues concerning an order entered pursuant to this rule shall be determined by the Senior Resident Superior Court Judge who entered the order.

DRC COMMENTS TO RULE 4

DRC Comment to Rule 4.C.

N.C.G.S. § 7A-38.1(1) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

DRC Comment to Rule 4.E.

Rule 4.E. was adopted to clarify a Senior Resident Superior Court Judge's authority in those situations where there may be a case related to a Superior Court case pending in a different forum. For example, it is common for there to be claims asserted against a third-party tortfeasor in a Superior Court case at the same time that there are related workers' compensation claims being asserted in an Industrial Commission case. Because of the related nature of such claims, the parties in the Industrial Commission case may need an attorney of record, party, or insurance carrier representative in the Superior Court case to attend the Industrial Commission mediation conference in order to resolve the pending claims in that case. Rule 4.E. specifically authorizes a Senior Resident Superior Court Judge to order such attendance provided that all parties in the related Industrial Commission case consent and the persons ordered to attend receive reasonable notice. The Industrial Commission's Rules for Mediated Settlement and Neutral Evaluation Conferences contain a similar provision ~~which~~ that provides that persons involved in an Industrial Commission case may be ordered to attend a mediation conference in a related Superior Court Case.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES. If a party or other person required to attend a mediated settlement conference fails to attend without good cause, ~~the Senior Resident Superior Court Judge~~ a resident or presiding Superior Court Judge, may impose upon the party or person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law. (See also Rule 7.~~F~~G. and the Comment to Rule 7.~~F~~G.)

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) **Control of conference.** The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) **Private consultation.** The mediator may communicate privately with any participant or counsel prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(3) **Scheduling the conference.** The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1;

(h) The duties and responsibilities of the mediator and the participants; and

(i) That any agreement reached will be reached by mutual consent.

(2) **Disclosure.** The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) **Declaring impasse.** It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) **Reporting results of conference.** The mediator shall report to the court on an AOC form within 10 days of the conference whether or not an agreement was reached by the parties. If an agreement was reached, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the person designated to file such consent judgment or dismissals. The mediator's report also shall inform the court of the absence of any party, attorney, or insurance representative known to the mediator to have been absent from the mediated settlement conference without permission. The Dispute Resolution Commission or the Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the Mediated Settlement Conference Program.

(5) **Scheduling and holding the conference.** It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. The mediator shall make an effort to

schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

(6) **Distribution of mediator evaluation form.** At the mediated settlement conference, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per party with additional copies distributed upon request. The evaluation is intended for purposes of self-improvement and the mediator shall review returned evaluation forms.

RULE 7. COMPENSATION OF THE MEDIATOR

A. **BY AGREEMENT.** When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. **BY COURT ORDER.** When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $125 that is due upon appointment.

C. **CHANGE OF APPOINTED MEDIATOR.** Pursuant to Rule 2.A., the parties have twenty-one (21) days to select a mediator. Parties who fail to select a mediator within that time frame and then desire a substitution after the court has appointed a mediator, shall obtain court approval for the substitution. If the court approves the substitution, the parties shall pay the court's original appointee the $125 one time, per case administrative fee provided for in Rule 7.B.

D. **INDIGENT CASES.** No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the Senior Resident Superior Court Judge for a finding of indigence and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, sub-

sequent to the trial of the action. In ruling upon such motions, the Judge shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

E. POSTPONEMENT FEES. As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for the settlement conference has been agreed upon and scheduled by the parties and the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference. A conference may be postponed only after notice to all parties of the reason for the postponement, payment of a postponement fee to the mediator, and consent of the mediator and the opposing attorney. If a mediation is postponed within seven (7) business days of the scheduled date, the fee shall be $125. If the settlement conference is postponed within three (3) business days of the scheduled date, the fee shall be $250. Postponement fees shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

F. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the conference.

G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the Senior Resident Superior Court Judge for a finding of indigency, shall constitute contempt of court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by a Resident or Presiding Superior Court Judge.

DRC COMMENTS TO RULE 7

DRC Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

DRC Comment to Rule 7.E.

Though MSC Rule 7.E. provides that mediators "shall" assess the postponement fee, it is understood there may be rare situations where the circumstances occasioning a request for a postponement are beyond the control of the parties, for example, an illness, serious accident, unexpected and unavoidable trial conflict. When the party or parties take steps to notify the mediator as soon as possible in such circumstances, the mediator, may, in his or her discretion, waive the postponement fee.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

DRC Comment to Rule 7.F.

If a party is found by a Senior Resident Superior Court Judge to have failed to attend a mediated settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 7.G.

If the Mediated Settlement Conference Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. MSC Rule 7.G. is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.E. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as Superior Court mediators. For certification, a person shall:

A. Have completed a minimum of 40 hours in a t~~T~~rial c~~C~~ourt m~~M~~ediation t~~T~~raining p~~P~~rogram certified by the Dispute Resolution Commission~~;~~, or have completed a 16 hour supplemental trial court mediation training certified by the Commission after having been certified by the Commission as a family financial mediator;

B. Have the following training, experience and qualifications:

(1) An attorney may be certified if he or she:

(a) is either:

(i) a member in good standing of the North Carolina State Bar, pursuant to Title 27, N.C. Administrative Code, The N.C. State Bar, Chapter 1, Subchapter A, Section .0201(b) or Section .0201(c)(1), as those rules existed January 1, 2000, or

(ii) a member similarly in good standing of the Bar of another state; demonstrates familiarity with North Carolina court structure, legal terminology and civil procedure; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney; and

(b) has at least five years of experience as a judge, practicing attorney, law professor and/or mediator, or equivalent experience.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule 8.B.(1) or Rule 8.B.(2).

(2) A non-attorney may be certified if he or she has completed the following:

(a) a six hour training on North Carolina court organization, legal terminology, civil court proce-

dure, the attorney-client privilege, the unauthorized practice of law, and common legal issues arising in Superior Court cases, provided by a trainer certified by the Dispute Resolution Commission;

(b) provide to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's experience claimed in Rule 8.B.(2)(c);

(c) one of the following; (i) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Dispute Resolution Commission; and after completing the 20 hour training, mediating at least 30 disputes, over the course of at least three years, or equivalent experience, and either a four year college degree or four years of management or administrative experience in a professional, business, or governmental entity; or (ii) ten years of management or administrative experience in a professional, business, or governmental entity.

(d) Observe three mediated settlement conferences meeting the requirements of Rule 8.C. conducted by at least two different certified mediators, in addition to those required by Rule 8.C.

C. Observe two mediated settlement conferences conducted by a certified Superior Court mediator;

(1) at least one of which must be court ordered by a Superior Court,

(2) the other may be a mediated settlement conference conducted under rules and procedures substantially similar to those set out herein, in cases pending in the North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, North Carolina Superior Court or the United States District Courts for North Carolina.

D. Demonstrate familiarity with the statute, rules, and practice governing mediated settlement conferences in North Carolina;

E. Be of good moral character and adhere to any ~~ethical~~ standards ~~hereafter~~ of practice for mediators acting pursuant to these Rules adopted by the~~is~~ Supreme Court. Applicants for certification and re-certification and all certified Superior Court mediators shall report to the Commission any criminal convictions, disbarments or other disciplinary complaints and actions as soon as the applicant or mediator has notice of them;

F. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission;

G. Pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission; ~~and~~

H. Agree to ~~mediate indigent cases without pay.; and~~ accept as payment in full of a party's share of the mediator's fee, the fee ordered by the Court pursuant to Rule 7;

I. Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include completion of training or self-study designed to improve a mediator's communication, negotiation, facilitation or mediation skills; completion of observations; service as a mentor to a less experienced mediator; being mentored by a more experienced mediator; or serving as a trainer. Mediators shall report on a Commission approved form.)

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators ~~of Superior Court civil actions~~ seeking only certification as Superior Court mediators shall consist of a minimum of 40 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of trial court mediation;

(3) Communication and information gathering skills.

~~(3)~~(4) Standards of conduct for mediators including, but not limited to the Standards of Professional Conduct adopted by the Supreme Court;

~~(4)~~(5) Statutes, rules, and practice governing mediated settlement conferences in North Carolina;

~~(5)~~(6) Demonstrations of mediated settlement conferences;

~~(6)~~(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

~~(7)~~(8) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

B. Certified training programs for mediators who are already certified as family financial mediators shall consist of a minimum of sixteen hours. The curriculum of such programs shall include the subjects in Rule 9.A. and discussion of the mediation and culture of insured claims. There shall be at least two simulations as specified in subsection (7).

~~B.~~C. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.

~~C.~~D. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. **ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES.** Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Senior Resident Superior Court Judge may order the use of the procedure requested under these rules or under local rules unless the court finds that the parties did not agree upon all of the relevant details of the procedure, (including items a-e in Rule 1.C.(2)); or that for good cause, the selected procedure is not appropriate for the case or the parties.

B. **OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES.** In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) **Neutral Evaluation (Rule 11).** Neutral evaluation in which a neutral offers an advisory evaluation of the case following summary presentations by each party.

(2) **Arbitration (Rule 12).** Non-Binding Arbitration, in which a neutral renders an advisory decision following summary presentations of the case by the parties and Binding Arbitration, in which a neutral renders a binding decision following presentations by the parties.

(3) **Summary Trials (Jury or Non-Jury) (Rule 13).** Non-binding summary trials, in which a privately procured jury or presiding officer renders an advisory verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer; and binding summary trials, in which a privately procured jury or presiding officer renders a binding verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer.

C. **GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.**

(1) **When proceeding is conducted.** Other settlement procedures ordered by the court pursuant to these rules shall be conducted no later than the date of completion set out in the court's original mediated settlement conference order unless extended by the Senior Resident Superior Court Judge.

(2) Authority and duties of neutrals.

(a) Authority of neutrals.

(i) Control of proceeding. The neutral shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the proceeding. The neutral shall attempt to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral. In the absence of agreement, the neutral shall select the date for the proceeding.

(b) Duties of neutrals.

(i) The neutral shall define and describe the following at the beginning of the proceeding.

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The inadmissibility of conduct and statements as provided by G. S 7A-38.1(l) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral and the participants.

(ii) Disclosure. The neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice, or partiality.

(iii) Reporting results of the proceeding. The neutral shall report the result of the proceeding to the court in writing in accordance with the provisions of Rules 11 and 12, herein, on an AOC form. The Administrative Office of the Courts may require the neutral to provide statistical data for evaluation of other settlement procedures on forms provided by it.

(iv) Scheduling and holding the proceeding. It is the duty of the neutral to schedule the proceeding and conduct it prior to the completion

deadline set out in the court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

(3) **Extensions of time.** A party or a neutral may request the Senior Resident Superior Court Judge to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. If the court grants the motion for an extension, this order shall set a new deadline for the completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(4) **Where procedure is conducted.** The neutral shall be responsible for reserving a place agreed to by the parties, setting a time, and making other arrangements for the proceeding, and for giving timely notice to all attorneys and unrepresented parties in writing of the time and location of the proceeding.

(5) **No delay of other proceedings.** Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

(6) **Inadmissibility of settlement proceedings.** Evidence of statements made and conduct occurring in a settlement proceeding shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim, except in proceedings for sanctions or proceedings to enforce a settlement of the action. However, no evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No neutral shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a settlement proceeding in any civil proceeding for any purpose, including proceedings to enforce a settlement of the action, except to attest to the signing of any such agreements, and except proceedings for sanc-

tions under this section, disciplinary proceedings of the State Bar, disciplinary proceedings of any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(7) **No record made.** There shall be no record made of any proceedings under these Rules unless the parties have stipulated to binding arbitration or binding summary trial in which case any party after giving adequate notice to opposing parties may record the proceeding.

(8) **Ex parte communication prohibited.** Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(9) **Duties of the parties.**

(a) **Attendance.** All persons required to attend a mediated settlement conference pursuant to Rule 4 shall attend any other settlement procedure which is non-binding in nature, authorized by these rules, and ordered by the court except those persons to whom the parties agree and the Senior Resident Superior Court judge excuses. Those persons required to attend other settlement procedures which are binding in nature, authorized by these rules, and ordered by the court shall be those persons to whom the parties agree.

Notice of such agreement shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the Order requiring a mediated settlement conference. The notice shall be on an AOC form.

(b) **Finalizing agreement.** If an agreement is reached in the proceeding, the parties to the agreement shall reduce its terms to writing, and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. A consent judgment or one or more voluntary dismissals shall be filed

with the court by such persons as the parties shall designate.

(c) **Payment of neutral's fee.** The parties shall pay the neutral's fee as provided by Rule 10.C.(12).

(10) **Selection of neutrals in other settlement procedures.** The parties may select any individual to serve as a neutral in any settlement procedure authorized by these rules. For arbitration, the parties may select either a single arbitrator or a panel of arbitrators. Notice of such selection shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the Order requiring a mediated settlement conference.

The notice shall be on an AOC form. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

(11) **Disqualification.** Any party may move a Resident or Presiding Superior Court Judge of the district in which an action is pending for an order disqualifying the neutral; and for good cause, such order shall be entered. Cause shall exist if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) **Compensation of the neutral.** A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparing for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time.

Unless otherwise ordered by the court or agreed to by the parties, the neutral's fees shall be paid in equal shares by the parties. For purposes of this section, multiple parties shall be considered one party when they are represented by the same counsel. The presiding officer and jurors in a summary jury trial are neutrals within the meaning of these Rules and shall be compensated by the parties.

(13) Sanctions for failure to attend other settlement procedures. If any person required to attend a settlement procedure fails to attend without good cause, a Resident or Presiding Judge may impose upon the person any appropriate monetary sanction including but not limited to, the payment of fines, reimbursement of a party's attorney fees, expenses, and share of the neutral's fee and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against a person, or a Resident or Presiding Judge upon his/her own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

RULE 11. RULES FOR NEUTRAL EVALUATION

A. NATURE OF NEUTRAL EVALUATION. Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing candid assessment of liability, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. PRE-CONFERENCE SUBMISSIONS. No later than twenty (20) days prior the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the

party's case, shall not be more than five (5) pages in length, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Court.

D. **REPLIES TO PRE-CONFERENCE SUBMISSIONS.** No later than ten (10) days prior to the date established for the neutral evaluation conference to begin any party may, but is not required to, send additional written information not exceeding three (3) pages in length to the evaluator, responding to the submission of an opposing party. The response shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Court.

E. **CONFERENCE PROCEDURE.** Prior to a neutral evaluation conference, the evaluator may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. **MODIFICATION OF PROCEDURE.** Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. **EVALUATOR'S DUTIES.**

(1) **Evaluator's opening statement.** At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The fact that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the Parties.

(2) **Oral report to parties by evaluator.** In addition to the written report to the Court required under these rules, at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of liability, estimated

settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefore. The evaluator shall not reduce his or her oral report to writing, and shall not inform the Court thereof.

(3) **Report of evaluator to court.** Within ten (10) days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, whether or not an agreement was reached by the parties and the name of the person designated to file judgments or dismissals concluding the action.

H. **EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS.** If all parties to the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions.

I. **FINALIZING AGREEMENT.** If before the conclusion of the neutral evaluation conference and the evaluator's report to the Court the parties are able to reach a settlement of their claims, the parties shall reduce the agreement to writing and sign it along with their counsel. A consent judgment or one or more voluntary dismissals shall be filed with the Court by such persons as the parties shall designate.

RULE 12. RULES FOR ARBITRATION

In this form of settlement procedure the parties select an arbitrator who shall hear the case and enter an advisory decision. The arbitrator's decision is made to facilitate the parties' negotiation of a settlement and is non-binding, unless neither party timely requests a trial *de novo*, in which case the decision is entered by the Senior Resident Superior Court Judge as a judgment, or the parties agree that the decision shall be binding.

A. **ARBITRATORS.**

(1) **Arbitrator's Canon of Ethics.** Arbitrators shall comply with the Canons of Ethics for Arbitrators promulgated by the Supreme Court of North Carolina. Arbitrators shall be disqualified and must recuse themselves in accordance with the Canons.

B. EXCHANGE OF INFORMATION.

(1) Pre-hearing exchange of information. At least 10 days before the date set for the arbitration hearing the parties shall exchange in writing:

(a) Lists of witnesses they expect to testify.

(b) Copies of documents or exhibits they expect to offer into evidence.

(c) A brief statement of the issues and contentions of the parties.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing. Each party shall bring to the hearing and provide to the arbitrator a copy of these materials. These materials shall not be filed with the court or included in the case file.

(2) Exchanged documents considered authenticated. Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian, or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(3) Copies of exhibits admissible. Copies of exchanged documents or exhibits are admissible in arbitration hearings, in lieu of the originals.

C. ARBITRATION HEARINGS.

(1) Witnesses. Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(2) Subpoenas. Rule 45 of the North Carolina Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

(3) **Motions.** Designation of an action for arbitration does not affect a party's right to file any motion with the court.

(a) The court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in the award. Parties shall state their contentions regarding pending motions referred to the arbitrator in the exchange of information required by Rule 12.B.(1).

(b) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the court so orders.

(4) **Law of evidence used as guide.** The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.

(5) **Authority of arbitrator to govern hearings.** Arbitrators shall have the authority of a trial Judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all matters involving contempt to the Senior Resident Superior Court Judge.

(6) **Conduct of hearing.** The arbitrator and the parties shall review the list of witnesses, exhibits and written statements concerning issues previously exchanged by the parties pursuant to Rule 12.B.(1), above. The order of the hearing shall generally follow the order at trial with regard to opening statements and closing arguments of counsel, direct and cross examination of witnesses and presentation of exhibits. However, in the arbitrator's discretion the order may be varied.

(7) **No Record of hearing made.** No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(8) **Parties must Be present at hearings; Representation.** Subject to the provisions of Rule 10.C.(9), all parties shall be present at hearings in person or through representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbi-

trator. All parties may be represented by counsel. Parties may appear *pro se* as permitted by law.

(9) Hearing concluded. The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments the arbitrator permits have been completed. In exceptional cases, the arbitrator has discretion to receive post-hearing briefs, but not evidence, if submitted within three days after the hearing has been concluded.

D. THE AWARD.

(1) Filing the award. The award shall be in writing, signed by the arbitrator and filed with the Clerk of the Superior Court in the County where the action is pending, with a copy to the Senior Resident Superior Court Judge within twenty (20) days after the hearing is concluded or the receipt of post-hearing briefs, whichever is later. An award form, which shall be an AOC form, shall be used by the arbitrator as its report to the court and may be used to record its award.

(2) Findings; Conclusions; Opinions. No findings of fact and conclusions of law or opinions supporting an award are required.

(3) Scope of award. The award must resolve all issues raised by the pleadings, may be in any amount supported by the evidence, shall include interest as provided by law, and may include attorney's fees as allowed by law.

(4) Costs. The arbitrator may include in an award court costs accruing through the arbitration proceedings in favor of the prevailing party.

(5) Copies of award to parties. The arbitrator shall deliver a copy of the award to all of the parties or their counsel at the conclusion of the hearing or the arbitrator shall serve the award after filing. A record shall be made by the arbitrator of the date and manner of service.

E. TRIAL DE NOVO.

(1) Trial *de novo* as of right. Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial *de novo* as of right upon filing a written demand for trial *de novo* with the court, and service of the demand on all

parties, on an AOC form within 30 days after the arbitrator's award has been served. Demand for jury trial pursuant to N.C.R.Civ.P. 38(b) does not preserve the right to a trial *de novo*. A demand by any party for a trial *de novo* in accordance with this section is sufficient to preserve the right of all other parties to a trial *de novo*. Any trial *de novo* pursuant to this section shall include all claims in the action.

(2) **No reference to arbitration in presence of jury.** A trial *de novo* shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the court's approval.

F. JUDGMENT ON THE ARBITRATION DECISION.

(1) **Termination of action before judgment.** Dismissals or a consent judgment may be filed at any time before entry of judgment on an award.

(2) **Judgment entered on award.** If the case is not terminated by dismissal or consent judgment, and no party files a demand for trial *de novo* within 30 days after the award is served, the Senior Resident Superior Court Judge shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be served on all parties or their counsel.

G. AGREEMENT FOR BINDING ARBITRATION.

(1) **Written agreement.** The arbitrator's decision may be binding upon the parties if all parties agree in writing. Such agreement may be made at any time after the order for arbitration and prior to the filing of the arbitrator's decision. The written agreement shall be executed by the parties and their counsel, and shall be filed with the Clerk of Superior Court and the Senior Resident Superior Court Judge prior to the filing of the arbitrator's decision.

(2) **Entry of judgment on a binding decision.** The arbitrator shall file the decision with the Clerk of Superior Court and it shall become a judgment in the same manner as set out in G.S. 1-567.1 ff.

H. MODIFICATION PROCEDURE.

Subject to approval of the arbitrator, the parties may agree to modify the procedures required by these rules for court ordered arbitration.

RULE 13. RULES FOR SUMMARY TRIALS

In a summary bench trial, evidence is presented in a summary fashion to a presiding officer, who shall render a verdict. In a summary jury trial, evidence is presented in summary fashion to a privately procured jury, which shall render a verdict. The goal of summary trials is to obtain an accurate prediction of the ultimate verdict of a full civil trial as an aid to the parties and their settlement efforts.

Rule 23 of the General Rules of Practice also provides for summary jury trials. While parties may request of the Court permission to utilize that process, it may not be substituted in lieu of mediated settlement conferences or other procedures outlined in these rules.

A. PRE-SUMMARY TRIAL CONFERENCE.

Prior to the summary trial, counsel for the parties shall attend a conference with the presiding officer selected by the parties pursuant to Rule 10.C.(10). That presiding officer shall issue an order which shall:

(1) Confirm the completion of discovery or set a date for the completion;

(2) Order that all statements made by counsel in the summary trial shall be founded on admissible evidence, either documented by deposition or other discovery previously filed and served, or by affidavits of the witnesses;

(3) Schedule all outstanding motions for hearing;

(4) Set dates by which the parties exchange:

(a) A list of parties' respective issues and contentions for trial;

(b) A preview of the party's presentation, including notations as to the document (e.g. deposition, affidavit, letter, contract) which supports that evidentiary statement;

(c) All documents or other evidence upon which each party will rely in making its presentation; and

(d) All exhibits to be presented at the summary trial.

(5) Set the date by which the parties shall enter a stipulation, subject to the presiding officer's approval, detailing the time allowable for jury selection, opening statements, the presentation of evidence, and closing arguments (total time is usually limited to one day);

(6) Establish a procedure by which private, paid jurors will be located and assembled by the parties if a summary jury trial is to held and set the date by which the parties shall submit agreed upon jury instructions, jury selection questionnaire, and the number of potential jurors to be questioned and seated;

(7) Set a date for the summary jury trial; and

(8) Address such other matters as are necessary to place the matter in a posture for summary trial.

B. **PRESIDING OFFICER TO ISSUE ORDER IF PARTIES UNABLE TO AGREE.** If the parties are unable to agree upon the dates and procedures set out in Section A. of this Rule, the presiding officer shall issue an order which addresses all matters necessary to place the case in a posture for summary trial.

C. **STIPULATION TO A BINDING SUMMARY TRIAL.** At any time prior to the rendering of the verdict, the parties may stipulate that the summary trial be binding and the verdict become a final judgment. The parties may also make a binding high/low agreement, wherein a verdict below a stipulated floor or above a stipulated ceiling would be rejected in favor of the floor or ceiling.

D. **EVIDENTIARY MOTIONS.** Counsel shall exchange and file motion in limine and other evidentiary matters, which shall be heard prior to the trial. Counsel shall agree prior to the hearing of said motions as to whether the presiding officer's rulings will be binding in all subsequent hearings or non-binding and limited to the summary trial.

E. **JURY SELECTION.** In the case of a summary jury trial, potential jurors shall be selected in accordance with the procedure set out in the pre-summary trial order. These jurors shall complete a questionnaire previously stipulated to by the parties. Eighteen jurors or such lesser number as the parties agree shall submit to questioning by the presiding officer and

each party for such time as is allowed pursuant to the Summary Trial Pre-trial Order. Each party shall then have three peremptory challenges, to be taken alternately, beginning with the plaintiff. Following the exercise of all peremptory challenges, the first twelve seated jurors, or such lesser number as the parties may agree, shall constitute the panel.

After the jury is seated, the presiding officer in his/her discretion, may describe the issues and procedures to be used in presenting the summary jury trial. The jury shall not be informed of the non-binding nature of the proceeding, so as not to diminish the seriousness with which they consider the matter and in the event the parties later stipulate to a binding proceeding.

F. **PRESENTATION OF EVIDENCE AND ARGUMENTS OF COUNSEL.** Each party may make a brief opening statement, following which each side shall present its case within the time limits set in the Summary Trial Pre-trial Order. Each party may reserve a portion of its time for rebuttal or surrebuttal evidence. Although closing arguments are generally omitted, subject to the presiding officer's discretion and the parties' agreement, each party may be allowed to make closing arguments within the time limits previously established.

Evidence shall be presented in summary fashion by the attorneys for each party without live testimony. Where the credibility of a witness is important, the witness may testify in person or by video deposition. All statements of counsel shall be founded on evidence that would be admissible at trial and documented by prior discovery.

Affidavits offered into evidence shall be served upon opposing parties far enough in advance of the proceeding to allow time for affiants to be deposed. Counsel may read portions of the deposition to the jury. Photographs, exhibits, documentary evidence and accurate summaries of evidence through charts, diagrams, evidence notebooks, or other visual means are encouraged, but shall be stipulated by both parties or approved by the presiding officer.

G. **JURY CHARGE.** In a summary jury trial, following the presentation of evidence by both parties, the presiding officer shall give a brief charge to the jury, relying on predetermined jury instructions and such additional instructions as the presiding officer deems appropriate.

H. DELIBERATION AND VERDICT. In a summary jury trial, the presiding officer shall inform the jurors that they should attempt to return a unanimous verdict. The jury shall be given a verdict form stipulated to by the parties or approved by the presiding officer. The form may include specific interrogatories, a general liability inquiry and/or an inquiry as to damages. If, after diligent efforts and a reasonable time, the jury is unable to reach a unanimous verdict, the presiding officer may recall the jurors and encourage them to reach a verdict quickly, and/or inform them that they may return separate verdicts, for which purpose the presiding officer may distribute separate forms.

In a summary bench trial, at the close of the presentation of evidence and arguments of counsel and after allowing time for settlement discussions and consideration of the evidence by the presiding officer, the presiding officer shall render a decision. Upon a party's request, the presiding officer may allow three business days for the filing of post-hearing briefs. If the presiding officer takes the matter under advisement or allows post-hearing briefs, the decision shall be rendered no later than ten days after the close of the hearing or filing of briefs whichever is longer.

I. JURY QUESTIONING. In a summary jury trial the presiding officer may allow a brief conference with the jurors in open court after a verdict has been returned, in order to determine the basis of the jury's verdict. However, if such a conference is used, it should be limited to general impressions. The presiding officer should not allow counsel to ask detailed questions of jurors to prevent altering the summary trial from a settlement technique to a form of pre-trial rehearsal. Jurors shall not be required to submit to counsels' questioning and shall be informed of the option to depart.

J. SETTLEMENT DISCUSSIONS. Upon the retirement of the jury in summary jury trials or the presiding officer in summary bench trials, the parties and/or their counsel shall meet for settlement discussions. Following the verdict or decision, the parties and/or their counsel shall meet to explore further settlement possibilities. The parties may request that the presiding officer remain available to provide such input or guidance as the presiding officer deems appropriate.

K. MODIFICATION OF PROCEDURE. Subject to approval of the presiding officer, the parties may agree to modify the procedures set forth in these Rules for summary trial.

L. SETTLEMENT OF THE CASE. In the event that the parties settle the case in the course of the summary trial, the presiding officer shall direct the parties to immediately prepare and sign a memorandum of settlement which shall be filed with the Clerk of Superior Court.

RULE 14. ~~10.~~ LOCAL RULE MAKING.

The Senior Resident Superior Court Judge of any district conducting mediated settlement conferences under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.1, implementing mediated settlement conferences in that district.

RULE 15. ~~11.~~ DEFINITIONS.

A. The term, Senior Resident Superior Court Judge, as used throughout these rules, shall refer both to said judge or said judge's designee.

B. The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the Administrative Office of the Courts. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

RULE 16. ~~12.~~ TIME LIMITS.

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the Rules of Civil Procedure.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PROFESSIONAL LIABILITY INSURANCE

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 25, 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 professional liability insurance, as particularly set forth in 27 N.C.A.C. 1A, Section .0200 and 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0200 Organization of the North Carolina State Bar

.0204 Certificate of Insurance Coverage

(a) Before July 1 of each year, each active member shall submit a certificate to the secretary of the North Carolina State Bar on a form provided by the secretary stating whether the member is engaged in the private practice of law and, if so, whether the member is covered by a policy of professional liability insurance issued by an insurer legally permitted to provide coverage in North Carolina. The certificate may be submitted in electronic form or in an original document. If, after having most recently submitted a certificate of insurance coverage asserting that the member is covered by a policy of professional liability insurance coverage, a member for any reason ceases to be insured, the member shall immediately advise the North Carolina State Bar of the changed circumstances in writing.

(b) Any active member who fails to submit the certificate of insurance coverage required above in a timely fashion may be suspended from active membership in the North Carolina State Bar in accordance with the procedures set forth in Rule .0903 of subchapter D.

(c) Any member failing to submit a certificate of insurance coverage in a timely fashion shall pay a late fee of $30 to defray the administrative cost of enforcing compliance with this rule; provided, however, that no late fee associated with such failure shall be charged if the member is also liable for a late fee in regard to failure to pay the annual membership fee or Client Security Fund assessment for the same year in a timely fashion.

(d) Notwithstanding the foregoing:

(1) A person licensed to practice law in North Carolina for the first time by examination shall not be required to file a certificate of insurance coverage during the year in which the person is admitted;

(2) A person licensed to practice law in North Carolina serving in the armed forces, in a legal or nonlegal capacity, shall not be required to file a certificate of insurance coverage for any year in which the member is on active duty in military service;

(3) A person licensed to practice law in North Carolina who files a petition for inactive status on or before December 31 of a given year shall not be required to file a certificate of insurance coverage for the following year if the petition is granted. A petition shall be deemed timely if it is postmarked on or before December 31.

27 N.C.A.C. 1D, Section .0900 Procedures for Administrative Committee

.0903 Suspension for Nonpayment of Membership Fees, Late Fee, Client Security Fund Assessment, or Assessed Costs, or Failure to File Certificate of Insurance Coverage

(a) Notice of Overdue Fees, ~~or~~ Costs or Certificate of Insurance Coverage

Whenever it appears that a member has failed to comply, in a timely fashion, with the rules regarding payment of the annual membership fee, late fee, the Client Security Fund assessment, and/or any district bar annual membership fee, or that the member has failed to pay, in a timely fashion, the costs of a disciplinary, disability, reinstatement, show cause, or other proceeding of the North Carolina State Bar as required by a notice of the chairperson of the Grievance Committee, an order of the Disciplinary Hearing Commission, or a notice of the secretary or the council of the North Carolina State Bar, or that the member has failed to file, in a timely fashion, a certificate of insurance coverage as required in Rule .0204 of subchapter A of these rules, the secretary shall prepare a written notice

(1) directing the member to show cause, in writing, within 30 days of the date of service of the notice why he or she should not be suspended from the practice of law, and

(2) when appropriate, demanding payment of a $30 late fee for the failure to pay the annual membership fee to the North Carolina State Bar and/or Client Security Fund assessment in a

timely fashion, and/or failure to submit a certificate of insurance coverage in a timely fashion.

(b) Service of the Notice

The notice shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(c) Entry of Order of Suspension Upon Failure to Respond to Notice to Show Cause

Whenever a member fails to respond in writing within 30 days of the service of the notice to show cause upon the member, and it appears that the member has failed to comply with the rules regarding payment of the annual membership fee, any late fees imposed pursuant to Rule .0203(b) or Rule .0204(c) of subchapter A, the Client Security Fund assessment, and/or any district bar annual membership fee, and/or it appears that the member has failed to pay any costs assessed against the member as required by a notice of the chairperson of the Grievance Committee, an order of the Disciplinary Hearing Commission, and/or a notice of the secretary or council of the North Carolina State Bar, and/or it appears that the member has failed to file a certificate of insurance coverage, the council may enter an order suspending the member from the practice of law. The order shall be effective when entered by the council. A copy of the order shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(d) Procedure Upon Submission of a Timely Response to a Notice to Show Cause

(1) Consideration by Administrative Committee

If a member submits a written response to a notice to show cause within 30 days of the service of the notice upon the member, the Administrative Committee shall consider the matter at its next regularly scheduled meeting. The member may personally appear at the meeting and be heard, may be represented by counsel, and may offer witnesses and documents. The counsel may appear at the meeting on behalf of the State Bar and be heard, and may offer witnesses and documents. The burden of proof shall be upon the member to show cause by clear, cogent and convincing evidence why the member should not be suspended from the practice of law for the apparent failure to comply with the rules regarding payment of the annual

membership fee, late fee, Client Security Fund assessment, and/or any district bar annual membership fee, and/or the apparent failure to pay costs assessed against the member as required by a notice of the chairperson of the Grievance Committee, an order of the Disciplinary Hearing Commission, and/or a notice of the secretary or council of the North Carolina State Bar, and/or the apparent failure to file a certificate of insurance coverage.

(2) Recommendation of Administrative Committee

The Administrative Committee shall determine whether the member has shown cause why the member should not be suspended. If the committee determines that the member has failed to show cause, the committee shall recommend to the council that the member be suspended.

(3) Order of Suspension

Upon the recommendation of the Administrative Committee, the council may enter an order suspending the member from the practice of law. The order shall be effective when entered by the council. A copy of the order shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(e) Late Tender of Membership Fees, ~~or~~ Assessed Costs, or Certificate of Insurance Coverage

If a member tenders to the North Carolina State Bar the annual membership fee, the $30 late fee, Client Security Fund assessment, any district bar annual membership fee, and/or 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 or overdue certificate of insurance coverage before a suspension order is entered by the council, no order of suspension will be entered.

.0904 Reinstatement After Suspension for Failure to Pay Fees or Assessed Costs, or to File Certificate of Insurance Coverage

(a) Reinstatement Within 30 Days of Service of Suspension Order

A member who has been suspended for nonpayment of the annual membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, and/or 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/or failure to file a certificate of insurance coverage as required by Rule .0204 of subchapter A, may petition the secretary for an order of reinstatement of the member's license at any time up to 30 days after service of the suspension order upon the member. The secretary shall enter an order reinstating the member to active status upon receipt of a timely written request and satisfactory showing by the member of certification of insurance coverage and/or payment of the membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, assessed costs, and the costs of the suspension and reinstatement procedure, including the costs of service. Such member shall not be required to file a formal reinstatement petition or pay a $125 reinstatement fee.

(b) Reinstatement More than 30 Days After Service of Suspension Order

At any time more than 30 days after service of an order of suspension on a member, a member who has been suspended for nonpayment of the membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, and/or 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/or failure to file a certificate of insurance coverage, may petition the council for an order of reinstatement.

(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, 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;

(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 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 past and current district bar annual membership fees owed at the time of suspension;

(D) all attendee fees, fines and penalties owed the Board of Continuing Legal Education at the time of suspension and attendee fees for CLE courses taken to satisfy the requirements of Rule .0904(c)(2) above;

(E) 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) 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; and

(5) that the member has filed a certificate of insurance coverage for the current year.

(d) Procedure for Review of Reinstatement Petition

The procedure for review of the reinstatement petition shall be as set forth in Rule .0902(c)-(f) above.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 25, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of August, 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 1st day of October, 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 1st day of October, 2003.

Brady, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE DISCIPLINE AND DISABILITY OF ATTORNEYS

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 April 18, 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 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

.0111 Grievances: Form and Filing

(a) A grievance may be filed by any person against a member of the North Carolina State Bar. Such grievance may be written or oral, ver-

ified or unverified, and may be made initially to the counsel. The counsel may require that a grievance be reduced to writing in affidavit form and may prepare and distribute standard forms for this purpose.

. . .

(f) The counsel may decline to investigate the following allegations:

(i) that a member provided ineffective assistance of counsel in a criminal case, unless a court has granted a motion for appropriate relief based upon the member's conduct;

(ii) that a plea entered in a criminal case was not made voluntarily and knowingly, unless a court granted a motion for appropriate relief based upon the member's conduct;

(iii) that a member's advice or strategy in a civil or criminal matter was inadequate or ineffective.

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 April 18, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of, August, 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 1st day of October, 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 1st day of October, 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 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 25, 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 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

.1517 Scope and Exemptions

(a) Except as provided herein, these rules shall apply to every active member licensed by the North Carolina State Bar. To qualify for an exemption for a particular calendar year, a member shall notify the board of the exemption in the annual report for that calendar year sent to the member pursuant to Rule .1522 of this subchapter. All active members who are exempt are encouraged to attend and participate in legal education programs.

(b) The governor, the lieutenant governor, and all members of the council of state, ~~all members of the federal and state judiciary,~~ members of the United States Senate, members of the United States House of Representatives, members of the North Carolina General Assembly and members of the United States Armed Forces on full-time active duty are exempt from the requirements of these rules for any calendar year in which they serve some portion thereof in such capacity. ~~All active members, including members of the judiciary, who are exempt are encouraged to attend and participate in legal education programs.~~

(c) Members of the state judiciary who are required by virtue of their judicial offices to take an average of twelve (12) or more hours of continuing judicial or other legal education annually and all members of the federal judiciary are exempt from the requirements of these rules for any calendar year in which they serve some portion thereof in such judicial capacities. A full-time law clerk for a member of the federal or state judiciary is exempt from the requirements of these rules for any calendar year in which the clerk serves some portion thereof in such capacity, provided, however, that the exemption shall not exceed two consecutive calendar years and, further provided, that the clerkship begins within one year after the clerk graduates from law school or passes the bar examination for admission to the North Carolina State Bar whichever occurs later.

(d) ~~(c)~~ Any active member residing outside of North Carolina or any active member residing inside North Carolina who is a full-time teacher at the Institute of Government of the University of North Carolina at Chapel Hill or at a law school in North Carolina accredited by the American Bar Association and who in each case neither practices in North Carolina nor represents North Carolina clients on matters governed by North Carolina law shall be exempt from the requirements of these rules. ~~upon written application to the board. Such application shall be filed on or before the due date for the payment of annual dues, or sooner as the circumstances may require, and shall be in effect for the year for which the application was made.~~

(e) ~~(d)~~ The board may exempt an active member from the continuing legal education requirements for a period of not more than one year at a time upon a finding by the board of special circumstances unique to that member constituting undue hardship or other reasonable basis for exemption, or for a longer period upon a finding of a permanent disability.

(f) ~~(e)~~ Nonresident attorneys from other jurisdictions who are temporarily admitted to practice in a particular case or proceeding pursuant to the provisions of G.S. 84-4.1 shall not be subject to the requirements of these rules.

(g) ~~(f)~~ The board may exempt an active member from the continuing legal education requirements if

(1) the member is sixty-five years of age or older and

(2) the member does not render legal advice to or represent a client unless the member associates another active member who assumes responsibility for the advice or representation.

(h) During a calendar year in which the records of the board indicate that an active member is exempt from the requirements of these rules, the board shall not maintain a record of such member's attendance at accredited continuing legal education activities. Upon the termination of the member's exemption, the member may request carry over credit up to a maximum of twelve (12) credits for any accredited continuing legal education activity attended during the calendar year immediately preceding the year of the termination of the exemption. Appropriate documentation of attendance at such activities will be 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 amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 25, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of August, 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 1st day of October, 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 1st day of October, 2003.

Brady, J.
For the Court

AMENDMENT 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 April 18, 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 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

.1518 Continuing Legal Education Program

(a) Each active member subject to these rules shall complete 12 hours of approved continuing legal education during each calendar year beginning January 1, 1988, as provided by these rules and the regulations adopted thereunder.

(b) Of the 12 hours

(1) at least 2 hours shall be devoted to the areas of professional responsibility or professionalism or any combination thereof; and

(2) effective January 1, 2002, at least once every three calendar years, each member shall complete an additional hour of continuing legal education instruction on substance abuse and debilitating mental conditions, as defined in Rule .1602 (c), which shall be in addition to the requirement of Rule .1518(b)(1) above. To satisfy this requirement, a member must attend an accredited program on substance abuse and debilitating mental conditions that is at least one hour long.

. . . .

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 April 18, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of August, 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 1st day of October, 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 1st day of October, 2003.

Brady, J.
For the Court

AMENDMENT 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 25, 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 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

.1518 Continuing Legal Education Program

(a) Each active member subject to these rules shall complete 12 hours of approved continuing legal education during each calen-

dar year beginning January 1, 1988, as provided by these rules and the regulations adopted thereunder.

(b) Of the 12 hours

(1) at least 2 hours shall be devoted to the areas of professional responsibility or professionalism or any combination thereof; and

(2) effective January 1, 2002, at least once every three calendar years, each member shall complete an ~~additional~~ hour of continuing legal education instruction on substance abuse and debilitating mental conditions~~,~~ as defined in Rule .1602 (c)~~,~~. ~~which~~ This hour shall be credited to the 12 hour requirement set forth in Rule .1518(a) above but shall be in addition to the requirement of Rule .1518(b)(1) above. To satisfy this requirement, a member must attend an accredited program on substance abuse and debilitating mental conditions that is at least one hour long.

(c) Members may carry over up to 12 credit hours earned in one calendar year to the next calendar year, which may include those hours required by Rule .1518(b) above. Additionally, a newly admitted active member may include as credit hours which may be carried over to the next succeeding year, any approved CLE hours earned after that member's graduation from law school.

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 July 25, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of August, 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 1st day of October, 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 1st day of October, 2003.

Brady, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING 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 25, 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 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

.1519 Accreditation Standards

The board shall approve continuing legal education activities which meet the following standards and provisions.

(1) They shall have significant intellectual or practical content and the primary objective shall be to increase the participant's professional competence and proficiency as a lawyer.

(2) They shall constitute an organized program of learning dealing with matters directly related to the practice of law, professional responsibility, professionalism, or ethical obligations of lawyers.

(3) Credit may be given for continuing legal education activities where live instruction is used or mechanically or electronically recorded or reproduced material is used, including videotape or satellite transmitted programs. Subject to the limitations set forth in Rule .1611 of this subchapter, credit may also be given for continuing

legal education activities on CD-ROM and on a computer website accessed via the Internet.

(4) Continuing legal education materials are to be prepared, and activities conducted, by an individual or group qualified by practical or academic experience in a setting physically suitable to the educational activity of the program and, when appropriate, equipped with suitable writing surfaces or sufficient space for taking notes.

(5) Thorough, high quality, and carefully prepared written materials should be distributed to all attendees at or before the time the course is presented. These may include written materials printed from a computer presentation, computer website or CD-ROM. A written agenda or outline for a presentation satisfies this requirement when ~~It is recognized that~~ written materials are not suitable or readily available for ~~some types of subjects~~ a particular subject. The absence of written materials for distribution should, however, be the exception and not the rule.

(6) Any accredited sponsor must remit fees as required and keep and maintain attendance records of each continuing legal education program sponsored by it, which shall be furnished to the board in accordance with regulations.

(7) Except as provided in Rule .1611 of this subchapter, in-house continuing legal education and self-study shall not be approved or accredited for the purpose of complying with Rule .1518 of this subchapter.

(8) Programs that cross academic lines, such as accounting-tax seminars, may be considered for approval by the board. However, the board must be satisfied that the content of the activity would enhance legal skills or the ability to practice 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 and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 25, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of August, 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 1st day of October, 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 1st day of October, 2003.

Brady, J.
For the Court

AMENDMENT 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 25, 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 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

.1522 Annual Report

Commencing in 1989, each active member of the North Carolina State Bar shall make an annual written report to the North Carolina State Bar in such form as the board shall prescribe by regulation concerning compliance with the continuing legal education program for the preceding year or declaring an exemption under Rule .1517 of this subchapter~~, unless the board's records indicate that such member has been previously exempted and the circumstances resulting in the~~

~~exemption are unchanged. It shall be the responsibility of any previously exempted member whose circumstances have changed and who is therefore not presently qualified for an exemption to notify the board of such changed circumstances within 30 days after such become apparent and to satisfy fully the requirements of these rules for the year following such change in circumstances.~~ The annual report form shall be corrected, if necessary, signed by the member, and promptly returned to the State Bar. Upon receipt of a signed annual report form, appropriate adjustments shall be made to the member's continuing legal education record with the State Bar. No further adjustments shall thereafter be made to the member's continuing legal education record.

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 July 25, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of August, 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 1st day of October, 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 1st day of October, 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 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 25, 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 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

.1523 Noncompliance

(a) Failure to Comply with Rules May Result in Suspension

A member who is required to file a report of CLE credits and does not do so or who fails to meet the minimum requirements of these rules, including the payment of duly assessed penalties and attendee fees, may be suspended from the practice of law in the state of North Carolina.

(b) Notice of Failure to Comply

The board shall notify a member who appears to have failed to meet the requirements of these rules that the member will be suspended from the practice of law in this state, unless the member shows good cause in writing why the suspension should not be made or the member shows in writing that he or she has complied with the requirements within ~~a 90~~ the 30 day period after receiving the notice. Notice shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized thereunder to serve process.

(c) Entry of Order of Suspension Upon Failure to Respond to Notice to Show Cause

~~Ninety three days after mailing such notice, if no~~ If a written response attempting to show good cause is not postmarked or received by ~~filed with~~ the board by the last day of the 30 day period after the member received the notice to show cause, ~~by the member attempting to show good cause or attempting to show that the member has complied with~~

~~the requirements of these rules~~, upon the recommendation of the board and the Administrative Committee, the council may enter an order suspending the member from the practice of law. The order shall be entered and served as set forth in Rule .0903(c) of this subchapter.

(d) Procedure Upon Submission of a Timely Response to a Notice to Show Cause

(1) Consideration by the Board

If the member files a timely written response to the notice, the board shall consider the matter at its next regularly scheduled meeting or may delegate consideration of the matter to a duly appointed committee of the board. The board shall review all evidence presented by the member to determine whether good cause has been shown or to determine whether the member has complied with the requirements of these rules within the ~~90~~ 30-day period after receiving the notice to show cause.

(2) Recommendation of the Board

The board shall determine whether the member has shown good cause why the member should not be suspended. If the board determines that good cause has not been shown and that the member has not shown compliance with these rules within the ~~90~~ 30-day period after receipt of the notice to show cause, then the board shall refer the matter to the Administrative Committee for hearing together with a written recommendation to the Administrative Committee that the member be suspended.

(3) Consideration by and Recommendation of the Administrative Committee

The Administrative Committee shall consider the matter at its next regularly scheduled meeting. The burden of proof shall be upon the member to show cause by clear, cogent, and convincing evidence why the member should not be suspended from the practice of law for the apparent failure to comply with the rules governing the continuing legal education program. Except as set forth above, the procedure for such hearing shall be as set forth in Rule .0903(d)(1) and (2) of this subchapter.

(4) Order of Suspension

Upon the recommendation of the Administrative Committee, the council may determine that the member has not com-

plied with these rules and may enter an order suspending the member from the practice of law. The order shall be entered and served as set forth in Rule .0903(d)(3) of this subchapter.

(e) Late Compliance Fee

Any member who complies with the requirements of the rules during the ~~90~~ **30**-day period after receiving the notice to show cause shall pay a late compliance fee as set forth in Rule .1608(b) of this subchapter.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 25, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of August, 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 1st day of October, 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 1st day of October, 2003.

Brady, J.
For the Court

AMENDMENT 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 25, 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 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

.1601 Organization

(a) Quorum—Five members shall constitute a quorum of the board.

(b) The Executive Committee—The executive committee of the board shall be comprised of the chairperson, a vice-chairperson elected by the members of the board, and a member to be appointed by the chairperson. Its purpose is to conduct all necessary business of the board that may arise between meetings of the full board. In such matters it shall have complete authority to act for the board.

(c) Other Committees—The chairperson may appoint ~~from time to time any~~ committees as established by the board ~~he or she deems advisable of not less than three members~~ for the purpose of considering and deciding matters submitted to them by the board.

(d) Definitions—As used herein, "board" means the Board of Continuing Legal Education, "CLE" means continuing legal education, and "rules" means the rules for the continuing legal education program adopted by the Supreme Court of North Carolina (Section .1500 of this subchapter). All other definitions shall be as set forth in the rules.

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 July 25, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of August, 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 1st day of October, 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 1st day of October, 2003.

Brady, J.
For the Court

AMENDMENT 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 25, 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 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

.1605 Computation of Credit

(a) Computation Formula—CLE and professional responsibility hours shall be computed by the following formula:

Sum of the total minutes of actual instruction ÷ 60 = Total Hours

For example, actual instruction totaling 195 minutes would equal 3.25 hours toward CLE.

(b) Actual Instruction—Only actual education shall be included in computing the total hours of actual instruction. The following shall not be included:

(1) introductory remarks;

(2) breaks;

(3) business meetings;

(4) speeches in connection with banquets or other events which are primarily social in nature;

(5) question and answer sessions at a ratio in excess of 15 minutes per CLE hour and programs less than 30 minutes in length provided, however, that the limitation on question and answer sessions shall not limit the length of time that may be devoted to participatory CLE.

(c) Teaching—As a contribution to professionalism, credit may be earned for teaching in an approved continuing legal education activity. Presentations accompanied by thorough, high quality, readable, and carefully prepared written materials will qualify for CLE credit on the basis of three hours of credit for each thirty minutes of presentation. Repeat presentations qualify for one-half of the credits available for the initial presentation. For example, an initial presentation of 45 minutes would qualify for 4.5 hours of credit.

(d) Teaching at a Law School—If a member is not a full-time teacher at a law school in North Carolina who is eligible for the exemption in Rule .1517(b) of this subchapter, the member may earn up to 12 hours of CLE credit for teaching courses at an ABA accredited law school. Two hours of CLE credit shall be earned for each hour of academic credit awarded to a law school course taught by the member. The member shall also complete the requirements set forth in Rule .1518(b) of this subchapter.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing 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 July 25, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of August, 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 1st day of October, 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 1st day of October, 2003.

Brady, J.
For the Court

AMENDMENT 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 25, 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 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

.1606 Fees

(a) Sponsor Fee—The sponsor fee, a charge paid directly by the sponsor, shall be paid by all sponsors of approved activities pre-

sented in North Carolina and by accredited sponsors located in North Carolina for approved activities wherever presented, except that no sponsor fee is required where approved activities are offered without charge to attendees. In any other instance, payment of the fee by the sponsor is optional. The amount of the fee, per approved CLE hour per active member of the North Carolina State Bar in attendance, is $1.25 plus such additional amount as determined by the council as necessary to support the Chief Justice's Commission on Professionalism but not to exceed $1.00. The fee is computed as shown in the following formula and example which assumes a 6-hour course attended by 100 North Carolina lawyers seeking CLE credit and further assumes that the fee-per-hour is $2.25 which includes as assessment of $1.00 for the Chief Justice's Commission on Professionalism:

Fee: $2.25 x Total Approved CLE hours (6) x Number of NC Attendees (100) = Total Sponsor Fee ($1350)

(b) Attendee Fee—The attendee fee is paid by the North Carolina attorney who requests credit for a program for which no sponsor fee was paid. An attorney should remit the fees along with his or her affidavit before February 28 following the calendar year for which the report is being submitted. The amount of the fee, per approved CLE hour for which the attorney claims credit, is set at $1.25 plus such additional amount as determined by the council as necessary to support the Chief Justice's Commission on Professionalism but not to exceed $1.00. It is computed as shown in the following formula and example which assumes that the attorney attended an activity approved for 3 hours of CLE credit and that the fee-per-hour is $2.25 which includes an assessment of $1.00 for the Chief Justice's Commission on Professionalism:

Fee: $2.25 x Total Approved CLE hours (3.0) = Total Attendee Fee ($6.75)

(c) Fee Review—The board will review the level of the fee at least annually and adjust it as necessary to maintain adequate finances for prudent operation of the board in a nonprofit manner. The fee charged to sponsors and attendees will be increased only to the extent necessary for those fees to pay the costs of administration of the CLE program. The council shall annually review the assessments for the Chief Justice's Commission on Professionalism and adjust it as necessary to maintain adequate finances for the operation of the commission.

(d) Uniform Application and Financial Responsibility—The fee shall be applied uniformly without exceptions or other preferential treat-

ment for a sponsor or attendee. The board shall make reasonable efforts to collect the sponsor fee from the sponsor of a CLE program when appropriate under Rule .1606(a) above. However, whenever a sponsor fee is not paid by the sponsor of a program, regardless of the reason, the lawyer requesting CLE credit for the program shall be financially responsible for the fee.

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 July 25, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of August, 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 1st day of October, 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 1st day of October, 2003.

Brady, J.
For the Court

AMENDMENT 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 April 18, 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 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

.1607 Special Cases and Exemptions

(a) Attorneys who have a permanent disability which makes attendance at CLE programs inordinately difficult may file a request for a permanent substitute program in lieu of attendance and shall therein set out continuing legal education plans tailored to their specific interests and physical ability. The board shall review and approve or disapprove such plans on an individual basis and without delay.

. . .

~~(d) Newly admitted active members who have previously been licensed to practice law in this state or in some other state and who have actually practiced law for a period of at least five years may apply to the board for an exemption from the practical skills requirement of Rule .1518(c) of this subchapter. This application must be filed prior to July 31 of the year for which the exemption is initially sought.~~

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 April 18, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of August, 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 1st day of October, 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 1st day of October, 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 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 25, 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 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 .1608 Regulations Governing the Administration of the Continuing Legal Education Program

.1608 General Compliance Procedures

(a) Compliance Period—The period for complying with the requirements of Rule .1518 of this subchapter is January 1 to December 31.

A member may complete the requirements for the year on or by February 28 of the succeeding year provided, however, that this additional time shall be considered a grace period and no extensions of this grace period shall be granted. All members are encouraged to complete the requirements within the appropriate calendar year.

~~(a)~~ (b) Affidavit—Prior to January 31 of each year, commencing in 1990, the prescribed affidavit form shall be mailed to all active members of the North Carolina State Bar concerning compliance with the continuing legal education program for the preceding year.

~~(b)~~ (c) Late Filing Penalty—Any attorney who, for whatever reasons, files the affidavit showing compliance or declaring an exemption after the February 28 due date shall pay a $75.00 late filing penalty. This penalty shall be submitted with the affidavit. An affidavit that is either received by the board or postmarked on or before February 28 shall be considered to have been timely filed. An attorney who complies with the requirements of the rules during the probationary period under Rule .1523(c) of this subchapter shall pay a late compliance fee of $125.00 pursuant to Rule .1524 of this subchapter.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 25, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of August, 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 1st day of October, 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 1st day of October, 2003.

Brady, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

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 April 18, 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 legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .1900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1900, Rules Concerning the Accreditation of Continuing Legal Education for Purposes of the Board of Legal Specialization

.1906 Accreditation of Courses

(a) All courses offered by an accredited sponsor which relate to the specialty field as defined by the board shall be accredited and credit for attendance shall be given for the hours of instruction related to the specialty field of the applicant as determined by the board.

. . .

(c) An accredited sponsor may not represent or advertise that a CLE course is approved or that the attendees will be given CLE credit by the board unless such sponsor provides a brochure or other appropriate information describing the topics, hours of instruction, and instructors for its CLE offerings in a specialty field at least thirty days in advance of the date of the course ~~and pays a fee of $100 per course for the costs of accreditation~~.

(d) An unaccredited sponsor desiring advance accreditation of a course and the right to designate its accreditation for the appropriate number of CLE credits in its solicitations shall submit a brochure or

other appropriate information describing the topics, hours of instruction, location, and instructors for its CLE offerings at least sixty days prior to the date of the course. ~~A fee of $200 shall accompany all requests for accreditation of courses from a sponsor not on the accredited sponsor list.~~

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 18, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of August, 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 1st day of October, 2003.

fs/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 1st day of October, 2003.

Brady, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING ORGANIZATIONS PRACTICING LAW

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 25, 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 organizations practicing law, as particularly set forth in 27 N.C.A.C. 1E, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1E, Section .0100 Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law

.0103 Registration with the North Carolina State Bar

. . . .

(d) Expiration of Certificate of Registration—The initial certificate of registration for either a professional corporation or a professional limited liability company shall remain effective through June 30 following the date of registration.

(e) Renewal of Certificate of Registration—The certificate of registration for either a professional corporation or a professional limited liability company shall be renewed on or before July 1 of each year upon the following conditions:

(1) Renewal of Certificate of Registration for Professional Corporation—A professional corporation shall submit an application for renewal of certificate of registration for a professional corporation (Form PC-4; *see* Rule .0106(d) of this subchapter) to the secretary listing the names and addresses of all of the shareholders and employees of the corporation who practice law for the professional corporation in North Carolina and the name and address of at least one officer and one director of the professional corporation, and certifying that all such persons are duly licensed to practice law in the state of North Carolina and representing that the corporation has complied with these regulations and the provisions of the Professional Corporation Act. Such application shall also

(i) set forth the name, address, and license information of each shareholder who is not licensed to practice law in

North Carolina but who performs services on behalf of the corporation in another jurisdiction in which the corporation maintains an office; and

(ii) certify that all such persons are duly licensed to practice law in the appropriate jurisdiction. Upon a finding by the secretary that all shareholders are active members in good standing with the North Carolina State Bar, or are duly licensed to practice law in another jurisdiction in which the corporation maintains an office, the secretary shall renew the certificate of registration by making a notation in the records of the North Carolina State Bar;

(2) Renewal of Certificate of Registration for a Professional Limited Liability Company—A professional limited liability company shall submit an application for renewal of certificate of registration for a professional limited liability company (Form PLLC-4; *see* Rule .0106(i) of this subchapter) to the secretary listing the names and addresses of all of the members and employees of the professional limited liability company who practice law in North Carolina, and the name and address of at least one manager, and certifying that all such persons are duly licensed to practice law in the state of North Carolina, and representing that the professional limited liability company has complied with these regulations and the provisions of the North Carolina Limited Liability Company Act. Such application shall also

(i) set forth the name, address, and license information of each member who is not licensed to practice law in North Carolina but who performs services on behalf of the professional limited liability company in another jurisdiction in which the professional limited liability company maintains an office; and

(ii) certify that all such persons are duly licensed to practice law in the appropriate jurisdiction. Upon a finding by the secretary that all members are active members in good standing with the North Carolina State Bar, or are duly licensed to practice law in another jurisdiction in which the professional limited liability company maintains an office, the secretary shall renew the certificate of registration by making a notation in the records of the North Carolina State Bar;

(3) Renewal Fee—An application for renewal of a certificate of registration for either a professional corporation or a profes-

sional limited liability company shall be accompanied by a renewal fee of $25;

(4) Refund of Renewal Fee—If the secretary is unable to make the findings required by Rules .0103(e)(1) or .0103(e)(2) above, the secretary shall refund the $25 registration fee;

(5) Failure to Apply for Renewal of Certificate of Registration—In the event a professional corporation or a professional limited liability company shall fail to submit the appropriate application for renewal of certificate of registration, together with the renewal fee, to the North Carolina State Bar within 30 days following the expiration date of its certificate of registration, the secretary shall send a notice to show cause letter to the professional corporation or the professional limited liability company advising said professional corporation or professional limited liability company of the delinquency and requiring said professional corporation or professional limited liability company to either submit the appropriate application for renewal of certificate of registration, together with the renewal fee and a late fee of $10, to the North Carolina State Bar within 30 days or to show cause for failure to do so. Failure to submit the application, the renewal fee, and the late fee within said thirty days, or to show cause within said time period, shall result in the suspension of the certificate of registration for the delinquent professional corporation or professional limited liability company and the issuance of a notification to the secretary of state of the suspension of said certificate of registration;

(6) Reinstatement of Suspended Certificate of Registration—Upon (a) the submission to the North Carolina State Bar of the appropriate application for renewal of certificate of registration, together with all past due renewal fees and late fees; and (b) a finding by the secretary that the representations in the application are correct, a suspended certificate of registration of a professional corporation or professional limited liability company shall be reinstated by the secretary by making a notation in the records of the North Carolina State Bar.

(7) Inactive Status Pending Dissolution—If a professional corporation or professional limited liability company notifies the State Bar in writing or, in response to a notice to show cause issued pursuant to Rule .0103(e)(5) of this subchapter, a delinquent professional corporation or professional limited liability company shows that the organization is no longer practicing law and is winding down the operations and financial activities of the

organization, no renewal fee or late fee shall be owed and the organization shall be moved to inactive status for a period of not more than one year. If, at the end of that period, a copy of the articles of dissolution has not been filed with the State Bar, the secretary of the State Bar shall send a notice to show cause letter and shall pursue suspension of the certificate of registration as set forth in Rule. .0103(e)(5) of this subchapter.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing 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 July 25, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of August, 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 1st day of October, 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 1st day of October, 2003.

Brady, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING INTERSTATE AND INTERNATIONAL LAW FIRMS

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 25, 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 interstate and international law firms, as particularly set forth in 27 N.C.A.C. 1E, Section .0200, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1E, Section .200 Rules on the Registration of Interstate and International Law Firms

.0206 Non-renewal of Registration

If a law firm or professional organization registered under these rules no longer meets the criteria for registration, it shall notify the State Bar in writing. If such written notice is not received by the State Bar on or before December 31 of the year in which registration is no longer required, the registration fee for the next calendar year, as set forth in Rule .0203 of this subchapter, shall be owed

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 July 25, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of August, 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 1st day of October, 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 1st day of October, 2003.

Brady, J.
For the Court

AMENDMENT TO THE NORTH CAROLINA RULES OF PROFESSIONAL CONDUCT

The following amendment to the North Carolina Rules of Professional Conduct was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 25, 2003.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, Rule 3.4, be amended as follows (additions are underlined, deletions are interlined):

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 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 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 testi-

fying 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.

Commentary

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled 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, including lost income, or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Paragraph (c) permits a lawyer to take steps in good faith and within the framework of the law to test the validity of rules; however, the lawyer is not justified in consciously violating such rules and the lawyer should be diligent in the effort to guard against the unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that the lawyer believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless the lawyer believes that the statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing the witness; and a lawyer should not, by subterfuge, put before a jury matters which it cannot properly consider.

[5] 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.

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 July 25, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of August, 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 1st day of October, 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 1st day of October, 2003.

Brady, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PROCEDURES FOR RULING ON QUESTIONS OF LEGAL ETHICS

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 October 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 procedures for ruling on questions of legal ethics, as particularly set forth in 27 N.C.A.C. 1D Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0100, Procedures for Ruling on Questions of Legal Ethics

.0101 Definitions

(1) . . . .

(10) "Formal ethics opinion" shall mean a published opinion issued by the council to provide ethical guidance for attorneys and to establish a principle of ethical conduct. A formal ethics opinion adopted under the Revised Rules of Professional Conduct (effective July 24,

1997,and as comprehensively revised in 2003) shall be designated as a "Formal Ethics Opinion" and numbered by year and order of issuance. ...

(15) "Revised Rules of Professional Conduct" shall mean the code of ethics of the Bar effective July 24, 1997 and comprehensively revised effective March 1, 2003.

.0103 Informal Ethics Advisories and Ethics Advisories

(a) ....

(b) The Bar's program for providing informal ethics advisories to inquiring attorneys is a designated lawyers' assistance program approved by the Bar and information received by the executive director, assistant executive director, or designated staff counsel from an attorney seeking an informal ethics advisory shall be confidential information ~~as defined in Rule 1.6(a) and (b)~~ pursuant to Rule 1.6(c) of the Revised Rules of Professional Conduct (2003); provided, however, such confidential information may be disclosed as allowed by ~~Rule 1.6(d)~~ Rule 1.6(b) and as necessary to respond to a false or misleading statement made about an informal ethics advisory. Further, if an attorney's response to a grievance proceeding relies in whole or in part upon the receipt of an informal ethics advisory, confidential information may be disclosed to Bar counsel, the Grievance Committee or other appropriate disciplinary authority.

(c) ....

.0104 Formal Ethics Opinions and Ethics Decisions

(a) Requests for formal ethics opinions or ethics decisions shall be made in writing and submitted to the executive director or assistant executive director who, after determining that ~~the~~ a request is in compliance with Rule .0102 of this subchapter, shall transmit the ~~requests~~ request to the chairperson of the committee.

(b) If a formal ethics opinion or ethics decision is requested concerning contemplated or actual conduct of another attorney, that attorney shall be given an opportunity to be heard by the committee, along with the person who requested the opinion, under such guidelines as may be established by the committee. At the discretion of the chairperson and the committee, additional persons or groups shall be notified by the method deemed most appropriate by the chairperson and provided an opportunity to be heard by the committee.

~~(c) The committee shall prepare a written proposed formal ethics opinion or ethics decision which shall state its conclusion in respect to the question asked and the reasons therefor.~~

~~(d)~~ (c) Upon initial consideration of the request, by vote of a majority of the members of the committee present at the meeting, the ~~The~~ committee shall prepare a written proposed response to the inquiry and shall determine whether to issue ~~an~~ the response as a proposed ethics decision or a proposed formal ethics opinion ~~in response to an inquiry~~. Prior to the next regularly scheduled meeting of the committee, all proposed formal ethics opinions shall be published and all proposed ethics decisions shall be circulated to the members of the council.

~~(c) A proposed formal ethics opinion or ethics decision shall be provided to interested persons by the method deemed most appropriate by the chairperson and shall also be transmitted to the president for consideration by the council. All proposed formal ethics opinions shall be published.~~

~~(f)~~ (d) Prior to the next regularly scheduled meeting of the committee, any interested person or group may submit a written request to reconsider a proposed ~~or final~~ formal ethics opinion or a proposed ethics decision and may ask to be heard by the committee. The committee, under such guidelines as it may adopt, may allow or deny such request. ~~If a proposed or final ethics decision is withdrawn or revised, interested persons shall be notified by the method deemed most appropriate by the chairperson. If a proposed or final formal ethics opinion is withdrawn or revised notice of the action and any proposed revised formal ethics opinion shall be published.~~

(e) Upon reconsideration of a proposed formal ethics opinion or proposed ethics decision, the committee may, by vote of not less than a majority of the duly appointed members of the committee, revise the proposed formal ethics opinion or proposed ethics decision. Prior to the next regularly scheduled meeting of the committee, all revised proposed formal ethics opinions shall be published and all revised proposed ethics decisions shall be circulated to the members of the council.

~~(e) A proposed formal ethics opinion or ethics decision shall be provided to interested persons by the method deemed most appropriate by the chairperson and shall also be transmitted to the president for consideration by the council. All proposed formal ethics opinions shall be published.~~

(f) Upon completion of the process, the committee shall determine, by a vote of not less than a majority of the duly appointed members of the committee, whether to transmit a proposed formal ethics opinion or proposed ethics decision to the council with a recommendation to adopt.

(g) ~~If the committee declines to revise a proposed formal ethics opinion or ethics decision in response to a written request, any~~ Any interested person or group may request to be heard by the council prior to a vote on the adoption of ~~the~~ a proposed formal ethics opinion or ethics decision. Whether permitted to appear before the council or not, the person or group has the right to file a written brief with the council under such rules as may be established by the council.

(h) The council's action on ~~the~~ a proposed formal ethics opinion or ethics decision shall be determined by vote of the majority of the council present and voting. Notice of such action shall be provided to interested persons by the method deemed most appropriate by the chairperson.

(i) A formal ethics opinion or ethics decision may be reconsidered or withdrawn by the council pursuant to rules which it may establish from time to time.

(j) To vote, a member of the committee must be physically present at a meeting.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 24, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of February, 2004.

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 5th day of February, 2004.

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 5th day of February, 2004.

Brady, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PLAN OF LEGAL SPECIALIZATION

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 October 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 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;

.1723 ~~Suspension or~~ Revocation or Suspension of Certification as a Specialist

(a) Automatic Revocation. The board shall revoke its certification of a lawyer as a specialist if the lawyer is disbarred or receives a disciplinary suspension from the North Carolina State Bar, a North Carolina court of law, or, if the lawyer is licensed in another jurisdiction in the United States, from a court of law or the regulatory authority of that jurisdiction. Revocation shall be automatic without regard for any stay of the suspension period granted by the disciplinary authority. This provision shall apply to discipline received on or after the effective date of this provision.

(b)~~(a)~~ Discretionary Revocation or Suspension. The board may revoke its certification of a lawyer as a specialist ~~in the specialization program~~ if the specialty is terminated or may suspend or revoke such certification if it is determined, upon the board's own initiative or upon recommendation of the appropriate specialty committee and after hearing before the board ~~on appropriate notice~~ as provided in Rule .1802 and Rule .1803, that

(1) the certification of the lawyer as a specialist was made contrary to the rules and regulations of the board;

(2) the lawyer certified as a specialist made a false representation, omission or misstatement of material fact to the board or appropriate specialty committee;

(3) the lawyer certified as a specialist has failed to abide by all rules and regulations promulgated by the board;

(4) the lawyer certified as a specialist has failed to pay the fees required;

(5) the lawyer certified as a specialist no longer meets the standards established by the board for the certification of specialists; ~~or~~

(6) the lawyer certified as a specialist ~~has been disciplined~~ received public discipline from the North Carolina State Bar on or after the effective date of this provision, other than suspension or disbarment ~~disbarred, or suspended~~ from practice~~, by the Supreme Court of any other state or federal court or agency~~ and the board finds that the conduct for which the professional discipline was received reflects adversely on the specialization program and the lawyer's qualification as a specialist; or

(7) the lawyer certified as a specialist was sanctioned or received public discipline on or after the effective date of this provision from any state or federal court or, if the lawyer is licensed in another jurisdiction, ~~from the Supreme Court or other~~ the regulatory authority of that jurisdiction in the United States, and the board finds that the conduct for which the sanctions or professional discipline was received reflects adversely on the specialization program and the lawyer's qualification as a specialist.

~~(b)~~ (c) Report to Board. ~~The~~ A lawyer certified as a specialist has a duty to inform the board promptly of any fact or circumstance described in Rule~~s~~ .1723(a)~~(1) through (6)~~ and (b) above.

(d)~~(c)~~ Reinstatement. If the board revokes its certification of a lawyer as a specialist, the lawyer cannot again be certified as a specialist unless he or she so qualifies upon application made as if for initial certification as a specialist and upon compliance with such other conditions as the board may prescribe. If the board suspends certification of a lawyer as a specialist, such certification cannot be reinstated except upon the lawyer's application therefore and compliance with such conditions as the board may prescribe.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 24, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of February, 2004.

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 5th day of February, 2004.

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 5th day of February, 2004.

Brady, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PLAN OF LEGAL SPECIALIZATION

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 October 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 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 .1800 Hearing and Appeal Rules of the Board of Legal Specialization

.1802 Denial, Revocation or Suspension of Continued Certification as a Specialist

(a) Denial of Continued Certification—The board, upon its initiative or upon recommendation of the appropriate specialty committee, may deny continued certification of a specialist, if the applicant does not meet the requirements as found in Rule .1721(a) of this subchapter.

(b) Revocation and Suspension of Certification as a Specialist. The board shall revoke the certification of a lawyer as provided in Rule .1723(a) of this subchapter and may revoke or suspend the certification of a lawyer as provided in Rule .1723(b) of this subchapter.

(c)~~(b)~~ Notification of Board Action—The executive director shall notify the ~~applicant~~ lawyer of the board's ~~decision to~~ action to grant or deny continued certification as a specialist upon application for continued certification pursuant to Rule .1721(a) of this subchapter, or to revoke or suspend continued certification pursuant to Rule .1723(a) ~~and~~ or (b) of this subchapter. The lawyer will also be notified of his or her right to a hearing if a hearing is allowed by these rules.

(d)~~(c)~~ Request for Hearing—Within 21 days of the mailing of notice from the executive director of the board that the lawyer has been denied continued certification pursuant to Rule .1721(a) or that certification has been revoked or suspended ~~under~~ pursuant to Rule .1723(b), the ~~applicant~~ lawyer ~~may~~ must request a hearing before the board in writing. There is no right to a hearing upon automatic revocation pursuant to Rule .1723(a).

(e)~~(d)~~ Hearing Procedure—Except as set forth in Rule .1802(f) below, the rules set forth in Rule .1801(a)(8) of this subchapter shall be followed when ~~an applicant~~ a lawyer requests a hearing regarding the denial of continued certification pursuant to Rule .1721(a) or the revocation or suspension of certification under Rule .1723(b).

(f)~~(e)~~ Burden of Proof: Preponderance of the Evidence—A three-member panel of the board shall apply the preponderance of the evidence rule in determining whether the ~~applicant's~~ lawyer's certification should be continued, revoked or suspended. In cases of denial of

an application for continued certification under Rule .1721(a), the burden of proof is upon the ~~applicant~~ lawyer. In cases of revocation or suspension under Rule .1723(b), the burden of proof is upon the board.

(g)~~(f)~~ Notification of Board's Decision—After the hearing, the board shall timely notify the ~~applicant~~ lawyer of its decision ~~to grant or deny~~ regarding continued certification as a specialist;

.1803 ~~Suspension or Revocation of a Specialist's Certification~~ RESERVED

~~(a) The board may suspend or revoke its certification of a lawyer as a specialist upon the board's initiative or upon recommendation of the appropriate specialty committee and after hearing before the board on appropriate notice, upon a finding that:~~

~~(1) the lawyer was certified as a specialist contrary to the rules and regulations of the board;~~

~~(2) the lawyer certified as a specialist made a false representation, omission or misstatement of material fact to the board or appropriate specialty committee;~~

~~(3) the lawyer certified as a specialist has failed to abide by all rules and regulations promulgated by the board;~~

~~(4) the lawyer certified as a specialist has failed to pay the fees required;~~

~~(5) the lawyer certified as a specialist no longer meets the standards established by the board for the certification of specialists; or~~

~~(6) the lawyer certified as a specialist has been disciplined, disbarred or suspended from practice in North Carolina or by the supreme court of any other state or federal court or agency.~~

~~(b) The executive director shall notify the specialist in writing of the board's consideration of the suspension or revocation of the specialist's certification. The specialist will also be notified of his or her right to a hearing on the issue. The specialist must request in writing a hearing within 21 days of the mailing of the notice of suspension or revocation of certification.~~

~~(c) At its next regular or specially called meeting, the board shall conduct a hearing according to the hearing procedures set forth in Rule .1801(a)(8) of this subchapter. The board shall apply the pre-~~

~~ponderance of the evidence rule in determining whether the specialist's certification should be suspended or revoked. The burden of proof is upon 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 amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 24, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of February, 2004.

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 5th day of February, 2004.

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 5th day of February, 2004.

Brady, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PLAN OF LEGAL SPECIALIZATION

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 October 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 Plan of Legal Specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .2500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .2500 Certification Standards for the Criminal Law Specialty

.2505 Standards for Certification as a Specialist

Each applicant for certification as a specialist in criminal law, the subspecialty of state criminal law, or the subspecialty of criminal appellate practice shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification:

(a) . . . .

(b) Substantial Involvement—An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of criminal law.

(1) Substantial involvement shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 500 hours a year to the practice of criminal law, but not less than 400 hours in any one year. "Practice" shall mean substantive legal work, specifically including representation in criminal trials, done primarily for the purpose of providing legal advice or representation, or a practice equivalent.

(2) "Practice equivalent" shall mean:

(A) Service as a law professor concentrating in the teaching of criminal law for one year or more, which may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2505(b)(1) above;

(B) Service as a federal, state or tribal court judge for one year or more, which may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2505(b)(1) above;

(3) For the specialty of criminal law and the subspecialty of state criminal law, the board shall require an applicant to show substantial involvement by providing information that demonstrates the applicant's significant criminal trial experience such as:

(A) representation during the applicant's entire legal career in criminal trials concluded by verdict;

(B) representation as principal counsel of record in federal felony cases or state felony cases (Class G or higher);

(C) court appearances in other substantive criminal proceedings in criminal courts of any jurisdiction; and

(D) representation in appeals of decisions to the North Carolina Court of Appeals, the North Carolina Supreme Court, or any federal appellate court.

~~For the specialty of criminal law and the subspecialty of state criminal law, the applicant must have been engaged in the active practice of law for at least five years prior to certification with a substantial involvement in the area of criminal law. Substantial involvement shall mean~~

~~(A) during the applicant's entire legal career, the applicant must have been participating counsel of record in criminal proceedings as follows:~~

~~(i) five felony jury trials in cases submitted to jury for decision;~~

~~(ii) ten additional jury trials, regardless of offenses, submitted to jury for decision;~~

~~(iii) fifty additional criminal matters to disposition in the state district or superior courts, or in the U.S. district court (disposition being defined as the conclusion of a criminal matter);~~

~~(iv) any one of the following:~~

~~(a) two oral appearances before an appellate court of the State of North Carolina or the United States; or~~

~~(b) three written appearances before any appellate court in which the applicant certifies that he or she had primary responsibility for the preparation of the record on appeal and brief; or~~

~~(c) 25 additional criminal trials in any jurisdiction which were submitted to the judge or jury for decision.~~

~~(B) during the five years immediately preceding application to the board, the applicant must have~~

~~(i) appeared as participating counsel for at least 25 days in the jury trial of one or more criminal cases, whether to verdict or not;~~

~~(ii) made 75 court appearances in any substantive nonjury trials or proceedings (excluding calendar calls, continuance motions, or other purely administrative matters) in a criminal court of any jurisdiction;~~

~~(iii) devoted an average of 500 hours per year in the area of criminal law but not less than 400 hours in any one year.~~

~~(C) upon recommendation by the specialty committee and approval by the board, where the profession or the geographical location of an applicant prohibits his or her completing the requirements in Rule .2505(b)(1)(A) and (B) above, and the applicant shows substantial involvement in other areas of law requiring similar skills, or has engaged in research, writing, or teaching special studies of criminal law and procedure, to include criminal appellate law, said applicant may substitute such experience for one year of the five required years of Rule .2505(b)(1)(B)(iii) above and must meet all of the requirements of Rule .2505(b)(1)(A)(iv) above and three fifths of the remaining requirements of Rule .2505(b)(1)(B) above.~~

(4) For the subspecialty of criminal appellate practice, the applicant must have been engaged in the active practice of criminal appellate law for at least five years prior to certification during which the applicant devoted an average of at least 500 hours a year to the practice of criminal law (in both trial and appellate courts), but not less than 400 hours in any one year. The board may require an applicant to show substantial involvement in criminal appellate law by providing information regarding the applicant's participation, during the five years prior to application, in activities such as brief writing, motion practice, oral arguments, and the preparation and argument of extraordinary writs.

~~(C) upon recommendation by the specialty committee and approval by the board, where the profession or the geographical location of an applicant prohibits his or her completion of all or a portion of the requirements of Rule .2505(b)(2)(A) above and the applicant can show substantial involvement in other areas of law requiring similar skills, or has engaged in research, writing, or teaching special studies of criminal law and procedure, to include criminal appellate law, said applicant may substitute such experience for one year of the required five years and may qualify by meeting all of the requirements of Rules .2505(b)(1)(A)(i) and (ii) above, and upon the showing of the representation of at least five criminal appellate actions within the last two years.~~

. . . .

(D) Peer Review

(1) . . . .

(4) ~~(A)~~ Each applicant ~~for certification as a specialist in the specialty of criminal law and in the subspecialty of state criminal~~

~~law~~ must provide for reference and independent inquiry the names and addresses of the following: (i) ten lawyers and judges who practice in the field of criminal law and who are familiar with the applicant's practice, and (ii) opposing counsel and the judge in last ten serious (Class G or higher) felony cases tried by the applicant.

~~(i) four attorneys of generally recognized stature who practice in the field of criminal law;~~

~~(ii) two judges of different jurisdictions before whom the applicant has litigated a case to disposition within the previous two years;~~

~~(iii) opposing counsel, co-counsel, and judges in the last five jury trials conducted by the applicant;~~

~~(iv) opposing counsel, co-counsel, and judges in the last five nonjury trials or proceedures conducted by the applicant;~~

~~(v) if the applicant has participated in appellate matters, opposing counsel, co-counsel, and judges in the last two appellate matters conducted by the applicant as well as copies of all briefs filed by the applicant in these two appellate matters;~~

~~(vi) if an applicant has not prepared any appellate briefs, then the applicant shall submit to the specialty committee two separate trial court memoranda submitted to a trial court within the last three years which were prepared and filed by the applicant.~~

~~(B) An applicant for the subspecialty of criminal appellate practice shall provide the names and addresses of the following:~~

~~(i) four attorneys of generally recognized stature to attest to the applicant's substantial involvement and competence in criminal appellate practice. Such lawyers shall be substantially involved in criminal appellate practice and familiar with the applicant's practice;~~

~~(ii) two judges before whom the applicant has appeared in criminal appellate matters within the last two years to attest to the applicant's substantial involvement and competence in criminal appellate practice;~~

~~(iii) opposing counsel, judges, and any co-counsel in the last two appellate matters the applicant has handled. The applicant shall also provide all briefs filed in these matters.~~

(5) ~~(C)~~ A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(E) . . . .

.2506 Standards for Continued Certification as a Specialist

The period of certification is five years. A certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2506(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement—The specialist must demonstrate that for the five years preceding reapplication he or she has had substantial involvement in the specialty or subspecialty as defined in Rule .2505(b)~~(1)(B) and (C) of this subchapter for the specialty of criminal law and the subspecialty of state criminal law, and Rule .2505(b)(2) of this subchapter for the subspecialty of criminal appellate practice~~.

(b) . . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 24, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of February, 2004.

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 5th day of February, 2004.

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 5th day of February, 2004.

Brady, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PREPAID LEGAL SERVICE PLANS

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 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 prepaid legal service plans, as particularly set forth in 27 N.C.A.C. 1E, Section .0300, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1E, Section .0300 Rules Concerning Prepaid Legal Services Plans

.0302 Registration Site

~~A prepaid legal services plan must be registered in the office of the North Carolina State Bar prior to its implementation or operation in North Carolina on forms supplied by the North Carolina State Bar.~~ A prepaid legal services plan must be registered with the North Carolina State Bar prior to its implementation or operation in North Carolina. A duly authorized committee (hereafter, committee) of the North Carolina State Bar Council shall review a submitted plan to determine if it is a prepaid legal services plan pursuant to Rule .0310, and therefore should be registered in North Carolina. The committee may appoint a subcommittee to conduct an initial review and to recommend to the committee whether the plan meets the definition of a prepaid legal services plan. The committee shall also establish rules and procedures regarding the initial and annual registrations of prepaid legal services plans.

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 24, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of February, 2004.

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 5th day of February, 2004.

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 5th day of February, 2004.

Brady, J.
For the Court

AMENDMENT TO THE NORTH CAROLINA RULES OF PROFESSIONAL CONDUCT

The following amendment to the Rules of Professional Conduct was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 24, 2003.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, Rule .02, Scope, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rule 0.2, Scope

[1] The Rules of Professional Conduct are rules of reason. . . .

[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. ~~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.~~ Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a Rule.

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 24, 2003.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of February, 2004.

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 5th day of February, 2004.

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 5th day of February, 2004.

Brady, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA BOARD OF LAW EXAMINERS

The following amendment to the Rules and Regulations of The North Carolina Board of Law Examiners were duly adopted by the North Carolina Board of Law Examiners on October 24, 2003, and approved by the Council of the North Carolina State Bar at its quarterly meeting on January 16, 2004.

BE IT RESOLVED by the North Carolina Board of Law Examiners that the Rules and Regulations of the North Carolina Board of Law Examiners, particularly Rules .0501 and .0502 of the Rules Governing Admission to the Practice of Law in the State of North Carolina, be amended as follows (additions are underlined, deletions are interlined):

.0501 Requirements for General Applicants

As a prerequisite to being licensed by the Board to practice law in the State of North Caroina, a general applicant shall:

(1) ....

(7) if the applicant is or has been a licensed attorney, then the applicant be in good ~~Professional~~ standing in every jurisdiction within each state, ~~or~~ territory of the United States, or the District of Columbia, in which the applicant is or has been licensed to practice law and not under any ~~pending~~ charges of misconduct while the application is pending before the Board. ~~An applicant may be inactive and in good standing in any state in which the applicant has been licensed.~~

(a) For purposes of this rule, an applicant is "in good standing" in a jurisdiction if:

(i) the applicant is an active or inactive member of the bar

of the jurisdiction and the jurisdiction issues a certificate attesting to the applicant's good standing therein; or

(ii) the applicant was formerly a member of the bar of the jurisdiction and the jurisdiction certifies the applicant was in good standing at the time that the applicant ceased to be a member.

(b) if the jurisdiction in which the applicant is inactive or was formerly a member will not certify the applicant's good standing solely becuase of the non-payment of dues, the Board, in its discretion, may waive such certification from that jurisdiction.

Rule .502 REQUIREMENTS FOR COMITY APPLICANTS

Any attorney at law duly admitted to practice in another state, or territory of the United States, or the District of Columbia, upon written application may, in the discretion of the Board, be licensed to practice law in the State of North Carolina without written examination provided each such applicant shall:

(1) . . . .

~~(5) Be at all times in good professional standing and entitled to practice in every state, territory of the United States, or the District of Columbia, in which the applicant has been licensed to practice law, and not under pending charges of misconduct while the application is pending before the Board; except that the applicant may be inactive in any jurisdiction as to which the applicant is not relying to meet the Board's comity rule;~~

(5) Be in good standing in every jurisdiction within each state, territory of the United States, or the District of Columbia, in which the applicant is or has been licensed to practice law and not under any charges of misconduct while the application is pending before the Board.

(a) For purposes of this rule, an applicant is "in good standing" in a jurisdiction if:

(i) the applicant is an active or inactive member of the bar of the jurisdiction and the jurisdiction issues a certificate attesting to the applicant's good standing therein; or

(ii) the applicant was formerly a member of the jurisdiction and the jurisdiction certifies the applicant was in good standing at the time that the applicant ceased to be a member.

(b) if the jurisdiction in which the applicant is inactive or was formerly a member will not certify the applicant's good standing

solely because of the non-payment of dues, the Board, in its discretion, may waive such certification from that jurisdiction.

The applicant must not only be in good standing but also must be an active member of each jurisdiction on which the applicant relies for admission by comity.

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 16, 2004.

Given over my hand and the Seal of the North Carolina State Bar, this the 19th day of February, 2004.

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 20th day of February, 2004.

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 20th day of February, 2004.

Brady, J.
For the Court

HEADNOTE INDEX

WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

CRIMINAL LAW

Capital sentencing—prosecutor's improper questions and argument—right to jury trial—right not to testify—curative actions by court—The trial court took sufficient action to cure any possible prejudice from the prosecutor's comments on defendant's exercise of her right to a jury trial and her right not to testify while questioning defendant during a capital sentencing proceeding where the court identified the questions that were allegedly improper, instructed the jury on defendant's right to plead not guilty and told the jury that questions pertaining to this right could not be considered, and instructed the jury that defendant's exercise of her right not to testify could not be held against her. Furthermore, assuming arguendo that the prosecutor's jury argument in the capital sentencing proceeding contained improper references to defendant's exercise of her constitutional rights to plead not guilty and to not testify in the guilt-innocence phase, any possible prejudice was cured when the trial court ordered the remarks stricken from the record and instructed the jury that it "could not consider that argument as it relates to some issue on defendant's constitutional right," and any error would be harmless beyond a reasonable doubt because the jury had already found defendant guilty of first-degree murder, and the remarks do not refer to any aggravating circumstances proffered by the State or mitigating circumstances proffered by defendant. **State v. Kemmerlin, 446.**

Defendant's decision not to testify—court's inquiry—A capital first-degree murder defendant waived his right to testify, and the trial court's inquiry was adequate, where the court's inquiry sufficiently determined that defendant was intellectually capable of understanding his right to testify, had communicated with his attorneys, and had agreed with his attorneys that it was not in his best interest to testify. **State v. Carroll, 526.**

Diminished capacity—instructions—The court's instructions on diminished capacity in a capital first-degree murder prosecution were not inaccurate and misleading and did not constitute plain error because they grouped intoxication, drug use, and lack of mental capacity together and used the term "lack of capacity" rather than "impaired capacity" or "diminished capacity." **State v. Carroll, 526.**

Insanity—burden of proof—instructions—The trial court's instruction in a first-degree murder and kidnapping case that defendant had the burden to "prove insanity to your satisfaction" sufficiently charged the jury on the standard of proof needed by defendant to prove his insanity without an instruction that defendant had the burden of proving insanity by a preponderance of the evidence. Furthermore, the jury could not have been confused by the court's use of the terms "satisfied," "convinced," and "proof beyond a reasonable doubt" where the court fully instructed the jury on which standard to use and told the jury not to use the "beyond a reasonable doubt" standard in considering whether defendant was insane. **State v. Prevatte, 178.**

Legal insanity—consideration after defendant found not guilty—The trial court did not err in a first-degree murder and second-degree kidnapping case by instructing the jury not to consider defendant's special issue of legal insanity unless the jury first found defendant was not guilty. **State v. Prevatte, 178.**

Motion for mistrial—previous escape from prison—prior murder—The trial court did not abuse its discretion in a first-degree murder and second-degree kidnapping case by failing to declare a mistrial when the State introduced evi-

CRIMINAL LAW—Continued

CRIMINAL LAW—Continued

Prosecutor's argument—improper statement that defendant requested mitigating circumstance of no significant history of prior criminal activity—The trial court did not err in a capital first-degree murder sentencing proceeding by allowing the prosecutor to improperly comment during closing arguments that defendant requested the submission of the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance that defendant has no significant history of prior criminal activity when defendant specifically requested that the (f)(1) mitigator not be submitted where the prosecutor immediately corrected himself, and the court instructed the jury that defendant did not seek the mitigating circumstance. **State v. Barden, 316.**

Prosecutor's argument—insanity defense—The trial court did not err in a first-degree murder and second-degree kidnapping case by overruling objections to the State's argument that allegedly distorted the legal standard applicable to the insanity defense during closing arguments, because: (1) the State properly argued that defendant's mental illness did not alone meet the requirements for legal insanity; and (2) any alleged error by the State, stating that if the jurors found defendant insane that they should let him go, was properly handled by the trial court's instruction. **State v. Prevatte, 178.**

Prosecutor's argument—jury as law and justice—no impropriety—The prosecutor's argument in a capital sentencing proceeding telling the jury that "Today, you are the law. You are justice" and that "you 13 people are the law of this county" was a proper argument that the jury was the conscience of the community for the purposes of defendant's trial and was not an improper argument that the jurors are a prosecutorial arm of the government. **State v. Prevatte, 178.**

Prosecutor's argument—jury voir dire—jurors did not have to believe expert—The trial court did not err in a first-degree murder and second-degree kidnapping case by permitting the State's comments during jury voir dire that the jurors did not have to believe any part of what an expert said simply based on the fact that the person is an expert witness. **State v. Prevatte, 178.**

Prosecutor's argument—jury's duty to enforce law—The trial court did not err in a first-degree murder and second-degree kidnapping case by allowing the State to argue during closing arguments that the jury's duty is to enforce the law. **State v. Prevatte, 178.**

Prosecutor's argument—lack of consequences—The prosecutor in a first-degree murder and second-degree kidnapping case did not improperly refer during opening and closing arguments to the lack of consequences defendant had suffered in the six years since the crimes were committed. **State v. Prevatte, 178.**

Prosecutor's argument—manipulation of mental tests—The trial court did not err in a first-degree murder and second-degree kidnapping case by allowing the State to attempt to impeach the insanity defense with the idea that defendant had taken mental tests several times and knew how to manipulate them. **State v. Prevatte, 178.**

Prosecutor's argument—misstatements of law—The trial court in a capital first-degree murder sentencing proceeding did not improperly allow the prosecutor to misstate the law during his closing arguments including statements that

CRIMINAL LAW—Continued

EVIDENCE—Continued

Murder prosecution—gang membership—not prejudicial—There was no prejudicial error in a capital first-degree murder prosecution in an officer's testimony that this case was assigned to a "gang unit" where the attorneys and judge mistakenly thought that the door had been opened, but the witness made only a single brief reference and there was no indication that the outcome of the trial would have been any different without the testimony. **State v. Berry, 490.**

Photograph of victim—relevancy—The trial court did not err in a capital first-degree murder prosecution by allowing the introduction of a photograph of the victim taken three months before his death. **State v. Barden, 316.**

Prior crimes or bad acts—dissimilar robberies—questionable pretrial identification procedure—The trial court erred in an attempted robbery with a dangerous weapon and felony murder case by allowing under N.C.G.S. § 8C-1, Rule 404(b) testimony of two prior robberies allegedly committed by defendant, and defendant is entitled to a new trial, because the prior robberies were dissimilar to the present crimes, and the testimony rested upon a pretrial identification procedure of questionable validity. **State v. Al-Bayyinah, 150.**

Prior crimes or acts—prior murder—admissible—The trial court did not err in a first-degree murder prosecution by admitting evidence of a prior murder where the court carefully studied the substance of the evidence, reviewed the applicable law, considered the arguments of counsel, determined that the probative value was not substantially exceeded by unfair prejudice, determined that the evidence was tendered to establish the permissible factor that defendant killed this witness to silence her, and gave limiting instructions. **State v. Berry, 490.**

Rocky relationship—personal knowledge—The trial court did not commit prejudicial error in a first-degree murder and second-degree kidnapping case by allowing testimony from a witness stating that the relationship between the victim and her husband was rocky but that they always seemed to get back together even though defendant contends the testimony was given without personal knowledge because the witness testified on cross-examination that she did not live with the victim and her husband and did not know what she meant by "rocky." **State v. Prevatte, 178.**

Testimony—bases of opinions—state of mind—failure to make offer of proof—The trial court did not err in a first-degree murder and second-degree kidnapping case by allegedly violating defendant's right to present evidence in his defense by failing to allow two expert witnesses to state the bases of their opinions and by limiting the testimony of some lay witnesses about defendant's state of mind where defendant failed to make offers of proof. **State v. Prevatte, 178.**

Testimony from victim's brother—victim's wallet—in-court identification of victim's wife and daughter—The trial court did not commit plain error in a capital first-degree murder prosecution by admitting evidence from the victim's brother concerning the victim's wallet, the fact that the victim sent money back to his wife and child in Mexico, and an in-court identification of the victim's wife and daughter. **State v. Barden, 316.**

Testimony from victim's supervisor—victim's character—work ethic—responsibleness—The trial court did not commit plain error in a capital first-

EVIDENCE—Continued

degree murder prosecution by admitting evidence from the victim's supervisor about the victim's work ethic and responsibleness. **State v. Barden, 316.**

HOMICIDE

Defense of habitation—porch part of dwelling—unlawful expression of opinion by trial court—The trial court erred in a voluntary manslaughter case arising out of a deadly affray which took place on the porch of a dwelling by answering the jury's inquiry by instructing that a porch is not inside the home since the instruction was tantamount to an instruction that the porch could not as a matter of law be inside the home for purposes of the defense of habitation under N.C.G.S. § 14-51.1. **State v. Blue, 79.**

Felony murder—underlying assault—death resulting from separate strangulation—no merger—The trial court did not err by submitting felony murder to the jury based on a felonious assault where defendant contended that the assault merged with the killing, but the victim died from a separate strangulation and not as a result of the assault. **State v. Carroll, 526.**

First-degree felony murder—motion to dismiss—sufficiency of evidence—armed robbery—The trial court did not err by denying defendant's motion to dismiss the charge of first-degree felony murder even though defendant contends the evidence was insufficient to support the underlying felony of armed robbery because the particular point when the robbery occurred is immaterial where the death and the taking are so connected as to form a continuous chain of events. **State v. Barden, 316.**

First-degree murder—felony murder—premeditation and deliberation—failure to submit second-degree murder—premeditation and deliberation convictions vacated—resentencing for one felony murder—In a capital trial wherein defendant was found guilty of two counts of first-degree murder based on premeditation and deliberation and felony murder of each victim, with the murder of the other victim as the underlying felony, and defendant was sentenced to death for each murder, the trial court erred by failing to instruct on second-degree murder as a lesser offense included within premeditated and deliberate murder, and defendant's convictions based on premeditated and deliberate murders must be vacated. Accordingly, defendant's convictions for first-degree murder are validly based only on felony murder, the murder providing the underlying felony in each case constitutes one element of that murder and merges into that murder conviction, judgment must be arrested on one of the murders, and defendant is awarded a new sentencing hearing at which only one felony murder will be submitted and the (e)(5) aggravating circumstance, that the murder was committed while defendant was engaged in the commission of any homicide, may not be considered. N.C.G.S. § 15A-2000(e)(5). **State v. Millsaps, 556.**

Short-form indictments—firearms enhancement holding—The firearms enhancement holding in *State v. Lucas*, 353 N.C. 568, does not conflict with the North Carolina Supreme Court's holdings on short-form murder indictments. **State v. Leeper, 55.**

JURY—Continued

dict based on both theories of first-degree murder; and, following the clerk's announcement that the jury unanimously found defendant guilty of first-degree murder on the basis of malice premeditation and deliberation and under the felony murder rule, each juror individually affirmed that this was his or her verdict. It would strain reason to conclude that the jury's verdict was not unanimously based on both theories of first-degree murder. **State v. Carroll, 526.**

Selection—capital trial—consideration of life sentence—bias—The trial court did not abuse its discretion in a first-degree capital murder prosecution by preventing defendant from exploring whether a prospective juror could consider a life sentence for premeditated murder given her personal knowledge of early release from life sentences for murder where the juror informed the court that she did not feel her prior associations with murder would affect her ability to be fair and impartial in defendant's case and she would not automatically vote for the death penalty and the court's instructions cured any misconception regarding life imprisonment without parole. **State v. Kemmerlin, 446.**

Selection—capital trial—duty to stand up alone and announce death verdict—excusal for cause—The trial court did not err in a first-degree murder and second-degree kidnapping case by allowing the State to inform prospective jurors that as a part of their duty they might have to stand up alone and announce a death verdict and by excusing for cause a prospective juror based on the fact that she could not fulfill this duty. **State v. Prevatte, 178.**

Selection—capital trial—excusal for cause—views on capital punishment—rehabilitation of juror—The trial court did not abuse its discretion in a first-degree capital murder prosecution by excusing for cause three prospective jurors on the grounds that each would be unable to return a sentence of death and by denying defendant's request to rehabilitate two of those prospective jurors. **State v. Kemmerlin, 446.**

Selection—capital trial—motion to strike panel—juror recognized mug shot of defendant in newspaper—The trial court did not err in a first-degree murder and second-degree kidnapping case by denying defendant's motion to strike the panel of jurors that heard a prospective juror's comment that she recognized a mug shot of defendant in the newspaper even though defendant contends the information allowed the other jurors to speculate about prior crimes defendant may have committed. **State v. Prevatte, 178.**

Selection—capital trial—peremptory challenges—*Batson*—racial discrimination—The trial court erred in a capital first-degree murder prosecution by holding that defendant had not made a prima facie showing of racial discrimination at the time he raised a *Batson* objection to the prosecutor's peremptory challenges of two African-American prospective jurors, and the case is remanded to the trial court for the limited purpose of holding a hearing to give the State an opportunity to present race-neutral reasons for striking those prospective jurors. **State v. Barden, 316.**

Selection—capital trial—qualification for both phases—An assignment of error in a first-degree murder prosecution concerning potential jurors with reservations about the death penalty was not restricted to the sentencing proceeding even though defendant raised it in that context. A trial court may not select a

JURY—Continued

panel for the guilt-innocence phase with the understanding that different jurors will be substituted at sentencing. **State v. Berry, 490.**

Selection—capital trial—reservations about death penalty—equivocal answers—The trial court did not abuse its discretion in a capital first-degree murder prosecution by excusing a potential juror for cause where the juror's responses on the death penalty were arguably equivocal, but his final answer indicates that the court properly interpreted his answers as unambiguous opposition to the death penalty regardless of the law or the evidence. **State v. Berry, 490.**

Selection—capital trial—reservations about death penalty—inconsistent answers—The trial court did not abuse its discretion in a capital first-degree murder prosecution by excusing for cause a prospective juror whose answers were inconsistent but who could not state that he would follow the law if the evidence were circumstantial. **State v. Berry, 490.**

Selection—capital trial—reservations about death penalty—unalterable views—The trial court did not abuse its discretion in a capital first-degree murder prosecution by excusing a potential juror for cause where she was unalterably opposed to the death penalty. Mere opposition does not disqualify a juror who can set aside her personal beliefs and follow the law; in this case, the court asked an additional question to determine that the opposition was unalterable. **State v. Berry, 490.**

Selection—capital trial—voir dire—insanity defense—The trial court did not err in a first-degree murder and second-degree kidnapping case by overruling objections to the State's argument that allegedly distorted the legal standard applicable to the insanity defense during jury voir dire because the statement was a proper attempt by the State to ascertain whether jurors could follow the law concerning defendant's guilt as well as whether defendant was not guilty by reason of insanity. **State v. Prevatte, 178.**

KIDNAPPING

Instructions—purpose of confinement or restraint—The trial court's instructions in a prosecution for two kidnappings did not unconstitutionally relieve the State of its burden of proving all elements of kidnapping because the court instructed the jury that it must find the confinement, restraint or removal was for the purpose of "murder" rather than "first degree murder," as specified in both indictments, or because the court failed to instruct the jury that it must also find defendant was "terrorizing" the second victim when the indictment in that case alleged terrorizing the victim as an additional purpose, where (1) both indictments alleged that the kidnapping was "for the purpose of facilitating the commission of a felony, First Degree Murder," and language in the indictments following "the commission of a felony" is mere surplusage and may properly be disregarded; and (2) although the indictment may allege more than one purpose, the State has to prove only one of the alleged purposes in order to sustain a conviction of kidnapping, and it was not necessary for the court to include terrorizing in its instructions. **State v. Prevatte, 178.**

Second-degree—additional restraint—sufficiency of evidence—The trial court did not err by upholding defendant's second-degree kidnapping convictions

SEARCH AND SEIZURE—Continued

than the results of the 1986 order, which had merely concluded that defendant was not excluded as a suspect. **State v. Pearson, 22.**

Nontestimonial identification order—procedures following collection of samples—The trial court properly concluded that violations of statutory nontestimonial identification statutes were not substantial and correctly refused to suppress the seized evidence where a return was not made to the issuing judge within 90 days and defendant was not provided with a copy of the results in a timely manner. N.C.G.S. § 15A-974(2) mandates suppression when the evidence is obtained as a result of the violation, but these violations involved procedures to be followed after the samples are taken and the deviation was a mere unintentional oversight. **State v. Pearson, 22.**

Nontestimonial identification order—supporting affidavit—reliance on information from another officer—A rape defendant failed to produce evidence that a statement in an affidavit supporting a nontestimonial identification order was made in bad faith such that it was knowingly false or in reckless disregard of the truth where the affidavit alleged that defendant had been seen peeping into an apartment but defendant argued that the report did not show that defendant was actually seen peeping. A police officer making an affidavit for issuance of a warrant may do so in reliance upon information reported to him by other officers in the performance of their duties, and the officer making the affidavit from a report in this case had every reason to conclude that defendant had been secretly peeping. **State v. Pearson, 22.**

SENTENCING

Capital—aggravating circumstance—course of conduct—instruction—There was plain error in a capital sentencing proceeding where the court's instruction on course of conduct allowed the jury to find the aggravating circumstance based on a prior murder without finding that the past and present murders were part of a course of conduct. **State v. Berry, 490.**

Capital—aggravating circumstance—defendant previously convicted of another capital offense—failure to submit—The trial court did not err in a capital sentencing proceeding by allowing the State to decline to present evidence of the aggravating circumstance under N.C.G.S. § 15A-2000(e)(2) that defendant had previously been convicted of another capital offense even though defendant had been found guilty of murder in 1974 in Georgia because the State chose to proceed under the (e)(3) aggravating circumstance that the offense was a prior violent felony. **State v. Prevatte, 178.**

Capital—aggravating circumstances—felony involving the use or threat of violence to the person—testimony of rape victim—The trial court did not commit error or plain error in a capital first-degree murder sentencing proceeding by permitting a State's witness to testify to prior events surrounding her attack and rape by defendant in support of the submission of the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance that defendant had been previously convicted of a felony involving the use or threat of violence to the person. **State v. Barden, 316.**

Capital—aggravating circumstances—instructions—course of conduct—The trial court did not err in a capital sentencing proceeding for a 1996 murder in

SENTENCING—Continued

its instruction on the course of conduct aggravating circumstance where defendant contended that the instruction permitted the jury to consider a 1992 juvenile adjudication and a 1992 purse snatching. One may not reasonably infer that a juror would stretch "on or about" to encompass a span of over four years. Moreover, the court instructed the jurors that the juvenile acts introduced to support the prior violent felony circumstance could not be used as the basis for the course of conduct circumstance. **State v. Leeper, 55.**

Capital—aggravating circumstances—mitigating circumstances—no significant history of prior criminal activity—prior violent felony—Although defendant contends the trial court erred in a capital first-degree murder sentencing proceeding by submitting both the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance that defendant has no significant history of prior criminal activity and the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance that defendant had been previously convicted of a felony involving the use or threat of violence to the person, our Supreme Court has consistently held that the submission of both of these circumstances is proper. **State v. Barden, 316.**

Capital—aggravating circumstances—murder especially heinous, atrocious, or cruel—The trial court did not err in a capital first-degree murder sentencing proceeding by submitting the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel. **State v. Barden, 316.**

Capital—aggravating circumstance—murder especially heinous, atrocious, or cruel—The trial court did not err in a capital sentencing proceeding by submitting the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel. **State v. Prevatte, 178.**

Capital—aggravating circumstance—murder part of course of conduct—no plain error—The trial court did not commit plain error in a capital sentencing proceeding by failing to specify and define the alleged crime of violence in the N.C.G.S. § 15A-2000(e)(11) aggravating circumstance that the murder was part of a course of conduct since there was no possibility of double counting where the (e)(5) circumstance was limited to the kidnapping of the female victim while the (e)(11) circumstance was limited to the kidnapping and assault of her son. **State v. Prevatte, 178.**

Capital—aggravating circumstance—murder part of course of conduct—single crime sufficient—The trial court did not err in a capital sentencing proceeding by instructing the jury that a single crime of violence could support the N.C.G.S. § 15A-2000(e)(11) aggravating circumstance that the murder was part of a course of conduct. **State v. Prevatte, 178.**

Capital—aggravating circumstances—overlapping—There was sufficient evidence in a capital sentencing proceeding to support the overlapping aggravating circumstances that the murder was committed to avoid arrest and that the murder was part of a course of conduct. Each circumstance was offered for a different purpose and there was separate and substantial evidence to support each circumstance individually. **State v. Berry, 490.**

Capital—aggravating circumstances—pecuniary gain—jury instructions—The trial court did not commit plain error in a capital first-degree murder

SENTENCING—Continued

sentencing proceeding by its instruction on the N.C.G.S. § 15A-2000(e)(6) pecuniary gain aggravating circumstance even though defendant contends it allowed the jury to find the aggravating circumstance without finding that the motive for the murder was pecuniary gain. **State v. Barden, 316.**

Capital—aggravating circumstances—prior violent felonies—Florida records—The trial court in a capital sentencing hearing properly admitted Florida records of a prior violent felony, and the evidence was sufficient for submission of the prior violent felony aggravating circumstance where a court clerk testified that the Florida documents were signed and verified in a manner verifying their authenticity, and an expert testified that defendant's fingerprints matched the fingerprints of the defendant in the Florida case. **State v. Carroll, 526.**

Capital—aggravating circumstances—use of juvenile adjudications—effective date—A 1992 juvenile adjudication could be used as an aggravating circumstance for first-degree murder even though defendant contended that the amendments concerning confidentiality of juvenile records and allowing the use of juvenile adjudications pertained only to offenses committed on or after 1 May 1994. The effective date of the amendments pertain to sentencing for crimes committed on or after that date, not to the date of the prior adjudications. **State v. Leeper, 55.**

Capital—death penalty—disproportionate—The trial court erred in a first-degree capital murder prosecution by sentencing defendant to the death penalty based on the fact that this crime does not rise to the level of those murder cases in which the death sentence has been found proportionate under N.C.G.S. § 15A-2000(d)(2), and defendant is sentenced to life imprisonment without parole. **State v. Kemmerlin, 446.**

Capital—death penalty—proportionate—The trial court did not err in a first-degree murder case by sentencing defendant to the death penalty where defendant bludgeoned the victim in the head numerous times, changed weapons during the course of the attack and acknowledged that the victim may have been alive after the attack but took no steps to assist the victim. **State v. Barden, 316.**

Capital—death penalty—proportionate—A death sentence was not disproportionate where defendant was convicted of first-degree murder under theories of premeditation and deliberation and felony murder; defenant killed the victim with a machete; and defendant attempted to burn the body and the victim's home after she died. **State v. Carroll, 526.**

Capital—death penalty—proportionate—Sentences of death imposed upon defendant for two first-degree murders were not disproportionate where defendant was convicted on the basis of premeditation and deliberation and under the felony murder rule; the jury found as aggravating circumstances that defendant had previously been adjudicated delinquent in a juvenile proceeding for an offense that would have been a felony involving violence to the person had defendant been an adult, N.C.G.S. § 15A-2000(e)(5), and that the murders were part of a violent course of conduct, N.C.G.S. § 15A-2000(e)(11); either of the statutory aggravating circumstances, standing alone, have been held sufficient to support a sentence of death; defendant planned to rob the first victim, shot the victim as he was driving his vehicle and immediately fled the scene; only a short

SENTENCING—Continued

SENTENCING—Continued

WORKERS' COMPENSATION—Continued

Court of Appeals in this case is reversed for the reasons stated in the dissenting opinion that injuries received by plaintiff when he fell while attempting to climb over a seven and one-half foot high locked chain link and barbed wire gate leading to an employee parking lot did not arise out of and in the course of his employment because he engaged in an unreasonable incidental activity for egress from the employer's premises when the employer provided a safe and secured exit and the premises exception to the coming and going rule thus did not apply. **Arp v. Parkdale Mills, Inc., 657.**

Lifting and turning—shoulder injury—not compensable injury by accident—The decision of the Court of Appeals in this workers' compensation case is reversed for the reasons stated in the dissenting opinion that the Industrial Commission's findings were supported by competent evidence and in turn supported its conclusion that plaintiff did not sustain a compensable injury by accident when he suffered a shoulder injury at the time he lifted a mailbag and turned while unloading an aircraft because there were no unusual conditions likely to result in unexpected consequences. **Landry v. US Airways, Inc., 419.**

ZONING

Local ordinance—regulation of swine farms—The Board of Health may not regulate swine farms under N.C.G.S. § 130A-39 upon considerations other than health. **Craig v. County of Chatham, 40.**

Local ordinance—swine farms—validity—A local zoning ordinance relating to swine farms was invalid because it attempts to incorporate an invalid county swine ordinance that was preempted by state law. **Craig v. County of Chatham, 40.**

Residential area—sawmill—accessory use—The decision of the Court of Appeals in the case is reversed for the reason stated in the dissenting opinion that landowners' use of a sawmill on residentially zoned property for nonindustrial and nonmanufacturing purposes did not violate a city zoning ordinance but was a permitted accessory use. **Dobo v. Zoning Bd. of Adjust. of the City of Wilmington, 656.**

Special use permit—broadcast tower—whole record test—An application of the whole record test reveals that the trial court erred by reversing respondent planning board's decision to deny petitioners' special use permit application to construct a broadcast tower. **Mann Media, Inc. v. Randolph Cty. Planning Bd., 1.**

Subdivision plat—compliance with ordinance and regulations—entitlement to approval—The decision of the Court of Appeals in this case is reversed for the reasons stated in the dissenting opinion that a subdivision plat for affordable housing complied with a city's zoning ordinance and subdivision regulations, the city council's denial of the subdivision application was unsupported by competent, material and substantial evidence, and the applicant was entitled to approval of its subdivision plat. **Guilford Fin. Servs., LLC v. City of Brevard, 655.**

WORD AND PHRASE INDEX