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SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
NORTH CAROLINA

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9	ROBERT H. HOBGOOD	Louisburg
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	JACK A. THOMPSON	Fayetteville
	JAMES F. AMMONS, JR.	Fayetteville
13	WILLIAM C. GORE, JR.	Whiteville
	OLA M. LEWIS	Southport
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	ANDY CROMER	King
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	HENRY E. FRYE, JR.	Greensboro
	LINDSAY R. DAVIS, JR.	Greensboro
	JOHN O. CRAIG III	Greensboro
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	WILLIAM Z. WOOD, JR.	Winston-Salem
	L. TODD BURKE	Winston-Salem
	RONALD E. SPIVEY	Winston-Salem
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20A	MICHAEL EARLE BEALE	Wadesboro
20B	SUSAN C. TAYLOR	Monroe
	W. DAVID LEE	Monroe
22	MARK E. KLASS	Lexington
	KIMBERLY S. TAYLOR	Hiddenite
	CHRISTOPHER COLLIER	Mooresville
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25A	BEVERLY T. BEAL	Lenoir
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	W. ROBERT BELL	Charlotte
	RICHARD D. BONER	Charlotte
	J. GENTRY CAUDILL	Charlotte

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	Linwood O. Foust[4]	Charlotte
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	Timothy L. Patti	Gastonia
27B	Forrest Donald Bridges	Shelby
	James W. Morgan	Shelby

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	Charles Phillip Ginn	Marshall
28	Dennis Jay Winner	Asheville
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William H. Freeman	Winston-Salem
Howard R. Greeson, Jr.	Greensboro
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Charles C. Lamm, Jr.[11]	Boone

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John B. Lewis, Jr.	Farmville
Donald L. Smith	Raleigh

1. Appointed and sworn in 30 August 2004 to replace Dwight L. Cranford who retired 1 August 2004.
2. Elected and sworn in 1 January 2005 to replace Stafford G. Bullock who retired 31 December 2004.
3. Retired 31 December 2004.
4. Elected and sworn in 1 January 2005 to replace Marcus L. Johnson who retired 31 December 2004.
5. Elected and sworn in 3 January 2005.
6. Retired 31 December 2004.
7. Appointed and sworn in 20 January 2005 to replace Clarence E. Horton, Jr. who retired 31 December 2004.
8. Appointed and sworn in 28 January 2005.
9. Deceased 22 July 2004.
10. Appointed and sworn in as Emergency Judge 2 January 2005.
11. Appointed and sworn in 1 January 2005.
12. Appointed and sworn in 3 January 2005.

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DISTRICT	JUDGES	ADDRESS
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	William K. Hunter	Greensboro
	Linda Valerie Lee Falls[11]	Greensboro
	Sherry Fowler Alloway[12]	Greensboro
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	Michael Knox	Concord
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	William Thomas Graham, Jr.	Winston-Salem

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	H. William Constangy	Charlotte
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	Bradley B. Letts	Sylva
	Monica Hayes Leslie	Waynesville

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Daphene L. Cantrell	Charlotte
Samuel Cathey[22]	Statesville
Sol G. Cherry	Fayetteville
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Spencer B. Ennis	Graham
J. Patrick Exum	Kinston
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Earl J. Fowler, Jr.[24]	Asheville
Rodney R. Goodman	Kinston
Adam C. Grant, Jr.[25]	Concord
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Pattie S. Harrison	Roxboro
Roland H. Hayes	Winston-Salem
Robert E. Hodges	Morganton

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	WILLIAM C. LAWTON[26]	Raleigh
	C. JEROME LEONARD, JR.	Charlotte
	EDMUND LOWE	High Point
	JAMES E. MARTIN	Ayden
	EDWARD H. MCCORMICK[27]	Lillington
	J. BRUCE MORTON	Greensboro
	DONALD W. OVERBY	Raleigh
	L. W. PAYNE, JR.	Raleigh
	STANLEY PEELE	Chapel Hill
	MARGARET L. SHARPE	Winston-Salem
	RUSSELL SHERRILL III	Raleigh
	CATHERINE C. STEVENS	Gastonia
	J. KENT WASHBURN[28]	Graham

RETIRED/RECALLED JUDGES

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

---

1. Elected and sworn in 6 December 2004.
2. Appointed and sworn in 24 September 2004 to replace Alma L. Hinton who was appointed to Superior Court. Elected and sworn in 6 December 2004.
3. Elected and sworn in 2 December 2004..
4. Elected and sworn in 2 December 2004 to replace William C. Lawton who retired 20 November 2004.
5. Elected and sworn in 6 December 2004.
6. Elected and sworn in 6 December 2004.
7. Elected and sworn in 6 December 2004 to replace Edward H. McCormick who retired 5 December 2004.
8. Appointed Chief Judge 17 December 2004 to replace J. Kent Washburn who retired 30 November 2004.
9. Elected and sworn in 6 December 2004.
10. Elected and sworn in 6 December 2004.
11. Elected and sworn in 6 December 2004 to replace Thomas G. Foster who retired 30 November 2004.
12. Elected and sworn in 6 December 2004 to replace William Daisy who resigned 31 August 2004.
13. Appointed and sworn in 15 February 2005.
14. Appointed and sworn in 28 February 2005.
15. Appointed Chief Judge 1 February 2005 to replace Samuel L. Cathey who retired 1 February 2005.
16. Retired 1 February 2005.
17. Elected and sworn in 6 December 2004.
18. Elected and sworn in 6 December 2004.
19. Appointed and sworn in 16 April 2004.
20. Elected and sworn in 6 December 2004.
21. Appointed and sworn in as Emergency Judge 3 January 2005.
22. Appointed and sworn in as Emergency Judge 1 February 2005.
23. Appointed and sworn in as Emergency Judge 16 December 2004.
24. Appointed and sworn in 17 May 2004.
25. Deceased 7 June 2001.
26. Appointed and sworn in as Emergency Judge 6 December 2004.
27. Appointed and sworn in 3 January 2005.
28. Appointed and sworn in as Emergency Judge 1 December 2004.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
ROY COOPER

Chief of Staff
JULIA S. WHITE

Deputy Chief of Staff
KRISTI J. HYMAN

Director of Administrative Services
STEPHEN C. BRYANT

Deputy Attorney General for Policy and Planning
KELLY CHAMBERS

General Counsel
J. B. KELLY

Chief Deputy Attorney General
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Daniel Robert Wanderman . . . . Applied from the State of New York

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State of North Carolina

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. JIM EDWARD HASELDEN

No. 665A01

(Filed 28 March 2003)

1. Appeal and Error— preservation of issues—failure to object at trial—challenge for cause

Although defendant contends the trial court erred in a capital first-degree murder case by excusing for cause a prospective juror based on his felony convictions in another state, this assignment of error is dismissed because: (1) defendant failed to preserve this issue for appellate review since he did not object at trial; and (2) defendant is not entitled to review of this assignment of error under the plain error rule.

2. Appeal and Error— preservation of issues—failure to object at trial—leg shackles

Although defendant contends his right to a fair trial in a capital first-degree murder case was violated when the trial court ordered that defendant be shackled during jury selection and by failing to review the order during the trial, this assignment of error is dismissed because: (1) defendant failed to preserve this issue for appellate review since he did not object at trial; (2) defendant is not entitled to review of this assignment of error under the plain error rule; and (3) in any event, defendant's prior altercations and threats more than justify the trial court's decision to use leg shackles to restrain him.

3. Jury— capital trial—selection—voir dire—questions concerning parole and parole eligibility

The trial court did not err in a capital first-degree murder case by denying defendant's request to voir dire jurors regarding their opinions and beliefs concerning parole and parole eligibility, because: (1) neither the North Carolina or United States Supreme Court has ever held that a defendant has a right, constitutional or otherwise, to question jurors about parole eligibility; (2) the jury in the present case was informed on the meaning of life imprisonment according to N.C.G.S. § 15A-2002; and (3) during deliberations the jurors neither indicated any confusion regarding the meaning of life without parole nor requested any additional instruction from the trial court.

4. Discovery— first-degree murder—failure to disclose witness statements—motion to dismiss—motion for mistrial

The trial court did not err in a capital first-degree murder case by denying defendant's motion to dismiss and/or motion for a mistrial based on the State's failure to disclose exculpatory evidence including prior statements to law enforcement officers by various State witnesses and failure to turn over court documents filed in the child custody litigation between the victim and her estranged husband, because: (1) there was no connection between any of these statements and defendant's decision to stipulate the various facts at trial; (2) defendant received all of the prior statements of the State witnesses after these witnesses had testified on direct examination at trial, and defendant used some of these prior statements to cross-examine the witnesses regarding inconsistencies between earlier statements and statements made at trial; and (3) defendant had in his possession at trial the documents relating to the custody litigation.

5. Evidence— victim impact—emotional outbursts of family—no plain error

The trial court did not commit plain error in a capital first-degree murder case by admitting victim-impact evidence and allegedly failing to control emotional outbursts by the victim's family because even assuming arguendo that it was error, the jury would not have reached a different result given defendant's confession to another person and defendant's stipulation at trial that he was responsible for the victim's death.

6. Evidence— photographs—area victim's body found

The trial court did not commit plain error in a capital first-degree murder case by admitting two photographs of the area where the victim's body was found even though defendant contends they depict a cross and memorial flowers which do not accurately reflect the scene at the time the body was discovered, because: (1) a witness testified that the photographs were a fair and accurate representation of the property and of the location where the victim's body was found; and (2) the probative value of the photographs far outweighed the danger of any undue prejudice.

7. Evidence— photographs—victim's body

The trial court did not abuse its discretion in a capital first-degree murder case by admitting three photographs of the victim's body even though defendant stipulated that he caused the victim's death with the infliction of multiple gunshot wounds, because: (1) the photographs not only depicted the condition of the victim's body when found, but also corroborated defendant's confession to another man that defendant had killed the victim; (2) each photograph was taken at a different angle which offered a unique perspective on the nature and location of the victim's wounds; and (3) by showing the number and location of the victim's wounds, the photographs helped to circumstantially prove premeditation and deliberation.

8. Homicide; Robbery— first-degree murder—dangerous weapon—motion to dismiss

The trial court did not err by denying defendant's motion to dismiss the charges of robbery with a dangerous weapon and first-degree murder, because defendant's own statements, both before and after the murder, provide adequate support for a finding that the use of a gun to kill the victim and the subsequent taking of her purse and car were part of one continuous transaction.

9. Sentencing— aggravating circumstances—robbery with a dangerous weapon

The trial court did not err in a first-degree murder sentencing proceeding by submitting robbery with a dangerous weapon as an aggravating circumstance under N.C.G.S. § 15A-2000(e)(5), because the evidence supported the trial court's submission of the (e)(5) aggravating circumstance.

10. Criminal Law— prosecutor's argument—capital sentencing—mitigating circumstances

The prosecutor's arguments in a capital sentencing proceeding that the victim did not have the benefit of any mitigating circumstances and that mitigating circumstances do not have to be found unanimously or beyond a reasonable doubt were not improper.

11. Criminal Law— prosecutor's argument—capital sentencing—mitigating circumstances—age of defendant and victim—victim's mother—victim impact evidence

The prosecutor's argument in a capital sentencing proceeding in which he compared the mitigating circumstance of the age of defendant to the age of the victim and the age of the victim's daughter and contrasted the mitigating circumstance that defendant was considerate and loving to his mother by referencing the victim's mother in the courtroom were proper statements of victim impact evidence which the jury could consider.

12. Criminal Law— prosecutor's argument—capital sentencing—Biblical references

The prosecutor's use of Biblical references in arguing to the jury in a capital sentencing proceeding that the Bible does not prohibit the death penalty was not so grossly improper that the trial court erred by failing to intervene ex mero motu where the prosecutor was anticipating that defense counsel might offer religious sentiment during closing argument; the prosecutor did not suggest that the Bible mandates a death sentence for murder but instead told the jury that the Bible verses he was citing were "not a mandate . . . but [were] the [Biblical] authority for those of you who worry about that"; the prosecutor told the jury that its sentencing decision should be based on the law and the evidence; and the trial court instructed the jury to follow the law as provided to it.

13. Criminal Law— prosecutor's argument—capital sentencing—death penalty deserved

The prosecutor did not improperly inject his personal beliefs or opinions into his jury argument in a capital sentencing proceeding by his remarks to the effect that defendant deserved to die; rather, the prosecutor permissibly argued that the characteristics of the murder for which defendant was convicted were such that a death sentence was deserved.

14. Criminal Law— prosecutor's argument—capital sentencing—consideration of victim's life

The prosecutor's argument in a capital sentencing proceeding that "If you let this murderer walk out of this courtroom with his life then you are saying that his life is worth more that [the victim's] life" simply reminded the jury that, in addition to considering defendant's life, it should also consider the life of the victim and was a proper extension of the prosecutor's earlier argument concerning victim impact evidence.

15. Sentencing— aggravating circumstance—murder especially heinous, atrocious, or cruel

The trial court did not err in a 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) the (e)(9) circumstance is neither unconstitutionally vague nor overbroad; (2) defendant murdered the victim in a remote secluded area where he knew they would be alone; (3) the evidence supports an inference that the victim was left in her last moments aware of but helpless to prevent impending death; and (4) defendant left the victim after inflicting the first gunshot wound but then returned and shot her again.

16. Sentencing— death penalty—proportionate

The trial court did not err in a first-degree murder case by sentencing defendant to the death penalty, because: (1) defendant was convicted based on malice, premeditation and deliberation, and under the felony murder rule; (2) the jury found the aggravating circumstances under N.C.G.S. § 15A-2000(e)(3) that defendant had been previously convicted of a felony involving the use of violence, under N.C.G.S. § 15A-2000(e)(5) that the murder was committed by defendant while he was engaged in the commission of robbery with a firearm or flight after committing robbery with a firearm, and under N.C.G.S. § 15A-2000(e)(9) that the murder was especially heinous, atrocious, or cruel; and (3) defendant took the victim to an isolated spot in the woods, made the victim get on her knees while she pled for her life, and defendant shot the victim and returned to shoot the victim again.

Justice BRADY concurring in a separate opinion.

Chief Justice LAKE joins in the concurring opinion.

Justice EDMUNDS dissenting.

Justice ORR joins in the dissenting opinion.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge James M. Webb on 6 June 2001 in Superior Court, Stokes County, upon a jury verdict finding defendant guilty of first-degree murder. On 11 March 2002, 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 4 February 2003.

Roy Cooper, Attorney General, by William P. Hart, Special Deputy Attorney General, and Amy C. Kunstling, Assistant Attorney General, for the State.

James R. Parish for defendant-appellant.

WAINWRIGHT, Justice.

On 20 March 2000, a Stokes County grand jury indicted Jim Haselden (defendant) for murder and robbery with a dangerous weapon. Defendant was tried capitally before a jury at the 21 May 2001 Special Session of Superior Court, Stokes County. On 31 May 2001, the jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. The jury also found defendant guilty of robbery with a firearm. On 6 June 2001, following a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction, and the trial court entered judgment in accordance with that recommendation. The trial court also sentenced defendant to 103 months minimum and 133 months maximum imprisonment for the robbery conviction.

Evidence presented at trial showed that defendant and the victim, Kim Sisk, lived next door to each other in the McConnell Road Trailer Park in Greensboro, North Carolina. Defendant stipulated at trial that on or about 20 December 1999, he inflicted multiple gunshot wounds to Kim which caused her death. Defendant also stipulated that he had sexual intercourse with Kim on the same date.

The State presented considerable evidence at trial concerning the days preceding the murder. Around 12 December 1999, Aaron Maness, a friend of defendant's, visited defendant at the trailer park and loaned him a saw. Defendant took the saw into his trailer and

soon returned with it. When Maness went inside defendant's trailer, Maness noticed a .16-gauge, sawed-off shotgun with gray tape on the handle. Maness also saw some shells near the shotgun. Later that evening, Maness watched defendant place part of the sawed-off stock in a dumpster.

Around 14 December 1999, Kim told Maness that defendant had agreed to give her $100.00 to drive defendant to Virginia. On 15 December 1999, around 10:30 or 11:00 p.m., defendant went for a ride with a friend, Mark Ingold. Defendant had a sawed-off shotgun and ammunition with him. Defendant said that he was tired of being broke and wanted money and a car. Defendant told Ingold to pull up and stop beside another car because defendant wanted to "car jack a car." Ingold refused to stop beside a car but did eventually stop so defendant could use the bathroom. At this point, defendant shot a stop sign. Shooting the sawed-off shotgun caused a cut on defendant's hand.

On 20 December 1999, around 11:00 a.m., Dorothy Hare, Kim's mother, went to see Kim at her trailer. Kim was wearing jeans, a blue shirt, boots, and a wristwatch. Kim was moving out of her trailer and packing her belongings in her teal green Camaro. Around 6:00 or 6:30 p.m., Chad Sisk, Kim's husband, saw Kim when she came to see their six-year-old daughter, Heather. Between 8:00 and 8:30 p.m., James Lucas saw Kim, and she told him that she was getting ready to take a neighbor to the mountains for $100.00. Lucas and his daughter saw Kim leave the trailer park that night around 9:15 or 9:30 p.m. Kim was driving her teal green Camaro and defendant was in the car. Kim's purse, which contained jewelry, was in the car. Kim usually carried money in her purse.

The next day, 21 December 1999, defendant arrived at his niece's residence in Morganton, North Carolina. Defendant was driving a teal green Camaro. Defendant had a pair of jeans and a trash bag full of clothes. The jeans were women's size six. Kim wore clothing size five or six. Defendant offered to let his niece have the clothes.

Later that night, defendant asked a resident of his niece's trailer park where he could run a car into a lake, blow it up, or burn it. Defendant eventually drove the Camaro to Burkemont Mountain, in Burke County, and left it in the woods near a logging road. When defendant got out of the Camaro, he had a plastic bag and a duffel bag. A sawed-off shotgun with duct tape around the handle was in the plastic bag. Defendant sold the shotgun to Jeremy Crawley for thirty

dollars. When Crawley and a companion later fired the gun, the gun left gashes on their hands. They had noticed a similar gash on defendant's hand.

On 23 December 1999, William Duggins discovered Kim Sisk's dead body in the woods in Stokes County. The body was located just over one mile from the residence of defendant's half-brother, Timothy Williamson. Defendant had previously lived with Williamson after defendant's release from prison. When Williamson told defendant that a girl's body had been found near his house, defendant replied, "Just tell Mom I love her, and I'll probably never see or talk to you guys again."

Law enforcement officers responding to the scene observed the body lying on its back. The body had massive trauma to the left side of the face. The left eye was dislodged. There were wounds to the right cheek. The body was clothed in jeans, a dark pullover shirt, hiking boots, and a wristwatch. A plastic sleeve from a shotgun shell was in the hair. Tooth or bone fragments were located just beyond the body on the left side. Semen and sperm were found in Kim's panties. The DNA profile subsequently obtained from this evidence matched defendant's DNA profile.

On 24 December 1999, Dr. Donald Jason performed an autopsy on the body. Dr. Jason found two shotgun wounds to the head and determined that these wounds were the cause of death. One wound was to the right cheek; powder stippling indicated that this wound was caused by a close-proximity shot. The second wound was to the front, left, mid-cheek. This wound was consistent with Kim being in a kneeling position and looking up when she was shot. Dr. Jason concluded that Kim could have remained conscious for at least an hour after receiving the wound to the left side of her face. The wound to the right side of her face would have resulted in almost immediate loss of consciousness. Dr. Jason concluded that the wounds could have been inflicted as much as ten minutes apart.

On 26 December 1999, defendant was living in Georgia with Willie Harper. Defendant told Harper that he had just gotten out of prison for "cutting a guy." Defendant admitted to Harper that he had killed a girl named Kim. Defendant said that his fingerprints were on the car and that his semen was in Kim. Defendant explained that Kim had been his next-door neighbor and that he was going to give her $100.00 to take him to Virginia. Defendant confessed to Harper that he had killed Kim with a sawed-off shotgun at night near some woods.

Defendant told Harper that he had made Kim get on her knees. Defendant said that Kim had pleaded, "Jim don't shoot me, Jim don't shoot me," four or five times, and then defendant "blew her whole face off." Defendant said that he went down the street but then returned and shot Kim in the face again. Defendant told Harper that this shot caused Kim's body to jump off the ground. Defendant said he sold the shotgun to some "rednecks" for thirty dollars.

At the time of Kim's murder, defendant was on parole for a prior conviction for assault with a deadly weapon. Defendant told Harper that he violated his parole when he fled from North Carolina after the murder. Defendant wanted Harper to help him obtain a gun because if the police caught defendant, he was not going back alive.

Harper eventually reported defendant's confession to Harper's boss, Mark Polson. Polson contacted the police, who subsequently arrested defendant. Throughout their investigation, the police never located Kim's purse or wallet.

JURY SELECTION

[1] Defendant first assigns error to the trial court's excusal of prospective juror Robert Sexton for cause based on Sexton's felony convictions in another state. Defendant contends that the trial court violated N.C.G.S. § 9-3 by not inquiring whether Sexton's citizenship rights had been restored. *See* N.C.G.S. § 9-3 (2001) (prohibiting prospective jurors from serving if they have been convicted of a felony and have not had their citizenship restored).

During jury selection, the trial court gave prospective jurors the opportunity to provide reasons why they should not serve on the jury. Prospective juror Sexton informed the trial court that he was unsure of his eligibility because of several felony convictions against him in Texas during the 1970s. The trial court asked if Sexton had "receive[d] any documentation indicating that [his] citizenship rights had been restored." Sexton replied that he had "asked one time for a full pardon, and they denied it." The trial court informed Sexton that a pardon was different from restoration of citizenship. Nonetheless, the trial court excused Sexton for cause "out of an abundance of caution" "based upon [Sexton's] representation that [he had] been convicted of a felony, and [was] unsure as to whether or not [his] citizenship ha[d] been restored."

Defendant contends that Sexton was not subject to being challenged for cause. Defendant contends that prospective juror Sexton

did not need documentation restoring his citizenship rights because his rights were automatically restored under N.C.G.S. § 13-1(5). *See* N.C.G.S. § 13-1(5) (2001) (providing for automatic restoration of citizenship rights for a person convicted of a felony in another state upon the occurrence of an "unconditional discharge of such person by the agency of that state having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon").

Defendant has failed to preserve this issue for appellate review. The record reveals no indication that defendant objected at trial to the excusal of prospective juror Sexton for cause. This Court will not consider arguments based upon matters not presented to or adjudicated by the trial court. N.C. R. App. P. 10(b)(1); *see also State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991). "Even alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court." *State v. Jaynes*, 342 N.C. 249, 263, 464 S.E.2d 448, 457 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996). Additionally, defendant is not entitled to review of this assignment of error under the plain error rule. "[T]his Court has not applied the plain error rule to issues which fall within the realm of the trial court's discretion, and we decline to do so now." *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001).

This assignment of error is procedurally barred and without merit.

[2] In another assignment of error, defendant contends that his due process rights to a fair trial were violated when the trial court ordered him shackled during jury selection and failed to review the order during the trial. According to defendant, the shackles prohibited him from standing when he was introduced to prospective jurors, thus prejudicing the jury by giving them the impression that defendant was rude, insolent, disrespectful, or did not care.

During jury selection, the trial court became aware that defendant was restrained by leg shackles. Deputies in charge of courtroom security made a written request that the trial court order the restraints to remain in place throughout the trial. In support of their request, the deputies informed the court that defendant had been involved in two altercations while awaiting trial: defendant threw urine and feces at another person, and defendant assaulted another inmate with a razor blade embedded in a toothbrush. A Stokes County

jail employee also made statements supporting the request for leg shackles. According to the statement, defendant had said that "when he was sentenced, . . . he had something for a few people that were going to be at his trial." In addition, defendant had said that "when he was sentenced and he got the death sentence that the fat bastard [referring to his attorney] is going to get it." Based on this information, the trial court "direct[ed] that the defendant while in the courtroom be restrained with a form of leg restraint with the instruction that at no time is any juror to be in [a] position to view the leg restraints." The trial court further noted that "defendant's table appears to be [an] average sized defense table with plywood that seems to cover at least three sides of the table front and each side. The defendant's feet and the leg restraint are concealed from view of this Court and [are] concealed from the view of jurors who are brought in the courtroom."

We first note that defendant has failed to preserve this issue for appellate review. The record reveals, and defendant concedes, that he voiced no objection at trial to being restrained by leg shackles. As such, defendant's assignment of error is procedurally barred. N.C. R. App. P. 10(b)(1); *see also Eason*, 328 N.C. at 420, 402 S.E.2d at 814. Moreover, defendant is not entitled to plain error analysis because the matter was largely within the discretion of the trial court. *See Steen*, 352 N.C. at 256, 536 S.E.2d at 18. In any event, defendant's prior altercations and threats more than justify the trial court's decision to use leg shackles to restrain him.

This assignment of error is procedurally barred and without merit.

[3] In his next assignment of error, defendant argues that the trial court erred in denying his request to *voir dire* jurors regarding their opinions and beliefs concerning parole and parole eligibility. Defendant concedes that this Court has generally prohibited disclosure of information concerning parole in capital cases. *See State v. Price*, 326 N.C. 56, 83, 388 S.E.2d 84, 99-100, *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990). Defendant also concedes that under N.C.G.S. § 15A-2002, the trial judge is required to instruct the jury, "in words substantially equivalent to those of this section, that a sentence of life imprisonment means a sentence of life without parole." N.C.G.S. § 15A-2002 (2001). Nonetheless, defendant argues that he had the right to inform the jury of the punishment that may be imposed upon conviction of murder, because

"N.C.G.S. § 84-14 authorizes the attorney in jury trials to argue 'the whole case as well of law as of fact.' " (Quoting N.C.G.S. § 84-14 (19__) (repealed 1995 and recodified as N.C.G.S. § 7A-97).) We disagree.

Neither this Court nor the United States Supreme Court has ever held that a defendant has a right, constitutional or otherwise, to question jurors about parole eligibility. *State v. Neal*, 346 N.C. 608, 617, 487 S.E.2d 734, 739-40 (1997), *cert. denied*, 522 U.S. 1125, 140 L. Ed. 2d 131 (1998). Contrary to defendant's assertions, the jury in the present case was informed of the meaning of life imprisonment. Using the exact language of N.C.G.S. § 15A-2002, the trial court charged the jury that "[a] sentence of life imprisonment means a sentence of life without parole." Moreover, during deliberations, the jurors neither indicated any confusion regarding the meaning of life without parole nor requested any additional instruction from the trial court.

This assignment of error is overruled.

GUILT-INNOCENCE PHASE

[4] In his next two assignments of error, defendant argues that the trial court erred in denying his motion to dismiss and/or his motion for a mistrial based on the State's failure to disclose exculpatory evidence. Specifically, defendant contends that the State failed to provide him with prior statements to law enforcement officers by State's witnesses Malinda Ivey, Bryan Richard Thomas, Sammy Brewer, Larry Dean Beam, Jeremy Crawley, and Aaron Maness until after those witnesses had testified on direct examination at trial. Defendant also contends that the State failed to turn over court documents filed in the child-custody litigation between the victim and her estranged husband, Chad Sisk.

According to defendant, if the State had timely produced the statements and documents referenced above, defendant would not have stipulated to his involvement in the murder or that he was guilty of at least second-degree murder. After a thorough review of the record, we can ascertain no connection between the statements defendant cites above and defendant's decision to stipulate to various facts at trial. Such an argument, in the face of the overwhelming evidence of defendant's guilt, defies fundamental reason.

There is no general constitutional or common law right to discovery in criminal cases. *Weatherford v. Bursey*, 429 U.S. 545, 559, 51 L. Ed. 2d 30, 42 (1977); *State v. Alston*, 307 N.C. 321, 335, 298 S.E.2d

631, 641 (1983). However, the State is required to disclose "evidence [that] is material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (1963). This constitutional duty requires the State only to turn over such information at trial, not prior to trial, because "[d]ue process is concerned that the suppressed evidence might have affected the outcome at trial and not that the suppressed evidence might have aided the defense in preparing for trial." *State v. Hardy*, 293 N.C. 105, 127, 235 S.E.2d 828, 841 (1977); *see also* N.C.G.S. § 15A-903(f)(1)-(2) (2001) (providing that statements of State's witnesses are not discoverable before the witnesses have testified on direct examination but are discoverable upon motion by defendant before his cross-examination of the witnesses).

Our review of the record reveals that defendant received all of the prior statements of Malinda Ivey, Sammy Brewer, Bryan Richard Thomas, Larry Dean Beam, Jeremy Crawley, and Aaron Maness after these witnesses had testified on direct examination at trial. Indeed, defendant used some of these prior statements to cross-examine the witnesses regarding inconsistencies between earlier statements and statements made at trial. Similarly, defendant had in his possession at trial the documents relating to the custody litigation between the victim and her estranged husband, Chad Sisk, and used them to cross-examine Sisk.

We therefore conclude that the trial court correctly denied defendant's motion to dismiss and motion for a mistrial.

This assignment of error is overruled.

[5] By his next assignments of error, defendant contends the trial court erred in admitting irrelevant and emotionally charged victim-impact evidence that he contends was grossly and improperly prejudicial. Defendant has waived appellate review of these issues by his failure to object to them at trial. *See* N.C. R. App. P. 10(b)(1). We nonetheless review this issue for plain error. Plain error analysis is applied when our review of the entire record reveals that the alleged error is a fundamental error so prejudicial that justice cannot have been done. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). To prevail, the " 'defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.' " *State v. Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12 (quoting *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993)), *cert. denied*, 531 U.S. 1019, 148 L. Ed. 2d 498 (2000).

In the present case, defendant objects to various portions of testimony, such as testimony by Kim's mother and Kim's husband that Kim was attempting to overcome a drug addiction, that Kim had recently rededicated her life to the Lord, and that Kim had reconciled with her husband and renewed her wedding vows. Defendant also argues that the trial court failed to control emotional outbursts by the victim's family and failed to act *ex mero motu* to admonish and prevent the victim's family from these outbursts.

After reviewing all of the evidence to which defendant objects, we find no plain error. Moreover, assuming *arguendo* that it was error to admit the evidence in issue, we fail to see how the jury would have reached a different result in defendant's case. Defendant confessed to Willie Harper that he killed the victim. At trial, defendant stipulated that he was responsible for the victim's death. We cannot conclude that the jury would have reached a different result had the evidence in issue been excluded.

These assignments of error are without merit.

[6] Defendant next assigns error to the admission of two photographs of the area where the victim's body was found. Defendant contends that the photographs, which depict a cross and memorial flowers at the scene, do not accurately reflect the scene at the time the body was discovered. Defendant concedes that this argument is reviewable only for plain error. We find no error, plain or otherwise, in the trial court's decision to admit the photographs into evidence.

"A photograph of the scene of a crime may be admitted into evidence if it is identified as portraying the locale with sufficient accuracy." *State v. Smith*, 300 N.C. 71, 75, 265 S.E.2d 164, 167 (1980). The trial court must weigh the photographs' probative value against the unfair danger of prejudice in determining the photographs' admissibility. N.C.G.S. § 8C-1, Rule 403 (2001); *State v. Goode*, 350 N.C. 247, 258, 512 S.E.2d 414, 421 (1999). "This determination 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.' " *Goode*, 350 N.C. at 258, 512 S.E.2d at 421 (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)) (alteration in original).

In the present case, State's witness William Duggins used the photographs to illustrate to the jury where he found the victim's body.

Duggins testified that the photographs were a fair and accurate representation of his property and of the location where he found the victim's body. The probative value of the photographs far outweighed the danger of undue prejudice to the defendant. Accordingly, we find no error in the trial court's decision to admit the photographs of the crime scene. *See State v. Rogers*, 316 N.C. 203, 223, 341 S.E.2d 713, 725 (1986) (admitting photographs of the crime scene for illustrative purposes where a witness testified that the photograph was a fair and accurate representation of the scene even though the photograph was not made at the time of the murder), *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).

This assignment of error is overruled.

[7] Defendant also assigns error to the trial court's admission of three photographs of the victim's body. Defendant contends the use of the three photographs was excessive, inflammatory, and unduly prejudicial, thus denying him of his constitutional right to a fair trial. Specifically, defendant argues that the photographs were improperly admitted in light of his stipulation that he had caused Kim's death with the infliction of multiple gunshot wounds. We disagree.

The three photographs at issue were used during the testimony of Captain Craig Carico, who was one of the first law enforcement responders to the scene where Kim's body was found. Carico testified that he took the photographs and that they fairly and accurately depicted the condition of Kim's body when found. The first photograph showed a close-up view of Kim's head. The remaining two photographs depicted Kim's left side from foot to head and Kim's right side from foot to head.

"Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526. A defendant's stipulation as to the cause of death does not preclude the use of photographs "to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree." *Id.*; *see also State v. Elkerson*, 304 N.C. 658, 665, 285 S.E.2d 784, 789 (1982). Whether an excessive number of photographs has been used is a matter largely within the trial court's discretion. *Hennis*, 323 N.C. at 285,

372 S.E.2d at 527. Factors a court may consider include what the photographs depict, the level of detail, the manner of presentation, and the scope of accompanying testimony. *Id.*

In the present case, the photographs not only depicted the condition of Kim's body when found, but also corroborated defendant's confession to Willie Harper that he had killed Kim in a wooded area by "[blowing] her whole face off." *See State v. Hyde*, 352 N.C. 37, 54-55, 530 S.E.2d 281, 293 (2000) (upholding the admission of fifty-one photographs of the victim's body where the photographs corroborated details of defendant's confession), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001). Moreover, each photograph was taken at a different angle, offering a unique perspective on the nature and location of Kim's wounds. *See id.* at 54, 530 S.E.2d at 293 (photographs were admissible because they depicted the different wounds inflicted on the victim); *State v. Blakeney*, 352 N.C. 287, 310, 531 S.E.2d 799, 816 (2000) (photographs and videotape were admissible because each illustrated either a unique perspective on how the victim was killed or contained unique detail of the condition and location of the victim's body as it pertained to the overall crime scene), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001) . Finally, by showing the number and location of Kim's wounds, the photographs helped to circumstantially prove premeditation and deliberation. *See Hennis*, 323 N.C. at 284, 372 S.E.2d at 526.

We therefore conclude that the trial court did not abuse its discretion in determining that the probative value of the photographs outweighed the danger of unfair prejudice to defendant. N.C.G.S. § 8C-1, Rule 403.

This assignment of error is therefore overruled.

[8],[9] Defendant next assigns error to the trial court's denial of his motion to dismiss the charges of robbery with a dangerous weapon and first-degree murder based upon a theory of felony murder because of insufficiency of the evidence presented at the close of all the evidence. In a related assignment of error, defendant also objects to the submission of robbery with a dangerous weapon as an aggravating circumstance at the sentencing proceeding. *See* N.C.G.S. § 15A-2000(e)(5) (2001) ("The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery . . . .") Specifically, defendant argues that the State failed to establish that a continuous transaction

occurred between the use of deadly force and the taking of Kim's car and personal property.

Although defendant's arguments on this issue involve both guilt-innocence and sentencing, we elect to address the arguments here for purposes of consistency.

We first note that defendant's only motion to dismiss the charges against him was based on alleged inadequacies in the murder indictment and the State's failure to disclose exculpatory evidence as required under *Brady*, 373 U.S. 83, 10 L. Ed. 2d 215. Defendant never made a motion to dismiss based on the sufficiency of the evidence. We further note that defendant also failed to object to the submission of the (e)(5) aggravating circumstance on the basis that defendant was engaged in a robbery with a dangerous weapon at the time of the murder. Finally, defendant does not argue plain error in the present appeal. As such, defendant has failed to preserve these assignments of error for appellate review. N.C. R. App. P. 10(b)(3); *State v. Gainey*, 355 N.C. 73, 97, 558 S.E.2d 463, 479 (defendant failed to preserve his challenge to the submission of the (e)(5) aggravating circumstance where he made no objection at trial and did not assign plain error on appeal), *cert. denied*, — U.S. —, 154 L. Ed. 2d 165 (2002). In an abundance of caution, however, we have reviewed the evidence supporting defendant's robbery conviction.

The essential elements of robbery with a dangerous weapon are: "(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of a person is endangered or threatened." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998); *see also* N.C.G.S. § 14-87(a) (2001). We have previously explained the temporal connection needed between the use of the dangerous weapon and the taking of property as follows:

> To be found guilty of robbery with a dangerous weapon, the defendant's threatened use or use of a dangerous weapon must precede or be concomitant with the taking, or be so joined by time and circumstances with the taking as to be part of one continuous transaction. Where a continuous transaction occurs, the temporal order of the threat or use of a dangerous weapon and the taking is immaterial.

State v. Olson, 330 N.C. 557, 566, 411 S.E.2d 592, 597 (1992) (citation omitted).

The evidence supporting the robbery conviction should be viewed in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *Call*, 349 N.C. at 417, 508 S.E.2d at 518. Circumstantial evidence may be sufficient to 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).

In the present case, the evidence, when viewed in the light most favorable to the State, shows that defendant's own statements, both before and after the murder, provide adequate support for a finding that the use of a gun to kill Kim and the subsequent taking of her purse and car were part of one continuous transaction. *See Gainey*, 355 N.C. at 89, 558 S.E.2d at 474 ("defendant's confession provides adequate support for a finding that defendant took the victim's Mustang from him by threatening his life with a gun"). On 15 December 1999, defendant told friends that he was tired of being broke and wanted money and a car. Defendant also expressed a desire to take a car from someone at gunpoint. Kim was last seen alive a few days later on 20 December 1999, packing her Camaro with her personal belongings and driving away with defendant. Kim's body was discovered on 23 December 1999, with fatal gunshot wounds to her face. Defendant stipulated at trial that he inflicted these wounds. Defendant also confessed to Willie Harper that he shot Kim, abandoned her Camaro in some woods, and sold the shotgun for thirty dollars. Kim's purse, which she had packed in the Camaro and was known to contain jewelry, was never found. This evidence supports a reasonable inference that defendant shot Kim to fulfill his earlier expressed desire to carjack someone and have money and a car.

The jury could therefore reasonably infer that there was "one continuous transaction with the element of use or threatened use of a dangerous weapon so joined in time and circumstances with the taking as to be inseparable." *State v. Hope*, 317 N.C. 302, 306, 345 S.E.2d 361, 364 (1986). The State introduced evidence sufficient to permit a rational jury to conclude beyond a reasonable doubt that defendant committed armed robbery. Moreover, the evidence supported the trial court's submission of the (e)(5) aggravating circumstance.

These assignments of error are without merit.

CAPITAL SENTENCING PROCEEDING

In another set of assignments of error, defendant argues that numerous portions of the State's sentencing proceeding closing arguments were improper. Defendant argues that the cumulative nature of the errors of law and fact in these closing arguments resulted in prejudicial error warranting a new sentencing proceeding.

Defendant concedes that his trial counsel failed to object to any of these closing arguments at trial. This Court has repeatedly held that arguments to which defendant fails to object at trial "must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979). In order to obtain a new sentencing proceeding based on improprieties in the prosecutor's closing argument, defendant must show that the prosecutor's argument " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 40 L. Ed. 2d 431, 437 (1974), *quoted in State v. McCollum*, 334 N.C. 208, 223-24, 433 S.E.2d 144, 152 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

"Prosecutors have a duty to advocate zealously that the facts in evidence warrant imposition of the death penalty, and they are permitted wide latitude in their arguments." *State v. Williams*, 350 N.C. 1, 25, 510 S.E.2d 626, 642, *cert. denied*, 528 U.S. 880, 145 L. Ed. 2d 162 (1999). Counsel is permitted to argue all facts presented as well as every reasonable inference that can be drawn from the facts. *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986).

In his brief, defendant cites at great length numerous portions of the prosecutor's closing argument. After examining each of defendant's arguments in light of the principles enunciated above, we conclude that the trial court did not err in failing to intervene *ex mero motu* during the prosecutor's closing argument. We consider each of defendant's arguments in turn.

[10] First, defendant argues that the prosecutor, in an attempt to make the jury resentful toward defendant, denigrated the procedural safeguards provided to defendant by the United States and North Carolina Constitutions. The prosecutor stated:

> Now, we get to the second issue, which is: Do you find any mitigating circumstances exist? Guess what? Even though he did this to Kim Dalton Sisk we give him the benefit of—it doesn't have to be unanimous to find his mitigating factors. Or even though she's dead and buried and gone and he's alive, it's almost like you're the winner, Mr. Haselden. You lived. You killed her. So you get the benefit of all these mitigating factors that she didn't. Not only that, but you don't even have to find them by unanimous. They can be any one of you or two of you can find them, or more. And they don't have to be beyond a reasonable doubt.

A prosecutor is permitted to legitimately belittle the significance of the mitigating circumstances. *State v. Billings*, 348 N.C. 169, 186-87, 500 S.E.2d 423, 433-34, *cert. denied*, 525 U.S. 1005, 142 L. Ed. 2d 431 (1998). In the present case, the prosecutor argued that Kim did not have the benefit of any mitigating circumstances. The prosecutor also correctly pointed out that mitigating circumstances do not have to be found unanimously or beyond a reasonable doubt. Taken in context, the prosecutor's argument to the jury concerning the mitigating circumstances was proper. Contrary to defendant's argument, the prosecutor never denigrated or belittled the constitutional requirements concerning mitigating circumstances.

Defendant's assignment of error is without merit.

[11] Defendant next argues the following portion of the prosecutor's closing argument was improper:

> The age of the defendant at the time of this murder is a mitigating circumstance. Can you believe that? The age of him, 21, 22, 23, whatever it is. That should be a mitigating circumstance, Mr. Right-from-wrong. How old was she? How old is Heather [the victim's daughter]? You can't consider that though.
>
> The defendant is considerate and loving to his mother. Well, I'll be dog. He has some qualities that are in him. What about this mother [the victim's mother]? Can't consider that though.

This prosecutorial argument was a proper attempt to offer victim impact evidence for the jury. The prosecutor's argument showed the jury that the victim was a unique human being and assisted the jury in evaluating defendant's culpability for the murder. *See Payne v. Tennessee*, 501 U.S. 808, 823, 115 L. Ed. 2d 720, 734 (1991). The State is permitted to counteract the defendant's mitigating evidence by

arguing that the victim was a unique individual whose death represents a loss to society and to the victim's family. *Id.*

In the portion of closing argument in issue, the prosecutor first compared the age of defendant to the age of the victim and the age of the victim's daughter. The prosecutor next contrasted the mitigating circumstance that defendant was considerate and loving to his mother by referencing the victim's mother in the courtroom. All of these factors, the victim's age, the age of the victim's daughter, and the effect of the murder on the victim's mother, were relevant considerations for the jury. Accordingly, the prosecutor's argument was proper.

Defendant's assignment of error is without merit.

[12] Defendant next contends that the prosecutor argued to the jury that the death penalty is mandated by the Bible. The prosecutor argued in pertinent part as follows:

> . . . As his Honor has instructed you, that side over there gets the last argument. I can't begin to think of what they would argue in this matter. But I suspect that at least one of their arguments is going to be that the death sentence is contrary to the Good Book. It's contrary to our Christian ethics. And then they're probably going to rare back and say, thou shalt not kill. If you're up on the Good Book, what does that mean? That means you and I shalt not kill. It doesn't mean that you shouldn't do it pursuant to the statutes and the law and order. You see, just a few verses below that, right after that thou shalt not kill, just a few verses below it it says, he that smiteth a man so that he die shall surely be put to death. Just a few verses below that. I suggest to you that that is Biblical authority for the death sentence. Not a mandate that you do it in any one case, but it is the authority for those of you [who] worry about that.
>
> . . . .
>
> Now, listen to this, ladies and gentlemen of the jury. In that Good Book it says this in Numbers 35. I believe it's starting at verse 6, I mean 16. If he smite him with an instrument of iron so that he die he is a murderer: The murderer shall surely be put to death. If he smite him with throwing a stone wherewith he may die, and he die, he is a murderer: And the murderer shall surely be put to death.

> Listen to this ladies and gentlemen of the jury. This is in the Bible, in Numbers, Chapter 35, verse 29. So these things shall be for a statute of judgment—
>
> Ladies and gentlemen of the jury, North Carolina Statute 15A-2000 is a statute of judgment. That is simply that, a statute of judgment. And what does it say in the Bible about a statute of judgment? A statute of judgment unto you throughout your generations and all your dwellings. Whosoever killeth any person, the murderer shall be put to the death by the mouth of witnesses. Moreover ye shall take no satisfaction for the life of a murderer which is guilty of death, but he shall surely be put to death. That's the statutes of judgment.
>
> . . . .
>
> You know, I'm going to make one more comment about the Bible. If you ever had any doubt—this is the New Testament, I understand. If you ever had any doubt about capital punishment in the Bible, remember when Jesus was on the cross, beside of him on each side, if I recall correctly, is two thieves. He told one of them, he said, you'll be in heaven with me today, some words to that effect. Now, he had the power to take himself away from justice and get down off of that cross. He had the power to take those two criminals down and put them on the ground and let them walk away, but he didn't, did he? It's probably why we say, God have mercy on your soul, because he said a soul, or at least that one. But he didn't take justice away from man. He didn't take them down off the cross. That's the strongest argument I can think of. He could've done it right then and there if he had wanted to, but he didn't.

In analyzing Biblical arguments, as with any allegedly improper closing argument, we consider whether the prosecutor's argument " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Darden*, 477 U.S. at 181, 91 L. Ed. 2d at 157 (quoting *Donnelly*, 416 U.S. at 643, 40 L. Ed. 2d at 437). More often than not, this Court has concluded that this Biblical argument is within the acceptable parameters allowed to counsel when arguing hotly contested cases. *State v. Bond*, 345 N.C. 1, 36, 478 S.E.2d 163, 182 (1996), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997). Indeed, in *State v. Williams*, this Court found the following argument was not so grossly improper as to have required that the trial court intervene *ex mero motu*:

> And I believe Mr. Warmack or Mr. Dixon [defense counsel] may stand up here and tell you . . . that they think capital punishment may be somehow contrary to Christian ethics. . . . And they may quote such chapters from the Bible as thou shall not kill and things like that, ladies and gentlemen.
>
> I want to quote a few things to you first of all. And right behind thou shall not kill in the Book of Exodus in verse 21, chapter 21, verse 12, it says: He that smiteth a man, so that he die, shall be surely put to death. . . .
>
> And right behind that, ladies and gentlemen, in Numbers, chapter 35, verse 18, it states: Or if he smite him with a hand weapon of wood, wherewith he may die, and he die, he is a murderer: the murderer shall surely be put to death. That's in the Book of Numbers. . . .
>
> So these things shall be a statute of judgment unto you throughout your generation and in all your dwellings. Whoever killeth any person, the murderer shall be put to death by the mouth of the witnesses. And moreover, you shall take no satisfaction for the life of a murderer which he is guilty of death but he shall surely be put to death.
>
> Ladies and gentlemen, none of us and none of you in this courtroom, . . . are going to be sitting on that jury taking joy in what you have to do today. . . . But that doesn't make it any less necessary, ladies and gentlemen, based on the facts and based on the law . . . .
>
> The statute of judgment. That's what this Bible—what this good book says, ladies and gentlemen, the statute of judgment. And we are trying this case under statute 15A-2000, ladies and gentlemen. That's the statute of judgment and that's what his honor is going to give.

350 N.C. at 25-26, 510 S.E.2d at 642-43 (alterations in original).

We have held similar religious arguments not to be reversible error in other cases. *See, e.g.*, *Billings*, 348 N.C. at 187, 500 S.E.2d at 434 (finding prosecutor's argument that "the law is divinely inspired by referring to the law as a 'statute of judgment' " was not so grossly improper as to require the trial court to intervene *ex mero motu*); *Bond*, 345 N.C. at 36, 478 S.E.2d at 182 (finding that the trial court

properly overruled defendant's objection to an argument almost identical to the first paragraph of argument at issue in the present case where the prosecutor stated "he that smiteth a man so that he die shall surely be put to death," in anticipation of defendant's usage of "thou shalt not kill").

In the present case, we conclude that the prosecutor's closing argument was not so grossly improper as to warrant a new sentencing proceeding. The prosecutor here was addressing a potential defense argument that the death penalty is contrary to Christian doctrine. *See Bond*, 345 N.C. at 36, 478 S.E.2d at 182 (recognizing that prosecutors are forced to anticipate and address the potential Biblical arguments that defendants often make in death cases); *see also State v. Oliver*, 309 N.C. 326, 359-60, 307 S.E.2d 304, 326 (1983). Considering the atrocity of the present murder and the few defense strategies available to defendant in his closing argument, it seems reasonable for the prosecution to anticipate that defendant might offer religious sentiment during his closing argument.

Moreover, the prosecutor argued to the jury that the Bible did not prohibit the death penalty. Contrary to defendant's argument, however, the prosecutor did not suggest that the Bible mandates a death sentence. Indeed, the prosecutor told the jury that the Bible verses he was citing were "[n]ot a mandate . . . but [were] the [Biblical] authority for those of you [who] worry about that." Additionally, the prosecutor in the present case told the jury that its sentencing decision should be based on the law and the evidence. Finally, the trial court instructed the jury to follow the law as provided to it. Accordingly, we conclude that the prosecutor's use of Biblical references was not so grossly improper that the trial court erred by failing to intervene *ex mero motu*.

Nonetheless, as we have done on several occasions, we strongly encourage counsel

> that they should base their jury arguments solely upon the secular law and the facts. Jury arguments based on any of the religions of the world inevitably pose a danger of distracting the jury from its sole and exclusive duty of applying secular law and unnecessarily risk reversal of otherwise error-free trials.

Williams, 350 N.C. at 27, 510 S.E.2d at 643.

Defendant's assignment of error is overruled.

[13] Defendant next argues that the prosecutor improperly injected his personal views and opinions into closing argument. The pertinent portion of the prosecutor's closing argument is as follows:

> . . . The very fabric of our justice deterrent system is on the line in this case. If this isn't especially heinous, atrocious and cruel killing that deserves the death sentence, I don't know what would be. I can't imagine the facts that would be. If ever we're going to use the death penalty it is in this case.
>
> . . . .
>
> . . . How much worse can it get? If you believe in the death penalty, if you can be part of it, if you can do it, then how much worse would it have to be than this for you to do it? I can't imagine. I hope I don't ever have to try that case, if it has to be worse.
>
> Ladies and gentlemen, [defendant] deserves to die. He deserves no less than what Kim Sisk received out there on December 20th. He deserves the same punishment. But we're a little too humane in this country for that. We can't give him the same punishment. But ladies and gentlemen, nevertheless, he deserves to die. And that's what we're here asking you for.

It is improper for an attorney to inject his personal beliefs or opinions into closing argument. N.C.G.S. § 15A-1230 (2001). Prosecutors are permitted to offer argument concerning the circumstances of the murder and whether these circumstances warrant imposition of the death penalty. *See, e.g.*, *State v. Hill*, 347 N.C. 275, 298, 493 S.E.2d 264, 277 (1997) (concluding that the prosecutor's argument that "this may be the most atrocious crime that has occurred here in Harnett County" was not grossly improper), *cert. denied*, 523 U.S. 1142, 140 L. Ed. 2d 1099 (1998); *State v. Larry*, 345 N.C. 497, 530, 481 S.E.2d 907, 926 (finding no error in prosecutor's argument that the defendant qualified for death penalty because the defendant was the "worst of the worst"), *cert. denied*, 522 U.S. 917, 139 L. Ed. 2d 234 (1997); *Johnson*, 298 N.C. at 368-69, 259 S.E.2d at 761 (concluding that the prosecutor's argument that murder was "one of the worst murder cases I've ever seen" was not prejudicial).

The remarks at issue in the present case were not a prosecutorial attempt to inject personal belief or opinion into closing argument. Rather, the prosecutor permissibly argued that the characteristics of this murder were such that a death sentence was deserved. *See Hill*, 347 N.C. at 298, 493 S.E.2d at 277.

Defendant's assignment of error is without merit.

[14] Defendant also argues that the prosecutor improperly stated to the jury, "If you let this murderer walk out of this courtroom with his life then you are saying that his life is worth more than Kim Sisk's life."

As we noted above, the prosecutor in this case properly offered victim-impact evidence for the jury's consideration. Victim-impact evidence is one way for the prosecution to counteract the defendant's mitigating evidence. *See Payne*, 501 U.S. at 821-24, 115 L. Ed. 2d at 734. In the present case, defendant requested, and the trial court submitted, numerous mitigating circumstances concerning defendant's life. Among these mitigating circumstances were: (1) defendant is considerate and loving to his mother; and (2) as a child, defendant was sweet, loving, and obedient. The prosecutorial argument at issue here simply reminded the jury that in addition to considering defendant's life, the jury should also consider the life of the victim. *See id.* at 821-24, 115 L. Ed. 2d at 734. This argument was a natural and proper extension of the prosecutor's earlier argument concerning victim impact evidence.

Defendant's assignment of error is overruled.

[15] Finally, defendant contends the trial court erred in submitting the (e)(9) aggravating circumstance to the jury. *See* N.C.G.S. § 15A-2000(e)(9) (2001) ("The capital felony was especially heinous, atrocious, or cruel."). Defendant argues that the (e)(9) aggravating circumstance is unconstitutionally vague and contends that there was not sufficient evidence to warrant its submission to the jury. We disagree.

We first note that defendant failed to raise at trial the argument that the (e)(9) aggravating circumstance is unconstitutionally vague, and defendant is thus barred from raising this issue on appeal. *See State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 519 (1988). In any event, we have repeatedly considered and rejected this argument. *See, e.g., State v. Call*, 353 N.C. 400, 424, 545 S.E.2d 190, 205 (holding that the (e)(9) aggravating circumstance is neither unconstitutionally vague nor overbroad), *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548 (2001). We see no reason to depart from our prior rulings on this issue.

We now turn our attention to defendant's contention that the submission of the (e)(9) aggravating circumstance was unsupported by

the evidence. We examine the evidence in the light most favorable to the State, as any contradictions or discrepancies in the evidence must be resolved by the jury. *Id.* Whether the submission of the (e)(9) aggravating circumstance is warranted depends on the particular facts of each case. *State v. Brewington*, 352 N.C. 489, 525, 532 S.E.2d 496, 517 (2000), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001).

In *State v. Gibbs*, we described the types of murders which warrant submission of the (e)(9) aggravating circumstance:

> One type includes killings physically agonizing or otherwise dehumanizing to the victim. *State v. Lloyd*, 321 N.C. 301, 319, 364 S.E.2d 316, 328 [, *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18] (1988). A second type includes killings less violent but "conscienceless, pitiless, or unnecessarily torturous to the victim," *State v. Brown*, 315 N.C. 40, 65, 337 S.E.2d 808, 826-27 (1985)[, *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373], including those which leave the victim in her "last moments aware of but helpless to prevent impending death," *State v. Hamlet*, 312 N.C. 162, 175, 321 S.E.2d 837, 846 (1984). A third type exists where "the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder." *Brown*, 315 N.C. at 65, 337 S.E.2d at 827.

335 N.C. 1, 61-62, 436 S.E.2d 321, 356 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994).

In the present case, the State's evidence revealed that defendant murdered Kim in a remote, secluded area where he knew they would be alone. *See Lloyd*, 321 N.C. at 319, 364 S.E.2d at 328 (the defendant killed the victim at a time he knew the victim would be alone). Defendant forced Kim to get on her knees, and while she was begging him not to shoot her, defendant "blew her whole face off." This evidence supports an inference that Kim was left in her last moments aware of but helpless to prevent impending death. *See Hamlet*, 312 N.C. at 176, 321 S.E.2d at 846. Indeed, defendant left Kim after inflicting the first gunshot wound, but then returned and shot her again, causing her body to jump off the ground. *See State v. Anthony*, 354 N.C. 372, 435, 555 S.E.2d 557, 597 (2001) (the defendant shot the victim once, then shot her a second time while the victim was helpless on the ground and begging for her life), *cert. denied*, — U.S. —, 153 L. Ed. 2d 791 (2002); *State v. Golphin*, 352 N.C. 364, 480-81, 533 S.E.2d

168, 243 (2000) (although the victim was already incapacitated by the first shot, he was shot "multiple times as he lay on the ground moaning"), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). We therefore conclude that the evidence, when viewed in the light most favorable to the State, supports the trial court's submission of the (e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel.

This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises eleven additional issues that this Court has previously decided contrary to defendant's position: (1) the murder indictment failed to adequately allege first-degree murder; (2) the murder indictment failed to allege premeditation and deliberation, essential elements of first-degree murder; (3) the "short form" murder indictment failed to allege all the necessary elements of the offense; (4) the death penalty statute, N.C.G.S. § 15A-2000, is unconstitutional; (5) imposition of the death penalty violates the United States Constitution, the North Carolina Constitution, and North Carolina common law; (6) the trial court erred in instructing the jury on Issue Three to continue to Issue Four if the mitigating circumstances were of equal value and failed to outweigh the aggravating circumstances; (7) the trial court erred in using the term "may" in sentencing Issues Three and Four, thereby making consideration of mitigating evidence discretionary with the sentencing jurors; (8) the trial court erred in its instructions defining the burden of proof applicable to the mitigating circumstances by using the inherently ambiguous and vague terms "satisfaction" and "satisfy"; (9) the trial court erred in placing upon defendant the burden of persuading the jury that mitigating circumstances exist and have mitigating value; (10) the trial court erred in instructing the jurors that in order to answer any of the final questions for Issues One, Three, and Four, they must be unanimous; and (11) the trial court erred in instructing jurors to reject proven mitigating evidence on the basis that it had no mitigating value.

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

[16] 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. Following a capital sentencing proceeding, the jury found all three aggravating circumstances submitted: (1) defendant had been previously convicted of a felony involving the use of violence to the person, N.C.G.S. § 15A-2000(e)(3); (2) the murder was committed by defendant while defendant was engaged in the commission of robbery with a firearm or flight after committing robbery with a firearm, N.C.G.S. § 15A-2000(e)(5); and (3) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9).

The trial court submitted five statutory mitigating circumstances for the jury's consideration. The jury did not find that any of these statutory mitigating circumstances existed. Of the fourteen nonstatutory mitigating circumstances submitted by the trial court, the jury found five to exist: (1) defendant is borderline retarded, (2) defendant has a substance abuse history, (3) defendant is the product of a deprived social environment and his early life was fairly chaotic, (4) defendant's insight, judgment, and behavior control are all poor at times, and (5) defendant as a teenager hung around with the "wrong crowd," which resulted in substance abuse and a behavior change.

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. *McCollum*, 334 N.C. at 240, 433 S.E.2d at 162.

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); *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 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 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*, 535 U.S. 940, 152 L. Ed. 2d 231 (2002).

In the present case, defendant took the victim to an isolated spot in the woods. Defendant made the victim get on her knees. The victim pled with defendant four or five times, "Jim don't shoot me, Jim don't shoot me." Defendant admitted that, at this point, he "blew her whole face off." Defendant left the scene and headed down the street, but then returned and shot the victim in the face again. Defendant told Harper that this shot caused Kim's body to jump off the ground. We conclude that the gruesome facts of the present murder are sufficient to distinguish the present case from those in which we found a death sentence disproportionate.

Moreover, this Court has held that four aggravating circumstances (namely, N.C.G.S. § 15A-2000(e)(3), (e)(5), (e)(9) and (e)(11)) are sufficient standing alone to support a death sentence. *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, the jury found three of these four aggravating circumstances: (1) defendant had been previously convicted of a felony involving the

use of violence to the person, N.C.G.S. § 15A-2000(e)(3); (2) the murder was committed by defendant while defendant was engaged in the commission of robbery with a firearm or flight after committing robbery with a firearm, N.C.G.S. § 15A-2000(e)(5); and (3) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). Each of the aggravating circumstances found in the present case, standing alone, would thus independently support the death sentence.

In sum, we conclude that 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 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.

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 judgments and sentences entered by the trial court must therefore be left undisturbed.

NO ERROR.

Justice BRADY concurring.

I agree with the majority that defendant received a fair trial and capital sentencing proceeding, free from prejudicial error. I write sep-

arately to emphasize a point regarding the prosecutor's biblical remarks to the jury during closing arguments. I agree wholeheartedly with the well-established principle that "it is the secular law of North Carolina which is to be applied in our courtrooms." *State v. Williams*, 350 N.C. 1, 27, 510 S.E.2d 626, 643, *cert. denied*, 528 U.S. 880, 145 L. Ed. 2d 162 (1999). However, it is my belief that neither this principle nor any other within our jurisprudence prevents prosecutors from presenting biblical references during closing argument in capital cases.

As so eloquently noted by United States Supreme Court Justice William Douglas over fifty years ago, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313, 96 L. Ed. 954, 962 (1952). This maxim is reflected in the practices of our government, beginning at its inception and continuing today. Our Founding Fathers never intended that we utilize the Establishment Clause of the United States Constitution or any other laws to sterilize our public forums by removing all references to our religious beliefs. Arlin M. Adams & Charles J. Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* 51-52 (Univ. of Penn. Press 1990); *see also School Dist. of Abington v. Schempp*, 374 U.S. 203, 294, 10 L. Ed. 2d 844, 899 (1963) (Brennan, J., concurring) (asserting that "the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers"). This was evident in the actions of the first Congress, which, three days before approving the final draft of the Bill of Rights, authorized the appointment of paid chaplains. *Marsh v. Chambers*, 463 U.S. 783, 788, 77 L. Ed. 2d 1019, 1025 (1983). Employing chaplains, along with the practice of opening congressional sessions with prayer, continues unfettered, has consistently been followed by most states, and was found constitutional by the United States Supreme Court in 1983. *Id.* at 790-91, 77 L. Ed. 2d at 1026-27. The American armed forces, as well as state and federal prisons, also provide chaplains for their populations. *See, e.g., Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985) (holding that Army's chaplaincy program did not violate the Establishment Clause). In addition, the ceremonial installations and inaugurations of both federal and state elected officials are often accompanied by an invocation or benediction. *Lee v. Weisman*, 505 U.S. 577, 633-34, 120 L. Ed. 2d 467, 510-11 (1992) (Scalia, J., dissenting) (noting that the first act of many of our presidents, including George Washington, was to pray or otherwise invoke a higher power). The United States

Congress has provided for the national motto reflecting our religious heritage, "In God we trust," 36 U.S.C.A. § 302 (West 2001), and has mandated that it "shall" be inscribed onto our currency, 31 U.S.C.A. § 5112(d)(1) (West 2003). Finally, many federal and state courts open their sessions asking God to save their honorable courts. Given these and "countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage," *Lynch v. Donnelly*, 465 U.S. 668, 677, 79 L. Ed. 2d 604, 612 (1984), it is illogical to eliminate biblical remarks in capital cases. However well intentioned it may be, such a blanket prohibition would artificially and selectively eliminate Judeo-Christian precepts of justice from closing arguments, while still permitting arguments arising from other concepts of justice.

America is, as it should be, "a microcosm of world religion," where "[e]very major world religious community is now present in strength." J. Gordon Melton, *Encyclopedia of American Religions* 18 (6th ed. 1999). Yet, of the more than 1,500 religious organizations that exist in the United States, "the overwhelming majority of Americans who engage in any outward religious activity are members of one of the more than 900 Christian denominations," a community that "shows no evidence of declining." *Id.* at 1, 18. It is from this sector of the population that a majority of North Carolina jurors is selected. These jurors, many of whom are cloaked in deeply held Judeo-Christian beliefs, do not automatically leave their religious beliefs on the courthouse steps. Indeed, their belief system would necessarily prohibit such a disavowment. This fact has certainly not escaped the innovative minds of defense attorneys, who argue that the Bible prohibits any type of killing. *See* John H. Blume & Sheri Lynn Johnson, *Don't Take His Eye, Don't Take His Tooth, and Don't Cast the First Stone: Limiting Religious Arguments in Capital Cases*, 9 Wm. & Mary Bill Rts. J. 61, 73-74 (2000) (noting that reported cases and the authors' "own conversations with other defense lawyers[] [led them] to conclude that defense counsel frequently make religious arguments against the death penalty, at least in the South, where [they] practice"). Such religious references are not prohibited under North Carolina law, though this Court has properly noted that "secular law" provides the ultimate rule of decision in criminal cases.

As noted by the majority, this Court recognizes that because defense attorneys make biblical pleas in capital cases, prosecutors often give biblical remarks in anticipation of defense arguments. *See State v. Bond*, 345 N.C. 1, 36, 478 S.E.2d 163, 182 (1996), *cert. denied*,

521 U.S. 1124, 138 L. Ed. 2d 1022 (1997). Even apart from this consideration, biblical arguments are within the acceptable parameters of the law, so long as prosecutors do not contend that the death penalty is divinely *mandated* for a specific defendant.

This is simply not a case where the State told the jury that the Bible required a death sentence for this particular defendant. Further, there is a marked difference between the challenged argument in the case *sub judice* and the arguments in *State v. Jones*, 355 N.C. 117, 558 S.E.2d 97 (2002), for example, where the prosecutor compared the defendant's crime to the Columbine High School shooting and the Oklahoma City federal building bombing, *id.* at 132 n.2, 558 S.E.2d at 107 n.2, and characterized defendant as being "lower than the dirt on a snake's belly," *id.* at 132, 558 S.E.2d at 107, in "a thinly veiled attempt to appeal to the jury's emotions," *id.* at 133, 558 S.E.2d at 107.

The majority's legal analysis unmistakably reveals that the prosecutor's biblical argument in the present case is wholly consistent with our prior decisions. I therefore disagree with the dissent's assertion that this Court has failed to act consistently. Rather, this Court, as noted by the dissent, has been entirely consistent—it has refused to reverse capital murder convictions in this State because of biblical arguments. I fail to see how this consistency is in any way a "disservice to litigators and to [this Court] by setting a standard of behavior while consistently excusing deviations from that standard." Virtually *every* capital defendant raises assignments of error challenging the propriety of closing arguments on perhaps every conceivable topic, not just those arising from Judeo-Christian concepts of justice. *See, e.g.*, *State v. Anthony*, 354 N.C. 372, 428, 555 S.E.2d 557, 593 (2001) (challenging whether closing argument was grossly improper where prosecutor's closing remarks included references to what victim may have been thinking as she was dying), *cert. denied*, — U.S. —, 153 L. Ed. 2d 791 (2002); *State v. Parker*, 354 N.C. 268, 291-92, 553 S.E.2d 885, 901-02 (2001) (same where prosecutor requested that jury draw conclusions from evidence and use common sense), *cert. denied*, — U.S. —, 153 L. Ed. 2d 162 (2002); *State v. Cummings*, 353 N.C. 281, 296-301, 543 S.E.2d 849, 858-61 (same where prosecutor improperly characterized defendant's statements), *cert. denied*, 534 U.S. 965, 151 L. Ed. 2d 286 (2001); *State v. Hardy*, 353 N.C. 122, 135-37, 540 S.E.2d 334, 345-46 (2000) (same where prosecutor commented on the victim's funeral service and noted that the victim's son had prayed for the defendant's forgiveness), *cert. denied*, 534 U.S. 840, 151 L. Ed. 2d 56 (2001); *State v. Grooms*, 353 N.C. 50, 81-82, 540 S.E.2d 713, 732-33

(2000) (same where prosecutor referred to the defendant as "the prince of darkness"), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001).

Grave consequences would result if this Court were to abandon its well-established gross impropriety standard of review in favor of a new legal standard. The stakes in capital murder trials are undeniably high. Counsel typically attempt to zealously deliver a "convincing" or "telling" argument to the jury that may include some moral tenet. These arguments are essentially used to encourage the jury to "do the right thing" and return a favorable verdict in accordance with the law. Therefore, arbitrarily eliminating only one category of argument would unfairly limit the ability of prosecutors to communicate to the jury that the ultimate punishment of death is sometimes appropriate. Likewise, such a standard would unfairly limit the ability of defense counsel to persuade the jury to spare the defendant's life.

Moreover, the effect of the dissent's proposed rule would be inconsistent with the doctrine of *stare decisis* and would constitute a further erosion of this Court's well-settled jurisprudence concerning closing arguments. Finally, and most importantly, the newly-proposed rule would inhibit the duty of capital jurors, who are required to make perhaps the most critical decision of their lives without explanation from trial counsel as to why the punishment of death, or life imprisonment, is not inherently at odds with their own core beliefs.

In the present case, the prosecutor did not argue that the death penalty was mandated by God *for this defendant*, or otherwise inappropriately request the jurors to render a verdict inconsistent with their sworn oaths. Rather, the prosecutor was following and, in fact, preserving the secular law of our state by explaining to jurors that their individual belief systems should not prohibit them from carrying out their duties under our well-established procedures for capital sentencing proceedings. For the reasons stated by the majority, with an emphasis on those discussed herein, I believe that the prosecutor's biblical references during closing arguments do not warrant a new sentencing hearing.

Chief Justice LAKE joins in this concurring opinion.

Justice EDMUNDS dissenting.

I dissent as to the majority's holding that the trial court did not err in failing to intervene *ex mero motu* when the prosecutor made an

argument based upon the Bible. This Court has frequently expressed its disapproval of such arguments.

> We continue to hold that it is not so grossly improper for a prosecutor to argue that the Bible does not prohibit the death penalty as to require intervention *ex mero motu* by the trial court, *but we discourage such arguments*. We caution all counsel that they should base their jury arguments solely upon the secular law and the facts. Jury arguments based on any of the religions of the world inevitably pose a danger of distracting the jury from its sole and exclusive duty of applying secular law and unnecessarily risk reversal of otherwise error-free trials. 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). In addition to the reasons set out above, such arguments can be inconsistent with the general framework set up by the General Assembly to try capital cases. That arrangement seeks to ensure that the death penalty is enforced as fairly and uniformly as possible. The verdict in a capital case depends on jury findings as to whether aggravating circumstances exist; whether any such aggravating circumstances are not outweighed by mitigating circumstances; and whether, based on these circumstances, the defendant should be sentenced to death or to imprisonment for life. N.C.G.S. § 15A-2000(b) (2001). Moreover, during jury selection, both sides and the judge routinely ask jurors if they hold any moral or religious views that would interfere with their ability to apply the law, and any juror holding such views may be challenged for cause. Judges equally routinely instruct jurors that they must follow the law, even if they do not agree with it. When this Court reviews a capital conviction for proportionality, we consider whether the sentence was based upon passion, prejudice, or any other arbitrary factor. N.C.G.S. § 15A-2000(d)(2). It is inconsistent to allow jury arguments relying on concepts that the jurors have been told at other times during the trial may not control their deliberations.

Although our opinions, not excluding the majority opinion here, have frequently cited to cases in which this Court "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), *sentence*

vacated on other grounds, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990),[1] my research has failed to reveal *any* case where this Court reversed a conviction because of an improper argument based upon religion, *see, e.g.*, *State v. Lloyd*, 354 N.C. 76, 117-18, 552 S.E.2d 596, 625 (2001) (prosecutor's biblical argument not so grossly improper that trial court erred in failing to intervene *ex mero motu*); *State v. Cummings*, 352 N.C. 600, 628-29, 536 S.E.2d 36, 56 (2000) (prosecutor's biblical argument, though inartful, was not grossly improper), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001); *State v. Braxton*, 352 N.C. 158, 217, 531 S.E.2d 428, 462 (2000) (prosecutor's biblical argument not so grossly improper as to require that trial court intervene *ex mero motu*), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *State v. Davis*, 349 N.C. 1, 47, 506 S.E.2d 455, 480 (1998) (prosecutor's biblical argument not so improper as to require trial court to intervene *ex mero motu*), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999); *State v. Walls*, 342 N.C. at 61, 463 S.E.2d at 770 (although the Court has previously disapproved of prosecutorial arguments that made improper use of religious sentiment, biblical argument here was not so grossly improper as to require trial court to intervene *ex mero motu*); *State v. Rose*, 339 N.C. 172, 203-04, 451 S.E.2d 211, 229 (1994) (prosecutor's biblical argument not so grossly improper as to require trial court to intervene *ex mero motu*), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995); *see also State v. Rouse*, 339 N.C. 59, 94, 451 S.E.2d 543, 562 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995); *State v. Bunning*, 338 N.C. 483, 490, 450 S.E.2d 462, 465 (1994); *State v. Daniels*, 337 N.C. 243, 278-79, 446 S.E.2d 298, 320-21 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995). There are many other nearly identical cases.

As a result, we have a situation where this Court has determined that a certain type of argument is improper, even if not so grossly improper as to require the trial court's intervention *ex mero motu*, but has failed to enforce that determination even once. I believe that this Court has done a disservice to litigators and to itself by setting a standard of behavior while consistently excusing deviations from that standard. Although we have noted that professionalism includes the avoidance by practitioners of all known improprieties, *State v. Rogers*, 355 N.C. 420, 464, 562 S.E.2d 859, 886 (2002), it is difficult to fault an advocate who realizes that he or she can land a telling, possibly decisive, blow at the modest cost of a verbal hand slapping from

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1. *See also State v. Davis*, 353 N.C. 1, 28, 539 S.E.2d 243, 262 (2000), *cert. denied*, 534 U.S. 839, 151 L. Ed. 2d 55 (2001); *State v. Walls*, 342 N.C. 1, 61, 463 S.E.2d 738, 770 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996).

this Court. Our expectation that arguments based upon religion would be kept within reasonable bounds has not been realized. Either this Court should state that such arguments are proper, or it should enforce its admonitions. Our failure to act consistently may well undermine the validity and enforcement of North Carolina's capital punishment system.

While the argument here was made by a prosecutor, defendants also can and do make religious arguments to the jury as they seek mercy. A review of the reported cases demonstrates that many religious arguments are made by a party to preempt religious arguments that may be made by opposing counsel in an unrebuttable closing argument. Consequently, these arguments feed on themselves as each side rolls out the ecclesiastical artillery. When the Supreme Court of Pennsylvania faced just this problem, it finally banned such arguments in capital litigation. *Commonwealth v. Chambers*, 528 Pa. 558, 586, 599 A.2d 630, 644 (1991), *cert. denied*, 504 U.S. 946, 119 L. Ed. 2d 214 (1992). That court stated:

> In the past we have narrowly tolerated references to the Bible and have characterized such references as on the limits of "oratorical flair" and have cautioned that such references are a dangerous practice which we strongly discourage. We now admonish all prosecutors that reliance in any manner upon the Bible or any other religious writing in support of the imposition of a penalty of death is reversible error per se and may subject violators to disciplinary action.

Id. (citations omitted). Nor is Pennsylvania alone in condemning such arguments. The United States Court of Appeals for the Fourth Circuit has observed that "[f]ederal and state courts have universally condemned such religiously charged arguments as confusing, unnecessary, and inflammatory." *Bennett v. Angelone*, 92 F.3d 1336, 1346 (4th Cir.), *cert. denied*, 519 U.S. 1002, 136 L. Ed. 2d 395 (1996).

I do not believe that we should go so far as Pennsylvania, for there is a place for religious and moral arguments in our jurisprudence. However, in order to give guidance to litigators and judges, this Court should hold that any argument that essentially asks a jury to base its decision on moral or religious grounds instead of on the law and the evidence is improper and grounds for reversal.

In the case at bar, the prosecutor warned the jury that defendant might quote the Bible to assert that the death penalty was contrary to Christian ethics. He then went on to say:

You see, just a few verses below that, right after that thou shalt not kill, just a few verses below it it says, he that smiteth a man so that he die shall surely be put to death. Just a few verses below that. I suggest to you that that is [b]iblical authority for the death sentence. Not a mandate that you do it in any one case, but it is the authority for those of you [who] worry about that.

. . . .

Ladies and gentlemen of the jury, North Carolina Statute 15A-2000 is a statute of judgment. That is simply that, a statute of judgment. And what does it say in the Bible about a statute of judgment? A statute of judgment unto you throughout your generations in all your dwellings. Whosoever killeth any person, the murderer shall be put to the death by the mouth of witnesses. Moreover ye shall take no satisfaction for the life of a murderer which is guilty of death, but he shall surely be put to death. That's the statutes of judgment.

. . . .

You know, I'm going to make one more comment about the Bible. If you ever had any doubt—this in the New Testament, I understand. If you ever had any doubt about capital punishment in the Bible, remember when Jesus was on the cross, beside of [H]im on each side, if I recall correctly, is two thieves. He told one of them, [H]e said, you'll be in Heaven with me today, some words to that effect. Now, [H]e had the power to take [H]imself away from justice and get down off of that cross. He had the power to take those two criminals down and put them on the ground and let them walk away, but [H]e didn't, did [H]e? It's probably why we say, God have mercy on your soul, because [H]e said a soul [sic], or at least that one. But [H]e didn't take justice away from man. He didn't take them down off the cross. That's the strongest argument I can think of. He could have done it right then and there if [H]e had wanted to, but [H]e didn't.

Other religious references may be found throughout the argument.

I view this argument as designed to persuade the jury that the Bible and Jesus sanctioned the imposition of the death penalty in this case. In light of *Williams* and the other considerations discussed above, it is apparent that the religious arguments made here by the prosecutor had the potential unfairly to arouse the passions of the jury, resulting in a sentencing recommendation based upon religious

sentiment rather than the capital sentencing procedure mandated by the laws of this state. As this Court has so often stated in the past, this argument was improper. Accordingly, I respectfully dissent as to this issue.

Justice ORR joins in this dissenting opinion.

KATHY F. GOODWIN v. WILLIAM R. WEBB, JR., AS EXECUTOR OF THE ESTATE OF CLAUDIUS KRESS GOODWIN, DECEASED

No. 524A02

(Filed 28 March 2003)

Divorce— separation agreement—duress—acceptance of benefits—ratification

The decision of the Court of Appeals that the trial court erred by granting summary judgment for defendant as to plaintiff's ratification of a separation agreement is reversed for the reasons stated in the dissenting opinion that plaintiff was not under duress at the time she accepted all the benefits under the agreement and thus ratified the agreement and cannot now challenge its validity.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 152 N.C. App. 650, 568 S.E.2d 311 (2002), reversing an order for summary judgment entered 4 June 2001 by Judge C. Preston Cornelius in Superior Court, Anson County. Heard in the Supreme Court 12 March 2003.

Baucom, Claytor, Benton, Morgan & Wood, P.A., by Rex C. Morgan, for plaintiff-appellee.

Etheridge, Moser, Garner, Bruner & Wansker, PA, by Terry R. Garner; and Katten Muchin Zavis Rosenman, by Christopher A. Hicks, for defendant-appellant.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals.

REVERSED.

RALPH G. WILLEY, GUARDIAN AD LITEM FOR ELIZABETH MULLINS, MINOR DAUGHTER OF WILLIAM HENRY MULLINS, DECEASED, EMPLOYEE v. WILLIAMSON PRODUCE, EMPLOYER, THE GOFF GROUP, CARRIER

No. 159A02

(Filed 28 March 2003)

Workers' Compensation— death benefits—truck driver—cocaine impairment—insufficient evidence

The decision of the Court of Appeals vacating and remanding an award of compensation for the death of a tractor-trailer driver in a one-vehicle accident is reversed for the reasons stated in the dissenting opinion that there was competent evidence to support the Industrial Commission's findings that it cannot be shown that 300 nanograms of the metabolite of cocaine in the deceased driver's urine after the accident had a measurable pharmacological effect on him at the time of the accident and that defendant employer thus did not produce sufficient evidence to prove that the accident was proximately caused by the driver being under the influence of cocaine so as to bar compensation pursuant to N.C.G.S. § 97-12.

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. 74, 562 S.E.2d 1 (2002), reversing an amended opinion and award entered 7 December 2000 by the North Carolina Industrial Commission and remanding for further proceedings. Heard in the Supreme Court 10 March 2003.

Keel O'Malley, L.L.P., by Susan M. O'Malley, for plaintiff-appellant.

Lewis & Roberts, P.L.L.C., by John H. Ruocchio, for defendant-appellees.

Teague, Campbell, Dennis & Gorham, L.L.P., by Linda Stephens, on behalf of the North Carolina Association of Defense Attorneys, amicus curiae.

Mark T. Sumwalt, P.A., by Vernon Sumwalt, on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals.

REVERSED.

RICHARD D. SIBLEY, PETITIONER v. THE NORTH CAROLINA BOARD OF THERAPY EXAMINERS, RESPONDENT

No. 429A02

(Filed 28 March 2003)

Physical Therapy— suspension of license—hugs, kisses, sex with patient—inadequate evidence and findings

The decision of the Court of Appeals upholding an order of the Board of Physical Therapy Examiners suspending the license of a physical therapist who hugged and kissed a patient and engaged in sexual intercourse with another patient is reversed for the reasons stated in the dissenting opinion that the evidence and the Board's findings were inadequate to support the Board's conclusions that the therapist's conduct amounted to incompetence in violation of N.C.G.S. § 90-270.36(9).

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. 367, 566 S.E.2d 486 (2002), affirming an order entered 17 November 2000 by Judge Ronald K. Payne in Superior Court, Buncombe County. Heard in the Supreme Court 11 March 2003.

Hyler & Lopez, P.A., by George B. Hyler, Jr., and Robert J. Lopez, for petitioner-appellant.

Satisky & Silverstein, L.L.P., by John M. Silverstein, for respondent-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals.

REVERSED.

STATE OF NORTH CAROLINA v. WILLIAM JASPER GOODMAN, JR.

No. 174A02

(Filed 28 March 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. 57, 560 S.E.2d 196 (2002), finding no error in the guilt phase of defendant's trial but remanding for resentencing a judgment entered 31 March 2000 by Judge James C. Davis in Superior Court, Gaston County. On 15 August 2002, the Supreme Court granted discretionary review of additional issues. Heard in the Supreme Court 13 March 2003.

Roy Cooper, Attorney General, by Philip A. Lehman, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Daniel R. Pollitt and Beth Posner, Assistant Appellate Defenders, for defendant-appellant.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed. We hold that defendant's petition for discretionary review as to additional issues was improvidently allowed.

REVERSED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

SHAWN PATRICK KNIGHT, EMPLOYEE v. WAL-MART STORES, INC., EMPLOYER AND INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, CARRIER

No. 228A02

(Filed 28 March 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. 1, 562 S.E.2d 434 (2002), affirming an opinion and award entered by the North Carolina Industrial Commission on 14 July 2000. Heard in the Supreme Court 4 February 2003.

Poisson, Poisson, Bower & Coldfelter, by Fred D. Poisson, Jr.; and R. James Lore, for plaintiff-appellee.

Young Moore and Henderson, P.A., by Joe E. Austin, Jr., for defendant-appellants.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Shannon P. Herndon, on behalf of the North Carolina Association of Defense Attorneys, amicus curiae.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. CHRIS WILLIAMS

No. 521PA02

(Filed 28 March 2003)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 153 N.C. App. 192, 568 S.E.2d 890 (2002), vacating a judgment entered 17 April 2001 by Judge William C. Griffin, Jr., in Superior Court, Pasquotank County, and remanding for entry of judgment for defendant's conviction of assault on a female. Heard in the Supreme Court 13 March 2003.

Roy Cooper, Attorney General, by William P. Hart, Special Deputy Attorney General, for the State-appellant.

Paul Pooley for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

GOVERNORS CLUB, INC., A NORTH CAROLINA NON-PROFIT CORPORATION, AND ROBERT L. ALPERT, ON BEHALF OF HIMSELF AND ALL OTHER SIMILARLY SITUATED MEMBERS OF GOVERNORS CLUB, INC. v. GOVERNORS CLUB LIMITED PARTNERSHIP, A DELAWARE LIMITED PARTNERSHIP, GOVERNORS CLUB DEVELOPMENT CORPORATION, A NORTH CAROLINA CORPORATION, ESTATE OF TRUBY J. PROCTOR, JR., AND KIRK J. BRADLEY

No. 504A02

(Filed 28 March 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 152 N.C. App. 240, 567 S.E.2d 781 (2002), reversing an order entered 4 October 2000 by Judge Raymond A. Warren in Superior Court, Chatham County. Heard in the Supreme Court 13 March 2003.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr., and Charles L. Becker, for plaintiff-appellee Governors Club, Inc.

McCoy, Weaver, Wiggins, Cleveland & Raper, P.L.L.C., by John E. Raper, Jr., for defendant-appellants Governors Club Limited Partnership and Governors Club Development Corporation; Smith Moore LLP, by James G. Exum, Jr., for defendant-appellant Estate of Truby G. Proctor, Jr.; and Boyce & Isley, P.L.L.C., by G. Eugene Boyce and Philip R. Isley, for defendant-appellant Kirk J. Bradley.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. MARVIN EARL WILLIAMS, JR.

No. 264A90-6

(Filed 28 March 2003)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered 28 August 2002 by Judge Ripley E. Rand in Superior Court, Wayne County, granting defendant's motion for discovery under N.C.G.S. § 15A-1415(f). Heard in the Supreme Court 12 March 2003.

Roy Cooper, Attorney General, by Valérie B. Spalding, Special Deputy Attorney General, for the State-appellant.

Shelby Duffy Benton and Glenn A. Barfield for defendant-appellee.

PER CURIAM.

WRIT OF CERTIORARI IMPROVIDENTLY ALLOWED.

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

STATE OF NORTH CAROLINA v. DARLON DILLON KINLOCK

No. 476A02

(Filed 28 March 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 152 N.C. App. 84, 566 S.E.2d 738 (2002), finding no error in judgments entered 23 January 2001 by Judge Jerry Braswell in Superior Court, Sampson County. Heard in the Supreme Court 12 March 2003.

Roy Cooper, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Patricia A. Duffy, Assistant Attorney General, for the State.

Christopher Wyatt Livingston for defendant-appellant.

American Civil Liberties Union of North Carolina Legal Foundation, by Seth H. Jaffe, amicus curiae.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
MARVIN JUNIOR KELLY	)	

No. 156P03

Upon consideration of the State of North Carolina's Petition for Extraordinary Writ and Motion Under Rule 2 of the Rules of Appellate Procedure to review the 13 March 2003 Order, entered by Judge Joseph Moody Buckner in District Court, Orange County, North Carolina, declaring N.C.G.S. § 7A-455.1 unconstitutional and enjoining the Clerk of Superior Court for said county from collecting the appointment fee and entering civil judgments pursuant to N.C.G.S. § 7A-455.1(b), and upon consideration of the State's Petition for Writ of Supersedeas pursuant to Rule 23 and Rule 2 of the Rules of Appellate Procedure to stay enforcement of the aforesaid order, it appears to the Court that the application of N.C.G.S. § 7A-455.1 should be consistent in all courts throughout the State, and it further appears to the Court that in the interest of justice and to expedite decision in the public interest as to the uniform administration of justice, the State's Petitions for Extraordinary Writ and for Writ of Supersedeas should be allowed.

Therefore, the Court, pursuant to Rule 2 of the Rules of Appellate Procedure suspends the requirements of the Rules of Appellate Procedure and in the exercise of its supervisory powers pursuant to Article IV, Section 12(1) of the North Carolina Constitution hereby (i) *ex mero motu* allows the State to seek review in this Court prior to determination in the Court of Appeals, (ii) issues its writ of certiorari to review the issue of the constitutionality of N.C.G.S. § 7A-455.1, (iii) issues its writ of supersedeas staying the enforcement of the trial court's 13 March 2003 order, and (iv) directs the parties to submit briefs on the following issues:

1. Whether N.C.G.S. § 7A-455.1 is unconstitutional under the Constitution of the United States?

2. Whether the trial court erred in declaring N.C.G.S. § 7A-455.1 unconstitutional under the North Carolina Constitution?

The parties shall file with this Court a settled record on appeal on or before 25 April 2003 at 5:00 p.m. Thereafter, briefing shall be as set forth in Rule 13 of the Rules of Appellate Procedure.

This case shall be consolidated with State of North Carolina v. Dudley Cedrick Webb, No. 157P03, for purposes of oral argument.

By entering this order, the Court expresses no opinion as to the merits of the issues to be briefed.

By order of the Court in Conference, this 2nd day of April, 2003.

/s Edmunds, J.
For the Court

STATE OF NORTH CAROLINA)
)
v.) ORDER
)
JOHN WALTER McNEIL)

No. 155P03

Upon consideration of the State of North Carolina's Petition for Extraordinary Writ and Motion Under Rule 2 of the Rules of Appellate Procedure to review the 25 February 2003 Osder, entered by Judge James Hill, in District Court, Durham County, North Carolina, declaring N.C.G.S. § 7A-455.1 unconstitutional and enjoining the Clerk of Superior Court for said county from collecting the appointment fee and entering civil judgments pursuant to N.C.G.S. § 7A-455.1(b), and upon consideration of the State's Petition for Writ of Supersedeas pursuant to Rule 23 and Rule 2 of the Rules of Appellate Procedure to stay enforcement of the aforesaid order, it appears to the Court that the application of N.C.G.S. § 7A-455.1 should be consistent in all courts throughout the State, and it further appears to the Court that in the interest of justice and to expedite decision in the public interest as to the uniform administration of justice, the State's Petitions for Extraordinary Writ and for Writ of Supersedeas should be allowed.

Therefore, the Court, pursuant to Rule 2 of the Rules of Appellate Procedure suspends the requirements of the Rules of Appellate Procedure and in the exercise of its supervisory powers pursuant to Article IV, Section 12(1) of the North Carolina Constitution hereby (i) *ex mero motu* allows the State to seek review in this Court prior to determination in the Court of Appeals, (ii) issues its writ of certiorari to review the issue of the constitutionality of N.C.G.S. § 7A-455.1, (iii) issues its writ of supersedeas staying the enforcement of the trial court's 25 February 2003 order, and (iv) directs the parties to submit briefs on the following issues:

1. Whether the trial court erred in declaring N.C.G.S. § 7A-455.1 unconstitutional under the Constitution of the United States?

2. Whether N.C.G.S. § 7A-455.1 is unconstitutional under the North Carolina Constitution?

The parties shall file with this Court a settled record on appeal on or before 25 April 2003 at 5:00 p.m. Thereafter, briefing shall be as set forth in Rule 13 of the Rules of Appellate Procedure.

This case shall be consolidated with State of North Carolina v. Dudley Cedrick Webb, No. 157P03, for purposes of oral argument.

By entering this order, the Court expresses no opinion as to the merits of the issues to be briefed.

By order of the Court in Conference, this 2nd day of April, 2003.

/s Edmunds, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
ROMAN GUITIERREZ RUBIO	)	

No. 154P03

Upon consideration of the State of North Carolina's Petition for Extraordinary Writ and Motion Under Rule 2 of the Rules of Appellate Procedure to review the 11 March 2003 Order, entered by Judge Charles C. Davis, in District Court, Forsyth County, North Carolina, declaring N.C.G.S. § 7A-455.1 unconstitutional and enjoining the Clerk of Superior Court for said county from collecting the appointment fee and entering civil judgments pursuant to N.C.G.S. § 7A-455.1(b), and upon consideration of the State's Petition for Writ of Supersedeas pursuant to Rule 23 and Rule 2 of the Rules of Appellate Procedure to stay enforcement of the aforesaid order, it appears to the Court that the application of N.C.G.S. § 7A-455.1 should be consistent in all courts throughout the State, and it further appears to the Court that in the interest of justice and to expedite decision in the public interest as to the uniform administration of justice, the State's Petitions for Extraordinary Writ and for Writ of Supersedeas should be allowed.

Therefore, the Court, pursuant to Rule 2 of the Rules of Appellate Procedure suspends the requirements of the Rules of Appellate Procedure and in the exercise of its supervisory powers pursuant to Article IV, Section 12(1) of the North Carolina Constitution hereby (i) *ex mero motu* allows the State to seek review in this Court prior to determination in the Court of Appeals, (ii) issues its writ of certiorari to review the issue of the constitutionality of N.C.G.S. § 7A-455.1, (iii) issues its writ of supersedeas staying the enforcement of the trial court's 11 March 2003 order, and (iv) directs the parties to submit briefs on the following issues:

1. Whether the trial court erred in declaring N.C.G.S. § 7A-455.1 unconstitutional under the Constitution of the United States?

2. Whether N.C.G.S. § 7A-455.1 is unconstitutional under the North Carolina Constitution?

The parties shall file with this Court a settled record on appeal on or before 25 April 2003 at 5:00 p.m. Thereafter, briefing shall be as set forth in Rule 13 of the Rules of Appellate Procedure.

This case shall be consolidated with State of North Carolina v. Dudley Cedrick Webb, No. 157P03, for purposes of oral argument.

By entering this order, the Court expresses no opinion as to the merits of the issues to be briefed.

By order of the Court in Conference, this 2nd day of April, 2003.

/s Edmunds, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
DUDLEY CEDRICK WEBB	)	

No. 157P03

Upon consideration of the State of North Carolina's Petition for Extraordinary Writ for this Court, in the exercise of its supervisory powers pursuant to Article IV, Section 12(1) of the North Carolina Constitution, to stay enforcement of orders entered by judges of the trial division declaring N.C.G.S. § 7A-455.1 unconstitutional and enjoining Clerks of Court from collecting the appointment fee and entering judgment for said fee, it appears to this Court that N.C.G.S. § 7A-455.1 should be uniformly applied in the courts throughout the State; and the Court having this day issued its writ of certiorari to review the issue of the constitutionality of said statute, it further appears to this Court that, in the interest of justice and to assure the uniform application of said statute in court proceedings in the trial courts, the State's Petition for Extraordinary Writ should be allowed.

Therefore, in the exercise of its supervisory powers pursuant to Article IV, Section 12(1) of the North Carolina Constitution, the Court hereby orders that ALL JUDGES OF THE SUPERIOR COURT DIVISION AND OF THE DISTRICT COURT DIVISION OF THE GENERAL COURT OF JUSTICE refrain from entering any orders prohibiting the collection of the application fee in N.C.G.S. § 7A-455.1 or the entry of a judgment for said fee pursuant to N.C.G.S. § 7A-455.1(b) and stay any such order previously entered until such time as this Court enters its opinion on the constitutionality of said statute.

By order of the Court in Conference, this 2nd day of April, 2003.

/s Edmunds, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
DUDLEY CEDRICK WEBB	)	

No. 157P03

Upon consideration of the State of North Carolina's Petition for Extraordinary Writ and Motion Under Rule 2 of the Rules of Appellate Procedure to review the 4 March 2003 Order and the 19 March 2003 Amended Order, entered by Judge Orlando F. Hudson, Jr., in Superior Court, Durham County, North Carolina, declaring N.C.G.S. § 7A-455.1 unconstitutional and enjoining the Clerk of Superior Court for said county from collecting the appointment fee and entering civil judgments pursuant to N.C.G.S. § 7A-455.1(b), and upon consideration of the State's Petition for Writ of Supersedeas pursuant to Rule 23 and Rule 2 of the Rules of Appellate Procedure to stay enforcement of the aforesaid orders, it appears to the Court that the application of N.C.G.S. § 7A-455.1 should be consistent in all courts throughout the State, and it further appears to the Court that in the interest of justice and to expedite decision in the public interest as to the uniform administration of justice, the State's Petitions for Extraordinary Writ and for Writ of Supersedeas should be allowed.

Therefore, the Court, pursuant to Rule 2 of the Rules of Appellate Procedure suspends the requirements of the Rules of Appellate Procedure and in the exercise of its supervisory powers pursuant to Article IV, Section 12(1) of the North Carolina Constitution hereby (i) *ex mero motu* allows the State to seek review in this Court prior to determination in the Court of Appeals, (ii) issues its writ of certiorari to review the issue of the constitutionality of N.C.G.S. § 7A-455.1, (iii) issues its writ of supersedeas staying the enforcement of the trial court's 4 March 2003 and 19 March 2003 orders, and (iv) directs the parties to submit briefs on the following issues:

1. Whether the trial court erred in declaring N.C.G.S. § 7A-455.1 unconstitutional under the Constitution of the United States?

2. Whether the trial court erred in declaring N.C.G.S. § 7A-455.1 unconstitutional under the North Carolina Constitution?

The parties shall file with this Court a settled record on appeal on or before 25 April 2003 at 5:00 p.m. Thereafter, briefing shall be as set forth in Rule 13 of the Rules of Appellate Procedure.

By entering this order, the Court expresses no opinion as to the merits of the issues to be briefed.

By order of the Court in Conference, this 2nd day of April, 2003.

/s Edmunds, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
RICHARD ALLEN STOKES	)	

No. 275A02

On 15 August 2002, this Court allowed the State's Petition for Discretionary Review only as to one issue. Upon consideration of the briefs filed with this Court, and after hearing oral argument, this Court has determined that it should allow the State's petition for discretionary review as to another issue, to wit:

Whether the Court of Appeals erred in holding that the testimony of Lieutenant Varner should have been excluded when the testimony was offered by the prosecution for impeachment purposes after the defendant opened the door to such testimony?

Accordingly, it is Ordered that the State and defendant shall file with this Court briefs as to this issue. The State shall have thirty days from the date of this Order to file its brief, and defendant shall have thirty days thereafter to file its responsive brief. Pursuant to North Carolina Rule of Appellate Procedure 30(f), no further oral argument will be held in this case.

By order of the Court in Conference, this 10th day of March, 2003.

s/Brady, J.
For the Court

ASHLEY STEPHENSON, INDIVIDUALLY, AND AS A RESIDENT AND REGISTERED VOTER OF BEAUFORT COUNTY, NORTH CAROLINA; LEO DAUGHTRY, INDIVIDUALLY, AND AS REPRESENTATIVE FOR THE 95TH DISTRICT, NORTH CAROLINA HOUSE OF REPRESENTATIVES; PATRICK BALLANTINE, INDIVIDUALLY, AND AS SENATOR FOR THE 4TH DISTRICT, NORTH CAROLINA SENATE; ART POPE, INDIVIDUALLY, AND AS REPRESENTATIVE FOR THE 61ST DISTRICT, NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND BILL COBEY, INDIVIDUALLY, AND AS CHAIRMAN OF THE NORTH CAROLINA REPUBLICAN PARTY AND ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED

v. ORDER

GARY O. BARTLETT, as EXECUTIVE DIRECTOR OF THE STATE BOARD OF ELECTIONS; LARRY LEAKE, ROBERT B. CORDLE, GENEVIEVE C. SIMS, LORRAINE G. SHINN, AND CHARLES WINFREE, AS MEMBERS OF THE STATE BOARD OF ELECTIONS; JAMES B. BLACK, AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; MICHAEL EASLEY, AS GOVERNOR OF THE STATE OF NORTH CAROLINA; AND ROY COOPER, AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA

No. 94PA02-2

This matter is hereby certified to the Honorable Knox V. Jenkins, Jr., Senior Resident Superior Court Judge, Johnston County, for additional findings of fact regarding the trial court's 31 May 2002 determination that the General Assembly's 2002 redistricting plans ("House Plan-Sutton 5" and "Senate Plan-Fewer Divided Counties") are unconstitutional.

To expedite this process, the trial court may consult with its court-appointed experts and request proposed findings of fact from the parties, and the parties may tender any such proposed findings consistent with the service requirements of Rule 5 of the North Carolina Rules of Civil Procedure.

The trial court shall recertify this matter to this Court within forty days from the date of this Order. Pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, the parties are deemed to have excepted and assigned error to the trial court's findings of fact. The parties shall have ten days from the date of recertification to this

Court to file any desired supplemental briefs for determination without further oral argument pursuant to Rule 30(f)(1) of the North Carolina Rules of Appellate Procedure.

By order of the Court in Conference, this 14th day of March, 2003.

Brady, J.
For the Court

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

27 MARCH 2003

No. 073P03 Case below: 155 N.C. App. 624	American Woodland Indus., Inc. v. Tolson	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA01-1533) 2. Defs' (Secretary of Revenue and State of NC) Conditional PDR as to Additional Issues 3. Defs' (Forsyth, Franklin, Gaston, Gates, Graham, Granville, Green, Guilford, Halifax, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Iredell, Jackson, Johnston, Jones, Lee, Lenoir, Lincoln, Macon, Martin, McDowell, Mecklenburg, Mitchell, Montgomery, Moore, Nash, Scotland and Wake Counties) Conditional PDR as to Additional Issues 4. Defs' (Alamance, Alleghany, Anson, Ashe, Avery, Beaufort, Bertie, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Caldwell, Camden, Carteret, Caswell, Catawba, Chatham, Cherokee, Chowan, Clay, Cleveland, Columbus, Craven, Currituck, Dare, Davidson, Duplin, Durham and Edgecombe Counties) Conditional PDR as to Additional Issues	1. Denied 2. Dismissed as Moot 3. Dismissed as Moot 4. Dismissed as Moot
No. 010PA03 Case below: 154 N.C. App. 512	Atkins v. Kelly Springfield Tire Co.	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA01-1460) 2. Defs' Petition for Writ of Supersedeas	1. Allow PDR as to Issues 1 and 2 only 2. Allowed
No. 085P03 Case below: 155 N.C. App. 637	Bessemer City Express, Inc. v. City of Kings Mountain	Plts' PDR Under N.C.G.S. § 7A-31 (COA02-41)	Denied
No. 092P03 Case below: 155 N.C. App. 161	Blankenship v. Town & Country Ford, Inc.	1. Def's (Town and Country Ford, Inc..) PDR Under N.C.G.S. § 7A-31 (COA02-191) 2. Plts' PDR Review as to Additional Issues	1. Denied 2. Dismissed as Moot
No. 143A95-5 Case below: Bertie County Superior Court	Bond v. State	3. Petitioner's Second Amended Petition for Writ of Habeas Corpus	Denied **03/04/03**
No. 076A03 Case below: 155 N.C. App. 353	Brevorka v. Wolfe Constr., Inc.	1. Plts' NOA (Dissent) (COA02-5) 2. Plts' PDR as to Additional Issues	1. — 2. Denied **Edmunds, J., recused**

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

27 MARCH 2003

No. 79P03 Case below: 155 N.C. App. 436	Brown v. N.C. Div. of Motor Vehicles	Plt's PDR Under N.C.G.S. § 7A-31	Denied **02/27/03**
No. 117P03 Case below: 155 N.C. App. 652	Campbell v. N.C. Dep't of Transp.	Respondent-Appellant's PDR Pursuant to N.C.G.S. § 7A-31 (COA02-81)	Denied
No. 046P03 Case below: 155 N.C. App. 225	County of Wake v. N.C. Dep't Env't & Natural Res.	1. Respondents' (Franks and Schifano et al.) and Respondent-Intervenor's (Town of Holly Springs) PDR Under N.C.G.S. § 7A-31 (COA01-847) 2. Petitioner's Conditional PDR as to Additional Issues 3. Respondent-Appellant Jerry Franks' PDR Under N.C.G.S. § 7A-31 4. Petitioner's Motion to Strike PDR	1. Denied 2. Dismissed as Moot 3. Denied 4. Denied
No. 581A02 Case below: 153 N.C. App. 413	Holcomb v. Colonial Assocs., L.L.C.	1. Plt's NOA Based Upon a Dissent (COA01-1067) 2. Plt's PDR as to Additional Issues 3. Defs' Conditional PDR as to Additional Issues	1. — 2. Denied 3. Dismissed as Moot
No. 077P03 Case below: 155 N.C. App. 200	Howard v. Vaughn	Several Defs' (Vaughn, Watkins, Dilworth Surgical Group, P.A. o/k/a Dilworth Surgical Specialists, P.A.) PDR Under N.C.G.S. § 7A-31 (COA02-28)	Denied
No. 050P03 Case below: 154 N.C. App. 698	Huntley v. Howard Lisk Co.	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-75)	Denied
No. 122P03 Case below: 154 N.C. App. 520	Icardi v. Celeris Corp.	Defs' PWC to Review the Decision of the COA (COA01-988)	Denied
No. 100P03 Case below: 155 N.C. App. 408	In re Request for Declaratory Ruling by the Envtl. Mgmt. Comm'n	Plts' PDR Under N.C.G.S. § 7A-31 (COA02-99)	Denied

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

27 MARCH 2003

No. 111P03 Case below: 155 N.C. App. 441	In re Will of Campbell	Caveators' (Fred Baars, Carole Baars Hakan, Sue Baars Smith, Emerson Campbell) PDR Under N.C.G.S. § 7A-31 (COA01-1223)	Denied **Lake, C.J., recused**
No. 074P03 Case below: 155 N.C. App. 220	McNeely v. Bollinger	Plt's PDR Under N.C.G.S. § 7A-31 (COA01-1059)	Denied
No. 084P03 Case below: 155 N.C. App. 213	Myers v. Mutton	1. Plt's and Petitioners' (Faison and Gillespie) NOA Based Upon a Constitutional Question (COA01-1409) 2. Plt's and Petitioners' (Faison and Gillespie) PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
No. 044P03 Case below: 154 N.C. App. 156	N.C. Farm Bureau Mut. Ins. Co. v. Holt	1. Def's NOA Based Upon a Constitutional Question (COA01-1439) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Dismiss Appeal 4. Counsels' Motion for Admission *Pro Hac Vice*	1. — 2. Denied 3. Allowed 4. Dismissed as Moot
No. 045A03 Case below: 154 N.C. App. 543	Overton v. Purvis	1. Plt's NOA Based Upon a Dissent (COA01-1520) 2. Plt's PWC as to additional issues	1. — 2. Denied
No. 101P03 Case below: 155 N.C. App. 574	Plummer v. Community Gen. Hosp. of Thomasville, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA97-191)	Denied
No. 522A02 Case below: 149 N.C. App. 672	Rhyne v. K-Mart Corp.	1. Plts' NOA Based Upon a Dissent (COA00-1516) 2. Plts' NOA Based Upon a Constitutional Question 3. Plts' PDR as to Additional Issues 4. Defs' PDR as to Additional Issues	1. — 2. Retained 3. Denied 4. Allowed
No. 516PA02 Case below: 152 N.C. App. 464	Seymour v. Lenoir Cty.	Joint Motion to Dismiss Appeal and for Leave to File Dismissal with Prejudice (COA01-972)	Allowed

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

27 MARCH 2003

No. 096A03 Case below: 155 N.C. App. 221	State v. Adams	1. Def's NOA Based Upon a Constitutional Question (COA01-1419) 2. AG's Motion to Dismiss Appeal	1. — 2. Allowed
No. 124P03 Case below: 155 N.C. App. 777	State v. Banner	1. Def's PDR Under N.C.G.S. § 7A-31 (COA02-272) 2. Def's Motion to Amend PDR	1. Denied 2. Denied
No. 011P03 Case below: 154 N.C. App. 521	State v. Bryant	1. Def's NOA Based Upon a Constitutional Question (COA02-144) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
No. 445P02-2 Case below: 154 N.C. App. 234	State v. Bullock	1. AG's Motion for Temporary Stay 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 (COA01-476) 4. Def's Motion to Deem Response to AG's PDR Timely Filed 5. Def's NOA Based Upon a Constitutional Question 6. Defendant's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/18/02** **356 N.C. 617** Dissolved 2. Denied 3. Denied 4. Dismissed as Moot 5. Dismissed *ex mero motu* 6. Denied
No. 174A02 Case below: 149 N.C. App. 57	State v. Goodman	Def's Motion Under Rule 2 of the Rules of Appellate Procedure (COA00-1417)	Denied **03/11/03**
No. 121P03 Case below: 155 N.C. App. 719	State v. Henderson	1. Def's NOA Based Upon a Constitutional Question (COA01-1501) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
No. 063P03 Case below: 153 N.C. App. 325	State v. Pasour	Def's PWC to Review the Decision of the COA (COA01-1432)	Denied

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

27 MARCH 2003

No. 051P03 Case below: 154 N.C. App. 727	State v. Safrit	Def's PDR Under N.C.G.S. § 7A-31 (COA02-304)	Denied
No. 631P02 Case below: 153 N.C. 581	State v. Strickland	Def's PWC (COA01-1449)	Denied
No. 110P03 Case below: 148 N.C. App. 217	State v. Stubbs	Def's PWC Review the Decision of the COA (COA01-259)	Denied
No. 106P03 Case below: 155 N.C. App. 251	State v. Taylor	Def's PWC to Review the Decision of the COA (COA01-942)	Denied
No. 080P03 Case below: 155 N.C. App. 223	State v. Thomas	Def's PDR Under N.C.G.S. § 7A-31 (COA01-1310)	Denied
No. 113PA03 Case below: 156 N.C. App. 53	State v. Tucker	1. AG's Petition for Writ of Supersedeas 2. AG's PDR Under N.C.G.S. § 7A-31 (COA02-156)	1. Allowed 2. Allowed
No. 031P03 Case below: 154 N.C. App. 743	State v. Wiggins	1. Def's NOA Based Upon a Constitutional Question (COA02-148) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed

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

27 MARCH 2003

No. 057P03 Case below: 154 N.C. App. 58	State ex rel. Utils. Comm'n v. Thrifty Call, Inc.	1. Respondent's NOA Based Upon a Constitutional Question (COA01-1466) 2. Respondent's PDR Under N.C.G.S. § 7A-31 3. Respondent's Alternative PDR of Constitutional Issues 4. Respondent's Motion to Avoid Inconsistency With Federal Tribunal by Holding Proceeding in Abeyance, Referring Matter to FCC, and/or Requesting FCC to Submit *Amicus Curiae* Brief 5. Respondent's Motion for Leave to File Reply to Response to PDR	1. Dismissed *ex mero motu* 2. Denied 3. Denied 4. Denied 5. Dismissed as Moot
No. 656P02 Case below: 154 N.C. App. 119	Structural Components Int'l, Inc. v. City of Charlotte	1. Plt's NOA Based Upon a Constitutional Question (COA02-200) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal	1. — 2. Denied **03/11/03** 3. Allowed **03/11/03**
No. 089P03 Case below: 155 N.C. App. 20	Suarez v. Wotring	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA02-108) 2. Plts' Alternate PWC to Review the Decision of the COA 3. Defs' Conditional PDR as to Additional Issues	1. Denied **03/03/03** 2. Denied **03/03/03** 3. Dismissed as Moot **03/03/03**
No. 099P03 Case below: 155 N.C. App. 462	Toomer v. Garrett	1. Defs' NOA Based Upon a Constitutional Question (COA01-1385) 2. Defs' PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
No. 211P02 Case below: 149 N.C. App. 405	Tuckett v. Guerrier	1. Defs' PWC to Review the Order of the COA (COA01-348) 2. Defs' PWC to Review the Decision of the COA	1. Denied **02/27/03** 2. Denied **02/27/03**

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

27 MARCH 2003

No. 642P02 Case below: 154 N.C. App. 83	Vares v. Vares	Plt's PDR Under N.C.G.S. § 7A-31 (COA01-1411)	Denied
No. 118P03 Case below: 155 N.C. App. 709	Walker v. Lake River Lawn & Garden	Defs' PDR Under N.C.G.S. § 7A-31 (COA01-1525)	Denied

STATE OF NORTH CAROLINA v. CHRISTINA SHEA WALTERS

No. 548A00

(Filed 2 May 2003)

1. Appeal and Error— preservation of issues—motion for change of venue

Although defendant contends the trial court erred in a case involving two first-degree murders and nine other felonies by failing to order a change of venue, this assignment of error was not preserved under N.C. R. App. P. 10(b)(1), because: (1) N.C.G.S. § 15A-952 provides that a motion for change of venue must be made prior to trial unless the trial court, in its discretion, permits the motion to be filed at a later time; and (2) defendant did not move for change of venue prior to trial as required under N.C.G.S. § 15A-957 or at any subsequent time.

2. Jury— special venire—pretrial publicity

The trial court did not abuse its discretion in a case involving two first-degree murders and nine other felonies by failing to order ex mero motu a special venire based on pretrial publicity, because: (1) each juror about whom defendant complains indicated that he or she would be fair and impartial and decide the case on the evidence that was presented; (2) the jurors indicated that they would disregard any information they heard or read prior to the trial; and (3) with regard to two of the jurors about whom defendant complains, defendant had no objection and specifically stated that these jurors were acceptable.

3. Homicide— first-degree murder—short-form indictment—constitutionality

The short-form murder indictment used to charge defendant with first-degree murder was constitutional.

4. Criminal Law— joinder of offenses—motion for severance

The trial court did not err in a case involving two first-degree murders and nine other felonies by granting the prosecutor's motion for joinder of the murders and related charges regarding the three victims, because: (1) N.C.G.S. § 15A-927(a) provides that a defendant must make a motion for severance of offenses before trial unless the basis for the motion is a ground not previously known, and any right to severance is waived by failure to

renew the motion; and (2) in the instant case not only did defendant fail to renew a motion for severance, but defendant failed to make a motion for severance at any time before, during, or after the trial.

5. Judges— leaving bench during recess—failure to show prejudice

The trial court did not err in a case involving two first-degree murders and nine other felonies by leaving the bench during a recess in jury selection proceedings even though a member of the media allegedly spoke with a prospective juror during this time, because: (1) defendant failed to cite any authority that would lead to the conclusion that the trial court erred in leaving the bench; (2) even assuming *arguendo* that it was error, defendant has failed to show prejudice as required by N.C.G.S. § 15A-1443(a), and it cannot be concluded that a different result would have been reached at trial when defendant has provided no evidence that the media member said anything to the prospective juror that would prejudice the case, defendant provided no evidence that the prospective juror said anything in response to the media member's comment, and the transcript shows only that the bailiff immediately interrupted any inappropriate contact between the prospective juror and the media member; and (3) defendant's alternative argument for plain error analysis applies only to jury instructions and evidentiary matters.

6. Jury— challenge for cause—failure to exhaust peremptory challenges

Although defendant contends the trial court erred in a case involving two capital first-degree murders and nine other felonies by denying defendant's challenge for cause of a prospective juror, thereby causing defendant to exercise a peremptory challenge, defendant failed to preserve this issue for appellate review because: (1) defendant has not met the requirements of N.C.G.S. § 15A-1214(h) when defendant did not exhaust all of her peremptory challenges and acknowledges that she did not seek additional peremptory challenges; and (2) although defendant included plain error as an alternative in her question presented, she did not specifically argue or give support in her brief as to why plain error analysis was appropriate.

7. Appeal and Error— preservation of issues—failure to provide authority

Although defendant contends she received ineffective assistance of counsel in a case involving two first-degree murders and nine other felonies based on her counsel's failure to challenge three prospective jurors for cause or to assert an additional peremptory challenge, this assignment of error is overruled because defendant failed to provide any authority or support for this claim.

8. Evidence— prior crimes or bad acts—cross-examination

The trial court did not err in a case involving two first-degree murders and nine other felonies by denying defendant's motion for disclosure of N.C.G.S. § 8C-1, Rule 404(b) evidence to be introduced by the State and by allowing cross-examination of defendant about certain prior bad acts, because: (1) there is no requirement that the State must provide a defendant with Rule 404(b) evidence that it intends to use at trial; (2) the State cross-examined defendant about the acts and did not directly introduce or use evidence of prior crimes or bad acts committed by defendant; (3) the trial court specifically asked defense counsel whether he wanted to object, and defense counsel stated that he had no problem with the questioning at that point in time; and (4) there was no plain error since defendant has not established any alleged prejudicial error on the part of the trial court that was so fundamental that the jury would have reached a different result absent the foregoing testimony.

9. Appeal and Error— preservation of issues—failure to file motion to suppress—failure to object

Although defendant contends the trial court erred in a case involving two capital first-degree murders and nine other felony convictions by admitting evidence from the hotel room where defendant was apprehended, this assignment of error is overruled because: (1) there is no evidence in the transcript or record where defendant filed a motion to suppress this evidence prior to trial; (2) defendant has not cited to any place in the transcript where she objected to the introduction of this evidence at trial; and (3) although defendant cites plain error as an alternative, defendant has not specifically argued or given support in her brief as to why plain error is appropriate in this situation.

10. Evidence— defendant shot the victim—opening the door

The trial court did not err in a case involving two first-degree murders and nine other felonies by overruling defendant's objection to the prosecutor's cross-examination of defendant about a statement made by defendant to a detective that she shot one of the victims, because: (1)defendant testified during her own defense that she gave two statements to two different detectives regarding the shooting of the victim, in the second statement defendant said that she did not shoot the victim, and defendant then testified on direct examination by her own attorney that the second statement was false; and (2) this was the same testimony that the prosecution elicited on cross-examination, and the prosecutor was entitled to question defendant about this evidence since defendant opened the door to this testimony.

11. Evidence— hearsay—911 tape—witness statement—prior consistent statement exception—corroboration

The trial court did not err in a case involving two first-degree murders and nine other felonies by overruling defendant's objection to the admission of a portion of a prior statement by a witness made to a detective and portions of the witness's telephone call to a 911 operator, because: (1) the 911 tape and the statement were admissible for the purpose of corroborating the witness's earlier testimony at trial, and any variation goes to the witness's credibility; and (2) defendant was tried alone and not jointly, the witness took the stand and was available for a full and effective cross-examination, and thus the rule in *Bruton*, 391 U.S. 123, has no applicability to the facts of this case.

12. Appeal and Error; Sentencing— capital—preservation of issues—mitigating circumstances—instructions—failure to object—plain error analysis

Although defendant contends the trial court erred in a capital sentencing proceeding by giving its instructions regarding mitigating and aggravating circumstances, this assignment of error is overruled because: (1) defendant did not preserve under N.C. R. App. P. 10(b)(2) this issue for appeal since she failed to object to this sentencing instruction at trial; and (2) there was no plain error since there is no need for the trial court to specifically state the distinction between statutory and nonstatutory mitigating circumstances with respect to value, and the trial court does not need to instruct the jury on how to weigh statutory mitigating cir-

cumstances versus nonstatutory mitigating circumstances when all mitigating circumstances are weighed against all aggravating circumstances.

13. Appeal and Error— preservation of issues—reference to entire transcript—particular error

Although defendant contends she received ineffective assistance of counsel in a case involving two capital first-degree murders and nine other felony convictions, defendant failed to preserve this issue for appeal because: (1) N.C. R. App. P. 10(c)(1) provides that an assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references; and (2) a reference to the entire transcript is not a reference to a particular error nor is it clear and specific.

14. Evidence— photographs—motion to exclude

The trial court did not abuse its discretion in a prosecution for two first-degree murders by denying defendant's motion to exclude two photographs of the victims, because: (1) the first photograph of one victim was used to identify that victim, and the presence of a fly on the victim's eyelid was not so gruesome as to require its inadmissibility; and (2) the second photograph showing the bodies of both victims lying in a field was not unduly prejudicial or gruesome under N.C.G.S. § 8C-1, Rule 403, and offered a different perspective than that shown on another photographic exhibit.

15. Sentencing— capital—aggravating circumstances—especially heinous, atrocious, or cruel murder

The trial court did not err in a case involving two capital first-degree murders by submitting the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murders were especially heinous, atrocious, or cruel, because: (1) the victims were subjected to at least an hour and a half of psychological torture by being trapped in the trunk of a car while pleading for their lives; (2) the victims were also abducted at gunpoint and robbed of jewelry; and (3) one victim was forced to witness her friend being shot in the head.

16. Criminal Law— prosecutor's argument—personal attack—name-calling

Although one of the State's closing arguments in a case involving two capital first-degree murders and nine other felony convictions that consisted of a rambling disjointed personal attack on defendant filled with irrelevant historical references and name-calling was close to mandating reversal, our Supreme Court was constrained by the lack of objections by the defense counsel, the lack of intervention by the trial judge, the limited number of questions presented on appeal, and defendant's failure to properly assign error.

17. Criminal Law— prosecutor's argument—comparing defendant and gang members to Adolph Hitler

The trial court did not abuse its discretion in a case involving two capital first-degree murders and nine other felony convictions by failing to sustain defendant's objection to the State's improper closing argument comparing defendant and her fellow gang members to Adolph Hitler, because: (1) given the overwhelming evidence of defendant's guilt, it cannot be said that the prosecutor's remarks were of such magnitude that their inclusion prejudiced defendant; (2) this argument which came after two proper arguments by the district attorney and an assistant district attorney most likely had little, if any, impact on the jurors' decision on the issue of guilt or innocence; and (3) the argument appears far more incomprehensible and disjointed than powerful and persuasive.

18. Criminal Law— prosecutor's argument—request to do justice—hypothetical reference to encountering victims hereafter—reference to God

The trial court did not err in a capital sentencing proceeding by failing to intervene ex mero motu during the State's closing argument that allegedly referred to the jury's solemn duty to the victims to do justice and that referred to the jurors confronting the victims in the hereafter, because: (1) the prosecutor did not imply that the jury's duty was to sentence defendant to death under God's law; (2) the remarks were not a biblical argument, nor were they based improperly on religion when the statements constituted a request to do justice and a hypothetical reference to encountering the victims in the hereafter; and (3) in making references to God, the prosecutor challenged defendant's direct tes-

timony in the guilt-phase that she had found God and a social worker's testimony in the sentencing phase.

19. Criminal Law— prosecutor's argument—weight of mitigating circumstances

The trial court did not err in a capital sentencing proceeding by failing to intervene ex mero motu during the State's closing argument that defendant's mitigating circumstances were excuses for the murders committed and that challenged the weight of defendant's mitigating circumstances, because: (1) the prosecutor simply contended that the jury should not give weight to defendant's mitigating circumstances; and (2) a prosecutor is permitted to legitimately belittle the significance of mitigating circumstances.

20. Criminal Law— prosecutor's argument—biblical reference

The trial court did not err in a capital sentencing proceeding by failing to intervene ex mero motu during the State's closing argument involving a biblical reference, because: (1) the prosecutor did not argue that the Bible commanded that defendant be put to death, but instead used the statement in question to respond to defendant's testimony that she did not want her children in the Davis Street environment; and (2) the prosecutor used this colloquy to amplify defendant's bad parenting and to attempt to eliminate any sympathy the defense might try to invoke with the jury based on the fact that defendant had children.

21. Criminal Law— prosecutor's argument—failure to call witnesses

The trial court did not err in a case involving two first-degree murders and nine other felonies by failing to intervene ex mero motu during the State's closing argument that defendant failed to call various witnesses to the stand, because: (1) the prosecutor was merely arguing that defendant had witnesses available who could have offered exculpatory evidence but that defendant had refused to call those witnesses; and (2) the prosecutor was also responding to defendant's assertion in which her attorney said to the jury that they tried to let the jury hear the whole story of what happened in this incident.

22. Sentencing— capital—death penalty proportionate

Sentences of death imposed upon defendant for two first-degree murders were not disproportionate, because: (1) defend-

ant was convicted of both counts of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule with the two underlying felonies of kidnapping and robbery with a firearm; (2) the jury found the existence of four aggravating circumstances; and (3) the two murder victims and a surviving victim all endured an extended period of terror.

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of death entered by Judge William C. Gore on 6 July 2000 in Superior Court, Cumberland County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. On 4 October 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 14 May 2002.

Roy Cooper, Attorney General, by Jill Ledford Cheek, Special Deputy Attorney General, for the State.

Andrea Michelle FormyDuval and Steven E. Williford for defendant-appellant.

ORR, Justice.

Defendant, Christina Shea Walters, was indicted on 4 January 1999 for two counts each of first-degree murder, first-degree kidnapping, and robbery with a dangerous weapon, as well as one count each of conspiracy to commit first-degree murder, conspiracy to commit first-degree kidnapping, and conspiracy to commit robbery with a dangerous weapon. In a second multicount indictment issued 25 January 1999, defendant was also indicted for attempted first-degree murder, conspiracy to commit first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, first-degree kidnapping, and robbery with a dangerous weapon. Defendant was tried capitally, and the jury found her guilty of all charges, specifically finding her guilty of both murders on the basis of premeditation and deliberation and under the felony murder rule. Following a capital sentencing proceeding, the jury recommended a sentence of death for each of the murders, and the trial court entered judgments accordingly. The trial court also sentenced defendant to consecutive terms of imprisonment for each of the nine other felony convictions.

The State's evidence at trial tended to show that defendant was one of nine gang members who set out to steal a car on the evening of 16 August 1998. The gang members included defendant, Francisco Tirado, Eric Queen, John Juarbe, Ione Black, Tameika Douglas, Carlos Frink, Carlos Nevills, and Darryl Tucker. The gang members gathered at and then left from defendant's residence, a trailer at 1386 Davis Street in Fayetteville, North Carolina. All nine gang members were "Crips" but of varying subgroups called "sets."

The gang needed money, and the members decided they would steal a car, drive it into the window of a pawn shop, and steal the property in the pawn shop. Several gang members, including defendant, went to the local Wal-Mart to steal some toiletry items and clothing, and to buy bullets for the occasion. The bullets were taken to the Davis Street trailer, where Tirado painted the tips blue, the color identified with the "Crips" gang, with fingernail polish from defendant's bedroom.

Soon thereafter, defendant and an unidentified deaf black male who was not part of the gang drove Douglas, Black, and Nevills to a neighborhood location and dropped them off with instructions to find a victim to rob, to steal the victim's car, to put the victim in the trunk of the car, and then to return to defendant's trailer within an hour and a half. Defendant provided Nevills with a gun, and then she and the deaf black male drove away, leaving Douglas, Black, and Nevills.

The three gang members walked around looking for someone to rob, and at about 12:30 a.m. on Monday, 17 August, they spotted Debra Cheeseborough leaving the Bojangles where she was the manager. Douglas, Black, and Nevills abducted Cheeseborough at gunpoint and drove around in her car with her in the backseat for a period of time before they stopped the car and put her in the trunk, also robbing her of her jewelry and money. They returned to defendant's trailer, where the remainder of the gang gathered around the car while discussing what to do with Cheeseborough.

Thereafter, with Cheeseborough still in the trunk, defendant, Douglas, Frink, and Queen got into Cheeseborough's car and drove her to Smith Lake, a location on the Fort Bragg military base. Defendant told Cheeseborough to get down on one knee. Defendant attempted to fire the gun at Cheeseborough, but it jammed. Defendant said "hold up" and tried to unjam the gun. Defendant then raised the gun again, this time to the level of Cheeseborough's waist, and fired the bullet into Cheeseborough's right side. After the shot

knocked Cheeseborough down onto her stomach, defendant shot her seven more times. The final shot went through Cheeseborough's glasses, grazed her eyelid, and hit her thumb. Cheeseborough pretended to be dead. She was discovered the next morning by a passerby and was subsequently taken to a hospital.

Debra Cheeseborough testified that no one told defendant to shoot her, the gun jammed before any shots were fired, it was defendant who told her to go down on one knee, there was no break in the firing of the bullets sufficient for defendant to have handed the gun to any other person to shoot her, and it was defendant who shot her.

After defendant shot Cheeseborough and left her for dead, the gang members returned to defendant's trailer, where they concluded that they needed a second car. Tucker, Black, Queen, and defendant rode around in Cheeseborough's car, ultimately targeting a car driven by Susan Moore in which Tracy Lambert was a passenger. The gang trapped Moore's car at the end of a dead-end road, and defendant handed a gun to Tucker, telling him to "go do what you got to do." Defendant, Frink, and Queen then drove away in Cheeseborough's car after Queen directed Black, Tucker, and Douglas to be back at defendant's trailer in forty-five minutes.

Tucker and Douglas forced Moore and Lambert into the trunk at gunpoint, and then Black, Tucker, and Douglas returned to defendant's trailer with the women in the trunk. At one point during the drive, the car was stopped so that the gang members could open the trunk and rob the women of their jewelry.

Upon the return to defendant's trailer, the entire gang surrounded the car and discussed who would kill the women. Despite the women's pleas for mercy, the entire gang, half in Cheeseborough's car and half in Moore's car, drove to a location in Linden where the women were forced out of the trunk and executed, each by a blue-tipped bullet to the brain. Queen shot one of the women, and Tirado shot the other. The gang members once again returned to defendant's trailer.

After talking for awhile, the group split up, with instructions from Tirado to return by 3:30 p.m. Sometime around dawn, Frink called defendant with news that some bodies had been found. Seven members of the gang, including defendant, subsequently fled to Myrtle Beach using Moore's cell phone to place calls to defendant's trailer. Black and Nevills did not accompany the gang to Myrtle Beach.

On Tuesday, 18 August, Juarbe and Tucker were apprehended in Cheeseborough's car by Myrtle Beach police officers. On Wednesday, 19 August, defendant, Frink, Douglas, Queen, and Tirado were apprehended and arrested at the Bon Villa motel in Myrtle Beach in a room rented by defendant.

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

[1] In defendant's first question presented before this Court, she contends that the trial court committed reversible error, or in the alternative plain error, in failing to order a change of venue or in failing to order a special venire, thereby depriving defendant of a fair and impartial trial in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

First, defendant did not move for change of venue prior to trial as required under N.C.G.S. § 15A-957. Pursuant to N.C.G.S. § 15A-952, a motion for change of venue must be made prior to trial, unless the trial court, in its discretion, permits the motion to be filed at a later time. Since defendant did not move for change of venue prior to trial, or at any subsequent time, she has failed to properly preserve this argument for appellate review. *See* N.C. R. App. P. 10(b)(1).

[2] Next, defendant argues that the trial court erred by not ordering a special venire *ex mero motu*. N.C.G.S. § 15A-958 provides: "Upon motion of the defendant or the State, or on its own motion, a court may issue an order for a special venire of jurors from another county if in its discretion it determines the action to be necessary to insure a fair trial." N.C.G.S. § 15A-958 (2001). For the following reasons, we conclude that the trial court did not abuse its discretion by not ordering a special venire.

Defendant claims that because of pretrial publicity, she was not able to receive a fair and impartial trial. She states that eight of the twelve jurors who were actually seated on the jury had obtained information relative to the case through the media. She also complains that jurors who were seated in the case heard from other prospective jurors during *voir dire* facts about the case and their feelings about the case based upon what they heard in the media.

However, each juror about whom defendant complains indicated that he or she would be fair and impartial and decide the case on the evidence that was presented. Also, the jurors indicated that they would disregard any information they heard or read prior to the trial.

Furthermore, with regard to two of the jurors about whom defendant complains, defendant had no objection and specifically stated that these jurors were acceptable. After reading the transcripts and considering the arguments by the State and defendant, we are not persuaded that the pretrial publicity prevented defendant from receiving a fair trial from jurors in the county in which the case was tried. We therefore conclude that the trial court did not abuse its discretion by not ordering a special venire in this case. This assignment of error is overruled.

[3] Defendant next contends that the short-form murder indictment violated her constitutional rights on the grounds that it failed to allege all the elements of first-degree murder. *See Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999). However, this Court has repeatedly addressed and rejected this argument. *See, e.g., State v. Braxton*, 352 N.C. 158, 173-75, 531 S.E.2d 428, 437-38 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *State v. Wallace*, 351 N.C. 481, 504-08, 528 S.E.2d 326, 341-43, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). Defendant has presented no compelling reason for this Court to reconsider the issue in the present case. Accordingly, this assignment of error is overruled.

[4] Next, defendant argues that the trial court erred by granting the prosecutor's motion for joinder of the murders and related charges regarding the victims Susan Moore and Tracy Lambert and the charges regarding Debra Cheeseborough. However, defendant has not cited to any place in the transcript or record where she made a motion for severance, and this Court has not found any such motion.

Pursuant to N.C.G.S. § 15A-927(a), a defendant must make a motion for severance of offenses before trial unless the basis for the motion is a ground not previously known. Under such a situation, the defendant may move for severance during trial but no later than the close of the State's evidence. Defendant waives his right to severance "if the motion is not made at the appropriate time." N.C.G.S. § 15A-927(a)(1) (2001). "If a defendant's pretrial motion for severance is overruled, he may renew the motion on the same grounds before or at the close of all the evidence. Any right to severance is waived by failure to renew the motion." N.C.G.S. § 15A-927(a)(2). Furthermore, as this Court has previously stated,

> [j]oinder is a decision which is made prior to trial; the nature of the decision and its timing indicate that the correctness of the joinder must be determined as of the time of the trial court's deci-

> sion and not with the benefit of hindsight. While this rule may seem severe and, perhaps, highly prejudicial to an accused, our statutes provide a method by which an accused may protect against prejudice to his defense.

State v. Silva, 304 N.C. 122, 127-28, 282 S.E.2d 449, 453 (1981) (citation omitted).

In the instant case, not only did defendant fail to renew a motion for severance, but she also failed to make a motion for severance at any time before, during, or after the trial. Therefore, defendant's assignment of error is without merit.

[5] Next, defendant argues that the trial court erred in leaving the bench during a recess in jury selection proceedings. Defendant contends that during the time the judge was off the bench, a member of the media spoke with prospective juror Richard Council, who eventually was seated on the jury, and therefore deprived defendant of a fair trial. We disagree.

The court reporter recorded the following events which form the basis of defendant's argument:

> THE COURT: And, Madam Clerk, would you go ahead and call another juror please for number five.
>
> THE CLERK: Richard Council.
>
> THE COURT: Thank you.
>
> Counsel, I have to make a phone call to my district attorney. If you'll give me just a moment, please.
>
> (Judge left the courtroom.)
>
> (Number five, Mr. Council, entered the courtroom.)
>
> THE BAILIFF: Sir, come on up and have a seat in number five.
>
> (A male media representative was talking to the juror, Mr. Council, as the juror walked by.)
>
> THE REPORTER: Tell that guy to quit talking to the juror, that media guy.
>
> (Bailiff, Sgt. David Farrell, directed number five, Mr. Council, in the box after Sgt. Farrell spoke to the media representative.)

(The judge returned to the courtroom.)

THE COURT: Remain seated.

THE BAILIFF: Come to order. Court's in session.

Defendant contends that the juror's actions and those of the media member were a direct violation of a 1 May 2000 order of the trial court regarding media access.

However, defendant has cited no authority to this Court that would lead us to conclude that the trial court erred in leaving the bench. Furthermore, even assuming *arguendo* that it was error, we hold that defendant has failed to show prejudice as required by N.C.G.S. § 15A-1443(a), and we cannot conclude that a different result would have been reached at trial.

Defendant has provided no evidence that the media member said anything to prospective juror Council that would prejudice her case. Also, defendant provided no evidence that Council said anything in response to the media member's "comment." The transcript shows only that the bailiff immediately interrupted any inappropriate contact between prospective juror Council and the media member.

On a final note, defendant included plain error as an alternative in her question presented. "[T]his Court has held that plain error analysis applies only to jury instructions and evidentiary matters." *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39-40 (2002), *cert. denied*, — U.S. —, 154 L. Ed. 2d 795 (2003).

Therefore, we conclude that defendant has failed to show prejudice as to this specific issue, and these assignments of error are overruled.

[6] Defendant next contends that the trial court erred by denying defendant's challenge for cause of prospective juror Kathrene Boxwell, thereby causing defendant to exercise a peremptory challenge. Defendant argues that Boxwell, who had previously managed an adult entertainment facility, was involved in litigation in which the business was forced into receivership. The defense attorney in the instant case, along with his wife, were attorneys involved in this prior litigation. Boxwell acknowledged remembering the defense attorney and his wife. Defendant also contends that Boxwell knew Tracy Lambert when they were employed at the same establishment. Furthermore, defendant argues that Boxwell had knowledge of this case from the print media.

However, we conclude from reading the transcripts that defendant used only thirteen of her fourteen peremptory challenges. N.C.G.S. § 15A-1214(h) provides:

> (h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:
>
> (1) Exhausted the peremptory challenges available to him;
>
> (2) Renewed his challenge as provided in subsection (i) of this section; and
>
> (3) Had his renewal motion denied as to the juror in question.

N.C.G.S. § 15A-1214(h) (2001); *see also State v. Call*, 349 N.C. 382, 402, 508 S.E.2d 496, 509 (1998). Also, " '[t]he statutory method for preserving a defendant's right to seek appellate relief when a trial court refuses to allow a challenge for cause is mandatory and is the only method by which such rulings may be preserved for appellate review.' " *State v. Goode*, 350 N.C. 247, 257, 512 S.E.2d 414, 420 (1999) (quoting *State v. Sanders*, 317 N.C. 602, 608, 346 S.E.2d 451, 456 (1986)).

In this case, the transcript reveals that defendant did not exhaust all of her peremptory challenges, and defendant also acknowledges that she did not seek additional peremptory challenges. Therefore, defendant has not met the requirements of N.C.G.S. § 15A-1214(h) in order to preserve this issue for appellate review. Furthermore, once again, defendant included plain error as an alternative in her question presented, but she does not specifically argue or give support in her brief as to why plain error is appropriate. Therefore, we will not address this part of her argument. *See Grooms*, 353 N.C. at 66, 540 S.E.2d at 723; *see also* N.C. R. App. P. 10(c)(4).

[7] Alternatively, defendant claims that her defense counsel's failure to challenge the three remaining prospective jurors for cause (Richard Council, Virginia Brazier, and Patricia Geroux) or to assert an additional peremptory challenge rose to the level of ineffective assistance of counsel. However, defendant provided this Court with no authority or support for this ineffective assistance of counsel claim. "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited,

will be taken as abandoned." N.C. R. App. P. 28(b)(6); *see also State v. Lloyd*, 354 N.C. 76, 87, 552 S.E.2d 596, 607 (2001). Accordingly, the assignments of error presented in this issue are overruled.

[8] In defendant's next question presented, she argues that the trial court erred in denying her motion for disclosure of Rule 404(b) evidence to be introduced by the State and that the trial court erred in allowing cross-examination of defendant about certain prior bad acts.

First, there is no requirement that the State must provide a defendant with Rule 404(b) evidence that it intends to use at trial. Rule 404(b) provides:

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

N.C.G.S. § 8C-1, Rule 404(b) (2001). As this Court stated in *State v. Payne*, "[t]his rule addresses the admissibility of evidence; it is not a discovery statute which requires the State to disclose such evidence as it might introduce thereunder." 337 N.C. 505, 516, 448 S.E.2d 93, 99 (1994), *cert. denied*, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995). Furthermore, in the instant case, just as in *Payne*, "the State did not directly introduce or use evidence of prior crimes or bad acts committed by defendant; rather, it cross-examined defendant about the act." *Id.* Thus, defendant's motion was properly denied.

As stated above, defendant also contends that the trial court erred in allowing cross-examination of defendant about certain prior bad acts. The following occurred during the prosecutor's cross-examination of defendant:

> Q. Did you say your dad almost killed a boy that you stabbed?
>
> A. I haven't stabbed no boy.
>
> Q. Did you say that?
>
> A. No, ma'am. I don't remember saying anything like that.
>
> Q. Do you remember saying the boy you stabbed was 20-something at the time?

A. Unless the person who wrote this was talking about when I had a boyfriend who was trying to take my shirt off and I sliced him with a box cutter but that's not stabbing.

The trial court then excused the jury in order to question the prosecutor about the purpose of the preceding questions. During this questioning, the court asked defense counsel why he had not objected, and defense counsel stated the following:

> Well, because we didn't care at the point she was at.
>
> . . . .
>
> . . . So far what she's asked her, she said she doesn't remember saying it. As long as she doesn't remember saying it, then—I mean I am assuming they can't prove it by extrinsic evidence because she has denied saying it until she tries to use those records to prove something that she said by extrinsic evidence, we really don't care. I mean she is welcome to keep asking her these things. If she remembers them, fine. If she doesn't, fine. As long as she doesn't get into saying, Well, didn't you say on such and such a date to Dr. So and So, then more power to them.

At this point, the judge brought the jury back into the courtroom, and the questioning resumed.

Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure provides that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make." N.C. R. App. P. 10(b)(1). In the instant case, the trial court specifically asked defense counsel whether he wanted to object, and defense counsel stated that he had no problem with the questioning at that point in time. Thus, defendant has failed to properly preserve this issue for appellate review. *See, e.g.*, *State v. Call*, 353 N.C. 400, 426-27, 545 S.E.2d 190, 206-07, *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548 (2001).

Defendant also contends that the trial court's alleged error amounted to plain error. This Court has previously stated that

> the plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error

> which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnotes omitted) (emphasis in original), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). Thus, in our review of the record for plain error, "defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002). After reviewing the record and transcripts as a whole, we conclude that defendant has not established any alleged prejudicial error on the part of the trial court that was so fundamental that the jury would have reached a different result absent the foregoing testimony. Accordingly, we find no plain error.

[9] Next, defendant argues that the trial court erred by admitting evidence from the hotel room in Myrtle Beach, South Carolina, where defendant was apprehended. Specifically, defendant contends that the evidence was obtained through an illegal search and seizure in violation of defendant's state and federal constitutional rights.

However, we have not found, nor has defendant cited, to any place in the transcript or record where she filed a motion to suppress this evidence prior to trial. Moreover, defendant has not cited to any place in the transcript where she objected to the introduction of this evidence at trial. Thus, defendant has failed to properly preserve this issue for appellate review. *See* N.C. R. App. P. 10(b)(1). Furthermore, "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *Lloyd*, 354 N.C. at 86-87, 552 S.E.2d at 607; *see also State v. Anthony*, 354 N.C. 372, 389, 555 S.E.2d 557, 571 (2001), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002).

Finally, defendant, in her question presented, asserts plain error as an alternative. However, defendant has not specifically argued or given support in her brief as to why plain error is appropriate in this situation. Rule 28(b)(6) provides that "[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argu-

ment is stated or authority cited, will be taken as abandoned." N.C. R. App. P. 28(b)(6); *see also Lloyd*, 354 N.C. at 87, 552 S.E.2d at 607. Thus, we will not address this aspect of defendant's contention.

[10] Defendant next contends that the trial court erred when it overruled defendant's objection to the prosecutor's cross-examination of defendant about a statement made by defendant to Detective Jo Autry.

During the State's case-in-chief, the prosecutor presented evidence that, after defendant's arrest, she gave a statement to Fayetteville Police Officer Chris Corcione. Officer Corcione testified that defendant stated that she had shot Debra Cheeseborough, that Eric Queen had shot Tracy Lambert, and that Francisco Edgar Tirado had shot Susan Moore.

When defendant took the stand during her case-in-chief, defense counsel asked her whether she had given another statement after giving the statement to Officer Corcione. Defendant responded that she had given another statement to Detective Jo Autry in which defendant said that she had *not* shot Debra Cheeseborough. Defendant testified that the statement given to Detective Autry was false and that she made it because she "was scared" and "wanted to go home." Defense counsel subsequently objected to the prosecutor's cross-examination of defendant about the statement to Detective Autry. In response to this questioning, defendant testified, as she did on direct examination, that she had lied in her statement to Detective Autry. She also stated that she did not remember exactly what she had said in her statement to Detective Autry. Defendant claims that the trial court erred by allowing this testimony because the prosecutor's questioning was improper under N.C.G.S. § 8C-1, Rule 803(5), the recorded recollection exception to the hearsay rule. We disagree.

It is clear from the transcript that defendant testified during her own defense that she gave two statements regarding the shooting of Debra Cheeseborough. In the first statement, given to Officer Corcione, defendant said that she shot Cheeseborough. In the second statement, given to Detective Autry, defendant said that she did *not* shoot Cheeseborough. Defendant then testified on direct examination by her own attorney that the second statement was false. This was the exact same testimony that the prosecution elicited on cross-examination. Thus, defendant was the one who placed this testimony into evidence. This Court has previously held that

> the law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself. Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially.

State v. Albert, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981); *see also State v. McKinney*, 294 N.C. 432, 435, 241 S.E.2d 503, 505 (1978). While we make no judgment as to whether this testimony would have been otherwise inadmissible, it is clear to this Court that defendant introduced this evidence. Therefore, since defendant "opened the door" to this testimony, the prosecutor was entitled to question defendant about this evidence. Thus, defendant's assignment of error is overruled.

[11] In defendant's next question presented, she argues that the trial court erred in overruling defendant's objection to the admission of a portion of a prior statement by Ione Black made to Detective Autry and portions of Black's telephone call to a 911 operator. Specifically, defendant contends that this evidence was inadmissible hearsay under N.C.G.S. § 8C-1, Rule 801(d)(E); the evidence was inadmissible 404(b) evidence; and the evidence violated the rule of *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968).

During the State's case-in-chief, Ione Black testified to the events leading up to and surrounding the murders and attempted murder. Black testified that when she returned home after the murders and attempted murder, she was scared because she knew that a couple of the people in the "gang" knew that she did not want to be there when the crimes occurred, and therefore, Black was afraid that these people might be looking for her. Next, when people in the "gang" actually did come to Black's house looking for her, Black told Carol Morrison, with whom she was living at the time, to tell them that she had gone to her mother's house. Dennis Jordan, Morrison's boyfriend, told the "gang" that Black had gone to her mother's house.

Next, Black testified that after the "gang" left her house, she was "really scared" because she had never seen "anybody get shot," and she "didn't really know any of the people that were involved in this and [she] just felt like they might try to do something to [her] because [she] didn't show up for the meeting" at defendant's trailer after the incidents. Later that evening, Black called 911 and told the operator

that she had "seen some people get shot," and she described a couple of the people who were involved in the incidents. Defendant then objected to the 911 tape being played to the jury on the grounds that the tape was unduly prejudicial because it contained a statement by Black that "[t]hey might have killed them boys too." Outside the presence of the jury, Black told the judge that she asked Tameika Douglas why they had to kill the women. Douglas responded by saying, "[T]hat wasn't s— because [Douglas] shot somebody last week." Black stated that she had heard on the news about a guy being shot a few days earlier, and she thought that might be what Douglas was referring to. After hearing this, the trial court overruled defendant's objection, stating that this evidence "is highly probative of the state of mind of the declarant, Ms. Black, at the time" and also that the evidence was "corroborative of her earlier testimony."

Along with the 911 tape, defendant objected to a portion of Detective Autry's testimony in which she testified to a statement given to her by Black. Specifically, defendant objected to that part of Black's statement where "she asked [Douglas] why they wanted to kill [the women]. [Black] state[d] that [Douglas] said, 'This ain't s—. A few days ago, I shot a man.' [Black] state[d] [Douglas] told her they had done this before." In overruling defendant's objection to this portion of the statement, the trial court stated that Black's statement to Detective Autry was

> substantially consistent, in the Court's opinion, with the sworn testimony of Ione Black given here in open court and that the variations are such that they can be argued to the jury. The jury can make its own determination as to whether or not specific aspects of the statement are consistent or in conflict with Ms. Black's statement [sic] but that there is not enough variation for the Court to require a redaction in the interest of fairness, in the Court's opinion.

Subsequently, Detective Autry was allowed to read Black's statement to the jury. For the following reasons, we conclude that defendant's objections are without merit.

As the trial court correctly noted, the foregoing 911 tape and the statement by Black to Detective Autry were admissible for the purpose of corroborating Black's earlier testimony at trial. It has been well established in this state that "[a] prior consistent statement of a witness is admissible to corroborate the testimony of the witness whether or not the witness has been impeached," even though the

statement was hearsay. *State v. Jones*, 329 N.C. 254, 257, 404 S.E.2d 835, 836 (1991); *see also State v. Rose*, 335 N.C. 301, 321, 439 S.E.2d 518, 529, *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). Furthermore, this Court has held that:

> In order to be admissible as corroborative evidence, a witness' prior consistent statements merely must tend to add weight or credibility to the witness' testimony. Further, it is well established that such corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates.

State v. Farmer, 333 N.C. 172, 192, 424 S.E.2d 120, 131 (1993) (citations omitted). Moreover, "[i]f the previous statements are generally consistent with the witness' testimony, slight variations will not render the statements inadmissible, but such variations . . . affect [only] the credibility of the statement." *State v. Martin*, 309 N.C. 465, 476, 308 S.E.2d 277, 284 (1983). Thus, we conclude that the 911 tape and Ione Black's statement to Detective Autry were properly admitted to corroborate her earlier testimony and that any variation goes to her credibility. Therefore, the assignments of error presented under this issue are overruled.

Defendant also alleges that this testimony violated *Bruton*, 391 U.S. 123, 20 L. Ed. 2d 476. "In *Bruton*[,] the United States Supreme Court held that at a joint trial, admission of a statement by a nontestifying codefendant that incriminated the other defendant violated that defendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." *State v. Evans*, 346 N.C. 221, 231, 485 S.E.2d 271, 277 (1997) (citing *Bruton*, 391 U.S. at 126, 20 L. Ed. 2d at 479), *cert. denied*, 522 U.S. 1057, 139 L. Ed. 2d 653 (1998). Furthermore,

> [t]he principles set out in *Bruton* apply only to the extrajudicial statements of a declarant who is unavailable at trial for full and effective cross-examination. *Nelson v. O'Neil*, 402 U.S. 622, 29 L. Ed. 2d 222 (1971). Where the declarant takes the stand and is subject to full and effective cross-examination, a codefendant implicated by extrajudicial statements has not been deprived of his right to confrontation.

Evans, 346 N.C. at 232, 485 S.E.2d at 277.

In the instant case, defendant was tried alone, not jointly. Also, the declarant, Ione Black, took the stand and was available for a "full and effective cross-examination." Thus, the rule in *Bruton* has no applicability to the facts of this case. Therefore, this argument is without merit.

[12] Defendant also contends that the trial court committed reversible error or, in the alternative, plain error, in its instructions regarding mitigating and aggravating circumstances. Specifically, defendant contends that the trial court's charge and written instructions to the jury as to mitigating and aggravating circumstances in the two cases were erroneous because they contradicted the "Issues and Recommendation as to Punishment" forms submitted. Furthermore, defendant argues that the trial court's charge and instructions resulted in a misleading conclusion as to mitigating and aggravating circumstances and supporting evidence, thereby denying defendant due process, a fair trial, and legal and constitutional rights guaranteed by the United States Constitution and the North Carolina Constitution. We disagree.

Despite defendant's claim that the jury instructions were erroneous, defendant made no objection. After the trial court gave the jury its instructions, both parties were given an opportunity to object.

> THE COURT: . . . Before sending the original issues and recommendation form to the jury and allowing the jury to commence their deliberations, I will now consider any requests for corrections to the charge or any additional matters any attorney feels is necessary or appropriate to submit a proper and accurate charge to the jury.
>
> Are there any specific requests for corrections or additions? What says the state?
>
> [PROSECUTOR]: Nothing, Judge.
>
> THE COURT: What says the defense?
>
> [DEFENSE COUNSEL]: None, your Honor.

After the jury began deliberations, it requested that the judge "give [it] the instructions specifically applying to mitigating values for issue two, questions eight through 23, versus mitigating circumstances in questions one through seven." Outside the presence of the jury, and in the presence of counsel, the judge proposed the following oral instructions:

> I would propose to instruct the jury that it is not for the court to instruct them as to values. That if they find mitigating circumstances one through seven exist, if any one or more of them finds it that they are to consider such statutory mitigating circumstance and that they—if they find that any of the circumstances numbered eight through 23 exist and find those to be mitigating, that they are to consider those, but that any value to be placed on any particular circumstance is for the jury to determine.
>
> . . . .
>
> THE COURT: . . . In regard to the court's oral instructions, as I've just stated, do you have any objection with the wording of those instructions?
>
> [DEFENSE COUNSEL]: No, your Honor.

Defendant had yet another chance to object to the judge's instructions to the jury with regard to Issue Two. Written copies of the judge's instruction relating only to Issue Two on mitigating circumstances were given to the jury. Before the written instructions on Issue Two were given to the jury, the judge said, "And with regard to the substance of the instructions, I understand there's no objection. Is that correct, counsel?" Defendant's counsel answered, "That's correct, your Honor." Defendant had several opportunities to object to the judge's instructions, but failed to do so.

Because defense counsel did not object to this sentencing instruction at trial, this assignment of error is barred by Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure. *State v. Neal*, 346 N.C. 608, 620, 487 S.E.2d 734, 742 (1997), *cert. denied*, 522 U.S. 1125, 140 L. Ed. 2d 131 (1998). "A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict . . . ." N.C. R. App. P. 10(b)(2). Because defendant failed to properly preserve this issue on appeal, we may review it only for plain error. *See* N.C. R. App. P. 10(c)(4); *State v. Hardy*, 353 N.C. 122, 131, 540 S.E.2d 334, 342 (2000), *cert. denied*, 534 U.S. 840, 151 L. Ed. 2d 56 (2001). As noted previously, "defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *Jones*, 355 N.C. at 125, 558 S.E.2d at 103.

Defendant argues that the trial court's instructions "did not distinguish [the] difference in how the jury should determine the mitigating *value* or *weight* of statutory versus non-statutory mitigating

circumstances." (Emphasis added.) Defendant uses the terms "value" and "weight" interchangeably. This Court has previously addressed the inappropriate interchangeable use of "value" and "weight." *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). We take this opportunity to reiterate the distinction between "value" and "weight." "The term 'value' is found only in the statutory catchall provision, N.C.G.S. § 15A-2000(f)(9), and has also only been applied to nonstatutory mitigating circumstances. The term 'weight' or 'weighing' is used only in N.C.G.S. § 15A-2000(b)(2) and [(c)(3)] referring to the process of weighing the mitigating circumstances found against the aggravating circumstances found." *Id.* at 51, 506 S.E.2d at 483.

First, we will deal with "value." This Court in *State v. Jaynes*, 342 N.C. 249, 285, 464 S.E.2d 448, 470 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996), maintained that by virtue of distinguishing between statutory and nonstatutory mitigating circumstances, "[t]he General Assembly has determined as a matter of law that statutory mitigating circumstances *have* mitigating value." (Emphasis added.) This simply means that only one or more of the jurors have to find by a preponderance of the evidence that one of the factual circumstances in N.C.G.S. § 15A-2000(f)(1) through (f)(8) exists. Once one or more of the jurors find that one of the factual circumstances in N.C.G.S. § 15A-2000(f)(1) through (f)(8) exists, that circumstance has mitigating value. In other words, the statutory mitigating circumstance that the jury found lessens defendant's culpability for committing the crime. Contrary to defendant's assertion, the General Assembly's determination does not require jurors "to *find* value as to statutory mitigating circumstances, as in the case of nonstatutory mitigating circumstances." *Davis*, 349 N.C. at 55, 506 S.E.2d at 485. (Emphasis added.) "Value" becomes a part of the analysis only when the jury determines whether the statutory catchall or nonstatutory mitigating circumstances exist. *Id.* Upon submission of a nonstatutory mitigating circumstance, at least one juror must find that the circumstance exists. Having done so, the juror must also find that the circumstance has value before it becomes part of the weighing process. Therefore, the trial court is not required to instruct the jury that statutory mitigating circumstances have value as a matter of law. As such, "value" should not be a consideration when the jury is considering statutory mitigating circumstances.

"Weight" becomes relevant only once the jury has found statutory and nonstatutory mitigating circumstances. *See* N.C.G.S.

§ 15A-2000(c)(3) (2001). Jurors do not use or find "weight" when considering whether a statutory or nonstatutory mitigating circumstance exists. Once the jury has found a statutory or nonstatutory mitigating circumstance, it weighs that and any other mitigating circumstances found against the aggravating circumstances found. *See id.* To summarize, "value" deals only with nonstatutory and the statutory catchall mitigating circumstances and applies to the process of determining the existence of the submitted circumstance, whereas "weight" is for balancing mitigating circumstances found against aggravating circumstances found.

Having reiterated the distinction between "value" and "weight," we will now deal with these concepts in their proper context with respect to the trial court's jury instructions as to Issue Two. For each of the seven statutory mitigating circumstances submitted, the trial court instructed the jury as follows:

> If one or more of you finds by a preponderance of the evidence that this circumstance exists, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.
>
> If none of you find the circumstance to exist, you would so indicate by having your foreperson write "no" in that space.

Here, the trial court instructed the jurors to write "yes" in the space provided if one or more of them found by a preponderance of the evidence that a particular statutory mitigating circumstance existed. The trial court did not specifically explain to the jury that the seven circumstances applicable to the aforementioned instruction are statutory mitigating circumstances. However, the trial court did not need to do so because once the jury found that one or more statutory mitigating circumstances existed, that circumstance indeed mitigated the crime or lessened defendant's culpability for the crime and would be weighed against the aggravating circumstances found. By virtue of the process through which the trial court guides the jury, if the jury finds that a statutory mitigating circumstance exists, that circumstance by implication has to have "value" because it lessens the defendant's culpability for the commission of the crime. Thus, the jury did not have to *give* the statutory mitigating circumstance value, and value was not a consideration. The jury simply wrote "yes" below the statutory mitigating circumstance listed on the form if the jury found it to exist by a preponderance of the evidence.

For the nonstatutory mitigating circumstances, the trial court instructed the jury as follows:

> Now, ladies and gentlemen, you should also consider the following circumstances arising from the evidence *which you find to have mitigating value.*
>
> Now, if one or more of you finds by a preponderance of the evidence that any of the following circumstances exist and *also are deemed by you to have mitigating value,* you would so indicate by having your foreperson write "yes" in the space provided.

(Emphasis added.)

In contrast to the trial court's instructions for statutory mitigating circumstances, the trial court's instructions for nonstatutory mitigating circumstances required an extra step. Once the jury found a nonstatutory mitigating circumstance by a preponderance of the evidence, it then had to determine if that nonstatutory mitigating circumstance had value. With a nonstatutory mitigating circumstance, the jury's finding of the facts supporting the existence of the circumstance does not automatically give the circumstance "value." The jury had to further determine whether or not that nonstatutory mitigating circumstance had value. Once again, the trial court's failure to specifically mention the word "nonstatutory" in its instruction is of no effect. The process the trial court's instructions required the jury to follow comports with the two-step process necessary to determine if a nonstatutory mitigating circumstance should have been considered. For a nonstatutory mitigating circumstance, even if a jury finds the factual basis for the circumstance to exist by a preponderance of the evidence, the jury must deem that circumstance to have mitigating value before it lessens defendant's culpability for the commission of the crime.

Distinguishing "value" with regard to statutory and nonstatutory mitigating circumstances is inherent in the trial court's instructions. Once the jury finds that a statutory mitigating circumstance exists, it is automatically considered in the weighing process by the jury writing "yes" on the issues and recommendation form. However, once a nonstatutory mitigating circumstance is found, it is only considered in the weighing process if the jury deems it to have mitigating value. Therefore, there is no need for the trial court to specifically state the distinction between statutory and nonstatutory mitigating circumstances with respect to "value."

Defendant argues that the trial court "made no distinction as to the weight to give statutory mitigating circumstance[s] and nonstatutory mitigating circumstances." It is not necessary for the trial court to make a distinction between statutory and nonstatutory mitigating circumstances when referring to "weight." Giving "weight" to statutory or nonstatutory mitigating circumstances as distinct concepts is an improper application of the law. N.C.G.S. § 15A-2000(c)(3) provides that once a jury finds a mitigating circumstance or circumstances, it must show that "the mitigating circumstance or circumstances [found] are insufficient to outweigh the aggravating circumstance or circumstances found." This statute does not make a distinction between statutory and nonstatutory mitigating circumstances when weighing them against aggravating circumstances. When the jury is considering "weight," all mitigating circumstances, whether statutory or nonstatutory, must be weighed against all aggravating circumstances. Thus, the trial court does not need to instruct the jury on how to weigh statutory mitigating circumstances versus nonstatutory mitigating circumstances because all mitigating circumstances are weighed against all aggravating circumstances.

After reviewing the record and transcripts, we conclude that the trial court did not commit error, much less plain error. This assignment of error is overruled.

[13] Next, defendant argues that her trial attorney rendered ineffective assistance of counsel at trial in violation of the Sixth Amendment to the Constitution of the United States. We disagree. Defendant failed to provide transcript references under the assignment of error. N.C. R. App. P. 10(c)(1) provides that "[a]n assignment of error is sufficient if it directs the attention of the appellate court to the *particular error* about which the question is made, with *clear* and *specific* record or transcript references." (Emphasis added.) Defendant identifies the "Entire Transcript" as the basis for the assignment of error alleging ineffective assistance of counsel, as contained in the record on appeal. As there are 3,285 transcript pages in this case, a reference to the entire transcript is not a reference to a "particular error", nor is it "clear and specific." *See id.* Given that defendant's assignment of error does not comport with the mandate of N.C. R. App. P. 10(c)(1), the ineffective assistance of counsel argument is not properly before this Court. Therefore, this assignment of error is overruled.

[14] In defendant's next question presented, she contends that the trial court erred in denying her motion to exclude two photographs,

exhibit H1 and H8, depicting Susan Horne and Tracy Lambert. We disagree and will discuss each photograph in turn.

Exhibit H1 is a "close-up facial view of . . . Susan Moore." The photograph shows "some blood on the face and . . . a fly on the left closed eyelid of the victim[.] . . . [U]nder the victim's head appears to be tire tracks and the victim's left hand appears to have blue fingernail polish. No other part of the victim's body can be viewed except the left hand and the front area of the head and face." Defendant argues that this exhibit was "unduly inflammatory" specifically concerning the fly on the victim's eyelid. In finding that exhibit H1 is "highly probative, material and relevant and that the danger of unfair prejudice does not outweigh the high probative value," the trial court stated:

> [T]his photograph is highly probative, . . . finding that the position of the body is a material fact in the case and that the location of the head on what appears to be a tire track is consistent with testimony given by one of the state's witnesses who was allegedly present at the scene and witnessed the alleged murder.
>
> The court finds further that the amount of blood present is not excessive; that this is a fair and accurate representation based upon previous testimony that the court has witnessed of the body of the victim Susan Moore as it was observed by investigators who first arrived on the scene. That it is an identification photograph allowing witnesses who need to make an identification to do so. Based upon their knowledge of the identi[t]y of Susan Moore and their observation of the person at the scene of the alleged murder.
>
> [The court] finds that the presence in and of itself of what appears to be a fly on the left eyelid is not unduly prejudicial or inflammatory, the court taking as a matter of common sense and judicial notice that flies do not only pitch or light upon bodies, but that they are a constant irritant to people who are alive as well and that there is no significance to be attached to the presence of the fly.

"As a general rule, gory or gruesome photographs have been held admissible so long as they are used for illustrative purposes and are not introduced solely to arouse the passions of the jury." *State v. Warren*, 348 N.C. 80, 110, 499 S.E.2d 431, 448, *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998). Furthermore, this Court has previously

stated that "[p]hotographs 'showing the condition of the body when found, its location . . . , and the surrounding scene at the time . . . are not rendered incompetent by the portrayal of the gruesome events which the witness testifies they accurately portray.' " *State v. Peterson*, 337 N.C. 384, 393-94, 446 S.E.2d 43, 49 (1994) (quoting *State v. Elkerson*, 304 N.C. 658, 665, 285 S.E.2d 784, 789 (1982)), *overruled on other grounds by State v. Jackson*, 348 N.C. 644, 503 S.E.2d 101 (1998). Furthermore, " '[p]hotographs are usually competent to be used by a witness to explain or illustrate anything that it is competent for him to describe in words.' " *State v. Watson*, 310 N.C. 384, 397, 312 S.E.2d 448, 457 (1984) (quoting *State v. Cutshall*, 278 N.C. 334, 347, 180 S.E.2d 745, 753 (1971)).

The decision of whether to admit photographs under N.C.G.S. § 8C-1, Rule 403 is "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). In the instant case, the trial court properly exercised its discretion in admitting exhibit H1. This photograph was used to identify this particular victim, and it was used during the testimony of Officer Penny Goodwin to illustrate her testimony as to what she observed on 17 August 1998. Furthermore, the photograph was not so gruesome as to require its inadmissibility, and as the trial court found, the presence of the fly on the victim's eyelid did not change this outcome. Thus, applying the above principles and the requirements of N.C.G.S. § 8C-1, Rule 403, we conclude that the trial court properly admitted this evidence.

Next, with regard to exhibit H8, defendant argues that this photograph should have been held inadmissible because it was duplicative of exhibit H7. We disagree.

Exhibit H8 is a photograph of Susan Moore's and Tracy Lambert's bodies lying in a field. In admitting exhibit H8 into evidence, the trial court found that "while it does duplicate to some degree the state's exhibit H7, . . . H8 gives a different perspective, and the court finds it could be probative and valuable to the jury in determining . . . the relative positions of the bodies one to another and the relative positions of the bodies to a tree as a point of reference." The trial court also found "that there is nothing unduly prejudicial or gory about the picture."

"Repetitive photographs may be introduced, even if they are revolting, as long as they are used for illustrative purposes and are not aimed solely at prejudicing or arousing the passions of the jury." *Peterson*, 337 N.C. at 394, 446 S.E.2d at 49. We conclude, as the trial court did, that this photograph was not unduly prejudicial or gruesome under N.C.G.S. § 8C-1, Rule 403, and furthermore, this photograph offered a different perspective than that which was offered by exhibit H7. Thus, the trial court did not err in admitting exhibit H8 into evidence.

[15] Next, defendant argues that the trial court erred in submitting the aggravating circumstance that the murders were especially heinous, atrocious, or cruel. *See* N.C.G.S. § 15A-2000(e)(9). We disagree.

> Whether a trial court properly submitted the (e)(9) aggravating circumstance depends on the facts of the case. The capital offense must not be merely heinous, atrocious, or cruel; it must be especially heinous, atrocious, or cruel. A murder is especially heinous, atrocious, or cruel when it is a conscienceless or pitiless crime which is unnecessarily torturous to the victim.

State v. Flippen, 349 N.C. 264, 270, 506 S.E.2d 702, 706 (1998), (citations omitted), *cert. denied*, 526 U.S. 1135, 143 L. Ed. 2d 1015 (1999). This Court has

> identified three types of murders that would warrant the submission of the [especially heinous, atrocious, or cruel] 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. 301, 319, 364 S.E.2d 316, 328, *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988). The second type includes killings that are less violent but involve infliction of psychological torture by leaving the victim in his or her "last moments aware of but helpless to prevent impending death," *State v. Hamlet*, 312 N.C. [162,] 175, 321 S.E.2d [837,] 846 [(1984)], and thus may be considered "conscienceless, pitiless, or unnecessarily torturous to the victim," *State v. Brown*, 315 N.C. 40, 65, 337 S.E.2d 808, 826-27 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *and overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). The third type includes killings that "demonstrate[] an unusual depravity of mind on the part of the defendant beyond

> that normally present in first-degree murder[s]." *Id.* at 65, 337 S.E.2d at 827.

Lloyd, 354 N.C. at 122, 552 S.E.2d at 627-28 (citation omitted) (fifth and sixth alterations in original). Furthermore, "[i]n determining whether the evidence is sufficient to support the trial court's submission of the especially heinous, atrocious, or cruel aggravating circumstance, we 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.' " *Flippen*, 349 N.C. at 270, 506 S.E.2d at 706 (quoting *Lloyd*, 321 N.C. at 319, 364 S.E.2d at 328).

Applying the principles above, we conclude that the evidence in this case was sufficient to support the submission of the (e)(9) aggravating circumstance to the jury. The evidence at trial tended to show that the two victims were forced into the trunk of their car at gunpoint while screaming and trying to escape. Then, for about an hour, defendant and others drove the car around while the two victims cried for help, begged not to be hurt, and asked their abductors what was going to be done to them. At some point during the ride, the car was stopped, and some of the other gang members took jewelry off of the victims at gunpoint. Eventually, the gang arrived at defendant's trailer with the two victims in the trunk. The trunk was opened again, and Susan Moore pled for their lives. She asked her abductors: "Well, what are you all going to do to us?" "Are you going to kill us?" "We don't know what y'all look like. Just let us go." One of the gang members then told her, "Shut up, b——," and the victims were then locked back in the trunk. The gang members then went into defendant's trailer. Finally, the gang returned outside and drove the victims to a "dirt road" that was about twenty minutes away from defendant's trailer. The gang pulled the victims out of the trunk. Queen held a gun to Tracy Lambert's head and said, "Well, I'm about to open this b——'s third eye." Lambert started to cry, saying, "Oh, my God, Susan. We're going to die. We're going to die. I don't want to die." Queen told Lambert to shut up and then shot her in the head. Moore, who was being held with a knife to her throat, begged the gang not to cut her in the throat, but to shoot her instead. Subsequently, Francisco Tirado shot Moore in the head.

The victims were subjected to at least an hour and a half of psychological torture by being trapped in the trunk of a car while pleading for their lives. The victims were also abducted at gunpoint and robbed of jewelry. Furthermore, Susan Moore was forced to witness

Tracy Lambert being shot in the head. We thus conclude that the evidence more than warranted the trial court's submission of the (e)(9) aggravating circumstance to the jury for both murders. This assignment of error is overruled.

[16] We turn once again to the all-too-familiar contention by a defendant that counsel for the State engaged in improper closing arguments. We note that this case was tried prior to our decision in *State v. Jones*, 355 N.C. 117, 558 S.E.2d 97. However, *Jones* did not introduce into the parameters of proper closing argument any new requirements, but instead reiterated established principles long articulated by the laws of this state and by this Court's decisions.

In this case, the State presented three separate arguments to the jury at guilt-innocence and at sentencing. In the first two arguments, the district attorney and one of his assistants engaged in proper closing arguments focusing on the evidence, the law, and the issues before the jury. This is a compelling case based upon the evidence presented at trial, and it is inconceivable why the third argument made by another assistant district attorney was ever made. Little, if any, argument was made about the evidence, law, or issues. Instead, the argument consisted of a rambling, disjointed personal attack on defendant, filled with irrelevant historical references and name-calling. Examples of the prosecutor's name-calling follow:

> Ladies and gentlemen, you mean to tell me three people get shot in cold blood by a bunch of no working, no school going, heathen, murdering, low-lifes and nobody's supposed to get emotional?
>
> . . . .
>
> . . . The whole low-life, no working, unemployed group, every one of them is just as guilty.
>
> . . . .
>
> . . . Ladies and gentlemen of the jury, you got to learn how to recognize evil when you see it. . . . You got to learn how to stand up to evil, ladies and gentlemen of the jury. You have to learn how to stand up to evil.
>
> And that girl and that whole gang of them over there, just like this man said, evil, wicked and mean.
>
> . . . .

> . . . You say she's not evil? You say she's not evil? You don't think so. Well, ladies and gentlemen of the jury, if you can't recognize evil, you will never recognize it.

See State v. Smith, 279 N.C. 163, 165-67, 181 S.E.2d 458, 459-60 (1971) (reversing defendant's rape conviction because of the prosecutor's "inflammatory and prejudicial" closing argument describing defendant as "lower than the bone belly of a cur dog"); *see also State v. Miller*, 271 N.C. 646, 659-61, 157 S.E.2d 335, 344-47 (1967) (holding that the prosecutor committed reversible error by, *inter alia*, calling defendants "storebreakers" and expressing his opinion that a witness was lying).

Furthermore, large portions of the argument consisted of matters that were totally extraneous to the decision being made by the jury and that violated several principles of closing argument set out previously by this Court. The effect of this argument is to take a case that appears rock solid on the evidence and law and that was twice ably argued to the jury and bring it perilously close to mandating reversal.

In reviewing this matter, however, we are constrained by the lack of objections by the trial attorneys for defendant (there was only one objection), the total lack of intervention by the trial judge, the limited number of questions presented to this Court on appeal, and defendant's failure to properly assign error.

We now turn to the issues raised by defendant. Our standard of review depends on whether there was a timely objection made or overruled, or whether no objection was made and defendant contends that the trial court should have intervened *ex mero motu*. If there is an objection, this Court must determine whether "the trial court abused its discretion by failing to sustain the objection." *Jones*, 355 N.C. at 131, 558 S.E.2d at 106. Application of the abuse of discretion standard to closing argument requires this Court to first determine if the remarks were improper. *Id.* "Next, we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.*

When defendant fails to object to an argument, this Court must determine if the argument was "so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Barden*, 356 N.C. 316, 358, 572 S.E.2d 108, 135 (2002).

> In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

Jones, 355 N.C. at 133, 558 S.E.2d at 107.

Defendant raises two issues regarding closing arguments, one in the guilt-innocence phase and one in the sentencing phase, respectively. When considering prejudice in a capital case,

> special attention must be focused on the particular stage of the trial. Improper argument at the guilt-innocence phase, while warranting condemnation and potential sanction by the trial court, may not be prejudicial where the evidence of defendant's guilt is virtually uncontested. However, at the sentencing proceeding, a similar argument may in many instances prove prejudicial by its tendency to influence the jury's decision to recommend life imprisonment or death. We also point out that by its very nature, the sentencing proceeding of a capital case involves evidence specifically geared towards the defendant's character, past behavior, and personal qualities. Therefore, it is certainly appropriate for closing argument at the sentencing hearing to incorporate reasonable inferences and conclusions about the defendant that are drawn from the evidence presented. However, mere conclusory arguments that are not reasonable—such as name-calling—or that are premised on matters outside the record—such as comparing defendant's crime to infamous acts—do not qualify and thus cannot be countenanced by this or any other court in the state.

Id. at 134-35, 558 S.E.2d at 108.

[17] We first address the one portion of the argument to which there was an objection. Defendant argues that the trial court erred in failing to intervene *ex mero motu* when the prosecutor's grossly improper argument intended to invoke passion into the jury by comparing defendant to Adolph Hitler. Defendant improperly characterizes the argument here, as the trial court does not intervene *ex mero motu* when an objection is made. We reiterate that the proper standard of review when an objection is made is whether "the trial court

abused its discretion by failing to sustain the objection." *Id.* at 131, 558 S.E.2d at 106.

During closing arguments in the guilt-innocence phase, the prosecutor told the jury:

> Over 50-some years ago, a man from England went to Germany to meet a fellow at a place called Berchtesgaden and he went over there to sign a peace treaty, and this man had a great big enormous picture window. Now, the man from England that looked out the window [was] named Neville Chamberlain, when he looked out the window, he saw a world of peace. He saw a world of harmony. And he signed a little piece of paper, just like the one that this defendant tried to pawn off on this district attorney right here, signed a little piece of paper with that man—that other man from Germany that looked out the window. And he said we're at peace. The man from England took a little piece of paper, went back home waving it to his folks, We have peace in our time. He had no idea that he was talking to a man that, before it was over, would be responsible for the deaths of 50 million people on every continent, every sea. He would be responsible for the death of over 50 million women and children. He had no idea that Adolph Hitler was going to turn out the way he did.
>
> But, ladies and gentlemen of the jury, oh, he met his match later on. Because Neville Chamberlain didn't remain in office. A fellow named Winston Churchill took over. And you know what Winston Churchill told the fuhrer? We will fight you on the beaches. We will fight you in the air. We will fight you on land. We will never surrender.
>
> And if these people have their way—they got up here political, economic, social and all that stuff, if they have their way, they will turn this county—this state and this country into a place of chaos.
>
> [DEFENSE COUNSEL]: Your Honor, we object.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: That's what they'll do. Got 12 keys of life. The last few of which are money, mac and murder. If they have their way—you know that man that looked out that picture window, the German one, he wrote a book. He had a little book he wrote while he was in prison called "Mein Kampf" and he had a twisted

> dream too just like these folks right here. And he didn't, I don't suppose, look evil to Mr. Chamberlain. Mr. Chamberlain's head probably wasn't screwed on right but Churchill's head was.

The State argues that defendant objected only to the portion of the prosecutor's argument that defendant's gang would "turn this county—this state and this country into a place of chaos" and did not object to the references to Adolph Hitler. It is apparent that defendant followed the prosecutor's argument and objected when the prosecutor tied his prior references to Hitler to defendant. Therefore, we conclude that defendant's objection was directed to the reference to Hitler as well as the statement tying defendant to Hitler, and thus we will review the argument based on an objection having been made.

The State further contends that this Court should apply by analogy the rule relating to admission of evidence: " '[T]he admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character.' " *State v. Hudson*, 331 N.C. 122, 151, 415 S.E.2d 732, 747-48 (1992) (quoting *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979)), *cert. denied*, 506 U.S. 1055, 122 L. Ed. 2d 136 (1993). In other words, the State argues that defendant's objection that was overruled should be waived because defendant did not object to subsequent portions of the prosecutor's argument relating to Adolph Hitler. However, the rule relating to the admission of evidence during the trial is not analogous to arguments allowed during closing arguments. Whereas it is customary to make objections during trial, counsel are more reluctant to make an objection during the course of closing arguments "for fear of incurring jury disfavor." *Jones*, 355 N.C. at 129, 558 S.E.2d at 105. Defendant should not be penalized twice (by the argument being allowed and by her proper objection being waived) because counsel does not want to incur jury disfavor. Therefore, defendant properly objected to the prosecutor's argument, and no waiver occurred by defendant's failure to object to later references to Hitler.

Because defendant properly objected to the closing argument, this Court must determine if "the trial court abused its discretion by failing to sustain the objection." *Id.* at 131, 558 S.E.2d at 106. As previously noted, the application of the abuse of discretion standard to closing arguments requires this Court to first determine if the remarks were improper. *Id.* "Next, we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court."

Id. Defendant contends that the prosecutor's argument was improper. We agree. "[I]mproper remarks include statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence, such as the infamous acts of others." *Id.*

Defendant contends that the prosecutor made this argument to compare her and the Crips to Hitler and the Nazis. However, at the conclusion of the argument, the prosecutor's reasoning for this argument appears to be different. "Ladies and gentlemen of the jury, go back there and act with resolve. Go back there. Do like Winston Churchill when he stood up to Hitler. Do it like that. Stand up to evil. Go back there and find this person guilty of every single charge on that indictment." Thus, the purpose of the argument appears to be to get the jury to "stand up to evil" like Winston Churchill did to Hitler rather than to appease evil like Neville Chamberlain did.

While this Court in *Jones* stated that arguments "premised on matters outside the record" during closing arguments are inappropriate, *id.* at 135, 558 S.E.2d at 108, we do not completely restrict closing arguments to matters that are only within the province of the record, to the exclusion of *any* historical references. However, despite the *de facto* historical nature of any past event, this Court will not allow such arguments designed to inflame the jury, either directly or indirectly, by making inappropriate comparisons or analogies. In this case, even if the prosecutor's argument about Neville Chamberlain and Adolph Hitler and Winston Churchill was to illustrate appeasement, using Hitler as the basis for the example has the inherent potential to inflame and to invoke passion in the jury, particularly when defendant is compared to Hitler in the context of being evil. We conclude that the prosecutor's argument in this case was improper.

Now we must "determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.* at 131, 558 S.E.2d at 106. Although the prosecutor's argument was improper, given the overwhelming evidence of defendant's guilt, it can hardly be said that the prosecutor's remarks "were of such magnitude that their inclusion prejudiced defendant." *See id.* In fact, this argument, coming when it did after two proper arguments by the district attorney and an assistant district attorney, most likely had little, if any, impact on the jurors' decision on the issue of guilt or innocence. Finally, in viewing the argument in its totality, it appears far more incomprehensible and dis-

jointed than powerful and persuasive. Thus, we must conclude that, although improper, the necessary showing of prejudice was not met.

[18] Next, defendant argues that the prosecutor made improper statements during closing arguments in the sentencing phase. Defendant failed to make any objections, so this Court must determine if the prosecutor's arguments were "so grossly improper that the trial court erred in failing to intervene *ex mero motu.*" *Barden*, 356 N.C. at 358, 572 S.E.2d at 135.

Defendant points to seven portions of the prosecutor's closing argument during the sentencing phase that defendant contends were so grossly improper as to require intervention by the trial court. Specifically, defendant argues that the prosecutor tried to prejudice the jury by referring to the jury's "solemn" duty to the victims to do justice and by referring to the jurors confronting the victims in the "hereafter." Contrary to defendant's contention and having reviewed the argument in context, we conclude that the prosecutor did not imply that the jury's duty was to sentence defendant to death under God's law. This Court has disapproved of contentions that state law-enforcement entities have been ordained by God and that resisting those entities is resisting God. *Call*, 353 N.C. at 419, 545 S.E.2d at 202; *State v. Cummings*, 352 N.C. 600, 628, 536 S.E.2d 36, 56 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). However, in this case, the prosecutor neither argued nor implied that law-enforcement entities were ordained by God. Furthermore, the remarks were not a biblical argument, nor were they based improperly on religion. The statements constituted a request to "do justice" and a hypothetical reference to encountering the victims in the hereafter. While inappropriate, these comments do not merit intervention by the trial court *ex mero motu. See Call*, 353 N.C. at 419.

Furthermore, in making references to God, the prosecutor challenged defendant's direct testimony in the guilt-phase that she had "found God." The prosecutor's reference to God was also in response to social worker Joan Cynthia Brooks' testimony about defendant's complaint about her grandmother's religious emphasis. Defendant contends that the prosecutor argued that defendant should be willing to die under God's laws. We disagree. The prosecutor did not suggest or imply that the jury should sentence defendant to death under God's laws. The prosecutor's comments were in direct response to defendant's testimony in the guilt-innocence phase that she had "found God" and to the social worker's testimony in the sentencing

phase. *See, e.g., State v. Robinson*, 336 N.C. 78, 129-30, 443 S.E.2d 306, 332 (1994) (holding that the prosecutor's argument on drugs and race was in response to the defendant's expert, who testified that defendant's inner-city background was partially responsible for his criminal behavior), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995).

[19] The prosecutor also argued that defendant's mitigating circumstances were excuses for the murders committed and challenged the weight of defendant's mitigating circumstances. Defendant provides no support for her contention that the prosecutor "misled the jury from the law" by making these statements about defendant's mitigating circumstances. The prosecutor simply contended that the jury should not give weight to defendant's mitigating circumstances. *See, e.g., id.* at 129, 443 S.E.2d at 332 (holding that the prosecutor's remark that the defendant's mitigation evidence constituted an "evasion of responsibility" was "directed toward the weight that the jury should give to defendant's evidence"). This Court has repeatedly maintained that "[a] prosecutor is permitted to legitimately belittle the significance of . . . mitigating circumstances." *State v. Haselden*, 357 N.C. 1, 20, 577 S.E.2d 594, 606 (2003); *accord State v. Billings*, 348 N.C. 169, 186-87, 500 S.E.2d 423, 433-34 (quoting *State v. Basden*, 339 N.C. 288, 305, 451 S.E.2d 238, 247 (1994), *cert. denied*, 515 U.S. 1152, 132 L. Ed. 2d 845 (1995)), *cert. denied*, 525 U.S. 1005, 142 L. Ed. 2d 431 (1998).

[20] In addition, the prosecutor argued to the jury during the sentencing stage, "You know what was once written about people who harm children? 'And whosoever shall offend one of these little ones that believe in me, it is better that a millstone be tied about his neck and he be drowned in the depths of the sea.' " Defendant contends that this was grossly improper and that the trial court should have intervened *ex mero motu*. However, the prosecutor did not argue that the Bible commanded that defendant be put to death. Instead, he used the statement in question to respond to defendant's testimony that she did not want her children in the Davis Street environment. The prosecutor appears to have used this colloquy to amplify defendant's bad parenting and to attempt to eliminate any sympathy the defense might try to invoke with the jury because defendant had children. This is evidenced by the prosecutor's following argument:

> Do not delude yourself, ladies and gentlemen of the jury. Counsel will get up here and tell you how pitiful [defendant] is, and how by letting her live, she'll be able to see her children.

> They'll be able to see—come visit their mother. Ladies and gentlemen of the jury, the last thing that you ought to think of this person as is a mother. That's the person that put her children out of the house for this motley crew.

This case does not involve the death of a child such that an interpretation could be drawn from this argument that defendant should die because she has harmed her children. Furthermore, the prosecutor does not directly or indirectly state that defendant should be executed for these crimes because the Bible says so. Although "[t]his Court has strongly cautioned against the use of arguments based on religion," *Barden*, 356 N.C. at 358, 572 S.E.2d at 135, we hold that the prosecutor's arguments in this case were not grossly improper and that they do not constitute reversible error by the trial court's failure to intervene *ex mero motu*.

As we have observed, this closing argument was made prior to our decision in *Jones*. However, let there be no mistake. It is the expressed intention of this Court to make sure *all* parties stay within the proper bounds of the laws and decisions of this Court relating to closing argument. The federal courts have consistently restricted closing argument, while our state jurisprudence has tended to give far greater latitude to counsel. There is a proper balance, and in *Jones*, we took great care to spell out the proper parameters. In this case, at one point in his argument, the prosecutor said, "I hope the judge doesn't put me in jail for my language . . . ." While not inclined in this case to go that far, we once again remind counsel for all parties that improper argument in flagrant disregard of the limits placed on closing argument can and must be enforced by the courts.

[21] Defendant also contends that the trial court erred by allowing the prosecutor to argue, during closing arguments at the guilt-innocence phase of the trial, that defendant failed to call John Juarbe, Tameika Douglas, and Francisco Tirado to the stand, which thereby impermissibly shifted the burden of proof to defendant to prove her case.

During closing arguments at the guilt-innocence phase of the trial, defense counsel stated:

> We didn't take one or two words out of context. We didn't take a statement here and a statement there and pull a couple words out and try to confuse you and not show you the statement. Heck, we even brought Eric Queen in here, put him on the stand and tried to get him to talk to you. He invoked his Fifth

> Amendment right which is his perfect right to do. End of story. We can't question him any more about that. We brought Darryl Tucker in here, put him on the stand and we asked him questions and he invoked his Fifth Amendment rights. Can't ask him questions any more. We did—we tried.
>
> In sum, we've tried to be completely up front with you. We tried to let you hear the whole story of what happened in this incident. We tried to let you hear it without emotional tirades, without smoke in [sic] mirrors. We tried to let you have the bare, cold facts and let you decide what happened. It's as simple as that.

During the prosecutor's closing argument in rebuttal, the prosecutor responded to this argument by saying:

> Now, the defense wants you to believe that they called in Mr. Queen, they called in Mr. Tucker because they were trying to show you everything and give you a chance to hear everything because they want to be real truthful with you and make sure you know everything. Well, were there any other defendants in this case?
>
> You've got to wonder, now, let's see, what was this defendant's relationship to those two defendants? Well, when she was arrested, law enforcement tells you she comes out of the bedroom with Queen. She says in the statement you couldn't sleep with somebody in your same set, so she didn't have a relationship with Eric Queen. But she said on the stand, yeah, we were boyfriend—no, we weren't boyfriend and girlfriend but we had a sexual relationship. She comes out of the back bedroom there—by law enforcement, those two were in the back bedroom. She is so afraid of him. She is so afraid. She is so afraid she keeps his picture right beside her bed. She look like she is scared of anybody in that picture? Looks like they are on pretty good terms in that picture. Eric Queen—you reckon—you reckon Eric Queen is the boyfriend? He is the one that's caught in the bedroom with her when law enforcement catches her. You reckon there wouldn't be a chance he wouldn't unload on her if he did say anything if they put him on the stand? Probably wouldn't, would he? He's the boyfriend?
>
> Now, who else on this chart would this defendant be close to? Well, she kept saying what? Couldn't throw Tucker out. His daddy was my O.G. [original gangster], plus he's fam. He's fam. Got to let

> him stay there. Got to send the children away for days. I cannot have the children here. I can't do whatever. Can't throw out Tucker. Finally, she did. When he questioned her, you got to leave. Fam, brings him in. You reckon if he says anything, you can take that chance putting him on the stand, can't you, because if he says anything, she's close enough that he's not likely to hurt her, isn't he?
>
> So why don't they put John Juarbe on the stand? Why didn't they call Tameika Douglas? Why didn't they call Paco [Tirado]? She was plenty ready to unload on Paco all the way through her testimony. If you put Paco up there, I wonder what he would have said. Put Carlos Frink, Carlos Nevills, think about it. The defendant chose to call up there the two people that, if they said anything, what? Were closest to her. Most unlikely to do what? Hurt her. Remember that. Remember that. Because the defendant has said to you how truthful she was, how she tried to show you everything.

Defendant first contends that the trial court committed plain error in this case by not intervening during this closing argument. However, this Court has stated that plain error review is appropriate only "when the issue involves either errors in the trial judge's instructions to the jury or rulings on the admissibility of evidence." *State v. Cummings*, 346 N.C. 291, 314, 488 S.E.2d 550, 563 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998). "Since defendant failed to object to these allegedly improper statements during the closing arguments, [she] 'must demonstrate that the prosecutor's closing arguments amounted to gross impropriety.' " *State v. May*, 354 N.C. 172, 178, 552 S.E.2d 151, 155 (2001) (quoting *State v. Rouse*, 339 N.C. 59, 91, 451 S.E.2d 543, 560 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995)), *cert. denied*, 535 U.S. 1060, 152 L. Ed. 2d 830 (2002). " 'To establish such an abuse, defendant must show the prosecutor's comments so infected the trial with unfairness that it rendered the conviction fundamentally unfair.' " *Hyde*, 352 N.C. at 56, 530 S.E.2d at 294 (quoting *State v. Robinson*, 346 N.C. 586, 607, 488 S.E.2d 174, 187 (1997)). Furthermore, " '[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.' " *Id.* (quoting *State v. Guevara*, 349 N.C. 243, 257, 506 S.E.2d 711, 721 (1998), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999)).

Also, "[w]hile a prosecutor may not comment on the failure of the accused to testify, he may 'comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State.' " *State v. Skeels*, 346 N.C. 147, 153, 484 S.E.2d 390, 393 (1997) (quoting *State v. Reid*, 334 N.C. 551, 555, 434 S.E.2d 193, 196 (1993)); *see also State v. Ward*, 354 N.C. 231, 261-62, 555 S.E.2d 251, 271 (2001); *State v. Fletcher*, 348 N.C. 292, 322, 500 S.E.2d 668, 685 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 113 (1999); *State v. Morston*, 336 N.C. 381, 406, 445 S.E.2d 1, 15 (1994). " '[T]he jury, in weighing the credibility of the evidence offered by the State[] may consider the fact that it is uncontradicted . . . or unrebutted by evidence available to defendant.' " *State v. Tilley*, 292 N.C. 132, 143, 232 S.E.2d 433, 441 (1977) (quoting *State v. Bryant*, 236 N.C. 745, 747, 73 S.E.2d 791, 792 (1953)) (third alteration in original).

In the present case, we conclude that the prosecutor was merely arguing that defendant had witnesses available who could have offered exculpatory evidence but that defendant had refused to call those witnesses. Furthermore, we conclude that the prosecutor was also responding to defendant's assertion in which her attorney said to the jury, "We tried to let you hear the whole story of what happened in this incident." Therefore, we hold that the prosecutor's closing argument did not amount to gross impropriety, and thus, the trial court did not err by not intervening *ex mero motu*.

Defendant raises four additional issues that she concedes have been previously decided contrary to her position by this Court: (1) the trial court erred in allowing death qualification of the jury; (2) the N.C.G.S. § 15A-2000 (e)(9) aggravating circumstance that a murder is "especially heinous, atrocious, or cruel" is unconstitutionally vague and overbroad; (3) the trial court erred by instructing the jury during the capital sentencing proceeding that the answers to Issues One, Three, and Four on the "Issues and Recommendation as to Punishment" form for each case must be unanimous; (4) the trial court erred by failing to change the wording of Issue Three on the "Issues and Recommendation as to Punishment" form for each case to avoid a recommendation of death if the jury found the aggravating and mitigating circumstances to be of equal weight and value.

Defendant raises these issues in order to urge this Court to reexamine its prior holdings with regard to these issues. We have considered defendant's arguments, and we find no compelling reason to reverse our prior holdings. Therefore, the assignments of error presented under these issues are overruled.

[22] Having found no prejudicial error in defendant's trial or capital sentencing proceeding, we must now review and decide three issues: (1) whether the record supports "the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death"; (2) whether "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor"; or (3) whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2). If this Court finds the existence of one of these factors, "[t]he sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof." *Id.*

After a thorough review of the record, transcript, briefs, and oral arguments, we hold that the record provides ample support for the jury's finding of all four aggravating circumstances submitted as to each murder: (1) the murder was committed while defendant was engaged in the commission of a first-degree kidnapping, N.C.G.S. § 15A-2000(e)(5); (2) the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); (3) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (4) the murders for which defendant was convicted were part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against other persons, N.C.G.S. § 15A-2000(e)(11). We also conclude that nothing in the record suggests that defendant's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

We now turn to our final statutory duty of proportionality review. In conducting our proportionality review, we consider "whether the sentence of death in the present case is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant." *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983). "[I]t is proper to compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate." *State v. Williams*, 355 N.C. 501, 590, 565 S.E.2d 609, 660 (2002), *cert. denied*, — U.S. —, 154 L. Ed. 2d 808 (2003). This Court has found a death sentence disproportionate in eight cases. *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d

396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373; *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

We conclude that this case is not substantially similar to any of the cases in which this Court has found the death sentence disproportionate. Defendant was convicted of two counts of first-degree murder both on the basis of premeditation and deliberation and under the felony murder rule with two underlying felonies—kidnapping and robbery with a firearm. This Court has 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). Additionally, the largest number of aggravating circumstances found by the juries in the cases held disproportionate was two. However, in the case at bar, the jury found the existence of four aggravating circumstances.

The facts in the case at bar are similar, if not more egregious than the facts in *State v. Call*, 353 N.C. 400, 545 S.E.2d 190. In *Call*, defendant lured one murder victim into a remote cornfield and killed the victim by hitting him in the head with a shovel and a tire iron. Defendant assaulted another victim by hitting him in the head with an aluminum bat and leaving him in the field all night. In the case at bar, both of the victims were violently kidnapped and were forced to ride in the trunk of their car, listening to plans to kill them. One of the two murder victims watched as her friend was fatally shot in her presence. The other begged to be shot versus having her throat cut before she was shot in the head. The surviving victim was kidnapped at gunpoint. She was thereafter robbed and was forced to get into the trunk of her car. She was in the trunk when gang members gathered around the car and discussed what to do with her. Defendant and three others drove her to a remote area, where defendant shot her multiple times and then left her in a field to die. All three victims in this case endured an extended period of terror.

This Court in *Call* found defendant's death sentence proportionate where the jury found the same four aggravating circumstances as in this case: (1) the murders were committed while defendant was engaged in the commission of a kidnapping, N.C.G.S. § 15A-2000(e)(5);

(2) the murders were committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); (3) the murders were especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (4) the murder was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11). *See id.*

Accordingly, after reviewing the facts of this case and the treatment of other similar cases, we find the death sentence in this case to be proportionate.

NO ERROR.

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

STATE OF NORTH CAROLINA v. HENRY BERNARD SPIVEY, JR.

No. 299A02

(Filed May 2 2003)

Constitutional Law— speedy trial—*Barker* factors balanced—no violation

A first-degree murder defendant's right to a speedy trial was not violated by a delay of four and one-half years after his arrest when the *Barker v. Wingo* factors were balanced. The delay is long enough to trigger examination of the other factors; the delay was caused by neutral factors, including the number of pending first-degree murder cases; defendant failed to carry his burden of showing neglect or willfulness the State; defendant's assertion of the right to a speedy trial does not alone entitle him to relief, even assuming that his pro se speedy trial request while he was represented by counsel was proper; and defendant did not show that his defense was impaired by the delay. He ultimately pled guilty to second-degree murder rather than risk rejection of his self-defense contention and face the death penalty.

Justice BRADY dissenting.

Justice ORR joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 150 N.C. App. 189, 563 S.E.2d 12 (2002), affirming an order denying defendant's motion to dismiss for lack of a speedy trial entered in open court on 26 April 1999 and reduced to writing on 24 June 1999 entered by Judge Jack A. Thompson and a final judgment entered 3 May 1999 by Judge James R. Vosburgh in Superior Court, Robeson County. Heard in the Supreme Court 11 March 2003.

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

William L. Davis, III, for defendant-appellant.

American Civil Liberties Union of North Carolina Legal Foundation, Inc., by Seth H. Jaffe, amicus curiae.

WAINWRIGHT, Justice.

On 18 October 1994, Henry Bernard Spivey, Jr. (defendant), was arrested for the murder of Jermaine Morris. The record reveals that on 17 October 1994, the previous day, officers were dispatched to a housing project in Lumberton, North Carolina, where they found Morris dead from numerous gunshot wounds. An autopsy showed Morris had been shot eleven times, mostly in the chest and stomach. It appears that defendant turned himself in and told authorities that he shot Morris.

On the day of the murder, defendant and Morris had a conflict over a woman named Samantha Fields, and defendant began shooting Morris when Morris struck him. Nathaniel Spivey, defendant's thirteen-year-old brother, also joined in shooting Morris. Nathaniel was charged as a juvenile but was bound over to superior court for trial as an adult. He pled guilty to second-degree murder and received a minimum sentence of 135 months' to a maximum sentence of 171 months' imprisonment.

On 27 November 1995, while represented by counsel, defendant filed a handwritten, *pro se* "Motion Reque[s]ting a Prompt and Speedy Trial." In his *pro se* motion, defendant stated: "[t]hat as of this date and on, defendant objects to any and all (including those acquiescued [sic] to by the Court Appointed Counsel) continuance's [sic]." Nearly twenty-one months later, on 8 August 1997, defendant's court-appointed attorneys filed a motion to dismiss for lack of a speedy trial.

Defendant's motion to dismiss for lack of a speedy trial was initially heard before the Honorable Gregory Weeks on 29 April 1998. The trial court heard arguments from counsel and then instructed the parties that it needed further briefs and documentation from the court records and continued the hearing to a later date.

A second hearing was held on defendant's motion to dismiss for lack of a speedy trial before the Honorable Jack Thompson on 26 April 1999. At this hearing, the State stipulated that defendant had been in jail since 18 October 1994 (approximately four and one-half years). The State further stipulated to statements made by two potential witnesses. The State informed the trial court that one of the witnesses, Fred Smith, was incarcerated in the Department of Correction. The State informed the trial court that the other witness, Samantha Fields, had changed addresses two or three times but that the State was in the process of trying to find her. In addition, pursuant to Judge Weeks' order, the State presented to the court documentation of murder cases tried between defendant's indictment and 19 April 1999. The State then provided defendant with a copy of this list and copies of the judgments. Following the hearings before the Honorable Gregory Weeks and the Honorable Jack Thompson, Judge Thompson announced in open court on 26 April 1999 that he was denying defendant's motion to dismiss for lack of a speedy trial on the grounds that there was not a sufficient showing by the defendant that his rights to a speedy trial were denied. Judge Thompson's decision is later reflected in a written order filed on 24 June 1999.

Defendant's case was subsequently called for trial on 3 May 1999. Defendant tendered a plea of guilty to second-degree murder. During a plea colloquy with the trial court, defendant acknowledged understanding that, by pleading guilty, he was giving up his constitutional rights relating to trial by jury. The plea was pursuant to a plea arrangement providing that defendant would be sentenced to a prison term of a minimum of 135 months' to a maximum of 171 months' imprisonment and that defendant was "reserv[ing] the right to appeal the denial of his motion to dismiss for lack of a speedy trial."

On 6 May 1999, defendant filed notice of appeal to the Court of Appeals. In an opinion filed 7 May 2002, the Court of Appeals granted certiorari to review the trial court's denial of defendant's motion to dismiss for lack of a speedy trial. *State v. Spivey*, 150 N.C. App. 189, 189-90, 563 S.E.2d 12, 12 (2002). Upon review, the majority in the Court of Appeals concluded that *State v. Hammonds*, 141 N.C. App.

152, 541 S.E.2d 166 (2000), *aff'd per curiam*, 354 N.C. 353, 554 S.E.2d 645 (2001), *cert. denied*, 536 U.S. 907, 153 L. Ed. 2d 184 (2002) was controlling. *Spivey*, 150 N.C. App. at 190, 563 S.E.2d at 12. *Hammonds* and the present case originated in Robeson County. *Id.* at 191, 563 S.E.2d at 13. The Court of Appeals noted that "[i]n *Hammonds*, the defendant argued that the trial court erred by denying his motion to dismiss where there was a pretrial delay of four and one-half years." *Id.* at 190, 563 S.E.2d at 12. In the present case, the Court of Appeals further quoted the following language from *Hammonds*:

> "Defendant argues that the delay between his arrest and trial was caused in part by the State's 'laggard performance.' The record, however, reveals that the local docket was congested with capital cases. The trial court described it as 'chopped the block [sic] with capital cases. They're trying two at a time and just one right after the other, and there are only so many that can be tried.' 'Our courts have consistently recognized congestion of criminal court dockets as a valid justification for delay.' *State v. Hughes*, 54 N.C. App. 117, 119, 282 S.E.2d 504, 506 (1981) (citations omitted) (finding defendant failed to meet his burden where delay was result of backlog of cases). Indeed, '[b]oth crowded dockets and lack of judges or lawyers, and other factors, make some delays inevitable.' *State v. Brown*, 282 N.C. 117, 124, 191 S.E.2d 659, 664 (1972) (citation omitted). Accordingly, in assessing defendant's speedy trial claim, we see no indication that court resources were either negligently or purposefully underutilized."

Spivey, 150 N.C. App. at 190, 563 S.E.2d at 12-13 (quoting *Hammonds*, 141 N.C. App. at 160-61, 541 S.E.2d at 173) (alterations in original).

The Court of Appeals held that "[t]he State in this case made a showing[,] as it did in *Hammonds*, that the dockets were clogged with murder cases and this caused an unavoidable backlog of cases." *Id.* at 191, 563 S.E.2d at 13. The dissenting judge concluded that the trial court abused its discretion in denying defendant's motion to dismiss for lack of a speedy trial. *Id.* (Timmons-Goodson, J., dissenting). For the reasons discussed herein, we affirm the majority decision of the Court of Appeals.

The sole issue in this case is whether the Court of Appeals correctly affirmed the trial court's denial of defendant's motion to dis-

miss for lack of a speedy trial. Defendant argues that, because over four and one-half years elapsed between his arrest and trial, he was denied his constitutional right to a speedy trial.

This Court has stated:

> The right to a speedy trial is different from other constitutional rights in that, among other things, deprivation of a speedy trial does not *per se* prejudice the ability of the accused to defend himself; it is impossible to determine precisely when the right has been denied; it cannot be said precisely how long a delay is too long; there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial; and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial.

State v. McKoy, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978).

In *Barker v. Wingo*, the United States Supreme Court identified four factors that "courts should assess in determining whether a particular defendant has been deprived of his right" to a speedy trial under the federal Constitution. 407 U.S. 514, 530, 33 L. Ed. 2d 101, 117 (1972). These factors are: (i) the length of delay, (ii) the reason for delay, (iii) the defendant's assertion of his right to a speedy trial, and (iv) whether the defendant suffered prejudice as a result of the delay. *Id.*; *see also State v. Flowers*, 347 N.C. 1, 27, 489 S.E.2d 391, 406 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998). "We follow the same analysis when reviewing such claims under Article I, Section 18 of the North Carolina Constitution." *State v. Grooms*, 353 N.C. 50, 62, 540 S.E.2d 713, 721 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001).

This Court must consider the factors in light of the balancing test set out by the United States Supreme Court as follows:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the constitution.

Barker, 407 U.S. at 533, 33 L. Ed. 2d at 118-19. With these principles in mind, we now balance the four factors based on the evidence in this case.

First, the length of the delay is not *per se* determinative of whether defendant has been deprived of his right to a speedy trial. *See State v. Webster*, 337 N.C. 674, 678, 447 S.E.2d 349, 351 (1994). The United States Supreme Court has noted that "lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year." *Doggett v. United States*, 505 U.S. 647, 652 n.1, 120 L. Ed. 2d 520, 528 n.1 (1992). However, " 'presumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* inquiry." *Id.* In this case, the length of delay was approximately four and one-half years, which is clearly enough to trigger examination of the other factors.

Second, defendant has the burden of showing that the delay was caused by the *neglect* or *willfulness* of the prosecution. *See Webster*, 337 N.C. at 679, 447 S.E.2d at 351. Only after the defendant has carried his burden of proof by offering *prima facie* evidence showing that the delay was caused by the neglect or willfulness of the prosecution must the State offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* evidence. *McKoy*, 294 N.C. at 143, 240 S.E.2d at 390. This Court has stated:

> The constitutional guarantee does not outlaw good-faith delays which are reasonably necessary for the State to prepare and present its case. . . . Neither a defendant nor the State can be protected from prejudice which is an incident of ordinary or reasonably necessary delay. The proscription is against purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort.

State v. Johnson, 275 N.C. 264, 273, 167 S.E.2d 274, 280 (1969) (citations omitted).

In the present case, the record does not reveal that the delay resulted from willful misconduct by the State. To the contrary, the record shows numerous causes for the delay. This case, like *Hammonds*, originated in Robeson County during a substantially similar time frame. The State made a showing in this case, as it did in *Hammonds*, that the dockets were clogged with murder cases. In

fact, *Hammonds* was one of the cases tried in Robeson County during defendant's pretrial incarceration.

The State, in explaining the delay in the present case, made the following showing: Seventy-three first-degree murder cases were pending in Robeson County when defendant was indicted. These seventy-three first-degree murder cases were also pending when the district attorney took office on 1 November 1994. Of these seventy-three first-degree murder cases, only five, including defendant's case, had not been disposed of by 29 April 1998. Four of these five remaining cases predate defendant's case. The district attorney has dealt with the cases in chronological order, beginning with the oldest. Defendant's case was tried based on this policy. In 1995, the double homicide trial of defendant John Clark, Jr. was held, and the sentencing phase of that trial lasted for thirteen to seventeen weeks. During the pendency of defendant's case, numerous capital murder trials were held in Robeson County including the trial of Daniel Andre Greene, who was the defendant in the highly publicized capital murder case involving the death of Michael Jordan's father, and which case was designated "exceptional." During one point in defendant's pretrial incarceration, there were only two courtrooms available in Robeson County because of courthouse renovation, and the Clark and Greene cases were held in these courtrooms. Greene's trial began in November 1995, and the sentencing proceeding in that case concluded approximately nine weeks into 1996. In 1996, the Robeson County district attorney's office tried fifteen first-degree murder cases, thirteen of which were tried capitally and all fifteen of which went to juries for a verdict. In 1997, the district attorney's office prosecuted twelve first-degree murder cases, and all twelve went to juries for a verdict. In 1997, the district attorney's office tried sixty-seven felony jury trials and twenty-three or twenty-four misdemeanor jury trials. From 1 July 1997 through 31 March 1998, a total of twenty-nine homicide cases were disposed of by the district attorney's office. Defendant's counsel was involved during the pendency of defendant's case in a number of murder cases that predated defendant's. Ninety-three murder cases in Robeson County were disposed of while defendant's case was pending. Accordingly, the delay in the present case is not particularly a matter of court congestion. The delay resulted from a combination of the circumstances cited above. *See Brown*, 282 N.C. at 124, 191 S.E.2d at 664 (holding that "crowded dockets and lack of judges or lawyers, and other factors, make some delays inevitable").

This Court has also recognized "that there may be selectivity in prosecutions and that the exercise of this prosecutorial prerogative does not reach constitutional proportion unless there be a showing that the selection was deliberately based upon 'an unjustifiable standard such as race, religion, or other arbitrary classification.' " *State v. Cherry*, 298 N.C. 86, 103, 257 S.E.2d 551, 562 (1979) (quoting *Oyler v. Boles*, 368 U.S. 448, 456, 7 L. Ed. 2d 446, 453 (1962)), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980). In the present case, defendant has failed to show that the State, by trying some murder cases that may have postdated defendant's, made these selections based on some unjustifiable standard. The complexities of a capital trial versus the disposal of noncapital trials and pleas justify the disposition of some noncapital cases before capital cases. Defendant has failed to present *any* evidence that the delay was caused by the State's neglect or willfulness, and we see no indication that court resources were either negligently or purposefully underutilized. Indeed, defendant relies solely on the length of delay and ignores the balancing of other factors. In light of these reasons, we conclude that the delay was caused by neutral factors and that defendant failed to carry his burden to show delay caused by the State's neglect or willfulness.

Third, defendant's *pro se* assertion of his right to a speedy trial is not determinative of whether he was denied the right. When defendant filed his *pro se* motion for a speedy trial on 27 November 1995, he was represented by counsel. Although defendant's *pro se* motion was filed more than a year after his arrest, his assertion of the right to a speedy trial was made in violation of the rule that a defendant does not have the right to be represented by counsel and to also appear *pro se*. *State v. Thomas*, 346 N.C. 135, 138, 484 S.E.2d 368, 370 (1997). Defendant's counsel filed a motion for a speedy trial on behalf of defendant on 8 August 1997, almost three years after defendant's arrest. This Court has recently held that "[h]aving elected for representation by appointed defense counsel, defendant cannot also file motions on his own behalf or attempt to represent himself." *Grooms*, 353 N.C. at 61, 540 S.E.2d at 721. Defendant does not have the right to appear both by himself and by counsel. *Id.*; *see also* N.C.G.S. § 1-11 (2001). Assuming *arguendo* that defendant properly asserted his rights through his *pro se* motion, this assertion of the right, by itself, did not entitle him to relief. *See Barker*, 407 U.S. at 533, 33 L. Ed. 2d at 118 (holding that none of the factors alone is sufficient to establish a violation and that all must be considered together).

Fourth, in considering whether a defendant has been prejudiced because of a delay, this Court has noted that a speedy trial serves " '(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.' " *Webster*, 337 N.C. at 680-81, 447 S.E.2d at 352 (quoting *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118).

A defendant must show actual, substantial prejudice. *State v. Goldman*, 311 N.C. 338, 346, 317 S.E.2d 361, 366 (1984) (holding that "in the absence of a showing of actual prejudice, . . . our courts should consider dismissal in cases of serious crimes with extreme caution"). Defendant has failed to show that he suffered significant prejudice as a result of the delay. Defendant contends that two material witnesses, Fred Smith and Samantha Fields, could not be located. These witnesses were either available or could have been located with diligent effort at the time the case was called for trial.

At the 26 April 1999 hearing, the State informed defendant that Fred Smith was incarcerated and available. As for Samantha Fields, it is apparent that the State had not been able to find her at the time of the 26 April 1999 hearing. However, a subpoena included in the appendix to defendant's brief shows that it was served on Fields on 30 April 1999. The record shows that, pursuant to the subpoena, Fields was interviewed by defendant and was present when defendant's case was called for trial on 3 May 1999. Therefore, defendant could have proceeded to trial and presented the witnesses if he had chosen to do so. It was the State that sought Smith and Fields as primary witnesses. Defendant has failed to show that his defense was impaired in any way by the delay.

When the case was called for trial on 3 May 1999, defendant tendered a plea of guilty to second-degree murder. After the trial court engaged in a plea colloquy with defendant and the State offered a factual basis, one of defendant's attorneys expressed disagreement with the factual basis, told the trial court that Samantha Fields was present, and explained that Fields was giving a version of the offense that *might* raise self-defense as an option for defendant. The attorney then explained why defendant had nevertheless decided to plead guilty to second-degree murder: "[T]here is the possibility, even with the contention there may be a viable self-defense, there is a chance that the jury may reject that. So, that's why we feel it's in our best interest to take the plea that has been offered." Defendant chose to plead guilty to second-degree murder rather than be tried before a jury that might find him guilty of first-degree murder,

an offense for which the State was seeking the death penalty. Defendant chose to avoid that possibility by pleading guilty to a lesser included offense.

After balancing the four factors set forth above, we hold that defendant's constitutional right to a speedy trial has not been violated. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice BRADY dissenting.

In this case, the record reveals that defendant was detained for 1,659 days from the time he was arrested, on 10 October 1994, until his case was disposed of, on 3 May 1999. Because I believe the four-and-one-half-year interval was attributable to either the State's inability or unwillingness to bring the case forward, I adamantly disagree with the majority's underlying conclusion that defendant "has failed to present *any* evidence that the delay was caused by the State's neglect or willfulness." I also take issue with the majority's assertion that there is "no indication that court resources were either negligently or purposefully underutilized" in this case. In fact, in my view, the evidence presented clearly, if not graphically, illustrates two things: (1) that there are long-term, systemic problems in the Robeson County courts when it comes to bringing serious criminal cases to trial; and (2) that the district attorney's office in Robeson County has contributed to the problem of crowded court dockets by failing to prosecute cases, including the one at issue, in a timely fashion. As a consequence, I respectfully dissent from the majority's holding that the rights accorded defendant under the speedy trial provisions of the United States Constitution and the North Carolina Constitution were not violated.

An individual's right to a speedy trial is among those rights enumerated in the Sixth Amendment to the United States Constitution which, in pertinent part, provides as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. Const. amend VI. This guarantee was deemed to be "one of the most basic rights preserved by our Constitution," *Klopfer v. North Carolina*, 386 U.S. 213, 226, 18 L. Ed. 2d 1, 9 (1967), and was made applicable to the states, through the operation of the Due Process Clause of the Fourteenth Amendment, in the *Klopfer* case, *id.* at 222-26, 18 L. Ed. 2d at 7-9. In *Klopfer*, the Supreme Court recognized the historical significance of "speedy justice," noting that

Western society's reverence for the concept dated back to the Magna Carta of 1215. *Id.* at 223-24, 18 L. Ed. 2d at 8. At the birth of our nation, many of the original thirteen colonies also independently established speedy trial safeguards for their respective citizens. *See id.* at 225-26 n.21, 18 L. Ed. 2d at 9 n.21 (Delaware, Maryland, Massachusetts, Pennsylvania, and Virginia). Here in North Carolina, our state Constitution provides that "[a]ll courts shall be open[] [to] every person . . . without favor, denial, or *delay*." N.C. Const. art. I, § 18 (emphasis added). The underlying guarantee was added to the state's Declaration of Rights amid the constitutional revisions of 1868. *See* N.C. Const. of 1868, art. I, § 35. Thus, in sum, the right to speedy justice has enjoyed a long and revered history, both in North Carolina and in our nation as a whole.

As for the underlying rationale supporting an accused's right to a speedy trial, the United States Supreme Court has held that the right is predicated on three objectives: (1) to prevent oppressive pretrial incarceration, (2) to lessen the anxiety and concern that accompanies the stigma of being charged with a criminal offense, and (3) to preclude a defendant's case from being impaired by the dimming memories of witnesses and/or the loss of exculpatory evidence. *Barker v. Wingo*, 407 U.S. 514, 532, 33 L. Ed. 2d 101, 118 (1972). In balance, the Court in *Barker* also held that the concerns for the accused must be measured against societal interests in a speedy trial, which the Court described thusly: (1) the detrimental effects on rehabilitation caused by delay between arrest and punishment, (2) the cost of lengthy pretrial detention, (3) the loss of wages that might have been earned by incarcerated breadwinners, (4) the opportunity of suspects released on bond to commit other crimes, and (5) the possibility that the accused may use a court backlog to negotiate favorable pleas to lesser offenses or to otherwise manipulate the system.[1] *Id.* at 519-21, 33 L. Ed. 2d at 110-12. In an even earlier case, the United States Supreme Court articulated the balancing of interests by describing the right to a speedy trial as "necessarily relative" because while it "secures rights to a defendant[,] [i]t does not preclude the rights of public justice." *Beavers v. Haubert*, 198 U.S. 77, 87, 49 L. Ed. 950, 954 (1905). Thus, in summary, when examining whether a right to a

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1. In addition to those considerations mentioned by the United States Supreme Court, logic commands the recognition of a reciprocal interest for a defendant in preventing the State from manipulating a pretrial delay to its advantage. One obvious way the State could gain advantage through a pretrial delay would be to use the delay—and the implied threat to extend it—as a means to induce an incarcerated defendant to accept a plea that the State views as favorable.

speedy trial has been violated, a court must include an analysis of how the circumstances giving rise to the claim adversely affect the accused, the administration of justice, or both.

As a means to determine whether an accused has been improperly denied prompt justice, the Court in *Barker* adopted a four-part balancing test originally proposed by Justice Brennan in his concurring opinion in *Dickey v. Florida*, 398 U.S. 30, 40, 26 L. Ed. 2d 26, 33 (1970) (Brennan, J., concurring). The four factors to consider are these: (1) the length of delay (between arrest and trial), (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant resulting from the delay. *Barker*, 407 U.S. at 530-32, 33 L. Ed. 2d at 116-18. North Carolina has adopted the *Barker* test for speedy trial claims, whether they arise under the Sixth Amendment of the United States Constitution, or under Article I, Section 18 of our state Constitution. *See, e.g., State v. Flowers*, 347 N.C. 1, 489 S.E.2d 391 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998); *State v. Hammonds*, 141 N.C. App. 152, 541 S.E.2d 166 (2000), *aff'd per curiam*, 354 N.C. 353, 554 S.E.2d 645 (2001), *and cert. denied*, 536 U.S. 907, 153 L. Ed. 2d 184 (2002).

Since the *Barker* decision in 1972, state and federal appellate courts across the nation have grappled with how to best weigh the four factors inherent to the speedy trial balancing test. One question that has proved especially troublesome is determining how long the delay must endure before the delay itself indicates prejudice. Here in North Carolina, the *Barker* test has been utilized in denying defendants relief under speedy trial claims, even where they were subjected to extended periods of pretrial incarceration. This attenuated approach to analyzing speedy trial claims is reflected not only by the majority in the instant case but in two other recent appellate decisions that have focused on whether the defendants demonstrated that the delay prejudiced their respective cases at trial. For example, in *Flowers*, this Court ultimately concluded that even if the delay did cause the defendant to lose access to a prospective witness, the defendant failed to show how that the witness' testimony would have altered the outcome of his trial. 347 N.C. at 29, 489 S.E.2d at 407. As a consequence, the Court held that the defendant was not denied his constitutional right to a speedy trial. *Id.* Similarly, in *Hammonds*, a case that also arose in Robeson County, the defendant's speedy trial contentions hinged upon whether or not *his case* was prejudiced by the death of an investigator and because two witnesses changed their stories during a delay of over four years. 141 N.C. App. at 163, 541

S.E.2d at 175. As for the question of whether the four-plus-year delay was *per se* prejudicial, the Court of Appeals concluded that the State's explanation for the delay—a crowded court docket—was adequate to overcome the defendant's allegations that the delay was a result of the prosecution's neglect or willfulness. *Id.* at 160, 541 S.E.2d at 173; *see also State v. Johnson*, 275 N.C. 264, 269, 167 S.E.2d 274, 278 (1969) (holding that burden is on the defendant to show that the delay was caused by the neglect or willfulness of the prosecution); *State v. Hughes*, 54 N.C. App. 117, 119, 282 S.E.2d 504, 506 (1981) (holding, in essence, that the defendant cannot show neglect or willfulness on the part of the prosecution when the delay is caused by a legitimate backlog of cases).

Thus, to this point, the aforementioned case law establishes that a four-plus-year delay from the time of arrest to the time of trial does not, in and of itself, prejudice either: (1) a defendant's three speedy trial interests (oppressive incarceration; anxiety, concern, and social stigma attached to accusation; and possibility of an impaired defense at trial); or (2) societal interests in the proper administration of justice (detrimental effects on rehabilitation caused by delay between arrest and punishment; the cost of lengthy pretrial detention; the possible loss of wages earned by incarcerated breadwinners; the opportunity of suspects released on bond to commit other crimes; and the possibility that the accused may use a court backlog to negotiate favorable pleas to lesser offenses or to otherwise manipulate the system).

It is against this backdrop that the instant defendant, who, like the defendant in *Hammonds* endured a four-plus year delay between his arrest and trial, argues that he was denied his constitutional right to a speedy trial. In sum, defendant contends that the facts and circumstances underlying his case distinguish it from that of the defendant in *Hammonds*, and as a consequence of those distinctions, defendant urges this Court to conclude that a proper application of the *Barker* test demonstrates prejudice. Support for defendant's argument can be found on two fronts: First, independent critical analysis of defendant's particular circumstances reveals that the State's explanation wholly fails to demonstrate that the elected district attorney was not negligent in contributing to the lengthy delay; second, such analysis also shows that the extended delay prejudiced both defendant's protected constitutional interests *and* society's interests in the administration of justice. As a result, I would conclude that defendant was improperly denied the right to a

speedy trial, as he is guaranteed under the Sixth Amendment to the United States Constitution and to the extent the right is similarly guaranteed by Section 18 of Article I of the North Carolina Constitution.

The State contends that the facts and circumstances here parallel those in *Hammonds* and urges this Court to use the *Hammonds* holding as a benchmark for the instant case. However, an objective examination of the two cases reveals that their apparent similarities boil down to just two factual circumstances: (1) each defendant was detained for four-plus years between arrest and trial; and (2) in each case, the State blamed a busy court docket for the delay. From that point, the two cases diverge, in good part because significantly more information about the state of the Robeson County courts was included in the record of the instant case. In *Hammonds*, the court held that the defendant did not allege that the prosecution willfully caused the delay; rather, the court determined that a crowded docket was the primary cause for the time lag between arrest and trial. 141 N.C. App. at 160-61, 541 S.E.2d at 173-74. Under such a scenario, the court ultimately concluded that because this Court has acknowledged that a prosecutor may exercise selectivity in preparing the trial calendar, *see State v. Cherry*, 298 N.C. 86, 103, 257 S.E.2d 551, 562 (1979), the prosecutor's scheduling decisions in *Hammonds* were not premised on unconstitutional considerations, such as race, religion, or other arbitrary classifications. *Hammonds*, 141 N.C. App. at 161, 541 S.E.2d at 174; *accord Cherry*, 298 N.C. at 103, 257 S.E.2d at 562. However, the same conclusion cannot be drawn on the facts at issue in the instant case. During oral argument, the State contended that ninety-one other homicide cases arose in the jurisdiction during the delay period in question and argued that such a crowded docket legitimately prevented prosecutors from bringing the case to trial before May of 1999. However, the State was prodded into conceding two other key points: (1) that as many as thirty-nine of those cases arose *after* defendant's arrest, yet *were disposed of prior to* the resolution of defendant's case; and (2) that only *one other defendant* among the ninety-two was detained longer than defendant. Thus, the district attorney's indifference toward defendant is evidence of precisely the type of neglect that reflects a violation of a defendant's right to a speedy trial. The State offered no explanation, beyond a crowded court docket, that would justify ignoring defendant's case—for over four and one-half years—while it actively prosecuted numerous newer cases.

Although I recognize that homicide cases cannot necessarily be tried in strict chronological sequence, I remain mindful that there are numerous checkpoints within the framework of our state's criminal procedure statutes that, if followed, help to ensure a timely prosecution of cases. One such statute carries particular significance in this case because it empowered the elected district attorney to calendar cases for trial. N.C.G.S. § 7A-49.3(a) (1986) (repealed 2000) ("[T]he district attorney shall file with the clerk of superior court a calendar of the cases he intends to call for trial at that session . . . ."). Thus, the district attorney was positioned to control the flow of the superior court's trial docket. As a consequence, the district attorney assumes the responsibility of tracking the criminal defendants awaiting trial within his or her district. While a crowded docket may partially explain a longer trial delay for *all* criminal defendants within a given district, it provides no justification for why the instant defendant was left warehoused in a local detention facility for four-plus years while thirty-nine other homicide detainees, who were arrested subsequent to defendant, had their cases disposed of before defendant.

I note, too, that when district attorneys find themselves in a bind over time constraints and crowded court dockets, they have the options of: (1) requesting the assignment of additional superior court judges, (2) requesting the assignment of one or more of the thirteen special superior court judges from the Administrative Office of the Courts (AOC), or (3) applying for the assignment of additional district attorneys, *see* N.C.G.S. § 7A-64(b) (1999) (amended 2000) (in subsection (b)(1), a judicial district may request such assistance when "[c]riminal cases have accumulated . . . beyond the capacity of the district attorney . . . to keep the dockets reasonably current"; in subsection (b)(2), a judicial district may request such assistance when "[t]he overwhelming public interest warrants the use of additional resources *for the speedy disposition* of cases . . . involving [offenses that are] a threat to public safety") (emphasis added)). Moreover, the General Assembly has specifically provided that district attorneys may request the assistance of the Attorney General's special prosecution division to prosecute or assist in the prosecution of criminal cases. N.C.G.S. § 114-11.6 (2001). The State offers no evidence that any of these various options were being pursued during the period of defendant's incarceration.

It is also apparent that the Robeson County district attorney, the appointed public defender, members of the criminal defense bar, and even members of the public were keenly aware of the problems

stated that "[p]hotographs 'showing the condition of the body when found, its location . . . , and the surrounding scene at the time . . . are not rendered incompetent by the portrayal of the gruesome events which the witness testifies they accurately portray.' " *State v. Peterson*, 337 N.C. 384, 393-94, 446 S.E.2d 43, 49 (1994) (quoting *State v. Elkerson*, 304 N.C. 658, 665, 285 S.E.2d 784, 789 (1982)), *overruled on other grounds by State v. Jackson*, 348 N.C. 644, 503 S.E.2d 101 (1998). Furthermore, " '[p]hotographs are usually competent to be used by a witness to explain or illustrate anything that it is competent for him to describe in words.' " *State v. Watson*, 310 N.C. 384, 397, 312 S.E.2d 448, 457 (1984) (quoting *State v. Cutshall*, 278 N.C. 334, 347, 180 S.E.2d 745, 753 (1971)).

The decision of whether to admit photographs under N.C.G.S. § 8C-1, Rule 403 is "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). In the instant case, the trial court properly exercised its discretion in admitting exhibit H1. This photograph was used to identify this particular victim, and it was used during the testimony of Officer Penny Goodwin to illustrate her testimony as to what she observed on 17 August 1998. Furthermore, the photograph was not so gruesome as to require its inadmissibility, and as the trial court found, the presence of the fly on the victim's eyelid did not change this outcome. Thus, applying the above principles and the requirements of N.C.G.S. § 8C-1, Rule 403, we conclude that the trial court properly admitted this evidence.

Next, with regard to exhibit H8, defendant argues that this photograph should have been held inadmissible because it was duplicative of exhibit H7. We disagree.

Exhibit H8 is a photograph of Susan Moore's and Tracy Lambert's bodies lying in a field. In admitting exhibit H8 into evidence, the trial court found that "while it does duplicate to some degree the state's exhibit H7, . . . H8 gives a different perspective, and the court finds it could be probative and valuable to the jury in determining . . . the relative positions of the bodies one to another and the relative positions of the bodies to a tree as a point of reference." The trial court also found "that there is nothing unduly prejudicial or gory about the picture."

"Repetitive photographs may be introduced, even if they are revolting, as long as they are used for illustrative purposes and are not aimed solely at prejudicing or arousing the passions of the jury." *Peterson*, 337 N.C. at 394, 446 S.E.2d at 49. We conclude, as the trial court did, that this photograph was not unduly prejudicial or gruesome under N.C.G.S. § 8C-1, Rule 403, and furthermore, this photograph offered a different perspective than that which was offered by exhibit H7. Thus, the trial court did not err in admitting exhibit H8 into evidence.

[15] Next, defendant argues that the trial court erred in submitting the aggravating circumstance that the murders were especially heinous, atrocious, or cruel. *See* N.C.G.S. § 15A-2000(e)(9). We disagree.

> Whether a trial court properly submitted the (e)(9) aggravating circumstance depends on the facts of the case. The capital offense must not be merely heinous, atrocious, or cruel; it must be especially heinous, atrocious, or cruel. A murder is especially heinous, atrocious, or cruel when it is a conscienceless or pitiless crime which is unnecessarily torturous to the victim.

State v. Flippen, 349 N.C. 264, 270, 506 S.E.2d 702, 706 (1998), (citations omitted), *cert. denied*, 526 U.S. 1135, 143 L. Ed. 2d 1015 (1999). This Court has

> identified three types of murders that would warrant the submission of the [especially heinous, atrocious, or cruel] 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. 301, 319, 364 S.E.2d 316, 328, *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988). The second type includes killings that are less violent but involve infliction of psychological torture by leaving the victim in his or her "last moments aware of but helpless to prevent impending death," *State v. Hamlet*, 312 N.C. [162,] 175, 321 S.E.2d [837,] 846 [(1984)], and thus may be considered "conscienceless, pitiless, or unnecessarily torturous to the victim," *State v. Brown*, 315 N.C. 40, 65, 337 S.E.2d 808, 826-27 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *and overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). The third type includes killings that "demonstrate[] an unusual depravity of mind on the part of the defendant beyond

> that normally present in first-degree murder[s]." *Id.* at 65, 337 S.E.2d at 827.

Lloyd, 354 N.C. at 122, 552 S.E.2d at 627-28 (citation omitted) (fifth and sixth alterations in original). Furthermore, "[i]n determining whether the evidence is sufficient to support the trial court's submission of the especially heinous, atrocious, or cruel aggravating circumstance, we 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.' " *Flippen*, 349 N.C. at 270, 506 S.E.2d at 706 (quoting *Lloyd*, 321 N.C. at 319, 364 S.E.2d at 328).

Applying the principles above, we conclude that the evidence in this case was sufficient to support the submission of the (e)(9) aggravating circumstance to the jury. The evidence at trial tended to show that the two victims were forced into the trunk of their car at gunpoint while screaming and trying to escape. Then, for about an hour, defendant and others drove the car around while the two victims cried for help, begged not to be hurt, and asked their abductors what was going to be done to them. At some point during the ride, the car was stopped, and some of the other gang members took jewelry off of the victims at gunpoint. Eventually, the gang arrived at defendant's trailer with the two victims in the trunk. The trunk was opened again, and Susan Moore pled for their lives. She asked her abductors: "Well, what are you all going to do to us?" "Are you going to kill us?" "We don't know what y'all look like. Just let us go." One of the gang members then told her, "Shut up, b——," and the victims were then locked back in the trunk. The gang members then went into defendant's trailer. Finally, the gang returned outside and drove the victims to a "dirt road" that was about twenty minutes away from defendant's trailer. The gang pulled the victims out of the trunk. Queen held a gun to Tracy Lambert's head and said, "Well, I'm about to open this b——'s third eye." Lambert started to cry, saying, "Oh, my God, Susan. We're going to die. We're going to die. I don't want to die." Queen told Lambert to shut up and then shot her in the head. Moore, who was being held with a knife to her throat, begged the gang not to cut her in the throat, but to shoot her instead. Subsequently, Francisco Tirado shot Moore in the head.

The victims were subjected to at least an hour and a half of psychological torture by being trapped in the trunk of a car while pleading for their lives. The victims were also abducted at gunpoint and robbed of jewelry. Furthermore, Susan Moore was forced to witness

Tracy Lambert being shot in the head. We thus conclude that the evidence more than warranted the trial court's submission of the (e)(9) aggravating circumstance to the jury for both murders. This assignment of error is overruled.

[16] We turn once again to the all-too-familiar contention by a defendant that counsel for the State engaged in improper closing arguments. We note that this case was tried prior to our decision in *State v. Jones*, 355 N.C. 117, 558 S.E.2d 97. However, *Jones* did not introduce into the parameters of proper closing argument any new requirements, but instead reiterated established principles long articulated by the laws of this state and by this Court's decisions.

In this case, the State presented three separate arguments to the jury at guilt-innocence and at sentencing. In the first two arguments, the district attorney and one of his assistants engaged in proper closing arguments focusing on the evidence, the law, and the issues before the jury. This is a compelling case based upon the evidence presented at trial, and it is inconceivable why the third argument made by another assistant district attorney was ever made. Little, if any, argument was made about the evidence, law, or issues. Instead, the argument consisted of a rambling, disjointed personal attack on defendant, filled with irrelevant historical references and name-calling. Examples of the prosecutor's name-calling follow:

> Ladies and gentlemen, you mean to tell me three people get shot in cold blood by a bunch of no working, no school going, heathen, murdering, low-lifes and nobody's supposed to get emotional?
>
> . . . .
>
> . . . The whole low-life, no working, unemployed group, every one of them is just as guilty.
>
> . . . .
>
> . . . Ladies and gentlemen of the jury, you got to learn how to recognize evil when you see it. . . . You got to learn how to stand up to evil, ladies and gentlemen of the jury. You have to learn how to stand up to evil.
>
> And that girl and that whole gang of them over there, just like this man said, evil, wicked and mean.
>
> . . . .

> . . . You say she's not evil? You say she's not evil? You don't think so. Well, ladies and gentlemen of the jury, if you can't recognize evil, you will never recognize it.

See State v. Smith, 279 N.C. 163, 165-67, 181 S.E.2d 458, 459-60 (1971) (reversing defendant's rape conviction because of the prosecutor's "inflammatory and prejudicial" closing argument describing defendant as "lower than the bone belly of a cur dog"); *see also State v. Miller*, 271 N.C. 646, 659-61, 157 S.E.2d 335, 344-47 (1967) (holding that the prosecutor committed reversible error by, *inter alia*, calling defendants "storebreakers" and expressing his opinion that a witness was lying).

Furthermore, large portions of the argument consisted of matters that were totally extraneous to the decision being made by the jury and that violated several principles of closing argument set out previously by this Court. The effect of this argument is to take a case that appears rock solid on the evidence and law and that was twice ably argued to the jury and bring it perilously close to mandating reversal.

In reviewing this matter, however, we are constrained by the lack of objections by the trial attorneys for defendant (there was only one objection), the total lack of intervention by the trial judge, the limited number of questions presented to this Court on appeal, and defendant's failure to properly assign error.

We now turn to the issues raised by defendant. Our standard of review depends on whether there was a timely objection made or overruled, or whether no objection was made and defendant contends that the trial court should have intervened *ex mero motu*. If there is an objection, this Court must determine whether "the trial court abused its discretion by failing to sustain the objection." *Jones*, 355 N.C. at 131, 558 S.E.2d at 106. Application of the abuse of discretion standard to closing argument requires this Court to first determine if the remarks were improper. *Id.* "Next, we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.*

When defendant fails to object to an argument, this Court must determine if the argument was "so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Barden*, 356 N.C. 316, 358, 572 S.E.2d 108, 135 (2002).

> In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

Jones, 355 N.C. at 133, 558 S.E.2d at 107.

Defendant raises two issues regarding closing arguments, one in the guilt-innocence phase and one in the sentencing phase, respectively. When considering prejudice in a capital case,

> special attention must be focused on the particular stage of the trial. Improper argument at the guilt-innocence phase, while warranting condemnation and potential sanction by the trial court, may not be prejudicial where the evidence of defendant's guilt is virtually uncontested. However, at the sentencing proceeding, a similar argument may in many instances prove prejudicial by its tendency to influence the jury's decision to recommend life imprisonment or death. We also point out that by its very nature, the sentencing proceeding of a capital case involves evidence specifically geared towards the defendant's character, past behavior, and personal qualities. Therefore, it is certainly appropriate for closing argument at the sentencing hearing to incorporate reasonable inferences and conclusions about the defendant that are drawn from the evidence presented. However, mere conclusory arguments that are not reasonable—such as name-calling—or that are premised on matters outside the record—such as comparing defendant's crime to infamous acts—do not qualify and thus cannot be countenanced by this or any other court in the state.

Id. at 134-35, 558 S.E.2d at 108.

[17] We first address the one portion of the argument to which there was an objection. Defendant argues that the trial court erred in failing to intervene *ex mero motu* when the prosecutor's grossly improper argument intended to invoke passion into the jury by comparing defendant to Adolph Hitler. Defendant improperly characterizes the argument here, as the trial court does not intervene *ex mero motu* when an objection is made. We reiterate that the proper standard of review when an objection is made is whether "the trial court

abused its discretion by failing to sustain the objection." *Id.* at 131, 558 S.E.2d at 106.

During closing arguments in the guilt-innocence phase, the prosecutor told the jury:

> Over 50-some years ago, a man from England went to Germany to meet a fellow at a place called Berchtesgaden and he went over there to sign a peace treaty, and this man had a great big enormous picture window. Now, the man from England that looked out the window [was] named Neville Chamberlain, when he looked out the window, he saw a world of peace. He saw a world of harmony. And he signed a little piece of paper, just like the one that this defendant tried to pawn off on this district attorney right here, signed a little piece of paper with that man—that other man from Germany that looked out the window. And he said we're at peace. The man from England took a little piece of paper, went back home waving it to his folks, We have peace in our time. He had no idea that he was talking to a man that, before it was over, would be responsible for the deaths of 50 million people on every continent, every sea. He would be responsible for the death of over 50 million women and children. He had no idea that Adolph Hitler was going to turn out the way he did.
>
> But, ladies and gentlemen of the jury, oh, he met his match later on. Because Neville Chamberlain didn't remain in office. A fellow named Winston Churchill took over. And you know what Winston Churchill told the fuhrer? We will fight you on the beaches. We will fight you in the air. We will fight you on land. We will never surrender.
>
> And if these people have their way—they got up here political, economic, social and all that stuff, if they have their way, they will turn this county—this state and this country into a place of chaos.
>
> [DEFENSE COUNSEL]: Your Honor, we object.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: That's what they'll do. Got 12 keys of life. The last few of which are money, mac and murder. If they have their way—you know that man that looked out that picture window, the German one, he wrote a book. He had a little book he wrote while he was in prison called "Mein Kampf" and he had a twisted

> dream too just like these folks right here. And he didn't, I don't suppose, look evil to Mr. Chamberlain. Mr. Chamberlain's head probably wasn't screwed on right but Churchill's head was.

The State argues that defendant objected only to the portion of the prosecutor's argument that defendant's gang would "turn this county—this state and this country into a place of chaos" and did not object to the references to Adolph Hitler. It is apparent that defendant followed the prosecutor's argument and objected when the prosecutor tied his prior references to Hitler to defendant. Therefore, we conclude that defendant's objection was directed to the reference to Hitler as well as the statement tying defendant to Hitler, and thus we will review the argument based on an objection having been made.

The State further contends that this Court should apply by analogy the rule relating to admission of evidence: " '[T]he admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character.' " *State v. Hudson*, 331 N.C. 122, 151, 415 S.E.2d 732, 747-48 (1992) (quoting *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979)), *cert. denied*, 506 U.S. 1055, 122 L. Ed. 2d 136 (1993). In other words, the State argues that defendant's objection that was overruled should be waived because defendant did not object to subsequent portions of the prosecutor's argument relating to Adolph Hitler. However, the rule relating to the admission of evidence during the trial is not analogous to arguments allowed during closing arguments. Whereas it is customary to make objections during trial, counsel are more reluctant to make an objection during the course of closing arguments "for fear of incurring jury disfavor." *Jones*, 355 N.C. at 129, 558 S.E.2d at 105. Defendant should not be penalized twice (by the argument being allowed and by her proper objection being waived) because counsel does not want to incur jury disfavor. Therefore, defendant properly objected to the prosecutor's argument, and no waiver occurred by defendant's failure to object to later references to Hitler.

Because defendant properly objected to the closing argument, this Court must determine if "the trial court abused its discretion by failing to sustain the objection." *Id.* at 131, 558 S.E.2d at 106. As previously noted, the application of the abuse of discretion standard to closing arguments requires this Court to first determine if the remarks were improper. *Id.* "Next, we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court."

Id. Defendant contends that the prosecutor's argument was improper. We agree. "[I]mproper remarks include statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence, such as the infamous acts of others." *Id.*

Defendant contends that the prosecutor made this argument to compare her and the Crips to Hitler and the Nazis. However, at the conclusion of the argument, the prosecutor's reasoning for this argument appears to be different. "Ladies and gentlemen of the jury, go back there and act with resolve. Go back there. Do like Winston Churchill when he stood up to Hitler. Do it like that. Stand up to evil. Go back there and find this person guilty of every single charge on that indictment." Thus, the purpose of the argument appears to be to get the jury to "stand up to evil" like Winston Churchill did to Hitler rather than to appease evil like Neville Chamberlain did.

While this Court in *Jones* stated that arguments "premised on matters outside the record" during closing arguments are inappropriate, *id.* at 135, 558 S.E.2d at 108, we do not completely restrict closing arguments to matters that are only within the province of the record, to the exclusion of *any* historical references. However, despite the *de facto* historical nature of any past event, this Court will not allow such arguments designed to inflame the jury, either directly or indirectly, by making inappropriate comparisons or analogies. In this case, even if the prosecutor's argument about Neville Chamberlain and Adolph Hitler and Winston Churchill was to illustrate appeasement, using Hitler as the basis for the example has the inherent potential to inflame and to invoke passion in the jury, particularly when defendant is compared to Hitler in the context of being evil. We conclude that the prosecutor's argument in this case was improper.

Now we must "determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.* at 131, 558 S.E.2d at 106. Although the prosecutor's argument was improper, given the overwhelming evidence of defendant's guilt, it can hardly be said that the prosecutor's remarks "were of such magnitude that their inclusion prejudiced defendant." *See id.* In fact, this argument, coming when it did after two proper arguments by the district attorney and an assistant district attorney, most likely had little, if any, impact on the jurors' decision on the issue of guilt or innocence. Finally, in viewing the argument in its totality, it appears far more incomprehensible and dis-

jointed than powerful and persuasive. Thus, we must conclude that, although improper, the necessary showing of prejudice was not met.

[18] Next, defendant argues that the prosecutor made improper statements during closing arguments in the sentencing phase. Defendant failed to make any objections, so this Court must determine if the prosecutor's arguments were "so grossly improper that the trial court erred in failing to intervene *ex mero motu.*" *Barden,* 356 N.C. at 358, 572 S.E.2d at 135.

Defendant points to seven portions of the prosecutor's closing argument during the sentencing phase that defendant contends were so grossly improper as to require intervention by the trial court. Specifically, defendant argues that the prosecutor tried to prejudice the jury by referring to the jury's "solemn" duty to the victims to do justice and by referring to the jurors confronting the victims in the "hereafter." Contrary to defendant's contention and having reviewed the argument in context, we conclude that the prosecutor did not imply that the jury's duty was to sentence defendant to death under God's law. This Court has disapproved of contentions that state law-enforcement entities have been ordained by God and that resisting those entities is resisting God. *Call,* 353 N.C. at 419, 545 S.E.2d at 202; *State v. Cummings,* 352 N.C. 600, 628, 536 S.E.2d 36, 56 (2000), *cert. denied,* 532 U.S. 997, 149 L. Ed. 2d 641 (2001). However, in this case, the prosecutor neither argued nor implied that law-enforcement entities were ordained by God. Furthermore, the remarks were not a biblical argument, nor were they based improperly on religion. The statements constituted a request to "do justice" and a hypothetical reference to encountering the victims in the hereafter. While inappropriate, these comments do not merit intervention by the trial court *ex mero motu. See Call,* 353 N.C. at 419.

Furthermore, in making references to God, the prosecutor challenged defendant's direct testimony in the guilt-phase that she had "found God." The prosecutor's reference to God was also in response to social worker Joan Cynthia Brooks' testimony about defendant's complaint about her grandmother's religious emphasis. Defendant contends that the prosecutor argued that defendant should be willing to die under God's laws. We disagree. The prosecutor did not suggest or imply that the jury should sentence defendant to death under God's laws. The prosecutor's comments were in direct response to defendant's testimony in the guilt-innocence phase that she had "found God" and to the social worker's testimony in the sentencing

phase. *See, e.g.*, *State v. Robinson*, 336 N.C. 78, 129-30, 443 S.E.2d 306, 332 (1994) (holding that the prosecutor's argument on drugs and race was in response to the defendant's expert, who testified that defendant's inner-city background was partially responsible for his criminal behavior), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995).

[19] The prosecutor also argued that defendant's mitigating circumstances were excuses for the murders committed and challenged the weight of defendant's mitigating circumstances. Defendant provides no support for her contention that the prosecutor "misled the jury from the law" by making these statements about defendant's mitigating circumstances. The prosecutor simply contended that the jury should not give weight to defendant's mitigating circumstances. *See, e.g.*, *id.* at 129, 443 S.E.2d at 332 (holding that the prosecutor's remark that the defendant's mitigation evidence constituted an "evasion of responsibility" was "directed toward the weight that the jury should give to defendant's evidence"). This Court has repeatedly maintained that "[a] prosecutor is permitted to legitimately belittle the significance of . . . mitigating circumstances." *State v. Haselden*, 357 N.C. 1, 20, 577 S.E.2d 594, 606 (2003); *accord State v. Billings*, 348 N.C. 169, 186-87, 500 S.E.2d 423, 433-34 (quoting *State v. Basden*, 339 N.C. 288, 305, 451 S.E.2d 238, 247 (1994), *cert. denied*, 515 U.S. 1152, 132 L. Ed. 2d 845 (1995)), *cert. denied*, 525 U.S. 1005, 142 L. Ed. 2d 431 (1998).

[20] In addition, the prosecutor argued to the jury during the sentencing stage, "You know what was once written about people who harm children? 'And whosoever shall offend one of these little ones that believe in me, it is better that a millstone be tied about his neck and he be drowned in the depths of the sea.' " Defendant contends that this was grossly improper and that the trial court should have intervened *ex mero motu*. However, the prosecutor did not argue that the Bible commanded that defendant be put to death. Instead, he used the statement in question to respond to defendant's testimony that she did not want her children in the Davis Street environment. The prosecutor appears to have used this colloquy to amplify defendant's bad parenting and to attempt to eliminate any sympathy the defense might try to invoke with the jury because defendant had children. This is evidenced by the prosecutor's following argument:

> Do not delude yourself, ladies and gentlemen of the jury. Counsel will get up here and tell you how pitiful [defendant] is, and how by letting her live, she'll be able to see her children.

> They'll be able to see—come visit their mother. Ladies and gentlemen of the jury, the last thing that you ought to think of this person as is a mother. That's the person that put her children out of the house for this motley crew.

This case does not involve the death of a child such that an interpretation could be drawn from this argument that defendant should die because she has harmed her children. Furthermore, the prosecutor does not directly or indirectly state that defendant should be executed for these crimes because the Bible says so. Although "[t]his Court has strongly cautioned against the use of arguments based on religion," *Barden*, 356 N.C. at 358, 572 S.E.2d at 135, we hold that the prosecutor's arguments in this case were not grossly improper and that they do not constitute reversible error by the trial court's failure to intervene *ex mero motu*.

As we have observed, this closing argument was made prior to our decision in *Jones*. However, let there be no mistake. It is the expressed intention of this Court to make sure *all* parties stay within the proper bounds of the laws and decisions of this Court relating to closing argument. The federal courts have consistently restricted closing argument, while our state jurisprudence has tended to give far greater latitude to counsel. There is a proper balance, and in *Jones*, we took great care to spell out the proper parameters. In this case, at one point in his argument, the prosecutor said, "I hope the judge doesn't put me in jail for my language . . . ." While not inclined in this case to go that far, we once again remind counsel for all parties that improper argument in flagrant disregard of the limits placed on closing argument can and must be enforced by the courts.

[21] Defendant also contends that the trial court erred by allowing the prosecutor to argue, during closing arguments at the guilt-innocence phase of the trial, that defendant failed to call John Juarbe, Tameika Douglas, and Francisco Tirado to the stand, which thereby impermissibly shifted the burden of proof to defendant to prove her case.

During closing arguments at the guilt-innocence phase of the trial, defense counsel stated:

> We didn't take one or two words out of context. We didn't take a statement here and a statement there and pull a couple words out and try to confuse you and not show you the statement. Heck, we even brought Eric Queen in here, put him on the stand and tried to get him to talk to you. He invoked his Fifth

> Amendment right which is his perfect right to do. End of story. We can't question him any more about that. We brought Darryl Tucker in here, put him on the stand and we asked him questions and he invoked his Fifth Amendment rights. Can't ask him questions any more. We did—we tried.
>
> In sum, we've tried to be completely up front with you. We tried to let you hear the whole story of what happened in this incident. We tried to let you hear it without emotional tirades, without smoke in [sic] mirrors. We tried to let you have the bare, cold facts and let you decide what happened. It's as simple as that.

During the prosecutor's closing argument in rebuttal, the prosecutor responded to this argument by saying:

> Now, the defense wants you to believe that they called in Mr. Queen, they called in Mr. Tucker because they were trying to show you everything and give you a chance to hear everything because they want to be real truthful with you and make sure you know everything. Well, were there any other defendants in this case?
>
> You've got to wonder, now, let's see, what was this defendant's relationship to those two defendants? Well, when she was arrested, law enforcement tells you she comes out of the bedroom with Queen. She says in the statement you couldn't sleep with somebody in your same set, so she didn't have a relationship with Eric Queen. But she said on the stand, yeah, we were boyfriend—no, we weren't boyfriend and girlfriend but we had a sexual relationship. She comes out of the back bedroom there—by law enforcement, those two were in the back bedroom. She is so afraid of him. She is so afraid. She is so afraid she keeps his picture right beside her bed. She look like she is scared of anybody in that picture? Looks like they are on pretty good terms in that picture. Eric Queen—you reckon—you reckon Eric Queen is the boyfriend? He is the one that's caught in the bedroom with her when law enforcement catches her. You reckon there wouldn't be a chance he wouldn't unload on her if he did say anything if they put him on the stand? Probably wouldn't, would he? He's the boyfriend?
>
> Now, who else on this chart would this defendant be close to? Well, she kept saying what? Couldn't throw Tucker out. His daddy was my O.G. [original gangster], plus he's fam. He's fam. Got to let

> him stay there. Got to send the children away for days. I cannot have the children here. I can't do whatever. Can't throw out Tucker. Finally, she did. When he questioned her, you got to leave. Fam, brings him in. You reckon if he says anything, you can take that chance putting him on the stand, can't you, because if he says anything, she's close enough that he's not likely to hurt her, isn't he?
>
> So why don't they put John Juarbe on the stand? Why didn't they call Tameika Douglas? Why didn't they call Paco [Tirado]? She was plenty ready to unload on Paco all the way through her testimony. If you put Paco up there, I wonder what he would have said. Put Carlos Frink, Carlos Nevills, think about it. The defendant chose to call up there the two people that, if they said anything, what? Were closest to her. Most unlikely to do what? Hurt her. Remember that. Remember that. Because the defendant has said to you how truthful she was, how she tried to show you everything.

Defendant first contends that the trial court committed plain error in this case by not intervening during this closing argument. However, this Court has stated that plain error review is appropriate only "when the issue involves either errors in the trial judge's instructions to the jury or rulings on the admissibility of evidence." *State v. Cummings*, 346 N.C. 291, 314, 488 S.E.2d 550, 563 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998). "Since defendant failed to object to these allegedly improper statements during the closing arguments, [she] 'must demonstrate that the prosecutor's closing arguments amounted to gross impropriety.' " *State v. May*, 354 N.C. 172, 178, 552 S.E.2d 151, 155 (2001) (quoting *State v. Rouse*, 339 N.C. 59, 91, 451 S.E.2d 543, 560 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995)), *cert. denied*, 535 U.S. 1060, 152 L. Ed. 2d 830 (2002). " 'To establish such an abuse, defendant must show the prosecutor's comments so infected the trial with unfairness that it rendered the conviction fundamentally unfair.' " *Hyde*, 352 N.C. at 56, 530 S.E.2d at 294 (quoting *State v. Robinson*, 346 N.C. 586, 607, 488 S.E.2d 174, 187 (1997)). Furthermore, " '[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.' " *Id.* (quoting *State v. Guevara*, 349 N.C. 243, 257, 506 S.E.2d 711, 721 (1998), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999)).

Also, "[w]hile a prosecutor may not comment on the failure of the accused to testify, he may 'comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State.' " *State v. Skeels*, 346 N.C. 147, 153, 484 S.E.2d 390, 393 (1997) (quoting *State v. Reid*, 334 N.C. 551, 555, 434 S.E.2d 193, 196 (1993)); *see also State v. Ward*, 354 N.C. 231, 261-62, 555 S.E.2d 251, 271 (2001); *State v. Fletcher*, 348 N.C. 292, 322, 500 S.E.2d 668, 685 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 113 (1999); *State v. Morston*, 336 N.C. 381, 406, 445 S.E.2d 1, 15 (1994). " '[T]he jury, in weighing the credibility of the evidence offered by the State[] may consider the fact that it is uncontradicted . . . or unrebutted by evidence available to defendant.' " *State v. Tilley*, 292 N.C. 132, 143, 232 S.E.2d 433, 441 (1977) (quoting *State v. Bryant*, 236 N.C. 745, 747, 73 S.E.2d 791, 792 (1953)) (third alteration in original).

In the present case, we conclude that the prosecutor was merely arguing that defendant had witnesses available who could have offered exculpatory evidence but that defendant had refused to call those witnesses. Furthermore, we conclude that the prosecutor was also responding to defendant's assertion in which her attorney said to the jury, "We tried to let you hear the whole story of what happened in this incident." Therefore, we hold that the prosecutor's closing argument did not amount to gross impropriety, and thus, the trial court did not err by not intervening *ex mero motu*.

Defendant raises four additional issues that she concedes have been previously decided contrary to her position by this Court: (1) the trial court erred in allowing death qualification of the jury; (2) the N.C.G.S. § 15A-2000 (e)(9) aggravating circumstance that a murder is "especially heinous, atrocious, or cruel" is unconstitutionally vague and overbroad; (3) the trial court erred by instructing the jury during the capital sentencing proceeding that the answers to Issues One, Three, and Four on the "Issues and Recommendation as to Punishment" form for each case must be unanimous; (4) the trial court erred by failing to change the wording of Issue Three on the "Issues and Recommendation as to Punishment" form for each case to avoid a recommendation of death if the jury found the aggravating and mitigating circumstances to be of equal weight and value.

Defendant raises these issues in order to urge this Court to reexamine its prior holdings with regard to these issues. We have considered defendant's arguments, and we find no compelling reason to reverse our prior holdings. Therefore, the assignments of error presented under these issues are overruled.

[22] Having found no prejudicial error in defendant's trial or capital sentencing proceeding, we must now review and decide three issues: (1) whether the record supports "the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death"; (2) whether "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor"; or (3) whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2). If this Court finds the existence of one of these factors, "[t]he sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof." *Id.*

After a thorough review of the record, transcript, briefs, and oral arguments, we hold that the record provides ample support for the jury's finding of all four aggravating circumstances submitted as to each murder: (1) the murder was committed while defendant was engaged in the commission of a first-degree kidnapping, N.C.G.S. § 15A-2000(e)(5); (2) the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); (3) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (4) the murders for which defendant was convicted were part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against other persons, N.C.G.S. § 15A-2000(e)(11). We also conclude that nothing in the record suggests that defendant's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

We now turn to our final statutory duty of proportionality review. In conducting our proportionality review, we consider "whether the sentence of death in the present case is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant." *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983). "[I]t is proper to compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate." *State v. Williams*, 355 N.C. 501, 590, 565 S.E.2d 609, 660 (2002), *cert. denied*, — U.S. —, 154 L. Ed. 2d 808 (2003). This Court has found a death sentence disproportionate in eight cases. *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d

396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373; *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

We conclude that this case is not substantially similar to any of the cases in which this Court has found the death sentence disproportionate. Defendant was convicted of two counts of first-degree murder both on the basis of premeditation and deliberation and under the felony murder rule with two underlying felonies—kidnapping and robbery with a firearm. This Court has 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). Additionally, the largest number of aggravating circumstances found by the juries in the cases held disproportionate was two. However, in the case at bar, the jury found the existence of four aggravating circumstances.

The facts in the case at bar are similar, if not more egregious than the facts in *State v. Call*, 353 N.C. 400, 545 S.E.2d 190. In *Call*, defendant lured one murder victim into a remote cornfield and killed the victim by hitting him in the head with a shovel and a tire iron. Defendant assaulted another victim by hitting him in the head with an aluminum bat and leaving him in the field all night. In the case at bar, both of the victims were violently kidnapped and were forced to ride in the trunk of their car, listening to plans to kill them. One of the two murder victims watched as her friend was fatally shot in her presence. The other begged to be shot versus having her throat cut before she was shot in the head. The surviving victim was kidnapped at gunpoint. She was thereafter robbed and was forced to get into the trunk of her car. She was in the trunk when gang members gathered around the car and discussed what to do with her. Defendant and three others drove her to a remote area, where defendant shot her multiple times and then left her in a field to die. All three victims in this case endured an extended period of terror.

This Court in *Call* found defendant's death sentence proportionate where the jury found the same four aggravating circumstances as in this case: (1) the murders were committed while defendant was engaged in the commission of a kidnapping, N.C.G.S. § 15A-2000(e)(5);

(2) the murders were committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); (3) the murders were especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (4) the murder was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11). *See id.*

Accordingly, after reviewing the facts of this case and the treatment of other similar cases, we find the death sentence in this case to be proportionate.

NO ERROR.

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

STATE OF NORTH CAROLINA v. HENRY BERNARD SPIVEY, JR.

No. 299A02

(Filed May 2 2003)

Constitutional Law— speedy trial—*Barker* factors balanced—no violation

A first-degree murder defendant's right to a speedy trial was not violated by a delay of four and one-half years after his arrest when the *Barker v. Wingo* factors were balanced. The delay is long enough to trigger examination of the other factors; the delay was caused by neutral factors, including the number of pending first-degree murder cases; defendant failed to carry his burden of showing neglect or willfulness the State; defendant's assertion of the right to a speedy trial does not alone entitle him to relief, even assuming that his pro se speedy trial request while he was represented by counsel was proper; and defendant did not show that his defense was impaired by the delay. He ultimately pled guilty to second-degree murder rather than risk rejection of his self-defense contention and face the death penalty.

Justice BRADY dissenting.

Justice ORR joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 150 N.C. App. 189, 563 S.E.2d 12 (2002), affirming an order denying defendant's motion to dismiss for lack of a speedy trial entered in open court on 26 April 1999 and reduced to writing on 24 June 1999 entered by Judge Jack A. Thompson and a final judgment entered 3 May 1999 by Judge James R. Vosburgh in Superior Court, Robeson County. Heard in the Supreme Court 11 March 2003.

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

William L. Davis, III, for defendant-appellant.

American Civil Liberties Union of North Carolina Legal Foundation, Inc., by Seth H. Jaffe, amicus curiae.

WAINWRIGHT, Justice.

On 18 October 1994, Henry Bernard Spivey, Jr. (defendant), was arrested for the murder of Jermaine Morris. The record reveals that on 17 October 1994, the previous day, officers were dispatched to a housing project in Lumberton, North Carolina, where they found Morris dead from numerous gunshot wounds. An autopsy showed Morris had been shot eleven times, mostly in the chest and stomach. It appears that defendant turned himself in and told authorities that he shot Morris.

On the day of the murder, defendant and Morris had a conflict over a woman named Samantha Fields, and defendant began shooting Morris when Morris struck him. Nathaniel Spivey, defendant's thirteen-year-old brother, also joined in shooting Morris. Nathaniel was charged as a juvenile but was bound over to superior court for trial as an adult. He pled guilty to second-degree murder and received a minimum sentence of 135 months' to a maximum sentence of 171 months' imprisonment.

On 27 November 1995, while represented by counsel, defendant filed a handwritten, *pro se* "Motion Reque[s]ting a Prompt and Speedy Trial." In his *pro se* motion, defendant stated: "[t]hat as of this date and on, defendant objects to any and all (including those acquiescued [sic] to by the Court Appointed Counsel) continuance's [sic]." Nearly twenty-one months later, on 8 August 1997, defendant's court-appointed attorneys filed a motion to dismiss for lack of a speedy trial.

Defendant's motion to dismiss for lack of a speedy trial was initially heard before the Honorable Gregory Weeks on 29 April 1998. The trial court heard arguments from counsel and then instructed the parties that it needed further briefs and documentation from the court records and continued the hearing to a later date.

A second hearing was held on defendant's motion to dismiss for lack of a speedy trial before the Honorable Jack Thompson on 26 April 1999. At this hearing, the State stipulated that defendant had been in jail since 18 October 1994 (approximately four and one-half years). The State further stipulated to statements made by two potential witnesses. The State informed the trial court that one of the witnesses, Fred Smith, was incarcerated in the Department of Correction. The State informed the trial court that the other witness, Samantha Fields, had changed addresses two or three times but that the State was in the process of trying to find her. In addition, pursuant to Judge Weeks' order, the State presented to the court documentation of murder cases tried between defendant's indictment and 19 April 1999. The State then provided defendant with a copy of this list and copies of the judgments. Following the hearings before the Honorable Gregory Weeks and the Honorable Jack Thompson, Judge Thompson announced in open court on 26 April 1999 that he was denying defendant's motion to dismiss for lack of a speedy trial on the grounds that there was not a sufficient showing by the defendant that his rights to a speedy trial were denied. Judge Thompson's decision is later reflected in a written order filed on 24 June 1999.

Defendant's case was subsequently called for trial on 3 May 1999. Defendant tendered a plea of guilty to second-degree murder. During a plea colloquy with the trial court, defendant acknowledged understanding that, by pleading guilty, he was giving up his constitutional rights relating to trial by jury. The plea was pursuant to a plea arrangement providing that defendant would be sentenced to a prison term of a minimum of 135 months' to a maximum of 171 months' imprisonment and that defendant was "reserv[ing] the right to appeal the denial of his motion to dismiss for lack of a speedy trial."

On 6 May 1999, defendant filed notice of appeal to the Court of Appeals. In an opinion filed 7 May 2002, the Court of Appeals granted certiorari to review the trial court's denial of defendant's motion to dismiss for lack of a speedy trial. *State v. Spivey*, 150 N.C. App. 189, 189-90, 563 S.E.2d 12, 12 (2002). Upon review, the majority in the Court of Appeals concluded that *State v. Hammonds*, 141 N.C. App.

152, 541 S.E.2d 166 (2000), *aff'd per curiam*, 354 N.C. 353, 554 S.E.2d 645 (2001), *cert. denied*, 536 U.S. 907, 153 L. Ed. 2d 184 (2002) was controlling. *Spivey*, 150 N.C. App. at 190, 563 S.E.2d at 12. *Hammonds* and the present case originated in Robeson County. *Id.* at 191, 563 S.E.2d at 13. The Court of Appeals noted that "[i]n *Hammonds*, the defendant argued that the trial court erred by denying his motion to dismiss where there was a pretrial delay of four and one-half years." *Id.* at 190, 563 S.E.2d at 12. In the present case, the Court of Appeals further quoted the following language from *Hammonds*:

> "Defendant argues that the delay between his arrest and trial was caused in part by the State's 'laggard performance.' The record, however, reveals that the local docket was congested with capital cases. The trial court described it as 'chopped the block [sic] with capital cases. They're trying two at a time and just one right after the other, and there are only so many that can be tried.' 'Our courts have consistently recognized congestion of criminal court dockets as a valid justification for delay.' *State v. Hughes*, 54 N.C. App. 117, 119, 282 S.E.2d 504, 506 (1981) (citations omitted) (finding defendant failed to meet his burden where delay was result of backlog of cases). Indeed, '[b]oth crowded dockets and lack of judges or lawyers, and other factors, make some delays inevitable.' *State v. Brown*, 282 N.C. 117, 124, 191 S.E.2d 659, 664 (1972) (citation omitted). Accordingly, in assessing defendant's speedy trial claim, we see no indication that court resources were either negligently or purposefully underutilized."

Spivey, 150 N.C. App. at 190, 563 S.E.2d at 12-13 (quoting *Hammonds*, 141 N.C. App. at 160-61, 541 S.E.2d at 173) (alterations in original).

The Court of Appeals held that "[t]he State in this case made a showing[,] as it did in *Hammonds*, that the dockets were clogged with murder cases and this caused an unavoidable backlog of cases." *Id.* at 191, 563 S.E.2d at 13. The dissenting judge concluded that the trial court abused its discretion in denying defendant's motion to dismiss for lack of a speedy trial. *Id.* (Timmons-Goodson, J., dissenting). For the reasons discussed herein, we affirm the majority decision of the Court of Appeals.

The sole issue in this case is whether the Court of Appeals correctly affirmed the trial court's denial of defendant's motion to dis-

miss for lack of a speedy trial. Defendant argues that, because over four and one-half years elapsed between his arrest and trial, he was denied his constitutional right to a speedy trial.

This Court has stated:

> The right to a speedy trial is different from other constitutional rights in that, among other things, deprivation of a speedy trial does not *per se* prejudice the ability of the accused to defend himself; it is impossible to determine precisely when the right has been denied; it cannot be said precisely how long a delay is too long; there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial; and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial.

State v. McKoy, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978).

In *Barker v. Wingo*, the United States Supreme Court identified four factors that "courts should assess in determining whether a particular defendant has been deprived of his right" to a speedy trial under the federal Constitution. 407 U.S. 514, 530, 33 L. Ed. 2d 101, 117 (1972). These factors are: (i) the length of delay, (ii) the reason for delay, (iii) the defendant's assertion of his right to a speedy trial, and (iv) whether the defendant suffered prejudice as a result of the delay. *Id.*; *see also State v. Flowers*, 347 N.C. 1, 27, 489 S.E.2d 391, 406 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998). "We follow the same analysis when reviewing such claims under Article I, Section 18 of the North Carolina Constitution." *State v. Grooms*, 353 N.C. 50, 62, 540 S.E.2d 713, 721 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001).

This Court must consider the factors in light of the balancing test set out by the United States Supreme Court as follows:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the constitution.

Barker, 407 U.S. at 533, 33 L. Ed. 2d at 118-19. With these principles in mind, we now balance the four factors based on the evidence in this case.

First, the length of the delay is not *per se* determinative of whether defendant has been deprived of his right to a speedy trial. *See State v. Webster*, 337 N.C. 674, 678, 447 S.E.2d 349, 351 (1994). The United States Supreme Court has noted that "lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year." *Doggett v. United States*, 505 U.S. 647, 652 n.1, 120 L. Ed. 2d 520, 528 n.1 (1992). However, " 'presumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* inquiry." *Id.* In this case, the length of delay was approximately four and one-half years, which is clearly enough to trigger examination of the other factors.

Second, defendant has the burden of showing that the delay was caused by the *neglect* or *willfulness* of the prosecution. *See Webster*, 337 N.C. at 679, 447 S.E.2d at 351. Only after the defendant has carried his burden of proof by offering *prima facie* evidence showing that the delay was caused by the neglect or willfulness of the prosecution must the State offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* evidence. *McKoy*, 294 N.C. at 143, 240 S.E.2d at 390. This Court has stated:

> The constitutional guarantee does not outlaw good-faith delays which are reasonably necessary for the State to prepare and present its case. . . . Neither a defendant nor the State can be protected from prejudice which is an incident of ordinary or reasonably necessary delay. The proscription is against purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort.

State v. Johnson, 275 N.C. 264, 273, 167 S.E.2d 274, 280 (1969) (citations omitted).

In the present case, the record does not reveal that the delay resulted from willful misconduct by the State. To the contrary, the record shows numerous causes for the delay. This case, like *Hammonds*, originated in Robeson County during a substantially similar time frame. The State made a showing in this case, as it did in *Hammonds*, that the dockets were clogged with murder cases. In

fact, *Hammonds* was one of the cases tried in Robeson County during defendant's pretrial incarceration.

The State, in explaining the delay in the present case, made the following showing: Seventy-three first-degree murder cases were pending in Robeson County when defendant was indicted. These seventy-three first-degree murder cases were also pending when the district attorney took office on 1 November 1994. Of these seventy-three first-degree murder cases, only five, including defendant's case, had not been disposed of by 29 April 1998. Four of these five remaining cases predate defendant's case. The district attorney has dealt with the cases in chronological order, beginning with the oldest. Defendant's case was tried based on this policy. In 1995, the double homicide trial of defendant John Clark, Jr. was held, and the sentencing phase of that trial lasted for thirteen to seventeen weeks. During the pendency of defendant's case, numerous capital murder trials were held in Robeson County including the trial of Daniel Andre Greene, who was the defendant in the highly publicized capital murder case involving the death of Michael Jordan's father, and which case was designated "exceptional." During one point in defendant's pretrial incarceration, there were only two courtrooms available in Robeson County because of courthouse renovation, and the Clark and Greene cases were held in these courtrooms. Greene's trial began in November 1995, and the sentencing proceeding in that case concluded approximately nine weeks into 1996. In 1996, the Robeson County district attorney's office tried fifteen first-degree murder cases, thirteen of which were tried capitally and all fifteen of which went to juries for a verdict. In 1997, the district attorney's office prosecuted twelve first-degree murder cases, and all twelve went to juries for a verdict. In 1997, the district attorney's office tried sixty-seven felony jury trials and twenty-three or twenty-four misdemeanor jury trials. From 1 July 1997 through 31 March 1998, a total of twenty-nine homicide cases were disposed of by the district attorney's office. Defendant's counsel was involved during the pendency of defendant's case in a number of murder cases that predated defendant's. Ninety-three murder cases in Robeson County were disposed of while defendant's case was pending. Accordingly, the delay in the present case is not particularly a matter of court congestion. The delay resulted from a combination of the circumstances cited above. *See Brown*, 282 N.C. at 124, 191 S.E.2d at 664 (holding that "crowded dockets and lack of judges or lawyers, and other factors, make some delays inevitable").

This Court has also recognized "that there may be selectivity in prosecutions and that the exercise of this prosecutorial prerogative does not reach constitutional proportion unless there be a showing that the selection was deliberately based upon 'an unjustifiable standard such as race, religion, or other arbitrary classification.' " *State v. Cherry*, 298 N.C. 86, 103, 257 S.E.2d 551, 562 (1979) (quoting *Oyler v. Boles*, 368 U.S. 448, 456, 7 L. Ed. 2d 446, 453 (1962)), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980). In the present case, defendant has failed to show that the State, by trying some murder cases that may have postdated defendant's, made these selections based on some unjustifiable standard. The complexities of a capital trial versus the disposal of noncapital trials and pleas justify the disposition of some noncapital cases before capital cases. Defendant has failed to present *any* evidence that the delay was caused by the State's neglect or willfulness, and we see no indication that court resources were either negligently or purposefully underutilized. Indeed, defendant relies solely on the length of delay and ignores the balancing of other factors. In light of these reasons, we conclude that the delay was caused by neutral factors and that defendant failed to carry his burden to show delay caused by the State's neglect or willfulness.

Third, defendant's *pro se* assertion of his right to a speedy trial is not determinative of whether he was denied the right. When defendant filed his *pro se* motion for a speedy trial on 27 November 1995, he was represented by counsel. Although defendant's *pro se* motion was filed more than a year after his arrest, his assertion of the right to a speedy trial was made in violation of the rule that a defendant does not have the right to be represented by counsel and to also appear *pro se*. *State v. Thomas*, 346 N.C. 135, 138, 484 S.E.2d 368, 370 (1997). Defendant's counsel filed a motion for a speedy trial on behalf of defendant on 8 August 1997, almost three years after defendant's arrest. This Court has recently held that "[h]aving elected for representation by appointed defense counsel, defendant cannot also file motions on his own behalf or attempt to represent himself." *Grooms*, 353 N.C. at 61, 540 S.E.2d at 721. Defendant does not have the right to appear both by himself and by counsel. *Id.*; *see also* N.C.G.S. § 1-11 (2001). Assuming *arguendo* that defendant properly asserted his rights through his *pro se* motion, this assertion of the right, by itself, did not entitle him to relief. *See Barker*, 407 U.S. at 533, 33 L. Ed. 2d at 118 (holding that none of the factors alone is sufficient to establish a violation and that all must be considered together).

Fourth, in considering whether a defendant has been prejudiced because of a delay, this Court has noted that a speedy trial serves " '(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.' " *Webster*, 337 N.C. at 680-81, 447 S.E.2d at 352 (quoting *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118).

A defendant must show actual, substantial prejudice. *State v. Goldman*, 311 N.C. 338, 346, 317 S.E.2d 361, 366 (1984) (holding that "in the absence of a showing of actual prejudice, . . . our courts should consider dismissal in cases of serious crimes with extreme caution"). Defendant has failed to show that he suffered significant prejudice as a result of the delay. Defendant contends that two material witnesses, Fred Smith and Samantha Fields, could not be located. These witnesses were either available or could have been located with diligent effort at the time the case was called for trial.

At the 26 April 1999 hearing, the State informed defendant that Fred Smith was incarcerated and available. As for Samantha Fields, it is apparent that the State had not been able to find her at the time of the 26 April 1999 hearing. However, a subpoena included in the appendix to defendant's brief shows that it was served on Fields on 30 April 1999. The record shows that, pursuant to the subpoena, Fields was interviewed by defendant and was present when defendant's case was called for trial on 3 May 1999. Therefore, defendant could have proceeded to trial and presented the witnesses if he had chosen to do so. It was the State that sought Smith and Fields as primary witnesses. Defendant has failed to show that his defense was impaired in any way by the delay.

When the case was called for trial on 3 May 1999, defendant tendered a plea of guilty to second-degree murder. After the trial court engaged in a plea colloquy with defendant and the State offered a factual basis, one of defendant's attorneys expressed disagreement with the factual basis, told the trial court that Samantha Fields was present, and explained that Fields was giving a version of the offense that *might* raise self-defense as an option for defendant. The attorney then explained why defendant had nevertheless decided to plead guilty to second-degree murder: "[T]here is the possibility, even with the contention there may be a viable self-defense, there is a chance that the jury may reject that. So, that's why we feel it's in our best interest to take the plea that has been offered." Defendant chose to plead guilty to second-degree murder rather than be tried before a jury that might find him guilty of first-degree murder,

an offense for which the State was seeking the death penalty. Defendant chose to avoid that possibility by pleading guilty to a lesser included offense.

After balancing the four factors set forth above, we hold that defendant's constitutional right to a speedy trial has not been violated. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice BRADY dissenting.

In this case, the record reveals that defendant was detained for 1,659 days from the time he was arrested, on 10 October 1994, until his case was disposed of, on 3 May 1999. Because I believe the four-and-one-half-year interval was attributable to either the State's inability or unwillingness to bring the case forward, I adamantly disagree with the majority's underlying conclusion that defendant "has failed to present *any* evidence that the delay was caused by the State's neglect or willfulness." I also take issue with the majority's assertion that there is "no indication that court resources were either negligently or purposefully underutilized" in this case. In fact, in my view, the evidence presented clearly, if not graphically, illustrates two things: (1) that there are long-term, systemic problems in the Robeson County courts when it comes to bringing serious criminal cases to trial; and (2) that the district attorney's office in Robeson County has contributed to the problem of crowded court dockets by failing to prosecute cases, including the one at issue, in a timely fashion. As a consequence, I respectfully dissent from the majority's holding that the rights accorded defendant under the speedy trial provisions of the United States Constitution and the North Carolina Constitution were not violated.

An individual's right to a speedy trial is among those rights enumerated in the Sixth Amendment to the United States Constitution which, in pertinent part, provides as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. Const. amend VI. This guarantee was deemed to be "one of the most basic rights preserved by our Constitution," *Klopfer v. North Carolina*, 386 U.S. 213, 226, 18 L. Ed. 2d 1, 9 (1967), and was made applicable to the states, through the operation of the Due Process Clause of the Fourteenth Amendment, in the *Klopfer* case, *id.* at 222-26, 18 L. Ed. 2d at 7-9. In *Klopfer*, the Supreme Court recognized the historical significance of "speedy justice," noting that

Western society's reverence for the concept dated back to the Magna Carta of 1215. *Id.* at 223-24, 18 L. Ed. 2d at 8. At the birth of our nation, many of the original thirteen colonies also independently established speedy trial safeguards for their respective citizens. *See id.* at 225-26 n.21, 18 L. Ed. 2d at 9 n.21 (Delaware, Maryland, Massachusetts, Pennsylvania, and Virginia). Here in North Carolina, our state Constitution provides that "[a]ll courts shall be open[] [to] every person . . . without favor, denial, or *delay*." N.C. Const. art. I, § 18 (emphasis added). The underlying guarantee was added to the state's Declaration of Rights amid the constitutional revisions of 1868. *See* N.C. Const. of 1868, art. I, § 35. Thus, in sum, the right to speedy justice has enjoyed a long and revered history, both in North Carolina and in our nation as a whole.

As for the underlying rationale supporting an accused's right to a speedy trial, the United States Supreme Court has held that the right is predicated on three objectives: (1) to prevent oppressive pretrial incarceration, (2) to lessen the anxiety and concern that accompanies the stigma of being charged with a criminal offense, and (3) to preclude a defendant's case from being impaired by the dimming memories of witnesses and/or the loss of exculpatory evidence. *Barker v. Wingo*, 407 U.S. 514, 532, 33 L. Ed. 2d 101, 118 (1972). In balance, the Court in *Barker* also held that the concerns for the accused must be measured against societal interests in a speedy trial, which the Court described thusly: (1) the detrimental effects on rehabilitation caused by delay between arrest and punishment, (2) the cost of lengthy pretrial detention, (3) the loss of wages that might have been earned by incarcerated breadwinners, (4) the opportunity of suspects released on bond to commit other crimes, and (5) the possibility that the accused may use a court backlog to negotiate favorable pleas to lesser offenses or to otherwise manipulate the system.[1] *Id.* at 519-21, 33 L. Ed. 2d at 110-12. In an even earlier case, the United States Supreme Court articulated the balancing of interests by describing the right to a speedy trial as "necessarily relative" because while it "secures rights to a defendant[,] [i]t does not preclude the rights of public justice." *Beavers v. Haubert*, 198 U.S. 77, 87, 49 L. Ed. 950, 954 (1905). Thus, in summary, when examining whether a right to a

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1. In addition to those considerations mentioned by the United States Supreme Court, logic commands the recognition of a reciprocal interest for a defendant in preventing the State from manipulating a pretrial delay to its advantage. One obvious way the State could gain advantage through a pretrial delay would be to use the delay—and the implied threat to extend it—as a means to induce an incarcerated defendant to accept a plea that the State views as favorable.

speedy trial has been violated, a court must include an analysis of how the circumstances giving rise to the claim adversely affect the accused, the administration of justice, or both.

As a means to determine whether an accused has been improperly denied prompt justice, the Court in *Barker* adopted a four-part balancing test originally proposed by Justice Brennan in his concurring opinion in *Dickey v. Florida*, 398 U.S. 30, 40, 26 L. Ed. 2d 26, 33 (1970) (Brennan, J., concurring). The four factors to consider are these: (1) the length of delay (between arrest and trial), (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant resulting from the delay. *Barker*, 407 U.S. at 530-32, 33 L. Ed. 2d at 116-18. North Carolina has adopted the *Barker* test for speedy trial claims, whether they arise under the Sixth Amendment of the United States Constitution, or under Article I, Section 18 of our state Constitution. *See, e.g., State v. Flowers*, 347 N.C. 1, 489 S.E.2d 391 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998); *State v. Hammonds*, 141 N.C. App. 152, 541 S.E.2d 166 (2000), *aff'd per curiam*, 354 N.C. 353, 554 S.E.2d 645 (2001), *and cert. denied*, 536 U.S. 907, 153 L. Ed. 2d 184 (2002).

Since the *Barker* decision in 1972, state and federal appellate courts across the nation have grappled with how to best weigh the four factors inherent to the speedy trial balancing test. One question that has proved especially troublesome is determining how long the delay must endure before the delay itself indicates prejudice. Here in North Carolina, the *Barker* test has been utilized in denying defendants relief under speedy trial claims, even where they were subjected to extended periods of pretrial incarceration. This attenuated approach to analyzing speedy trial claims is reflected not only by the majority in the instant case but in two other recent appellate decisions that have focused on whether the defendants demonstrated that the delay prejudiced their respective cases at trial. For example, in *Flowers*, this Court ultimately concluded that even if the delay did cause the defendant to lose access to a prospective witness, the defendant failed to show how that the witness' testimony would have altered the outcome of his trial. 347 N.C. at 29, 489 S.E.2d at 407. As a consequence, the Court held that the defendant was not denied his constitutional right to a speedy trial. *Id.* Similarly, in *Hammonds*, a case that also arose in Robeson County, the defendant's speedy trial contentions hinged upon whether or not *his case* was prejudiced by the death of an investigator and because two witnesses changed their stories during a delay of over four years. 141 N.C. App. at 163, 541

S.E.2d at 175. As for the question of whether the four-plus-year delay was *per se* prejudicial, the Court of Appeals concluded that the State's explanation for the delay—a crowded court docket—was adequate to overcome the defendant's allegations that the delay was a result of the prosecution's neglect or willfulness. *Id.* at 160, 541 S.E.2d at 173; *see also State v. Johnson*, 275 N.C. 264, 269, 167 S.E.2d 274, 278 (1969) (holding that burden is on the defendant to show that the delay was caused by the neglect or willfulness of the prosecution); *State v. Hughes*, 54 N.C. App. 117, 119, 282 S.E.2d 504, 506 (1981) (holding, in essence, that the defendant cannot show neglect or willfulness on the part of the prosecution when the delay is caused by a legitimate backlog of cases).

Thus, to this point, the aforementioned case law establishes that a four-plus-year delay from the time of arrest to the time of trial does not, in and of itself, prejudice either: (1) a defendant's three speedy trial interests (oppressive incarceration; anxiety, concern, and social stigma attached to accusation; and possibility of an impaired defense at trial); or (2) societal interests in the proper administration of justice (detrimental effects on rehabilitation caused by delay between arrest and punishment; the cost of lengthy pretrial detention; the possible loss of wages earned by incarcerated breadwinners; the opportunity of suspects released on bond to commit other crimes; and the possibility that the accused may use a court backlog to negotiate favorable pleas to lesser offenses or to otherwise manipulate the system).

It is against this backdrop that the instant defendant, who, like the defendant in *Hammonds* endured a four-plus year delay between his arrest and trial, argues that he was denied his constitutional right to a speedy trial. In sum, defendant contends that the facts and circumstances underlying his case distinguish it from that of the defendant in *Hammonds*, and as a consequence of those distinctions, defendant urges this Court to conclude that a proper application of the *Barker* test demonstrates prejudice. Support for defendant's argument can be found on two fronts: First, independent critical analysis of defendant's particular circumstances reveals that the State's explanation wholly fails to demonstrate that the elected district attorney was not negligent in contributing to the lengthy delay; second, such analysis also shows that the extended delay prejudiced both defendant's protected constitutional interests *and* society's interests in the administration of justice. As a result, I would conclude that defendant was improperly denied the right to a

speedy trial, as he is guaranteed under the Sixth Amendment to the United States Constitution and to the extent the right is similarly guaranteed by Section 18 of Article I of the North Carolina Constitution.

The State contends that the facts and circumstances here parallel those in *Hammonds* and urges this Court to use the *Hammonds* holding as a benchmark for the instant case. However, an objective examination of the two cases reveals that their apparent similarities boil down to just two factual circumstances: (1) each defendant was detained for four-plus years between arrest and trial; and (2) in each case, the State blamed a busy court docket for the delay. From that point, the two cases diverge, in good part because significantly more information about the state of the Robeson County courts was included in the record of the instant case. In *Hammonds*, the court held that the defendant did not allege that the prosecution willfully caused the delay; rather, the court determined that a crowded docket was the primary cause for the time lag between arrest and trial. 141 N.C. App. at 160-61, 541 S.E.2d at 173-74. Under such a scenario, the court ultimately concluded that because this Court has acknowledged that a prosecutor may exercise selectivity in preparing the trial calendar, *see State v. Cherry*, 298 N.C. 86, 103, 257 S.E.2d 551, 562 (1979), the prosecutor's scheduling decisions in *Hammonds* were not premised on unconstitutional considerations, such as race, religion, or other arbitrary classifications. *Hammonds*, 141 N.C. App. at 161, 541 S.E.2d at 174; *accord Cherry*, 298 N.C. at 103, 257 S.E.2d at 562. However, the same conclusion cannot be drawn on the facts at issue in the instant case. During oral argument, the State contended that ninety-one other homicide cases arose in the jurisdiction during the delay period in question and argued that such a crowded docket legitimately prevented prosecutors from bringing the case to trial before May of 1999. However, the State was prodded into conceding two other key points: (1) that as many as thirty-nine of those cases arose *after* defendant's arrest, yet *were disposed of prior to* the resolution of defendant's case; and (2) that only *one other defendant* among the ninety-two was detained longer than defendant. Thus, the district attorney's indifference toward defendant is evidence of precisely the type of neglect that reflects a violation of a defendant's right to a speedy trial. The State offered no explanation, beyond a crowded court docket, that would justify ignoring defendant's case—for over four and one-half years—while it actively prosecuted numerous newer cases.

Although I recognize that homicide cases cannot necessarily be tried in strict chronological sequence, I remain mindful that there are numerous checkpoints within the framework of our state's criminal procedure statutes that, if followed, help to ensure a timely prosecution of cases. One such statute carries particular significance in this case because it empowered the elected district attorney to calendar cases for trial. N.C.G.S. § 7A-49.3(a) (1986) (repealed 2000) ("[T]he district attorney shall file with the clerk of superior court a calendar of the cases he intends to call for trial at that session . . . ."). Thus, the district attorney was positioned to control the flow of the superior court's trial docket. As a consequence, the district attorney assumes the responsibility of tracking the criminal defendants awaiting trial within his or her district. While a crowded docket may partially explain a longer trial delay for *all* criminal defendants within a given district, it provides no justification for why the instant defendant was left warehoused in a local detention facility for four-plus years while thirty-nine other homicide detainees, who were arrested subsequent to defendant, had their cases disposed of before defendant.

I note, too, that when district attorneys find themselves in a bind over time constraints and crowded court dockets, they have the options of: (1) requesting the assignment of additional superior court judges, (2) requesting the assignment of one or more of the thirteen special superior court judges from the Administrative Office of the Courts (AOC), or (3) applying for the assignment of additional district attorneys, *see* N.C.G.S. § 7A-64(b) (1999) (amended 2000) (in subsection (b)(1), a judicial district may request such assistance when "[c]riminal cases have accumulated . . . beyond the capacity of the district attorney . . . to keep the dockets reasonably current"; in subsection (b)(2), a judicial district may request such assistance when "[t]he overwhelming public interest warrants the use of additional resources *for the speedy disposition* of cases . . . involving [offenses that are] a threat to public safety") (emphasis added)). Moreover, the General Assembly has specifically provided that district attorneys may request the assistance of the Attorney General's special prosecution division to prosecute or assist in the prosecution of criminal cases. N.C.G.S. § 114-11.6 (2001). The State offers no evidence that any of these various options were being pursued during the period of defendant's incarceration.

It is also apparent that the Robeson County district attorney, the appointed public defender, members of the criminal defense bar, and even members of the public were keenly aware of the problems

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
CLAYTON DRAPER	)	

No. 186PA03

Upon consideration of the State of North Carolina's Petition for Extraordinary Writ and Motion Under Rule 2 of the Rules of Appellate Procedure to review the 3 April 2003 Order, entered by Judge William L. Daisy, in District Court, Guilford County, North Carolina, declaring N.C.G.S. § 7A-455.1 unconstitutional and upon consideration of the State's Motion for Review Prior to Determination in the Court of Appeals and Motion for Consolidation, it appears to the Court that the application of N.C.G.S. § 7A-455.1 should be consistent in all courts throughout the State; and it further appears to the Court that in the interest of justice and to expedite decision in the public interest as to the uniform administration of justice, the State's Determination, and Motion for Consolidation should be allowed.

Therefore, the Court, pursuant to Rule 2 of the Rules of Appellate Procedure suspends the requirements of the Rules of Appellate Procedure and in the exercise of its supervisory powers pursuant to Article IV, Section 12(1) of the North Carolina Constitution hereby (I) allows the State to seek review in this Court prior to determination in the Court of Appeals, (ii) issues its writ of certiorari to review the issue of the constitutionality of N.C.G.S. § 7A-455.1, and (iii) directs the parties to submit briefs on the following issues:

1. Whether the trial court erred in declaring N.C.G.S. § 7A-455.1 unconstitutional under the Constitution of the United States?

2. Whether the trial court erred in declaring N.C.G.S. § 7A-455.1 unconstitutional under the North Carolina Constitution?

The parties shall file with this Court a settled record on appeal on or before 5 May 2003 at 5:00 p.m. Thereafter, briefing shall be as set forth in Rule 13 of the Rules of Appellate Procedure.

This case shall be consolidated with State of North Carolina v. Dudley Cedrick Webb, No. 157PA03, for purposes of oral argument.

By entering this order, the Court expresses no opinion as to the merits of the issues to be briefed.

By order of the Court in Conference, this 11th day of April, 2003.

Brady, J.
For the Court

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

1 MAY 2003

No. 062P03 Case below: 155 N.C. App. 77	Allen v. N.C. Dep't of Health & Human Servs.	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA01-1129)	Denied
No. 158P03 Case below: 155 N.C. App. 641	Beneficial Mortgage Co. of N.C. v. Hamidpour	1. Plaintiff-Appellant's PDR Under N.C.G.S. § 7A-31(c) (COA02-269) 2. Defendant-Appellee Craig's Conditional PDR as to Additional Issues	1. Denied 2. Dismissed as Moot
No. 598P02 Case below: 153 N.C. App. 25	Boyce & Isley v. Cooper	1. Defs' Motion for Temporary Stay (COA01-880) 2. Defs' Petition for Writ of Supersedeas 3. Defs' NOA Based Upon a Constitutional Question 4. Defs' PDR of Additional Issues 5. Defs' Alternative PDR of Constitutional Issues	1. Allowed Pending Determination of Defs' PDR **11/27/02** Stay dissolved **05/01/03** 2. Denied 3. Dismissed *ex mero motu* 4. Denied 5. Denied **Lake, C.J., Parker, J. and Orr, J., recused**
No. 163P03 Case below: 156 N.C. App. 218	Bragg v. Ameristeel	Def's PDR Under N.C.G.S. § 7A-31 (COA02-457)	Denied
No. 461P02 Case below: 152 N.C. App. 200	Creel v. N.C. Dep't of Health & Human Servs.	Plt's PDR Under N.C.G.S. § 7A-31 (COA01-1058)	Denied
No. 546A02 Case below: 153 N.C. App. 1	Farber v. N.C. Psychology Bd.	Plt's Motion to Withdraw Appeal	Allowed **03/31/03**
No. 135P03 Case below: 156 N.C. App. 29	Floyd v. McGill	1. Def's (Stephanie L. McGill) PDR Under N.C.G.S. § 7A-31 (COA02-372) 2. Defs' (Transit Management and City of Charlotte) PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied

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

1 MAY 2003

No. 454P02 Case below: 150 N.C. App. 601	Gregory v. Kilbride	Plt's PDR Under N.C.G.S. § 7A-31 (COA00-667)	Denied
No. 132P03 Case below: 156 N.C. App. 147	Harrison v. Lucent Technologies	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-348)	Denied
No. 086P03 Case below: 155 N.C. App. 220	Hayes v. Rogers	1. Def's (David H. Rogers) NOA (Constitutional Question) (COA01-1496) 2. Def's (David H. Rogers) PDR Under N.C.G.S. § 7A-31 3. Plts' Motion to Dismiss Appeal	1. — 2. Denied **03/31/03** 3. Allowed **03/31/03**
No. 483P02 Case below: 151 N.C. App. 747	*In re Jackson*	Respondent's (Peggy Green) PDR Under N.C.G.S. § 7A-31 (COA01-1410)	Denied
No. 128P03 Case below: 154 N.C. App. 742	In re Scharfen-berger	1. Respondent's (Carla Abed Alftah) Petition for Writ of Mandamus (COA02-14) 2. Respondent's (Alftah) PWC to Review the Decision of the COA	1. Denied 2. Denied
No. 545P02 Case below: 152 N.C. App. 477	It's Prime Only, Inc. v. Darden	1. Defs' and Plts' (Keith and Charlene B. Darden) Motion for Variance of the Requirements of the Rules of Appellate Procedure (COA01-1246) 2. Defs' (Norman W. Shearin, Vandeventer, Black, Meredith & Martin, L.L.P.) PDR Under N.C.G.S. § 7A-31 3. Defs' (Billy G. Roughton, James Soules, Russell Poland, David Irby, and It's Prime Only, Inc.) PDR Under N.C.G.S. § 7A-31	1. Allowed **04/22/03** 2. Denied 3. Denied
No. 133P03 Case below: 155 N.C. App. 776	Keffer v. Keffer	Def's PWC to Review the Decision of the COA (COA01-366-2)	Denied
No. 371P02 Case below: 151 N.C. App. 15	Leatherwood v. Ehlinger	Def's PDR Under N.C.G.S. § 7A-31 (COA01-728)	Denied

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

1 MAY 2003

No. 069P03 Case below: 155 N.C. App. 587	McDuffie v. Mitchell	Plt's PDR Under N.C.G.S. § 7A-31 (COA01-1492)	Denied
No. 162P03 Case below: 156 N.C. App. 218	N.C. Dep't of Env't & Natural Res. v. Swain	Respondent's PDR Under N.C.G.S. § 7A-31 (C0A02-754)	Denied
No. 082P03 Case below: 155 N.C. App. 320	N.C. Monroe Constr. Co. v. State	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA01-1478) 2. Plt's and Third Party Plt's (N.C. Monroe Construction Company) Conditional PDR as to Additional Issues	1. Denied 2. Dismissed as Moot
No. 395P02 Case below: 151 N.C. App. 228	Neier v. State	1. Plt's (Bryce Neier) and Def's (Michael C. Boose) NOA Based Upon a Constitutional Question (COA01-652) 2. Plt's (Bryce Neier) and Def's (Michael C. Boose) PDR Under N.C.G.S. § 7A-31 3. Defs' (State of North Carolina, N.C. State Board of Elections, and AOC) Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
No. 182P02 Case below: 156 N.C. App. 427	Nudelman v. J.A. Booe Bldg. Contr'r, Inc.	Plts' PDR Under N.C.G.S. § 7A-31 (COA02-267)	Denied
No. 091P03 Case below: 155 N.C. App. 415	Paquette v. County of Durham	Defs' PDR Under N.C.G.S. § 7A-31 (COA02-59)	Denied
No. 112P03 Case below: 154 N.C. App. 589	Piedmont Triad Reg'l Water Auth. v. Unger	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-201)	Denied
No. 008A03 Case below: 154 N.C. App. 292	Porter v. American Credit Counselors Corp.	Joint Motion of Plaintiffs and Defendants to Dismiss Pending Appeal (COA01-1358)	Allowed **04/10/03**

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

1 MAY 2003

No. 078P03 Case below: 356 N.C. 676 155 N.C. App. 777	Providian Nat'l Bank v. Bryant	Defs' Petition for Rehearing of PDR Under N.C. R. App. P. 31 (COA01-1546)	Dismissed
No. 043P03 Case below: 154 N.C. App. 742	Robertson v. Robertson	Def's PDR Under N.C.G.S. § 7A-31 (COA01-1239)	Denied
No. 635P02 Case below: 153 N.C. App. 342	RPR & Assocs., Inc. v. University of N.C.-Chapel Hill	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA01-1146) 2. AG's Conditional PWC to Review the Decision of the COA	1. Denied **04/07/03** 2. Dismissed as Moot **04/07/03**
No. 136P03 Case below: 155 N.C. App. 754	Smiley's Plumbing Co. v. PFP One, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA01-1384)	Denied
No. 159P03 Case below: 156 N.C. App. 318	State v. Adams	Def's PDR Under N.C.G.S. § 7A-31 (COA01-1443)	Denied
No. 513P02 Case below: 152 N.C. App. 478	State v. Barrett	Def's PDR Under N.C.G.S. § 7A-31 (COA01-914)	Denied
No. 193P03 Case below: 151 N.C. App. 598	State v. Carmon	Def's Motion for Extension of Time to File PDR (COA01-525)	Convert to Cert. and Deny
No. 123P03 Case below: Alamance County Superior Court	State v. Cockerham	Def's PDR Under N.C.G.S. § 7A-31 (COA01-1590)	Denied

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

1 MAY 2003

No. 547P02 Case below: 149 N.C. App. 669	State v. Colt	1. Temporary Stay (COA01-192) 2. Defs' Petition for Writ of Supersedeas 3. Defs' NOA Based Upon a Constitutional Question 4. Defs' PDR Under N.C.G.S § 7A-31 5. AG's Motion to Deny the Petition for Writ of Supersedeas 6. AG's Motion to Deny Temporary Stay 7. AG's Motion to Dismiss Appeal 8. AG's Motion to Deny PDR	1. Disolved 2. Denied 3. — 4. Denied 5. Dismissed 6. Dismissed 7. Allowed 8. Dismissed
No. 181P03 Case below: Cumberland County Superior Court	State v. Franceschi	1. Def's Petition for Writ of Supersedeas 2. Def's PWC to Review the Order of the Superior Court 3. Def's Motion for Temporary Stay	1. Denied 2. Denied 3. Allowed **04/15/03** Stay Dissolved **05/01/03**
No. 184P03 Case below: Craven County Superior Court	State v. Frazier	1. Def's Motion for Temporary Stay 2. Def's Motion to Rehear and Reconsider Pursuant to App. Rule 37, the Applications of Reginald L. Frazier 3. Def's Addendum to Motion for Arrest of Judgment and Petition for Writ of Habeas Corpus Filed Before this Court	1. Denied **04/04/03** 2. Denied **04/16/03** 3. Denied **05/01/03**
No. 480P02 Case below: 151 N.C. App. 750	State v. Hagans	1. Def's NOA Based Upon a Constitutional Question (COA01-853) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
No. 183P03 Case below: 156 N.C. App. 634	State v. Hensley	1. Def's PDR Under N.C.G.S. § 7A-31 (COA02-520) 2. AG's Motion to Deny Discretionary Review	1. Denied 2. Dismissed as Moot
No. 621P02 Case below: 153 N.C. App. 801	State v. Howie	Def's PWC to Review the Decision of the COA (COA01-1459)	Denied

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

1 MAY 2003

No. 535P02 Case below: 152 N.C. App. 608	State v. Love	Def's PDR Under N.C.G.S. § 7A-31 (COA01-1275)	Denied
No. 622P02 Case below: 153 N.C. App. 723	State v. McConico	1. Def's PWC to Review the Decision of the COA (COA01-1562) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's NOA Based Upon a Constitutional Question 4. AG's Motion to Dismiss Appeal	1. Denied 2. Denied 3. — 4. Allowed
No. 169P03 Case below: 156 N.C. App. 219	State v. McManus	Def's PDR Under N.C.G.S. § 7A-31 (COA02-822)	Denied
No. 379A95-3 Case below: Cumberland County Superior Court	State v. Meyer	1. Def's PWC to Review the Order of Superior Court 2. Def's Motion to Hold Consideration of PWC in Abeyance Pending Decision by Cumberland County Superior Court on Motion for Reconsideration	1. Denied 2. Denied
No. 655P02 Case below: 154 N.C. App. 186	State v. Mitchell	1. Def's NOA (Constitutional Question) (COA02-82) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Allowed 3. Allowed
No. 511P02 Case below: 152 N.C. App. 694	State v. Pratt	1. Def's NOA Based Upon a Constitutional Question (COA01-1268) 2. Def's PWC to Review the Decision of the COA 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
No. 569P02 Case below: 153 N.C. App. 203	State v. Rogers	Def's PDR Under N.C.G.S. § 7A-31 (COA01-989)	Denied
No. 151P03 Case below: 149 N.C. App. 978	State v. Simms	Def's PWC to Review the Decision of the COA (COA01-590)	Denied

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

1 MAY 2003

No. 178P03 Case below: 150 N.C. App. 566	State v. Stafford	Def's PWC to Review the Decision of the COA (COA01-532)	Denied
No. 095P03 Case below: 155 N.C. App. 1	State v. Wade	1. Def's NOA Based Upon a Constitutional Question (COA02-25) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
No. 561P02 Case below: 150 N.C. App. 718	State v. Willoughby	Def's PWC to Review the Decision of the COA (COA01-899)	Denied
No. 152P03 Case below: 156 N.C. App. 292	Strickland v. Doe	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-399)	Denied
No. 527P02 Case below: 152 N.C. App. 659	Sudds v. Gillian	Plt's PDR Under N.C.G.S. § 7A-31 (COA01-998)	Denied
No. 640P02 Case below: 154 N.C. App. 522	Taylor v. K-Mart Corp.	1. Plt's NOA Based Upon a Constitutional Question (COA02-329) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
No. 105P03 Case below: 155 N.C. App. 282	Teasley v. Beck	Plts' PDR Under N.C.G.S. § 7A-31 (COA02-212)	Denied
No. 478P02 Case below: 151 N.C. App. 752	Ward v. Floors Perfect	Plt's PDR Under N.C.G.S. § 7A-31 (COA01-568)	Denied

PETITION TO REHEAR
1 MAY 2003

No. 319A02 Case below: 356 N.C. 654	Alford v. Catalytica Pharms., Inc.	Def's (Catalytica Pharmaceuticals, Inc.) Petition for Rehearing (COA01-959)	Denied

MARY WILLIAMS, PLAINTIFF v. BLUE CROSS BLUE SHIELD OF NORTH CAROLINA, DEFENDANT v. ORANGE COUNTY, ORANGE COUNTY BOARD OF COMMISSIONERS, AND ORANGE COUNTY HUMAN RELATIONS COMMISSION, COUNTERCLAIM DEFENDANTS

No. 277PA01

(Filed 13 June 2003)

1. Statutes of Limitation and Repose— constitutionality of statute—continuing violation runs from enforcement

The statute of limitations did not bar a counterclaim for a declaratory judgment that challenged the constitutionality of an Orange County anti-discrimination ordinance and its enabling legislation because the alleged wrong constitutes a continuing violation. Although Orange County asserts that the statute of limitations ran from the effective date of the ordinance or the enabling legislation, this suit and a companion case were the first two suits brought pursuant to the ordinance and BCBSNC had no certainty that it would run afoul of the ordinance until it was enforced.

2. Laches— constitutionality of statute—runs from enforcement

A counterclaim challenging the constitutionality of an Orange County anti-discrimination ordinance was not barred by laches, even though it was filed five and one-half years after the ordinance was adopted and eight and one-half years after the enabling legislation and Orange County had expended large amounts of money, time, and administrative effort in the creation and enforcement of the legislation and the ordinance, because this suit and a companion case were the first two suits brought pursuant to the ordinance and BCBSNC moved expeditiously once the suits were filed.

3. Constitutional Law— North Carolina—local act—anti-discrimination ordinance

The employment discrimination provision of an Orange County anti-discrimination ordinance and its enabling legislation constituted local acts within the meaning of Article II, Section 24 of the North Carolina Constitution because, using the reasonable classification test, it could not be concluded that conditions in Orange County are suspect to such an extent that the legislature could legally create a separate classification to address employment discrimination in that county only.

4. Constitutional Law— North Carolina—local act prohibition—labor and trade

The employment discrimination provisions of an Orange County anti-discrimination ordinance and its enabling legislation regulated labor and trade and violated the local act provisions of the North Carolina Constitution because the effect was to govern labor practices even though the intent was to prohibit discrimination.

5. Constitutional Law— North Carolina—local act—permissive—invalid

Legislation enabling an Orange County anti-discrimination ordinance was invalid (as applied to employment) as a prohibited local act regardless of whether Orange County chose to act on the legislation. A statute's validity is judged by what is possible rather than by what has been done.

6. Counties— delegation of power from state—ordinance exceeding state and federal standard—employment discrimination

Orange County did not possess the inherent authority to pass an employment discrimination ordinance under N.C.G.S. § 153A-121(a), which gives counties the power to enact ordinances protecting the health and welfare of its citizens and the peace and dignity of the county, and N.C.G.S. § 160A-174, which provides that state and federal law making an act unlawful do not preclude city ordinances requiring a higher standard of conduct. The ordinance in this case goes beyond requiring a higher standard of conduct and creates a new and independent framework for litigation which substantially exceeds the leeway permitted by these statutes.

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

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of an order for partial summary judgment entered 13 November 2000 and an amended order for partial summary judgment entered 23 January 2001 by Judge Steven A. Balog in Superior Court, Orange County. Heard in the Supreme Court 11 December 2001.

Maupin Taylor & Ellis, P.A., by Thomas A. Farr, M. Keith Kapp, Kevin W. Benedict, and Terence D. Friedman, for defendant-appellee Blue Cross Blue Shield of North Carolina.

Coleman, Gledhill & Hargrave, P.C., by Geoffrey E. Gledhill and S. Sean Borhanian; and The Brough Law Firm, by Michael B. Brough, for defendant-appellants Orange County, Orange County Board of Commissioners, and Orange County Human Relations Commission.

Office of the City Attorney, by Emanuel McGirt, for City of Durham, amicus curiae.

Elliot, Pishko, Gelbin & Morgan, P.A., by Robert M. Elliot and J. Griffin Morgan, on behalf of the North Carolina Academy of Trial Lawyers; and Seth H. Jaffe, for the American Civil Liberties Union of North Carolina Legal Foundation, Inc., amici curiae.

Van Hoy, Reutlinger & Adams, by Philip Marshall Van Hoy and Stephen John Dunn, on behalf of Employers Association and Capital Associated Industries, Inc., amici curiae.

Edwards, Ballard, Clark, Barrett and Carlson, P.A., by Kenneth P. Carlson, Jr., on behalf of North Carolina Society of Human Resource Management, amicus curiae.

North Carolina Association of County Commissioners, by C. Ronald Aycock, Counsel and Executive Director; and S.C. Kitchen, Durham County Attorney, amicus curiae.

Office of the County Attorney, by E. Holt Moore, III, for New Hanover County Human Relations Commission, amicus curiae.

City of Asheville, by Robert W. Oast, Jr., City Attorney, amicus curiae.

City of Durham, by Emanuel McGirt, City Attorney, amicus curiae.

Moore & Van Allen, PLLC, by George M. Teague, on behalf of North Carolina Citizens for Business and Industry; and P. Andrew Ellen for the North Carolina Retail Merchants Association, amici curiae.

EDMUNDS, Justice.

In this action, we are called upon to determine: (1) whether the North Carolina General Assembly violated Article II, Section 24 of the North Carolina Constitution by ratifying enabling legislation permitting Orange County, the Orange County Board of Commissioners, and the Orange County Human Relations Commission (collectively, counterclaim defendants) to enact and enforce the employment provisions of an antidiscrimination ordinance entitled the Orange County Civil Rights Ordinance (the Ordinance); and (2) whether counterclaim defendants acted illegally in enacting and enforcing the employment provisions of that Ordinance. For the reasons that follow, we affirm the trial court's grant of partial summary judgment to defendant Blue Cross Blue Shield of North Carolina (BCBSNC) and denial of summary judgment to counterclaim defendants.

Pursuant to N.C.G.S. § 160A-492, the Orange County Board of Commissioners (the Board of Commissioners) in 1987 established the Orange County Human Relations Commission (the HRC). *See* N.C.G.S. § 160A-492 (2001) ("[t]he governing body of any city, town, or county is hereby authorized to undertake . . . human relations, community action and manpower development programs . . . [and] may appoint such human relations, community action and manpower development committees or boards and citizens' committees, as it may deem necessary in carrying out such programs and activities"). The Board of Commissioners' mandate to the HRC was that it

> (1) study and make recommendations concerning problems in the field of human relationships; (2) anticipate and discover practices and customs most likely to create animosity and unrest and to seek solutions to problems as they arise; (3) make recommendations designed to promote goodwill and harmony among groups in the County irrespective of their race, color, creed, religion, ancestry, national origin, sex, affectional preference, disability, age, marital status or status with regard to public assistance; (4) monitor complaints involving discrimination; (5) address and attempt to remedy the violence, tensions, polarization, and other harm created through the practices of discrimination, bias, hatred, and civil inequality; and (6) promote harmonious relations within the county through hearings and due process of law . . . .

Orange County Civil Rights Ordinance, art. II, sec. 2.1(a), at 1 (effective 1 January 1995) [hereinafter Ordinance].

Thereafter, the HRC advertised and conducted public hearings on discrimination in the areas of employment, housing, and public accommodation and determined that discrimination in those areas existed in Orange County on the basis of race, color, religion, sex, national origin, age, disability, familial status, marital status, sexual orientation, and veteran status. *See* Ordinance, art. II, sec. 2.1(b), (c). As a result of these findings, the Board of Commissioners requested that the North Carolina General Assembly adopt enabling legislation allowing Orange County to enact a comprehensive civil rights ordinance.

In response, the General Assembly ratified chapter 246 of the 1991 Session Laws on 10 June 1991, effective that same day. Act of June 10, 1991, ch. 246, sec. 6, 1991 N.C. Sess. Laws 456, 460. This legislation was passed both to aid Orange County in addressing the concerns raised by the HRC and to authorize Orange County to create or designate a commission to assist in the implementation of the Ordinance. Section 6 of chapter 246 authorized the Board of Commissioners to adopt an ordinance to be referred to either as a "Civil Rights Ordinance" or a "Human Rights Ordinance." *Id.*

On 23 March 1993, the Board of Commissioners adopted a resolution requesting that the Orange County delegation to the General Assembly introduce a rewrite of the 1991 legislation to provide for "local administration of federal and [s]tate laws prohibiting discrimination on the basis of race, color, religion, sex, national origin, age, disability, marital status, familial status, and veteran status." The General Assembly made the requested amendments by enacting section 14 of chapter 358 of the 1993 Session Laws, effective upon ratification on 16 July 1993. Act of July 16, 1993, ch. 358, sec. 14, 1993 N.C. Sess. Laws 1158, 1169.

After the General Assembly passed this enabling legislation, the Board of Commissioners, on 6 June 1994, adopted the Ordinance. On 18 April 1995, the Board of Commissioners adopted another resolution requesting from the General Assembly an amendment to the enabling legislation authorizing the HRC to serve as a deferral agency for cases deferred by the Equal Employment Opportunity Commission (EEOC) and the Department of Housing and Urban Development (HUD), pursuant to planned "worksharing agreements" with those agencies. These agreements would authorize transfer by the EEOC to Orange County of employment discrimination complaints filed with it originating in the county and transfer by HUD to Orange County of housing discrimination complaints arising in the

county. Accordingly, the General Assembly enacted section 2, chapter 339 of the 1995 Session Laws, effective upon ratification on 28 June 1995. Act of June 28, 1995, ch. 339, sec. 2, 1995 N.C. Sess. Laws 802, 803.

In its current form, the Ordinance is an antidiscrimination law applicable only in Orange County and administered by counterclaim defendants. The employment provisions of the Ordinance provide in pertinent part:

> (a) It is unlawful for an employer:
>
> (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to that individual's compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, disability, familial status, or veteran status.

Ordinance, art. IV, sec. 4.1(a)(1), at 9 (effective 1 January 1996).[1] The Ordinance is enforceable by a private cause of action that permits those affected to recover injunctive relief, back pay, and compensatory and punitive damages up to $300,000. Ordinance, art. VIII, sec. 8.3.2, at 50-53; art. X, at 54-55. Different sections of the Ordinance prohibit discrimination in employment, housing, and public accommodations, as well as the infliction of bodily injury or property destruction on account of the factors listed above. The employment discrimination provision of the Ordinance became effective 1 January 1996 and applies to all employers engaged in an industry affecting commerce who have fifteen or more employees in Orange County. Ordinance, art. III, at 4. Specifically excepted employers include the State of North Carolina and the United States. *Id.* at 4-5. The Ordinance provides that when the HRC receives individual complaints of employment discrimination, it may begin its investigation by requesting a statement of the employer's position regarding the allegations. Ordinance, art. VIII, sec. 8.1, at 39-42. HRC may also issue subpoenas to obtain documents and materials from the employer. *Id.* After completing its investigation, the HRC issues either a finding of cause to believe discrimination occurred or a finding that reasonable cause does not exist. Ordinance, art. VIII, sec. 8.2, at 42-46.

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1. The Ordinance was enacted 6 June 1994 and was subsequently amended 3 August 1995. All of its articles, with the exception of Article IV, took effect on 1 January 1995. Article IV, the unfair employment provision of the Ordinance that is the subject of the appeal at bar became effective 1 January 1996.

If the HRC finds cause to exist, attempts are made to resolve the complaint by conference, conciliation, and/or persuasion. Ordinance, art. VIII, sec. 8.1, at 42. If these efforts fail, the HRC issues a right-to-sue letter, Ordinance, art. VIII, sec. 8.2, at 45, allowing the complainant to litigate the matter in the Superior Court, Orange County, within one year of receipt of the letter, Ordinance, art. X, at 54. As an alternative if cause is found to exist, the HRC itself can instead choose to litigate the employment discrimination claim before a state administrative law judge (ALJ). Ordinance, art. VIII, sec. 8.2(j)(1), at 45. In such a case, the employer has no opportunity to opt out of the administrative process and demand a jury trial in state court. Ordinance, art. VIII, sec. 8.3.1(a), at 46. Any decision by the ALJ is automatically reviewed by a three-member panel of the HRC commissioners. Ordinance, art. VIII, sec. 8.3.1(j)(1), at 48. A reviewing panel has the discretion to review all aspects of the ALJ's findings, including findings of fact, credibility determinations, and legal findings, and may affirm, modify, or reverse the ALJ's recommended decision. *Id.*

In the case at bar, plaintiff Mary Williams filed claims with the HRC and the EEOC alleging discrimination on the grounds that she had been forced to resign from her employment with BCBSNC because of her age and sex, and also alleging that BCBSNC had retaliated against her for filing the discrimination claim. Following an investigation, the HRC found reasonable cause to believe that BCBSNC had discriminated against plaintiff based on her age and gender, and issued a right-to-sue letter.

Plaintiff filed the suit giving rise to the instant appeal in Superior Court, Orange County, on 23 March 1999, claiming that BCBSNC fired her because of her age and also in retaliation for filing a claim of discrimination with the HRC and the EEOC. Specifically, plaintiff alleged four causes of action: (1) that BCBSNC wrongfully discharged plaintiff because of her age, in violation of North Carolina public policy as set forth in the Equal Employment Practices Act (EEPA), N.C.G.S. ch. 143, art. 49A (2001), and the Ordinance; (2) that BCBSNC wrongfully discharged plaintiff because she filed a charge of age discrimination with the HRC and the EEOC, in violation of North Carolina public policy as set forth in the EEPA and the Ordinance; (3) that BCBSNC discharged plaintiff because of her age, in violation of the Ordinance; and (4) that BCBSNC discharged plaintiff in retaliation for filing a complaint with the HRC in violation of the Ordinance.

BCBSNC removed the suit to the United States District Court for the Middle District of North Carolina, asserting that plaintiff's claims raised substantial questions of federal law. On 29 July 1999, the federal court remanded the case to Superior Court, Orange County, holding that because plaintiff had chosen to assert only state law claims, she was entitled to proceed in state court.

After the trial court on 1 November 1999 approved BCBSNC's motion to add a counterclaim, BCBSNC filed its amended answer and counterclaim. This new filing contained a declaratory judgment action (denominated as the counterclaim), asserting that the enabling legislation and the Ordinance violated Article II, Section 24(1)(j) of the North Carolina Constitution, which prohibits "any local, private, or special act or resolution . . . [r]egulating labor, trade, mining, or manufacturing." N.C. Const. art. II, § 24(1)(j). On 31 July 2000, BCBSNC filed a further amended answer and first amended counterclaim, adding a claim that the Ordinance denied BCBSNC equal protection of the law. Beginning on 6 November 2000, the trial court heard cross-motions for summary judgment. BCBSNC's motion was based upon a claim that the Ordinance's employment discrimination provisions were unconstitutional, while counterclaim defendants' motion argued that the Ordinance was constitutional in its entirety but that, even if it were not, BCBSNC was precluded from attacking the Ordinance based on the affirmative defenses of laches and the statute of limitations.

After hearing arguments and reviewing the parties' briefs, the trial court on 13 November 2000 entered an order declaring the employment provisions of the Ordinance to be in violation of Article II, Section 24 of the North Carolina Constitution, and in violation of the equal protection guarantees of the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. The trial court also enjoined counterclaim defendants from enforcing the unlawful employment discrimination provisions of the Ordinance as well as any civil rights investigations and civil actions thereunder. Pursuant to the request of counterclaim defendants, and with the consent of BCBSNC, the trial court on 23 January 2001 amended its order to certify its decision for interlocutory appeal under Rule 54(b) of the North Carolina Rules of Civil Procedure and section 1-277 of the North Carolina General Statutes. N.C. R. Civ. P. 54(b); N.C.G.S. § 1-277 (2001). Counterclaim defendants filed notice of appeal on 19 February 2001. This Court allowed discretionary review on 19 July 2001, prior to determination by the Court of Appeals pursuant to section 7A-31. N.C.G.S. § 7A-31 (2001).

As a preliminary matter, we observe that the only issues before us pertain to the employment provisions of the enabling legislation and the Ordinance. Because the parties had no occasion to brief or argue the constitutionality of the provisions of the enabling legislation and the Ordinance relating to housing and public accommodation and because the following analysis consequently focuses only on the employment provisions, we express no opinion as to the legality of any aspect of either the enabling legislation or the Ordinance unrelated to employment.

[1] We first consider whether the trial court erred in concluding that BCBSNC's declaratory judgment action against counterclaim defendants was not barred by the statute of limitations. Summary judgment may be granted in a declaratory judgment proceeding, *N.C. Farm Bureau Mut. Ins. Co. v. Briley*, 127 N.C. App. 442, 444, 491 S.E.2d 656, 657 (1997), *disc. rev. denied*, 347 N.C. 577, 500 S.E.2d 82 (1998), where "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). "When the statute of limitations is properly pleaded and the facts of the case are not disputed[,] resolution of the question becomes a matter of law and summary judgment may be appropriate." *Marshburn v. Associated Indem. Corp.*, 84 N.C. App. 365, 369, 353 S.E.2d 123, 126, *disc. rev. denied*, 319 N.C. 673, 356 S.E.2d 779 (1987).

Counterclaim defendants contend that summary judgment should have been granted because the claims of BCBSNC are barred by the statute of limitations. Their position is that the time period for BCBSNC's filing of a constitutional challenge to the Ordinance or the enabling legislation began to run on the date the enabling legislation or the Ordinance became effective, which was 28 June 1995 for the enabling legislation or 1 January 1996 for the Ordinance. Further, counterclaim defendants contend that the applicable statute of limitations for BCBSNC's action is three years based upon either N.C.G.S. § 1-52(2) or 1-52(5) and that BCBSNC failed successfully to file suit within that period because BCBSNC filed its counterclaim motion on 1 November 1999. We disagree, and for the reasons that follow, we affirm the trial court's granting of summary judgment in favor of BCBSNC as to this issue.

The general rule for claims other than malpractice is that a cause of action accrues as soon as the right to institute and maintain a suit

arises. *See* N.C.G.S. § 1-15(a) (2001); *Thurston Motor Lines, Inc. v. General Motors Corp.*, 258 N.C. 323, 325, 128 S.E.2d 413, 415 (1962). However, this Court has also recognized the "continuing wrong" or "continuing violation" doctrine as an exception to the general rule. *See Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N.C.*, 345 N.C. 683, 694-95, 483 S.E.2d 422, 429-30 (1997). When this doctrine applies, a statute of limitations does not begin to run until the violative act ceases. *See Virginia Hosp. Ass'n. v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989). "A continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation." *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981). To determine whether BCBSNC suffers from a continuing violation, we examine this case under a test that considers "[t]he particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged," as set out in *Cooper v. United States*, 442 F.2d 908, 912 (7th Cir. 1971). *See Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N.C.*, 108 N.C. App. 357, 368, 424 S.E.2d 420, 425 (utilizing the *Cooper* test to determine if a continuing violation exists), *aff'd per curiam*, 335 N.C. 158, 436 S.E.2d 821 (1993); *National Adver. Co. v. City of Raleigh*, 947 F.2d 1158, 1167 (4th Cir. 1991) (same), *cert. denied*, 504 U.S. 931, 118 L. Ed. 2d 593 (1992). In particular, we must examine the wrong alleged by BCBSNC to determine if the purported violation is the result of "continual unlawful acts," each of which restarts the running of the statute of limitations, or if the alleged wrong is instead merely the "continual ill effects from an original violation." *Ward v. Caulk*, 650 F.2d at 1147.

Our review of the record satisfies us that the alleged wrong here constitutes a continuing violation. To date, BCBSNC has been the subject of at least two lawsuits as well as numerous proceedings under the Ordinance. When the enabling legislation and the Ordinance were first enacted, BCBSNC was just another employer in Orange County to which these new laws applied; any harm to BCBSNC was both prospective and speculative. The alleged wrongs to BCBSNC became apparent only upon enforcement of the Ordinance through the filing of lawsuits and proceedings against BCBSNC. Thus, BCBSNC is not merely suffering the ill effects of a single alleged original wrong that accrued when the enabling legislation and the Ordinance were enacted. Instead, it has been subjected to a number of alleged wrongs through the application of the enabling legislation and the Ordinance. "[I]f the same alleged violation was committed at the time of each act, then the limitations

period begins anew with each violation . . . ." *Perez v. Laredo Junior Coll.*, 706 F.2d 731, 733 (5th Cir. 1983), *cert. denied*, 464 U.S. 1042, 79 L. Ed. 2d 172 (1984).

Counterclaim defendants cite several cases to support their position that the alleged wrong occurred upon enactment of the applicable laws and that any further wrong was no more than the ill effects of an original violation. *See Capital Outdoor Adver., Inc. v. City of Raleigh*, 337 N.C. 150, 164, 446 S.E.2d 289, 297 (1994) (where owner of outdoor advertising company challenged ordinance requiring amortization and ultimate removal of nonconforming signs, limitation period began on effective date of ordinance because "[i]t was on that precise date that the expected useful life of the plaintiffs' billboards was foreshortened"); *National Adver. Co. v. City of Raleigh*, 947 F.2d 1158 (where ordinance required that nonconforming signs be removed within five and one-half years, limitations period began to run when ordinance enacted because plaintiff advertiser was immediately on notice that his signs would have to be taken down at a time certain in the future); *Rozar v. Mullis*, 85 F.3d 556 (11th Cir. 1996) (where landfill placed in predominately African-American neighborhood, two-year statute of limitations applied to bar suit against county defendants because plaintiffs' injury accrued when county selected the landfill site at a public hearing, but did not bar suit against state defendants, who became involved only during the later permitting process). We believe that these cases are distinguishable from the case at bar. In both *Capital Outdoor Advertising* and *National Advertising Company*, the plaintiffs were provided notice at the moment the ordinances were passed that they would suffer a specific loss at a specific time. By contrast, BCBSNC had no certainty that it would run afoul of the Ordinance until the instant suit and companion suit were filed against it. *Rozar* involved a taking, in that the value of the plaintiffs' property would be diminished by the landfill. "This argument misapprehends the differences between a statute that effects a taking and a statute that inflicts some other kind of harm." *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993), *cert. denied*, 510 U.S. 1093, 127 L. Ed. 2d 217 (1994). In takings cases, there is a "single harm, measurable and compensable when the statute is passed." *Id.*

Unlike the cases cited by counterclaim defendants, the alleged wrong in the case at bar "is continuing, or does not occur until the statute is enforced—in other words, until it is applied." *Id.* According to BCBSNC, the suit brought by plaintiff here against BCBSNC, and a

companion case, were the first two lawsuits brought against an employer pursuant to the Ordinance. BCBSNC asserted a challenge to the constitutionality of the Ordinance nine months after plaintiff's lawsuit was filed and only four and a half months after this case was remanded from the federal district court. Similarly, BCBSNC sought to challenge the Ordinance eleven months after the companion lawsuit was filed. Thus, BCBSNC's action in the case at bar was brought well within any limitations period triggered by the suits and proceedings brought against it.

These assignments of error are overruled.

[2] We next address whether the trial court erred in concluding that BCBSNC's declaratory judgment action against counterclaim defendants was not barred by the equitable doctrine of laches. Like the statute of limitations, laches may be raised properly on a motion for summary judgment. *See Taylor v. City of Raleigh*, 290 N.C. 608, 622, 227 S.E.2d 576, 584 (1976); *Capps v. City of Raleigh*, 35 N.C. App. 290, 241 S.E.2d 527 (1978).

> In equity, where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim, the doctrine of laches will be applied. Hence, what delay will constitute laches depends upon the facts and circumstances of each case.

Teachey v. Gurley, 214 N.C. 288, 294, 199 S.E. 83, 88 (1938). Our review of this issue involves a three-part analysis:

> (1) Do the pleadings, affidavits and exhibits show any dispute as to the facts upon which [counterclaim] defendants rely to show laches on the part of plaintiffs [technically, defendants in this case]? (2) If not, do the undisputed facts, if true, establish plaintiffs' laches? (3) If so, is it appropriate that [counterclaim] defendants' motion for summary judgment, made under G.S. 1A-1, Rule 56(b), be granted?

Taylor v. City of Raleigh, 290 N.C. at 621, 227 S.E.2d at 584.

Here, counterclaim defendants contend that BCBSNC's delay in filing a constitutional challenge—almost five and a half years after the Ordinance was adopted and eight and a half years from the effective date of the enabling legislation—has caused a sufficient detrimental change in their position that laches should act as a bar to suit.

Counterclaim defendants argue that BCBSNC's delay in bringing the challenge, when considered along with the large amounts of money, time, and administrative effort expended in the creation and enforcement of the enabling legislation and the Ordinance, has caused it materially to change its position such that it would be prejudicial and unfair to allow BCBSNC's challenge to continue.

As detailed above, BCBSNC indicates in its brief that the suit at bar and the companion case were the first two lawsuits brought against an employer pursuant to the Ordinance. We have held " 'the mere passage or lapse of time is insufficient to support a finding of laches; for the doctrine of laches to be sustained, the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke it.' " *Id.* at 622-23, 227 S.E.2d at 584-85 (quoting 22 Am. Jur. 2d *Declaratory Judgments* § 78 (1965)). We do not discount the expense and good-faith effort expended by Orange County. Nevertheless, the record shows that BCBSNC moved expeditiously once these suits were filed against it. Accordingly, we believe that there was no unreasonable delay in bringing this challenge.

These assignments of error are overruled.

[3] We next consider whether the trial court erred in its holding that the employment discrimination provisions of the Ordinance and its enabling legislation violated Article II, Section 24 of the North Carolina Constitution. This section of the Constitution, entitled "Limitations on local, private, and special legislation," provides in pertinent part:

> (1) *Prohibited subjects.* The General Assembly shall not enact any local, private, or special act or resolution:
>
> . . . .
>
> (j) Regulating labor, trade, mining, or manufacturing;
>
> . . . .
>
> (3) *Prohibited acts void.* Any local, private, or special act or resolution enacted in violation of the provisions of this Section shall be void.

N.C. Const. art. II, § 24(1)(j), (3).

Counterclaim defendants argue that neither the enabling legislation nor the Ordinance is a local act under Article II, Section 24.

Further, counterclaim defendants contend that even if this Court determines that the enabling legislation and the Ordinance are local acts, they are not prohibited local acts because they seek to regulate *discrimination* (which is not a forbidden purpose) rather than labor or trade.

Our review of counterclaim defendants' argument is two-fold. First, we must determine whether the enabling legislation and the Ordinance are local acts as contended by BCBSNC or whether they are general laws as contended by counterclaim defendants. Second, if they are found to be local acts, we must determine whether the enabling legislation and the Ordinance regulate labor or trade. As we make this determination, we are aware that:

> It is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.

Glenn v. Board of Educ., 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936).

"A statute is either 'general' or 'local'; there is no middle ground." *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 656, 142 S.E.2d 697, 702 (1965). We have observed that "no exact rule or formula capable of constant application can be devised for determining in every case whether a law is local, private or special or whether general." *McIntyre v. Clarkson,* 254 N.C. 510, 517, 119 S.E.2d 888, 893 (1961). Consequently, since the enactment of Article II, Section 24 (originally Article II, Section 29, *see Smith v. County of Mecklenburg*, 280 N.C. 497, 506, 187 S.E.2d 67, 73 (1972)), we have set out alternative methods for determining whether a law is general or local. *See City of New Bern v. New Bern-Craven Cty. Bd. of Educ.*, 338 N.C. 430, 435-36, 450 S.E.2d 735, 738-39 (1994). In earlier decisions, we held that if the legislation impacted a majority of the counties, the law was general. *See State v. Dixon*, 215 N.C. 161, 165, 1 S.E.2d 521, 523 (1939). Later, we established what has become known as the "reasonable classification" test. *See McIntyre v. Clarkson*, 254 N.C. at 518-19, 119 S.E.2d at 894-95. This test considers how the law in question classifies the persons or places to which it applies. Pursuant to this test, the "[c]lassification must be reasonable and . . . must be based on a reasonable and tangible distinction and operate the same

on all parts of the state under the same conditions and circumstances." *Id.* at 519, 119 S.E.2d at 894. A law is deemed local

> where, by force of an inherent limitation, it arbitrarily separates some places from others upon which, but for such limitation, it would operate, where it embraces less than the entire class of places to which such legislation would be necessary or appropriate having regard to the purpose for which the legislation was designed, and where the classification does not rest on circumstances distinguishing the places included from those excluded.

Id. at 518, 119 S.E.2d at 894. On the other hand,

> the constitutional prohibition against local acts simply commands that when legislating in certain specified fields the General Assembly must make rational distinctions among units of local government which are reasonably related to the purpose of the legislation. A law is general if "any rational basis reasonably related to the objective of the legislation can be identified which justifies the separation of units of local government into included and excluded categories."

Adams v. N.C. Dep't. of Natural & Econ. Res., 295 N.C. 683, 691, 249 S.E.2d 402, 407 (1978) (quoting Joseph S. Ferrell, *Local Legislation in the North Carolina General Assembly*, 45 N.C. L. Rev. 340, 391 (1967)).

In *Town of Emerald Isle v. State*, 320 N.C. 640, 360 S.E.2d 756 (1987), we departed from the reasonable classification test enunciated in *Adams* where the act in question applied only to a site-specific portion of land on a particular beach. Instead, we applied a test that examined "the extent to which the act in question affects the general public interests and concerns," *id.* at 651, 360 S.E.2d at 763, because the reasonable classification test was "ill-suited to the question presented in [that] case, since by definition a particular public pedestrian beach access facility must rest in but one location," *id.* at 650, 360 S.E.2d at 762.

Our review of the various analyses for determining whether an act is local or general satisfies us that the reasonable classification test is most appropriate to the case at bar. While, in this case, the enabling legislation and the Ordinance allowing for the creation of a comprehensive civil rights ordinance apply only to Orange County, this legislation is not site-specific as in *Emerald Isle* be-

cause "[s]uch a legislated change could be effected as easily in [Orange County] as in any other [county] in the state." *City of New Bern v. New Bern-Craven Cty. Bd. of Educ.*, 338 N.C. at 436, 450 S.E.2d at 739. Consequently, the *Emerald Isle* analysis is inapplicable to this case.

Under a reasonable classification analysis, "the distinguishing factors between a valid general law and a prohibited local act are the related elements of reasonable classification and uniform application." *Adams v. N.C. Dep't. of Natural & Econ. Res.*, 295 N.C. at 690, 249 S.E.2d at 407. Legislative classification of conditions, persons, places, or things is reasonable when it is "based on [a] rational difference of situation or condition." *High Point Surplus Co. v. Pleasants*, 264 N.C. at 656, 142 S.E.2d at 702.

Based upon our earlier decisions, we must determine in this case whether the legislature had a rational basis to justify singling out Orange County through the enabling legislation, thereby allowing this one county to create its own civil rights ordinance enforcing particular employment rights of Orange County citizens. Phrased differently, we must determine whether the General Assembly should have granted Orange County the power, rationally based upon some situation unique to that county, to create and enforce additional employment rights beyond those accorded any other county in this state. Based upon our thorough review of the record, we determine that neither the enabling legislation passed by the legislature nor the Ordinance suggests any rational basis justifying treatment of Orange County differently from all other North Carolina counties as to those rights.

A history of the promulgation of Article II, Section 24 reveals:

> The organic law of the State was originally drafted and promulgated by a convention which met at Halifax in December, 1776. During the ensuing 140 years, the Legislature of North Carolina possessed virtually unlimited constitutional power to enact local, private, and special statutes. This legislative power was exercised with much liberality, and produced a plethora of local, private, and special enactments. As an inevitable consequence, the law of the State was frequently one thing in one locality, and quite different things in other localities. To minimize the resultant confusion, the people of North Carolina amended their Constitution at the general election of 1916 so as to deprive their Legislature of the power to enact local, private, or special

> acts or resolutions relating to many of the most common subjects of legislation.
>
> . . . .
>
> In thus amending their organic law, the people were motivated by the desire that the General Assembly should legislate for North Carolina in respect to the subjects specified as a single united commonwealth rather than as a conglomeration of innumerable discordant communities. To prevent this laudable desire from degenerating into a mere pious hope, they decreed in emphatic and express terms that "any local, private, or special act or resolution passed in violation of the provisions of this section shall be void."

Idol v. Street, 233 N.C. 730, 732-33, 65 S.E.2d 313, 314-15 (1951) (quoting N.C. Const. of 1868, art. II, sec. 29 (1917) (now Article II, Section 24, as previously noted); *see also* John V. Orth, *The North Carolina State Constitution: A Reference Guide* 89-90, 166-67 (1993).

A brief comparison of the Ordinance with the employment discrimination law applicable across North Carolina reveals that the enabling legislation and the Ordinance generate different law in one locality from that applicable to other localities within the state. First, the Ordinance creates in Orange County two additional protected categories of employment discrimination apparently found nowhere else in the state.[2] The Ordinance prevents Orange County employers with fifteen or more employees from discriminating because of "familial status" or "veteran status," Ordinance, art. IV, sec. 4.1(a)(1), at 9, classifications that are not found in either the EEPA or section 2000e-2 of title 42 of the United States Code, 42 U.S.C. § 2000e-2 (2000) ("Unlawful employment practices"). Second, a method for enforcing employment discrimination suits has been created in Orange County that exists nowhere else in North Carolina. Thus, in a single dispute involving one employee, an employer in Orange County may be investigated and sued by either the HRC or the EEOC.[3] In

2. We use the word "apparently" advisedly. The briefs indicate that the City of Durham and New Hanover County also have human relations commissions that enforce local employment discrimination ordinances. Those ordinances are not before us. However, even if their provisions mirror those of the Orange County Ordinance and create similar additional employment rights in the City of Durham and in New Hanover County, their existence in those limited locales does not affect our analysis that the enabling legislation and the employment provisions of the Orange County Ordinance constitute a local law.

3. We note that a plaintiff may always bring suit as an individual upon receipt of a right-to-sue letter.

other words, as acknowledged in deposition by the Director of the Orange County Department of Human Rights and Relations, such an Orange County employer can be compelled to respond to two different government investigations and suits. By contrast, an employer elsewhere in North Carolina may be subject to investigation by the EEOC or the North Carolina Department of Administration's Human Relations Commission, *see* N.C.G.S. § 143-422.3, but can only be sued through a federal claim brought by the EEOC.

Additionally, an employee working in Orange County may benefit from a longer statute of limitations for the raising of administrative claims than employees working in other counties. Employers in any county other than Orange may raise a statute of limitations defense if an employee fails to file a complaint with the EEOC within 180 days of the alleged unlawful act. *See* 42 U.S.C. § 2000e-5(e) (2000). In Orange County, however, by virtue of the Ordinance, an employer may not raise a statute of limitations defense unless the charge was filed after 300 days of the alleged act. *See id.*; *see also* 29 U.S.C. § 626(d)(2) (2000).

Similarly, the statute of limitations period for the filing of discrimination lawsuits differs between Orange County employers and employers elsewhere. A North Carolina employer not in Orange County may assert a statute of limitations defense against an employee who fails to file suit within ninety days of receiving a right-to-sue letter from the EEOC. *See* 42 U.S.C. § 2000e-5(f)(1); 29 U.S.C. § 626(e). In contrast, while the limitations period for EEOC complaints remains the same, an employer in Orange County may not assert a statute of limitations defense for discrimination claims filed under the Ordinance unless the employee fails to file suit one year after receiving a right-to-sue notice from the HRC. Ordinance, art. X, at 54.

In addition, there is no evidence in the record to suggest that employment practices in Orange County differ in any significant way from the employment practices in other North Carolina counties. Consequently, we are unable to conclude that conditions in Orange County alone are suspect to such an extent that the legislature legally could create a separate classification to address employment discrimination in that county only. *See City of New Bern v. New Bern-Craven Cty. Bd. of Educ.*, 338 N.C. at 438, 450 S.E.2d at 740 (no rational basis to separate New Bern from other cities for special legislative attention regarding the designation of an appropriate inspection department); *Smith v. County of Mecklenburg*, 280 N.C. at

507-08, 187 S.E.2d at 74 (no particular features in Mecklenburg and Moore Counties that differentiate them from other counties with reference to the right of their citizens to decide whether to have liquor by the drink); *High Point Surplus Co. v. Pleasants*, 264 N.C. at 657, 142 S.E.2d at 703 (no reasonable distinction to demonstrate that a Sunday observance law is more necessary for the welfare of Wake County than other counties); *Treasure City of Fayetteville, Inc. v. Clark*, 261 N.C. 130, 134-35, 134 S.E.2d 97, 100-01 (1964) (no reasonable basis to exempt certain counties from Sunday closing statute than other counties); *McIntyre v. Clarkson*, 254 N.C. at 524-25, 119 S.E.2d at 898 (no reasonable and distinctive feature to allow certain counties to have different laws regarding the appointment of justices of the peace). Based on all the considerations set out above, we hold that the employment provisions of the enabling legislation and the Ordinance are local laws.

Counterclaim defendants contend that the creation and implementation of the Ordinance was the fruit of countless hours of thorough research regarding discrimination in Orange County. We do not doubt the difficult and well-intentioned labor that has been expended in the planning and implementation of this employment rights program, nor do we question the commendable motives behind Orange County's effort to expunge as many vestiges of discrimination as is humanly possible. Our role, however, is to determine whether the method employed by Orange County comports with the Constitution of North Carolina. Any local, private, or special act or resolution enacted in violation of Article II, Section 24 shall be void, "no matter how praiseworthy or wise [its provisions] may be." *Idol v. Street*, 233 N.C. at 733, 65 S.E.2d at 315.

> It was the purpose of [Article II, Section 24] to free the General Assembly from the enormous amount of petty detail which had been occupying its attention, to enable it to devote more time and attention to general legislation of statewide interest and concern, to strengthen local self-government by providing for the delegation of local matters by *general laws* to local authorities, and to require uniform and coordinated action under general laws on matters related to the welfare of the whole State.

High Point Surplus Co. v. Pleasants, 264 N.C. at 656, 142 S.E.2d at 702. Therefore, if the General Assembly should undertake to address employment discrimination by means of a state statute, Article II, Section 24 requires that it enact either a statewide law applicable to employers and their employees regardless of where they reside

within the state or a general law that makes reasonable classifications based upon rational differences of circumstances. That process was not followed here. Upholding the particularized laws in this case could lead to a balkanization of the state's employment discrimination laws, creating a patchwork of standards varying from county to county. The end result would be the "conglomeration of innumerable discordant communities" that Article II, Section 24 was enacted to avoid. *Id.* at 732, 65 S.E.2d at 315.

[4] Having determined that the enabling legislation and the Ordinance are local laws, we next must consider whether they regulate labor or trade. Previously, this Court has adopted the definition of to "regulate" as " 'to govern or direct according to rule; . . . to bring under the control of law or constituted authority.' " *State v. Gulledge*, 208 N.C. 204, 208, 179 S.E. 883, 886 (1935) (quoting *Webster's New International Dictionary* 2099 (2d ed. 1935)), *quoted in Cheape v. Town of Chapel Hill*, 320 N.C. 549, 559, 359 S.E.2d 792, 798 (1987). "Labor" has been defined as "compensated employment," *State v. Chestnutt*, 241 N.C. 401, 403, 85 S.E.2d 297, 299 (1955), and "trade" has been defined as "a business venture for profit and includes any employment or business embarked in for gain or profit," *High Point Surplus Co. v. Pleasants*, 264 N.C. at 655-56, 142 S.E.2d at 702. After reviewing the record, we believe the enabling legislation and the Ordinance regulate labor in Orange County.

As noted above, counterclaim defendants contend that the acts seek only to regulate discrimination, not labor or trade. However, the record demonstrates that while the intent of the enabling legislation and the Ordinance is to prohibit discrimination in the workplace, the effect of these enactments is to govern the labor practices of "person[s] engaged in an industry affecting commerce who has 15 or more employees" in Orange County. Numerous aspects of the employer/employee relationship fall within the ambit of the Ordinance, from hiring through resignation, retirement, or termination. The Ordinance requires covered employers to conduct their internal practices pursuant to the requirements of the Ordinance or face the possibility of civil suit by either an employee or the HRC. By seeking to curb unlawful discrimination by regulating covered employers, the enabling legislation and the Ordinance have the practical effect of regulating labor, as forbidden by Article II, Section 24.

In their briefs and at oral argument, the parties discussed the enabling legislation and the Ordinance in terms of trade. Although

our conclusion that the acts regulate labor is dispositive as to this issue, we believe that they regulate trade as well. Most of the employers affected by the Ordinance are businesses operated for gain or profit. Regulation of these employers has the practical effect of regulating trade. *See Smith v. County of Mecklenburg*, 280 N.C. at 509, 187 S.E.2d at 75 (statute authorizing an election in Mecklenburg County to determine whether liquor by the drink could be sold under rules and regulations created by the local county board was determined to be a regulation of trade); *High Point Surplus Co. v. Pleasants*, 264 N.C. at 656-57, 142 S.E.2d at 702-03 (local ordinance and statute that excepted forty-eight counties from its operation of establishing Sunday sales laws was determined to be a regulation of trade); *Orange Speedway, Inc. v. Clayton*, 247 N.C. 528, 533, 101 S.E.2d 406, 410 (1958) (statute that forbade the holding of motorcycle or automobile races on Sunday in Orange County was determined to be a regulation of trade).

[5] Counterclaim defendants also argue that the enabling legislation does not "directly" regulate trade or labor because the legislation merely gives Orange County the option of adopting an employment discrimination ordinance. Therefore, counterclaim defendants claim that "permissive" legislation, such as the enabling legislation, does not violate Article II, Section 24 in this case. Even though we have concluded that the enabling legislation and the Ordinance regulate labor, we address this argument because its validity is not dependent on the purpose for which the local law was passed. In other words, if the legislation as passed is valid because it is "permissive," it does not matter that the purpose of the act is to regulate labor as opposed to trade.

In *High Point Surplus Company*, this Court determined that legislation enabling fifty-two counties to prohibit sales on Sunday while excepting the remaining forty-eight counties was an unconstitutional local law regulating trade. *High Point Surplus Co. v. Pleasants*, 264 N.C. at 656-57, 142 S.E.2d at 702-03. The legislation did not mandate that the fifty-two counties prohibit sales, but instead enabled the local board of commissioners of these fifty-two counties to make such determinations applicable to the incorporated towns and cities within the counties, so long as each town's or city's governing body by resolution agreed to such regulation. *Id.* at 653-54, 142 S.E.2d at 700. The defendant-appellees in *High Point Surplus Company* sought to distinguish the Sunday sales legislation from our decision in *Treasure City of Fayetteville, Inc. v. Clark*, 261 N.C. 130, 134

S.E.2d 97, by pointing out that the statute in *Treasure City* involved a mandatory Sunday closing law, "whereas [this statute] is permissive and takes effect only when invoked by action of the county commissioners of an included county." *High Point Surplus Co. v. Pleasants*, 264 N.C. at 657, 142 S.E.2d at 703. We were unpersuaded by this argument because "[a] statute's validity must be judged not by what has actually been done under it but by what is possible under it." *Id.*; *see also State v. Smith*, 265 N.C. 173, 143 S.E.2d 293 (1965) (statute authorizing the Forsyth County Board of Commissioners, after adoption by resolution, to regulate the operation of dance clubs or pool halls near a church or school held to be unconstitutional local act regulating trade); *McIntyre v. Clarkson*, 254 N.C. 510, 119 S.E.2d 888 (permissive statute that enables county commissioners, upon approval by county resolution, to determine the number of justices of the peace to be appointed held to be unconstitutional local and special law); *Food Fair, Inc. v. City of Henderson*, 17 N.C. App. 335, 194 S.E.2d 213 (1973) (permissive statute that authorized the governing bodies of three counties to refuse to issue license for the sale of wine within corporate limits held to be an unconstitutional local act regulating trade). Accordingly, counterclaim defendants' argument that the purportedly permissive nature of the enabling legislation renders it valid is unpersuasive. We hold that this legislation, by giving the power to Orange County to enact the employment legislation, is invalid, whether or not Orange County had chosen to act on that power.

[6] Finally, counterclaim defendants argue that, even if the enabling legislation is unconstitutional, Orange County possesses the inherent authority to pass the employment discrimination Ordinance at bar. They cite section 153A-121(a), which gives a county the power to enact ordinances that "define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county," N.C.G.S. § 153A-121(a), and section 160A-174, which provides that "[t]he fact that a State or federal law, standing alone, makes a given act, omission, or condition unlawful shall not preclude city ordinances requiring a higher standard of conduct or condition," N.C.G.S. § 160A-174 (2001).[4] However, under the Ordinance, a citizen is given subpoena

4. Counterclaim defendants also cite to N.C.G.S. § 153A-4 ("Broad construction"), N.C.G.S. § 153A-123 ("Enforcement of ordinances"), and N.C.G.S. § 153A-134 ("Regulating and licensing businesses, trades, etc."). We do not interpret any of these statutes as providing Orange County with the authority to enact its own comprehensive employment rights law.

power and the right to sue, even in the absence of finding of cause by the HRC. Under the Ordinance, the citizen may seek an injunction against an employer and may recover back pay and compensatory and punitive damages. By creating a civil relationship and concomitant private cause of action by one citizen against another, the Ordinance goes far beyond merely "requiring a higher standard of conduct or condition." Such a new and independent framework for litigation substantially exceeds the leeway permitted to individual counties by these statutes. Consequently, we are satisfied that Orange County's employment discrimination Ordinance is not saved by these statutory provisions.

In this analysis, as before, we are addressing only the employment discrimination provisions of the Ordinance. Aspects of the Ordinance dealing with housing and public accommodation, including such matters as any enforcement mechanisms and remedies available under those portions of the Ordinance, are not before us, and we express no opinion as to whether Orange County possessed inherent authority to address these areas.

These assignments of error are overruled.

Because we hold that the enabling legislation and the Ordinance violate Article II, Section 24 of the North Carolina Constitution, we need not address the additional assignments of error as to whether the acts are violative of equal protection under the federal and state Constitutions. Based upon the foregoing, we hold that the trial court did not err in concluding that the enabling legislation and the Ordinance pertaining to employment discrimination are unconstitutional acts.

AFFIRMED.

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

DANIEL FABRICIO ROSERO v. LISA BLAKE

No. 322A02

(Filed 13 June 2003)

Child Custody, Support, and Visitation— custody—illegitimate child—common law presumption abrogated

The trial court did not err by awarding custody of an illegitimate child to plaintiff father based on the best interest of the child standard, because the common law rule that custody of an illegitimate child presumptively vests in the mother has been abrogated by changes in statutory law, including that: (1) N.C.G.S. § 50-13.2(a) provides that absent a showing that the biological or adoptive parents are unfit, that they have otherwise neglected their children's welfare, or that some other compelling reason exists, the paramount rights of both parents to the companionship, custody, or care and control of their minor child must prevail; (2) N.C.G.S. § 29-19(b)(2) and (c) provides that illegitimate children today are entitled to inherit from their fathers and his relatives, and the fathers would be entitled to inherit from their children, even though they have not been legitimated; (3) N.C.G.S. § 48-3-601(2)(b) provides that the consent of illegitimate children's fathers who acknowledged paternity is required for their adoption; and (4) N.C.G.S. § 110-132(a) provides another method for formal acknowledgment of paternity even though the father may not have pursued legitimation procedures.

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. 250, 563 S.E.2d 248 (2002), reversing and remanding an order for permanent custody entered 2 January 2001, *nunc pro tunc* 12 December 2000, by Judge Anne Salisbury in District Court, Wake County. On 15 August 2002, the Supreme Court allowed plaintiff's petition for discretionary review of additional issues. Heard in the Supreme Court 10 March 2003.

Kathleen Murphy for plaintiff-appellant.

Sally H. Scherer for defendant-appellee.

The Sandlin Law Firm, by Deborah Sandlin, on behalf of the North Carolina Academy of Trial Attorneys, amicus curiae.

BRADY, Justice.

The questions presented for review are whether the North Carolina common-law rule that custody of an illegitimate child presumptively vests in the mother has been abrogated by statutory and case law and whether that presumption violates the federal and state Constitutions. We conclude that the common-law rule has been abrogated by statute, and accordingly, we reverse the decision of the Court of Appeals.

The parties to this action are the natural parents of Kayla Alexandria Rosero, born 20 March 1996. Following brief sexual encounters between the parties in 1995, plaintiff, Kayla's father, moved to the state of Oklahoma, where he resided at the time of Kayla's birth. Kayla's mother, defendant, resided at all times in North Carolina with Kayla and Kayla's two older, half brothers. The parties were never married to each other.

Upon being informed of Kayla's birth, first by defendant and then by the Wake County Child Support Enforcement Agency, plaintiff submitted to a blood test, which proved that he was Kayla's father. Plaintiff acknowledged paternity on 3 March 1997 by signing a "Father's Acknowledgment of Paternity" prepared pursuant to N.C.G.S. § 110-132(a), and an "Order of Paternity" was subsequently entered pursuant to the acknowledgment. Plaintiff agreed to and began providing support for Kayla without a court order. Plaintiff has never legitimated Kayla pursuant to N.C.G.S. § 49-10 or sought a judicial determination of paternity as provided for in N.C.G.S. § 49-14.

Kayla continued to reside with defendant in North Carolina but visited regularly with plaintiff and his wife in Oklahoma. Defendant maintained a relationship with Clea Johnson, the father of her other children, and Kayla also became close to Johnson, calling him "daddy Clea." Defendant worked rotating shifts at a local medical facility, and as a result, Kayla often spent nights and weekends with defendant's mother and grandmother. Defendant's mother worked at the day care attended by Kayla.

Kayla's visits with her father in Oklahoma consisted of long weekends. Defendant flew with Kayla to meet plaintiff in Oklahoma, facilitating the minor child's visits with her father. On three or four occasions, Kayla visited with her father two weeks at a time. Plaintiff also visited Kayla in North Carolina and kept in contact with her through telephone calls and other correspondence.

On 22 March 2000, shortly after Kayla's fourth birthday, plaintiff initiated the present action for primary custody of his minor child, alleging that awarding him custody was in her best interest. Defendant answered plaintiff's allegations and filed a counterclaim for primary custody. According to defendant, she should retain primary custody, as it is in Kayla's best interest to remain in North Carolina and in the environment to which she had become accustomed. Four and one-half months after initiating the custody proceeding, but prior to a hearing, plaintiff and his wife moved to North Carolina and continued regular visits with the child.

Upon hearing testimony and arguments from both parties, the trial court awarded primary custody to plaintiff. In an order entered 2 January 2001, signed *nunc pro tunc* 12 December 2000, the court concluded that, although both parents were fit and proper, it was in Kayla's best interest that she be placed in plaintiff's primary custody. The court found support in its conclusion in the stable and structured life provided by plaintiff and his wife, a person with whom Kayla had developed a loving relationship. The trial court noted that, in contrast to the environment created by plaintiff, defendant's social life and work schedule created a "hectic household" that did not meet the child's needs for stability and consistency. Defendant appealed the order for permanent custody.

During the pendency of defendant's appeal, plaintiff took physical custody of Kayla, and in turn, defendant filed a motion for a protective order with the trial court. The trial court denied the motion for a protective order.

On 21 May 2002, a divided panel of the Court of Appeals reversed the trial court's order awarding custody to plaintiff and remanded the case for a new hearing consistent with its opinion. *Rosero v. Blake*, 150 N.C. App. 250, 563 S.E.2d 248 (2002). The Court of Appeals began by concluding that the trial court did not err in refusing to grant the protective order. *Id.* at 254, 563 S.E.2d at 251. Relevant to our review, the Court of Appeals further concluded that, in awarding custody to plaintiff based upon what was in Kayla's best interest, the trial court ignored the common-law presumption that custody of an illegitimate child should be awarded to the mother, absent a showing that she is unfit or otherwise unable to care for the minor child. *Id.* at 260, 563 S.E.2d at 255. Judge Ralph Walker concurred in part and dissented in part with a separate opinion. Judge Walker found no error in the trial court's application of the best interest of the child standard because it was his belief that the common-law presumption in favor of the

mother had been abrogated by statute. *Id.* at 262, 563 S.E.2d at 256 (Walker, J., concurring in part and dissenting in part). Judge Walker also concluded that the case should be remanded for more detailed findings, as the trial court's findings were not supported by competent evidence. *Id.* at 266, 563 S.E.2d at 258 (Walker, J., concurring in part and dissenting in part).

The case is now before this Court pursuant to plaintiff's appeal of right based upon Judge Walker's dissent and plaintiff's petition for discretionary review of an additional issue allowed by this Court.

We find it appropriate to begin with a brief background into the common-law presumption giving rise to plaintiff's appeal. Under early North Carolina common law, an illegitimate child was *nullius filius*, meaning that the child had "no father known to the law, no distinction being made between a reputed father and an admitted father." *Allen v. Hunnicutt*, 230 N.C. 49, 50, 52 S.E.2d 18, 19 (1949). Thus, custody of an illegitimate child was to be presumptively awarded to the mother unless she was deemed unsuitable. *See, e.g.*, *Jolly v. Queen*, 264 N.C. 711, 713, 142 S.E.2d 592, 595 (1965); *Browning v. Humphrey*, 241 N.C. 285, 287, 84 S.E.2d 917, 918-19 (1954); *In re Shelton*, 203 N.C. 75, 79, 164 S.E. 332, 334 (1932). This well-established presumption in favor of the child's mother could be rebutted by the putative father only if he proved that "the mother, by reason of character or special circumstances, is unfit or unable to have the care of her child and that, for this reason, the welfare, or best interest, of the child overrides [the mother's] paramount right to custody." *Jolly*, 264 N.C. at 714, 142 S.E.2d at 595. The presumption dates back to pre-America England, where "[b]etween the father and the mother . . . , the latter seems to have the prior claim; for if the father obtain[ed] the custody surreptitiously, the king's bench w[ould] make him restore it." *Moritz v. Garnhart*, 7 Watts 302, 303 (Pa. 1838) (citation omitted). The mother's paramount right to custody was based upon the "frequent doubt as to the child's father, and [the fact] that the mother, nearest in interest and affection to the child, w[ould] best promote its welfare." *Wall v. Hardee*, 240 N.C. 465, 466, 82 S.E.2d 370, 372 (1954); *see also Moritz*, 7 Watts at 303 ("Though [a child born out of wedlock] be not looked upon as a child for any civil purpose, the ties of nature are respected in regard to its maintenance.").

The North Carolina General Statutes provide that common law, "which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, [is] hereby declared to be

in full force within this [s]tate." N.C.G.S. § 4-1 (2001) (last amended in 1778). Thus, because the common-law presumption recognizing a preference for maternal custody of an illegitimate child had not been abrogated, a putative father was on unequal footing with the mother unless he had the child statutorily legitimated either through a legitimacy proceeding as provided for by N.C.G.S. § 49-10 or through subsequent marriage to the child's mother pursuant to N.C.G.S. § 49-12. *See* N.C.G.S. § 49-11 (2001) ("The effect of legitimation . . . shall be to impose upon the father and mother all of the lawful parental privileges and rights, as well as all of the obligations which parents owe to their lawful issue, and to the same extent as if said child had been born in wedlock . . . .").

In 1955, this Court held that a putative father was a "parent" as defined by North Carolina's general custody statute in effect at that time, N.C.G.S. § 50-13 (1950) (repealed 1967), and therefore had a right to maintain an action for custody of his illegitimate child under that statute.[1] *Dellinger v. Bollinger*, 242 N.C. 696, 699, 89 S.E.2d 592, 594 (1955) ("Certainly [N.C.G.S. § 50-13] is sufficiently broad and comprehensive to include this proceeding which is a controversy respecting the custody of a child."). Although a putative father could *maintain* an action for custody under N.C.G.S. § 50-13, this Court confirmed, as late as 1965, that to be awarded custody, the putative father must still overcome the common-law presumption for awarding custody in favor of the mother. In *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965), a mother sought to retain custody of her illegitimate child under circumstances remarkably similar to those existing in the present case. The father in *Jolly* had held his illegitimate child out as his son, had cared for the child, and had provided for him. However, the father failed to have the child legitimated.

This Court reversed the trial court's award of custody to the putative father based upon the trial court's finding that such an award was in the child's best interest. *Id.* at 716, 142 S.E.2d at 596. In so doing, this Court referenced the maternal-preference presumption, noting

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1. N.C.G.S. § 50-13 provided for a custody proceeding pursuant to a divorce. In 1949, the General Assembly amended the statute to include not only custody actions arising out of divorce proceedings, but also "controversies respecting the custody of children not provided for by . . . G.S. 17-39." Act of Apr. 15, 1949, ch. 1010, sec. 1, 1949 N.C. Sess. Laws 1148, 1148. N.C.G.S. § 17-39, as found in the 1953 edition of our General Statutes, provided *habeas corpus* relief to determine custody where husband and wife were living separate and apart. 3 Robert E. Lee, *North Carolina Family Law* § 222 (3d ed. 1963) [hereinafter Lee's *Family Law*]. Both N.C.G.S. § 17-39 and § 50-13 were repealed in 1967. Act of July 6, 1967, ch. 1153, sec. 1, 1967 N.C. Sess. Laws 1772, 1772.

that when confronted with a similar situation in the past, the Court was not " 'presented with convincing authority' " to sustain a trial court's conclusion that the best interest of an illegitimate child would be served by placing it with the father. *Id.* at 715, 142 S.E.2d at 595 (quoting *In re Care & Custody of McGraw*, 228 N.C. 46, 47, 44 S.E.2d 349, 350 (1947)). The Court went on to emphasize the following:

> In this case [the putative father] has taken no steps to legitimate the son whose custody he now claims. Therefore, under our intestacy laws, the child cannot inherit from his father or his father's relatives. Should [the putative father] die, [his wife], of course, would have no legal obligation to the boy. The child and his lineal descendants can take "by, through and from his mother and his other maternal kindred, both descendants and collaterals, and they are entitled to take from him." G.S. 29-19. Should [the mother] and her husband desire that he adopt the [child], [the father's] consent would be unnecessary. The child's domicile is that of his mother . . . . The only legal right which the boy can enforce against his putative father is provided by Gen. Stats., ch. 49, art. I.[2] But this article is not primarily to benefit illegitimate children but to prevent them from becoming public charges.

Jolly, 264 N.C. at 715, 142 S.E.2d at 595-96 (citations omitted).

The Court in *Jolly* envisioned a derogation to parents' paramount right to custody of their children by sustaining a finding that the *Jolly* child's best interest would be served by placing him with his father, a person with whom the child had no legal relationship. According to the Court,

> a judge might find it to be in the best interest of a legitimate child of poor but honest, industrious parents, who were providing him with the necessities, that his custody be given to a more affluent neighbor or relative who had no child and desired him. Such a

2. At the time this Court decided *Jolly*, N.C.G.S. §§ 49-1 to -9 provided the exclusive remedy for collecting financial support for an illegitimate child. Pursuant to sections 49-1 to -9, a criminal action could be brought in the name of the state against a reputed father for his willful negligence to support his illegitimate child. 2 Lee's *Family Law* § 177. Violation of the statute was punishable as a misdemeanor, and, upon finding a violation, the judge was to set an amount of support to be paid by the father. *Id.* Any benefit to the child was incidental to the statute's purpose, which was to prevent illegitimate children "from becoming public charges." *Allen*, 230 N.C. at 51, 52 S.E.2d at 19. Those same provisions, with subsequent modifications, still govern criminal actions for nonsupport of illegitimate children today. *See* N.C.G.S. § 49-1 to -9 (2001).

finding, however, could not confer a right as against such parents who had not abandoned their child, even though they had permitted him to spend much time in the neighbor's home. In other words, the parents' paramount right to custody would yield only to a finding that they were unfit custodians because of bad character or other, special circumstances. So it is with the paramount right of an illegitimate[child's] mother.

Id. at 715-16, 142 S.E.2d at 596.

It is against this background that we consider the dispositive issue for which plaintiff appealed of right to this Court: Whether the North Carolina common-law rule that custody of an illegitimate child presumptively vests in the mother has been abrogated by statutory and case law. Concluding that the presumption no longer exists as law in this state, we reverse the Court of Appeals' decision to the contrary for the reasons stated below.

There is no question that the landscape of our law governing child custody, the rights of unwed fathers, and the rights of illegitimate children changed dramatically beginning shortly after our 1965 decision in *Jolly*. In 1967, our General Assembly repealed all prior statutes governing the custody of minor children and enacted N.C.G.S. § 50-13.1 to -13.8, a statutory scheme under which all child custody actions are now to be brought. Ch. 1153, secs. 1-2, 1967 N.C. Sess. Laws at 1772-77; *see also Oxendine v. Catawba Cty. Dep't of Soc. Servs.*, 303 N.C. 699, 706, 281 S.E.2d 370, 374 (1981) (noting that although section 50-13.1 is contained within that portion of our General Statutes governing divorce and alimony, its application was not to be restricted to custody disputes within the context of separation or divorce). N.C.G.S. §§ 50-13.1 to -13.8 were enacted "to eliminate conflicting and inconsistent custody statutes and to replace them with a comprehensive act governing all custody disputes." *Oxendine*, 303 N.C. at 706, 281 S.E.2d at 374. When enacted, N.C.G.S. § 50-13.2 directed the trial courts to award custody based upon what "will best promote the interest and welfare of the child." Ch. 1153, sec. 2, 1967 N.C. Sess. Laws at 1772 (adopting the text still contained in N.C.G.S. § 50-13.2(a), (b)). Significant to our discussion here, the legislature further amended N.C.G.S. § 50-13.2 in 1977 to provide: "[B]etween the mother and father, whether natural or adoptive, there is no presumption as to who will . . . better promote the interest and welfare of the child." Act of June 8, 1977, ch. 501, sec. 2, 1977 N.C. Sess. Laws 582, 582-83 (amending subsection 50-13.2(a)) (The relevant portion of the current version of the statute provides the fol-

lowing: "Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child.").

During the same year that the General Assembly enacted N.C.G.S. §§ 50-13.1 to -13.8, it adopted N.C.G.S. §§ 49-14, -15, and -16, abrogating common law to allow an illegitimate child's father to bring a judicial action establishing paternity. 3 Robert E. Lee, *North Carolina Family Law* § 251 (Supp. 1976). N.C.G.S. § 49-15, which has not been amended since its enactment in 1967, provides as follows:

> Upon and after the establishment of paternity of an illegitimate child pursuant to G.S. 49-14, the rights, duties, and obligations of the mother and the father so established, with regard to support and custody of the child, shall be the same, and may be determined and enforced in the same manner, as if the child were the legitimate child of such father and mother.

N.C.G.S. § 49-15 (2001).

Soon after the enactment of and subsequent modifications to sections 50-13.1 to -13.8 and sections 49-14 to -16, our appellate courts acknowledged the legal consequences that followed therefrom. Notably, a 1974 decision by the Court of Appeals indicated that the common-law presumption for awarding custody of illegitimate children to their mothers had been abrogated. In *Conley v. Johnson*, 24 N.C. App. 122, 210 S.E.2d 88 (1974), the Court of Appeals affirmed a trial court's award of visitation of an illegitimate child to her father based upon what was in the child's best interest. The trial court in *Conley* found that the plaintiff, who alleged that he was the child's father and had been previously ordered to pay child support in criminal court, was indeed the child's father and was "a fit, suitable and proper person to have reasonable visitation privileges." *Id.* at 123, 210 S.E.2d at 89. The mother appealed.

The Court of Appeals in *Conley* acknowledged that the mother's challenge to the trial court's award of visitation was based upon common law that dictated that an illegitimate child's father was not entitled to visitation unless visitation was consented to by the mother. *Id.* The court, however, citing *Dellinger*, 242 N.C. 696, 89 S.E.2d 592, and N.C.G.S. §§ 50-13.1 to -13.2 and 49-14 to -16, noted its belief that the common law had been abrogated by case and statutory law. *Conley*, 24 N.C. App. at 123-24, 210 S.E.2d at 89. The Court of Appeals concluded that the illegitimate child's father was entitled to all rights,

duties, and obligations as was a parent under North Carolina statutes governing custody disputes. *Id.* at 124, 210 S.E.2d at 89-90. The court reasoned that if the father would be entitled to custody under section 50-13.1, surely he would be entitled to visitation. *Id.* at 124, 210 S.E.2d at 90.

In addition to those legislative changes acknowledged by the Court of Appeals in *Conley*, our General Assembly has continually enacted and modified legislation to establish legal ties binding illegitimate children to their biological fathers and to acknowledge the rights and privileges inherent in the relationship between father and child. These provisions operate even where the father acknowledges paternity but fails to have his child judicially legitimated or to seek a judicial determination of paternity. *See, e.g.*, N.C.G.S. § 7B-1111(a)(5) (2001) (providing that parental rights of an illegitimate child's biological father cannot be terminated where the father has established or acknowledged paternity based upon any one of four enumerated methods); N.C.G.S. § 31-5.5 (2001) (entitling afterborn illegitimate children to devises under biological father's will); N.C.G.S. § 49-12.1 (2001) (allowing the putative father to legitimate his biological child, born to a mother married to another man, thus rebutting the well-established presumption that the child is the offspring of the other man); N.C.G.S. § 97-2(12) (2001) (granting "acknowledged" illegitimate children benefits pursuant to our workers' compensation laws); N.C.G.S. § 143-166.2(a) (2001) (including illegitimate children in the definition of "dependent child" for the purpose of allowing them to receive death benefits if their fathers were employed as North Carolina law enforcement officers, firemen, or rescue squad employees).

The General Assembly has also provided a method by which putative fathers may formally acknowledge illegitimate children without initiating legitimation proceedings or judicial determinations of paternity. At the time plaintiff formally acknowledged his paternity, N.C.G.S. § 110-132(a)[3] provided, in pertinent part:

3. The Court of Appeals cited to a version of N.C.G.S. § 110-132(a) appearing in the 1999 edition of our General Statutes. *Rosero*, 150 N.C. App. at 259, 563 S.E.2d at 255; *see also* N.C.G.S. § 110-132(a) (1999) (amended 2001). The 1999 version of N.C.G.S. § 110-132(a) contained amendments from the 1997 session of the General Assembly, which included that portion of the statute that now allows for rescission. Act of Aug. 19, 1997, ch. 433, sec. 4.7, 1997 N.C. Sess. Laws 1275, 1285-86. Because the 1997 amendments did not become effective until October 1997, *see* ch. 433, sec. 11.3, 1997 N.C. Sess. Laws at 1316, it appears that the version cited by the Court of Appeals included the allowance for rescission and was not applicable to plaintiff, who acknowledged his paternity in April of 1997. Thus, the version of the statute contained in the

> In lieu of or in conclusion of any legal proceeding instituted to establish paternity, the written acknowledgment of paternity executed by the putative father of the dependent child when accompanied by a written affirmation of paternity executed and sworn to by the mother of the dependent child . . . shall have the same force and effect as a judgment . . . .

N.C.G.S. § 110-132(a) (Supp. 1990) (amended 1997 and 2001).[4]

1990 cumulative supplement of our General Statutes is the version that we note as being applicable to plaintiff.

4. N.C.G.S. § 110-132(a), with recent additions underlined and omissions stricken, now provides:

> **§ 110-132 ~~Acknowledgment~~ Affidavit of ~~paternity~~ parentage and agreement to support.**
>
> (a) In lieu of or in conclusion of any legal proceeding instituted to establish paternity, the written ~~acknowledgment~~ affidavits of ~~paternity~~ parentage executed by the putative father ~~of the dependent child when accompanied by a written affirmation of paternity executed~~ and ~~sworn to by~~ the mother of the dependent child ~~and filed with and approved by a judge of the district court in the county where the mother of the child resides or is found, or in the county where the putative father resides or is found, or in the county where the child resides or is found~~ shall constitute an admission of paternity and shall have the same ~~force and~~ legal effect as a judgment of ~~that court; and a~~ paternity for the purpose of establishing a child support obligation, subject to the right of either signatory to rescind within the earlier of:
>
> (1) 60 days of the date the document is executed, or
>
> (2) The date of entry of an order establishing paternity or an order for the payment of child support.
>
> In order to rescind, a challenger must request the district court to order the rescission and to include in the order specific findings of fact that the request for rescission was filed with the clerk of court within 60 days of the signing of the document. The court must also find that all parties, including the child support enforcement agency, if appropriate, have been served in accordance with Rule 4 of the North Carolina Rules of Civil Procedure. In the event the court orders rescission and the putative father is thereafter found not to be the father of the child, then the clerk of court shall send a copy of the order of rescission to the State Registrar of Vital Statistics. Upon receipt of an order of rescission, the State Registrar shall remove the putative father's name from the birth certificate. In the event that the putative father defaults or fails to present or prosecute the issue of paternity, the trial court shall find the putative father to be the biological father as a matter of law.
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> After 60 days have elapsed, execution of the document may be challenged in court only upon the basis of fraud, duress, mistake, or excusable neglect. The burden of proof shall be on the challenging party, and the legal responsibilities, including child support obligations, of any signatory arising from the executed documents may not be suspended during the challenge except for good cause shown.

The above-noted statutory changes to our family-law jurisprudence follow or are reflective of many decisions from this Court and the United States Supreme Court. These decisions acknowledge that, *absent a showing that the biological or adoptive parents are unfit*, that they have otherwise neglected their children's welfare, or that some other compelling reason exists, the paramount rights of both parents to the companionship, custody, care, and control of their minor children must prevail. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 72-73, 147 L. Ed. 2d 49, 61 (2000) (recognizing that "the Due Process Clause [of the United States Constitution] does not permit a [s]tate to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made"); *Caban v. Mohammed*, 441 U.S. 380, 392-93, 60 L. Ed. 2d 297, 307-08 (1979) (holding that gender-based law that allowed a child's unwed mother to withhold consent to adopt the child but did not allow the same as to the child's father violated the Equal Protection Clause); *Stanley v. Illinois*, 405 U.S. 645, 657-58, 31 L. Ed. 2d 551, 562 (1972) (concluding that there was a violation of an unwed father's due process rights where he had custody of his child after the mother had died and the child was taken from him without a hearing on his fitness); *Prince v. Massachusetts*, 321 U.S. 158, 166, 88 L. Ed. 645, 652 (holding that "[i]t is cardinal with us that the cus-

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A written agreement to support ~~said~~ the child by periodic payments, which may include provision for reimbursement for medical expenses incident to the pregnancy and the birth of the child, accrued maintenance and reasonable expense of prosecution of the paternity action, when acknowledged as provided herein, filed with, and approved by a judge of the district court at any time, shall have the same force and effect as an order of support entered by that court, and shall be enforceable and subject to modification in the same manner as is provided by law for orders of the court in such cases. ~~Such written affirmations, acknowledgments~~ The written affidavit shall contain the social security number of the person executing the affidavit. Voluntary agreements to support shall contain the social security number of each of the parties to the agreement. The written affidavits and agreements to support shall be sworn to before a certifying officer or notary public or the equivalent or corresponding person of the state, territory, or foreign country where the affirmation, acknowledgment, or agreement is made, and shall be binding on the person executing the same whether ~~he~~ the person is an adult or a minor. ~~Such~~ The child support enforcement agency shall ensure that the mother and putative father are given oral and written notice of the legal consequences and responsibilities arising from the signing of an affidavit of parentage and of any alternatives to the execution of an affidavit of parentage. The mother shall not be excused from making ~~such affirmation~~ the affidavit on the grounds that it may tend to disgrace or incriminate her; nor shall she thereafter be prosecuted for any criminal act involved in the conception of the child as to whose paternity she ~~makes affirmation~~ attests.

N.C.G.S. § 110-132(a) (2001).

tody, care and nurtur[ing] of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Owenby v. Young*, 357 N.C. 142, 144-45, 579 S.E.2d 264, 266 (2003) (affirming that biological and adoptive parents have a constitutionally protected liberty interest in the care and custody of their children); *Adams v. Tessener*, 354 N.C. 57, 66, 550 S.E.2d 499, 505 (2001) (holding that in a custody action between natural parents and grandparents, grandparents were properly awarded custody because natural parents' conduct was inconsistent with their protected right to care for the child); *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997) (holding that due process afforded the parents of minor children a superior right to custody of that child in dispute between parents and nonrelatives where the parents have acted consistent with their constitutionally protected status); *Petersen v. Rogers*, 337 N.C. 397, 402-03, 445 S.E.2d 901, 904-05 (1994) (recognizing parents' constitutionally protected right to custody, care, and control of their children); *cf. Skinner v. Oklahoma*, 316 U.S. 535, 86 L. Ed. 1655 (1942) (striking down involuntary sterilization law because it violated fundamental rights to marriage and procreation).

In light of the changes in our laws governing familial relationships, we conclude that the Court of Appeals improperly relied upon *Jolly v. Queen*. The relationship of the father in *Jolly* to his illegitimate child was governed by the strict common-law doctrine of *nullius filius*, dictating the presumption that custody of illegitimate children vested in their mother. The Court in *Jolly* refused to sustain the trial court's findings as to what was in the illegitimate child's best interest, where the child was not entitled to inherit from the father or his father's relatives and could be adopted without the father's consent. *Jolly*, 264 N.C. at 715, 142 S.E.2d at 595-96. As such, the Court was forced to look upon the father, not as a parent entitled to a legal relationship, but as a stranger who wished to take in an unrelated child and raise him as his own.

Since *Jolly*, the General Assembly has modified those statutes governing intestate succession and adoption discussed therein, such that the restrictions imposed upon an unwed father's estate and his right to consent to an adoption *no longer exist*. Unlike the child in *Jolly*, illegitimate children today are entitled to inherit from their fathers and his relatives, and their fathers would be entitled to inherit from them, even though they have not been legitimated. N.C.G.S. § 29-19(b)(2), (c) (2001); *see also Estate of Lucas v. Jarrett*,

55 N.C. App. 185, 188-89, 284 S.E.2d 711, 713-14 (1981) (noting that there was a change in section 29-19(b), the statute governing intestate succession where a child is illegitimate, since the decision in *Jolly*). Additionally, the consent of illegitimate children's fathers who acknowledged paternity would now be required for their adoption. *See* N.C.G.S. § 48-3-601(2)(b) (2001). Further, in contrast to the father in *Jolly*, illegitimate children's fathers, including plaintiff, now benefit from the provisions of N.C.G.S. § 110-132(a), providing another method for formal acknowledgment of paternity, and other statutory provisions establishing legal ties between illegitimate children and their fathers, even though they may not have pursued legitimation procedures.

Moreover, we disagree with the Court of Appeals' majority that the vast changes to the law discussed above indicate only a patchwork of abrogations to the common law such that the presumption for awarding custody of an illegitimate child is still the law in this state. The majority reasoned that the differences between sections 110-132(a) and 49-14 support its conclusion that the presumption still exists, even where a father acknowledges paternity via section 110-132(a) and embraces his role as the illegitimate child's father. *See Rosero*, 150 N.C. App. at 258-59, 563 S.E.2d at 254. Unlike the Court of Appeals, we find the divergent purposes underlying the article in which N.C.G.S. § 110-132(a) is contained, to provide child support, and N.C.G.S. § 49-14, to determine paternity, irrelevant. The legislative intent of the comprehensive statutes addressing child welfare should be the paramount consideration. *See Brown v. Flowe*, 349 N.C. 520, 523-24, 507 S.E.2d 894, 896 (1998) (noting that this Court construes multiple statutes governing a single subject *in pari materia* to effectuate legislative intent and "to harmonize them into one law on the subject"). Given the changes to our General Statutes discussed *supra*, the effects of acknowledging paternity, a judicial determination of paternity, and legitimation proceedings are similar: The illegitimate child is able to inherit by and through the father, the father is able to inherit from his child, and the father's consent is needed for adoption.

We also note that the Court of Appeals' majority found support for its conclusion in the distinction between the high standard for establishing paternity judicially under section 49-14, that is, by clear and convincing evidence, and the complete lack of standards for acknowledging paternity in section 110-132(a). *Rosero*, 150 N.C. App. at 259, 563 S.E.2d at 254-55. The majority further found it significant

that acknowledgment under the version of section 110-132(a) appearing in the 1999 edition of our General Statutes could be rescinded, while a judicial determination of paternity was absolute. *Id.* According to the Court of Appeals, these distinctions indicated that a father acknowledging paternity under section 110-132(a) was not on equal footing with the father who had received a judicial determination of paternity. Thus, the court reasoned, the maternal-preference presumption still applied to the detriment of the father who acknowledged paternity under N.C.G.S. § 110-132(a). *Id.* at 260, 563 S.E.2d at 255. Again, we disagree. Although section 110-132(a) does not provide for even a modicum of proof of paternity, it does require, in both the current version and the version in effect for this case, that the child's mother affirm that the acknowledging father is, in fact, the natural father. Such a requirement prevents a man from "simply declar[ing] his paternity of a child unilaterally and easily fil[ing] for a court order approving his acknowledgment and agreement to support." *Durham Cty. Dep't of Soc. Servs. v. Williams*, 52 N.C. App. 112, 117 n.3, 277 S.E.2d 865, 869 n.3 (1981). Furthermore, whether the affirmation of paternity can be rescinded is irrelevant. At the time custody is adjudicated, a father who affirms his paternity pursuant to section 110-132(a) and pays child support in conjunction with that affirmation is acting consistent with his right to care for and have control of the child. As with any custody determination, the arrangement arrived at by the trial court can subsequently yield to a modification based upon a substantial change in circumstances.

Given the legal relationship between fathers and their illegitimate children now existing by virtue of certain statutory enactions, we believe that the legislature's 1977 modifications to N.C.G.S. § 50-13.2(a) represent an express abrogation of the common-law presumption at issue in the present case. As noted *supra*, given the unambiguous 1977 modification, N.C.G.S. § 50-13.2(a) now provides that "[b]etween the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child." We are unpersuaded by defendant's argument that N.C.G.S. § 50-13.2(a) applies only to abrogate the so-called "tender years" doctrine, which previously provided that a mother had the superior right to custody of her young children. *See Westneat v. Westneat*, 113 N.C. App. 247, 251, 437 S.E.2d 899, 901 (1994). To determine whether N.C.G.S. § 50-13.2(a) abrogated the presumption at issue, we must examine its plain language. *State v. Dellinger*, 343 N.C. 93, 95, 468 S.E.2d 218, 220 (1996). "When the language of a statute is clear and unambiguous, there is no room for judicial con-

struction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council, BSA, Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (citations omitted). Neither section 50-13.2(a) nor the case in which the Court of Appeals held that the "tender years" doctrine was no longer applicable, *Westneat*, expressly provides that the statute abrogates only the "tender years" doctrine. There is absolutely nothing in the plain language of section 50-13.2(a) or *Westneat* that supports defendant's assertion. We therefore conclude that, by its plain language, the statute clearly abrogates the common-law presumption vesting custody of an illegitimate child in the child's mother.

Applying N.C.G.S. § 50-13.2(a) in such a manner is not only dictated by its plain language, but also ensures that the best interest of the child, illegitimate or legitimate, not the relationship, or lack thereof, between natural or adoptive parents, is the district court's paramount concern. For, as between natural or adoptive parents, "[t]he welfare of the child has always been the polar star which guides the courts in awarding custody." *Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998); *see also Owenby*, 357 N.C. at 145, 579 S.E.2d at 267. Several courts in our sister states have applied this same reasoning to find the common-law presumption for awarding custody in favor of the illegitimate child's mother no longer applicable, with varying degrees of consideration given to the method by which the father acknowledged or established paternity. *See Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981) (noting that "the controlling consideration must be the interests of the child"); *Cox v. Hendricks*, 208 Neb. 23, 27, 302 N.W.2d 35, 38 (1981) (acknowledging and adopting the "clear trend in recent cases . . . to disregard the fact that a child was born out of wedlock in deciding custody disputes between natural parents"); *In re Byrd*, 66 Ohio St. 2d 334, 338, 421 N.E.2d 1284, 1286-87 (1981) (recognizing that use of best interest standard, rather than the maternal-preference presumption, promotes equality between the right of legitimate and illegitimate children to be placed with the parent who would promote their best interest); *see also Pi v. Delta*, 175 Conn. 527, 530-31, 400 A.2d 709, 710-11 (1978) (concluding that although state statute provides that the mother of an illegitimate child was that child's sole guardian, custody should be determined according to what is in the child's best interest); *Bazemore v. Davis*, 394 A.2d 1377, 1379 (D.C. Ct. App. 1978) (noting that in custody disputes between natural parents, the best interest of the child standard applies); *Race v. Sullivan*, 612 So. 2d 660, 661 (Fla. Dist. Ct. App. 1993) (holding that "[t]he shared parental responsibility law . . . is

applicable to non-married parents" and that the best interest of the child standard applies as between non-married parents); *In re Custody of Bourey*, 127 Ill. App. 3d 530, 533, 469 N.E.2d 386, 388 (1984) (noting that "the best interest of the child guides the decision, no matter what form the proceedings may take"); *La Grone v. La Grone*, 238 Kan. 630, 632-33, 713 P.2d 474, 476 (1986) (holding that "an unwed parent, whether mother or father, should be treated the same as any other parent for the purpose of determining custody" and that the best interest of the child standard should apply); *Walton v. Deblieux*, 428 So. 2d 937, 939 (La. Ct. App. 1983) (holding that "[t]he criteria applicable in determining the custody of legitimate children are also applicable in determining the custody of illegitimate children"). *But see Ex parte D.J.*, 645 So. 2d 303 (Ala. 1994) (per curiam) (concluding that maternal presumption for custody of an illegitimate child was still good law in that state); *Taylor v. Commonwealth*, 260 Va. 683, 537 S.E.2d 592 (2000) (holding that defendant's status as fiancée to the unwed father of the ten-month-old victim did not excuse the defendant's actions in assisting in the kidnapping of the child because the right of the father to immediate custody of the child was inferior to that of the mother). If the reasoning of the Court of Appeals in its 1974 decision in *Conley v. Johnson* was correct—that the common-law presumption in favor of the mother had already been abrogated by case law and the 1967 amendments to our General Statutes—there is no question that the presumption no longer exists in this, the twenty-first century.

The above-noted modification to N.C.G.S § 50-13.2(a) was an abrogation of the common-law presumption at issue in the present case. That abrogation, coupled with those changes to our General Statutes recognizing the legal relationship between parent and illegitimate child, establishes that an illegitimate child's father who has acknowledged or affirmed his paternity under section 110-132(a) and whose conduct is consistent with his right to care for and control his child, no longer stands as a third party in relation to his illegitimate child. We therefore hold that the father's right to custody of his illegitimate child is legally equal to that of the child's mother, and, as dictated by section 50-13.2, if the best interest of the child is served by placing the child in the father's custody, he is to be awarded custody of that child. Accordingly, in the present case, the trial court did not err in applying the best interest of the child standard.

As we have determined that the best interest of the child standard was properly applied in the present case, we must now

review the trial court's findings of fact and conclusions of law in accordance with that standard. "In a custody proceeding, the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Owenby*, 357 N.C. at 147, 579 S.E.2d at 268. Our review of the custody order in the case at issue reveals that the trial court's findings of fact are supported by record evidence and that those findings, in turn, support the trial court's conclusions of law. We therefore affirm the trial court's order awarding custody of Kayla to plaintiff.

In conjunction with plaintiff's appeal of right discussed *supra*, this Court granted plaintiff's petition for discretionary review of an additional issue: Whether the common-law presumption that the mother of an illegitimate child retains a superior right to that child's custody violates the Equal Protection Clause of the United States and North Carolina Constitutions. Because we have determined that this presumption has been abrogated by statute, we need not address whether it violates plaintiff's rights under the United States and North Carolina Constitutions. *See Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam) (noting that "the courts of this [s]tate will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds").

Because a mother's right to the custody of her illegitimate child is no longer superior to that of the child's father, the trial court properly applied the best interest of the child standard as between the parties to the present action. Furthermore, the evidence of record supports the trial court's findings of fact, which further supports the trial court's conclusion that awarding custody of Kayla to plaintiff was in Kayla's best interest. Accordingly, we reverse the Court of Appeals' decision and remand this case to that court for further remand to the District Court, Wake County, for reinstatement of the trial court's order.

REVERSED.

LEWIS D. DOCKERY AND JAMES L. GUNTER v. PAUL E. HOCUTT AND WIFE, CORA J. HOCUTT, AND LANE WHITAKER AND WIFE, DELOIS C. WHITAKER

No. 609A02

(Filed 13 June 2003)

1. References and Referees— compulsory reference—abuse of discretion standard

The trial court did not abuse its discretion in an adverse possession case by ordering a compulsory reference under N.C.G.S. § 1A-1, Rule 53(a)(2)(c) because considering the type of evidence necessary to prove the elements of adverse possession, it cannot be said as a matter of law that plaintiff's claim did not require a reference or that the trial court could not reasonably conclude from a review of the pleadings that resolution of the issues would involve a complicated question of boundary or require a personal view of the site.

2. Adverse Possession; References and Referees— compulsory reference—demand for jury trial—order of confirmation

The test to determine a demand for a jury trial following a compulsory reference is the same as that for a motion for directed verdict pursuant to N.C.G.S. 1A-1, Rule 50. Therefore, the trial court did not err in an adverse possession case by denying plaintiff's demand for a jury trial following a compulsory reference because plaintiff failed to adduce evidence before the referee demonstrating known and visible lines and boundaries on the ground and the existence of these boundaries for the requisite twenty-year period.

3. Adverse Possession— compulsory reference—adoption of referee's report in full—witness credibility

Although the trial court erred in an adverse possession case by adopting in full a referee's report containing findings of fact requiring assessment of witnesses' credibility in the context of a compulsory reference, the error was not prejudicial because the trial court also reviewed the evidence and concluded that taken in the light most favorable to plaintiff, the evidence presented was insufficient to raise controverted issues of fact that would support plaintiff's claim including that plaintiff failed to offer any evidence from which a jury could find the existence for twenty

years of known and visible lines and boundaries of the disputed property to identify the extent of any possession claim.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 153 N.C. App. 744, 571 S.E.2d 81 (2002), affirming an order entered 30 August 2001 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Supreme Court 8 April 2003.

Hatch, Little & Bunn, LLP, by A. Bartlett White and Tina L. Frazier, for plaintiff-appellant Lewis Dockery.

Douglass & Douglass, by Thomas G. Douglass, for defendant-appellees.

PARKER, Justice.

Plaintiffs Lewis D. Dockery (plaintiff) and James L. Gunter instituted this civil action claiming title to certain lands by adverse possession. Plaintiff Gunter resolved his dispute with defendants and is no longer a party to this litigation. The determinative issues before this Court are whether the Court of Appeals properly affirmed the trial court's compulsory reference of the case to a referee and whether the Court of Appeals properly affirmed the trial court's denial of plaintiff's request for jury trial after an adverse determination by the referee. For the reasons discussed herein, we modify and affirm the decision of the Court of Appeals.

Plaintiff owns a one-half interest in a home on Gumtree Circle, located in the Idlewood Village Subdivision in the City of Raleigh, Wake County, North Carolina. Defendants Hocutt and Whitaker own adjacent lots on Savannah Drive, located in the Kingswood Forest Subdivision in the City of Raleigh, Wake County, North Carolina. The land in dispute was originally part of a 1.43-acre tract located to the rear of and between plaintiff's parcel and defendants' parcels as shown on Exhibit A to plaintiff's complaint.[1] In 1995 the 1.43-acre tract was owned by a trust; the trustee conveyed the tract to J.J. Allen and Paulette F. Rogers in 1996. Thereafter, Allen and Rogers conveyed a .67-acre tract to defendants. This new tract was divided and combined with defendants' lots as shown on a survey recorded 14 April 1997 in the Wake County Public Registry, which is Exhibit B to plaintiff's complaint. This survey divided the .67-acre tract into two

1. Exhibits A, B, and C to the complaint were hearing Exhibits 1, 2A, and 2B, respectively.

parcels, .30 acre and .37 acre, respectively, and created a new east boundary line dividing the .67-acre tract from the remainder of the 1.43-acre tract. Defendants Hocutts' deed was recorded 10 February 1998 in the Wake County Public Registry; defendants Whitakers' deed was recorded 8 February 1998 and re-recorded 12 February 1998 in the Wake County Public Registry. Plaintiff's complaint alleges the following:

> 6. Other than a strip of land 35 feet wide and 100 feet long which Hocutt has used as a garden, said strip being to the rear of and adjacent to the 0.28 acre tract owned by Hocutt, and other than a 35 foot wide by 127 foot long strip of land to the rear and adjacent to the property of Plaintiff Gunter which Gunter has used as a garden, Plaintiff Dockery has had exclusive, complete, actual, open, notorious, hostile and continuous undisputed possession of the 0.37 acre and 0.30 acre tracts shown on Exhibit B.
>
> 7. Plaintiff Dockery's possession of the 0.37 and 0.30 acre tracts under known and visible lines (other than the Hocutt garden and Gunter garden) has been actual, open, hostile, continuous and exclusive in excess of 20 years.

Plaintiff attached to his complaint as Exhibit C a copy of the survey recorded in April 1997 adding lines demarcating the Hocutt and Gunter garden plots. Plaintiff's ownership claim is premised upon his clearing, caring for, and using the land in question for a garden and storage for a disputed amount of time between January 1978 and March 1998. In their counterclaim defendants asserted ownership through record title to the land in question pursuant to the deeds recorded in February 1998.

Defendants moved for summary judgment. The motion was denied on 27 July 1999 on the basis that genuine issues of material fact existed. On 20 August 1999 when the case came on for trial, the trial court, upon reviewing the pleadings, entered an order of compulsory reference pursuant to N.C.G.S. § 1A-1, Rule 53. Plaintiff and defendants objected to the order of reference.

After hearing the evidence, the referee filed his report of referee in which he made findings of fact and concluded as a matter of law among other things that "[t]here was no evidence of known and visible lines and boundaries of the property existing for 20 years to identify the extent of any possession claimed"; and "[t]he plaintiff did not have actual, open, hostile, exclusive and continuous possession of the

property for 20 years under known and visible lines and boundaries." The referee denied plaintiff's claim, allowed defendants' claim to quiet title, and vested title to the property in defendants as set out in their respective deeds. Plaintiff filed exceptions to the referee's findings and conclusions, submitted issues, and demanded a jury trial on all issues. Defendants moved that the trial court adopt and render judgment on the referee's report.

The trial court entered an order confirming the referee's findings and conclusions on 30 August 2001. In that order the trial court recited that the court had reviewed the evidence presented to the referee and the exceptions taken by plaintiff. The trial court stated that "[t]he Court, considering the evidence in the light most favorable to the Plaintiff[], could find no material facts that would support a claim for adverse possession of the subject property. The evidence presented is insufficient to raise controverted issues of fact that could support Plaintiff['s] claims." The trial court further concluded that plaintiff failed to offer any evidence from which a jury could find: "(1) the existence for 20 years of known and visible lines and boundaries of the disputed property to identify the extent of any possession claimed; and (2) that Plaintiff['s] possession was actual, open, hostile, exclusive and continuous for 20 years under known and visible lines and boundaries." The trial court denied plaintiff's motion for jury trial, allowed defendants' motion for entry of judgment consistent with the referee's report, adopted the referee's findings and conclusions, and vested title to the property in defendants pursuant to their respective deeds.

On appeal to the Court of Appeals, plaintiff contended that the trial court erred in ordering a compulsory reference, that the trial court erred in adopting the findings and conclusions of the referee, and that the trial court erred in denying plaintiff's demand for jury trial in that genuine issues of fact existed which were properly for resolution by a jury. The Court of Appeals held that any error by the trial court in referring the matter to a referee was "cured by Judge Stephens' Order of Confirmation which indicates that he independently evaluated the evidence presented by both sides and determined that as a matter of law, plaintiff had failed to establish a claim of title by adverse possession." *Dockery v. Hocutt*, 153 N.C. App. 744, 745-46, 571 S.E.2d 81, 82 (2002). The Court of Appeals stated that "the trial court, by independently reviewing the evidence, determined that there were no issues of fact and effectively entered summary judgment on the issue of adverse possession." *Id.* at 746, 571 S.E.2d at 82.

The majority analyzed the trial court's action in terms of a motion pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) where matters outside the pleadings are considered and the motion is converted to a motion for summary judgment under N.C.G.S. § 1A-1, Rule 56. *Id.* at 746-47, 571 S.E.2d at 83. Based on its review of the record on appeal, the Court of Appeals further upheld the trial court's order that " 'plaintiff[] has failed to offer any evidence from which a jury could find: (1) the existence for 20 years of known and visible lines and boundaries of the disputed property to identify the extent of any possession claimed; and (2) that Plaintiff['s] possession was actual, open, hostile, exclusive and continuous for 20 years under known and visible lines and boundaries.' " *Id.* at 747, 571 S.E.2d at 83.

The dissenting judge in the Court of Appeals was of the opinion that the pleadings did not require resolution of a complicated boundary dispute or a personal view of the premises and that, hence, a compulsory reference was not permitted by N.C.G.S. § 1A-1, Rule 53(a)(2)(c). *Id.* at 748, 571 S.E.2d at 84 (Greene, J., dissenting). The dissenting judge also disagreed that the trial court effectively entered summary judgment for defendants, noting that on summary judgment defendant would have had the burden to show that plaintiff was unable to present substantial evidence; whereas, in the present case the trial court placed the burden on plaintiff to produce evidence. *Id.* at 749, 571 S.E.2d at 84 (Greene, J., dissenting). The dissenting judge also reasoned that even assuming the trial court's order was tantamount to summary judgment, the order did not cure the prejudicial error resulting from the improper reference for the reason that on a motion pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), the trial court could not have considered the transcript of the evidence before the referee and would have had only the pleadings upon which to base its decision. Since the complaint sufficiently alleged a claim for adverse possession, plaintiff would have been entitled to a jury trial. *Id.* (Greene, J., dissenting). Finally, the dissenting judge opined that the evidence raised genuine issues of material fact with respect to each of the elements of adverse possession. *Id.* at 749-50, 571 S.E.2d at 84 (Greene, J., dissenting).

[1] On appeal to this Court, plaintiff first argues that the trial court erred by ordering a compulsory reference. We disagree. Rule 53(a)(2) of the North Carolina Rules of Civil Procedure provides that where the parties do not consent to a reference, a trial court may order a reference on its own motion "[w]here the case involves a complicated question of boundary, or requires a personal view of the premises." N.C.G.S. § 1A-1, Rule 53(a)(2)(c) (2001).

This Court has held that " '[t]he ordering or refusal to order a compulsory reference in an action which the court has authority to refer is a matter within the sound discretion of the court.' " *Long v. Honeycutt*, 268 N.C. 33, 41, 149 S.E.2d 579, 585 (1966)[2] (quoting *Rudisill v. Hoyle*, 254 N.C. 33, 46, 118 S.E.2d 145, 154 (1961)). When a decision is discretionary with the trial court, the standard for appellate review is whether the trial court abused its discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Id.* The pleadings in this case, including the exhibits to plaintiff's complaint, reveal that resolution of the issues would require the determination of the boundaries of an irregularly shaped tract of land surrounded by no fewer than twelve discrete lots. As in *Sledge v. Miller*, 249 N.C. 447, 106 S.E.2d 868 (1959), the location of the known and visible lines and boundaries marking the land plaintiff adversely possessed was the complicated question of boundary required by Rule 53(a)(2)(c) that formed the basis for the reference in this case. *Id.* at 450, 106 S.E.2d at 872. Considering the type of evidence necessary to prove the elements of adverse possession, we cannot say as a matter of law that plaintiff's claim did not require a reference or that the trial court could not reasonably conclude from a review of the pleadings that resolution of the issues would involve a complicated question of boundary or require a personal view of the site. We, therefore, hold that the trial court had authority to order and did not abuse its discretion in ordering the reference.

[2] Plaintiff's remaining three arguments relate to plaintiff's contention that the Court of Appeals erred in holding that the order of confirmation constituted summary judgment. Plaintiff argues that this holding was error in that (i) defendants' motion for summary judgment had previously been denied, and one superior court judge cannot allow a summary judgment previously denied by another on the same issues; (ii) the complaint was sufficient to state a claim for adverse possession; and defendants, having the burden of proof as the moving party, had not shown that plaintiff would be unable to prove any element of his claim; and (iii) plaintiff had presented evidence of each element of adverse possession sufficient to take the

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2. This case was decided before the effective date of the North Carolina Rules of Civil Procedure. Nonetheless, the pertinent substance of the current Rule 53(a)(2) and the former statute, N.C.G.S. § 1-189 (1953) (repealed 1967), is identical. Thus, despite the intervening passage of the Rules of Civil Procedure, this case still has precedential value.

case to the jury. We are not persuaded that these arguments provide plaintiff with a basis for relief.

At the outset we note that defendants' summary judgment motion; supporting affidavits, if any; and the trial court's order thereon are not in the record on appeal. Thus, this Court cannot review plaintiff's contention that the Court of Appeals erred on the basis that one trial judge cannot allow a summary judgment previously denied by another on the same issue. *See* N.C. R. App. P. 9(a)(1)(j).

The dissenting judge properly noted that when the trial court entered the order of confirmation, the court had before it the transcript of the testimony at the hearing before the referee and the exhibits, heard arguments of counsel, and made an independent determination from the evidence that plaintiff had not satisfied his burden of showing evidence of all the elements of adverse possession. *Dockery*, 153 N.C. App. at 749, 571 S.E.2d at 84. On a motion for summary judgment, defendants as movants would have had the burden to show that plaintiff could not adduce evidence of an essential element of his claim and that no genuine issue of material fact existed, thereby entitling defendants to judgment as a matter of law. *See Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 62-63, 414 S.E.2d 339, 341-42 (1992).

Rule 53(b)(2)(c) provides that "[i]f there is a trial by jury upon any issue referred, the trial shall be only upon the evidence taken before the referee." N.C.G.S. § 1A-1, Rule 53(b)(2)(c). Thus, when the trial court reviews a referee's order, the claimant has been put to the full burden of proof; and the trial court has before it all the testimony, including cross-examination, not merely a forecast of the evidence. Given the limitation imposed by Rule 53(b)(2)(c), the trial court in ruling on a party's demand for jury trial following a compulsory reference is in a position analogous to that of a trial judge in ruling on a motion for directed verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure at the close of all evidence. This Court has stated:

> The question raised by [a motion for directed verdict] is whether the evidence is sufficient to go to the jury. In passing upon such motion the court must consider the evidence in the light most favorable to the non-movant. That is, "the evidence in favor of the non-movant must be deemed true, all conflicts in the evidence must be resolved in his favor and he is entitled to the benefit of

> every inference reasonably to be drawn in his favor." *Summey v. Cauthen*, [283 N.C. 640, 647, 197 S.E.2d 549, 554 (1973)]. It is only when the evidence is insufficient to support a verdict in the non-movant's favor that the motion should be granted.

Rappaport v. Days Inn of America, Inc., 296 N.C. 382, 384, 250 S.E.2d 245, 247 (1979) (citations omitted), *overruled in part on other grounds by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998). Under the North Carolina Constitution, a party has a right to a jury trial in "all controversies at law respecting property." N.C. Const. art. I, § 25. This constitutional right to a jury trial preserved in Rule 53(b)(2) and properly asserted procedurally by plaintiff in this case is not absolute, however. *N.C. Nat'l Bank v. Burnette*, 297 N.C. 524, 537, 256 S.E.2d 388, 396 (1979). The right "is premised upon a preliminary determination by the trial judge that there indeed exist genuine issues of fact and credibility which require submission to the jury." *Id.* Moreover, this Court has recognized in certain cases credibility is manifest as a matter of law but that no general rule can be stated to determine whether credibility is manifest in a particular case. *Id.* at 536-37, 256 S.E.2d at 395.

Although the opinion predates the current Rules of Civil Procedure, in *Nantahala Power & Light Co. v. Horton*, 249 N.C. 300, 106 S.E.2d 461 (1959), this Court applied the Rule 50 standard in reviewing a compulsory reference. The Court held that the respondents were entitled to a jury trial only if the evidence taken before the referee supported more than nominal damages in respect to mineral and water-power rights, thereby requiring the respondents as the claimants to have produced evidence to substantiate submission of the contended issue of fact. *Id.* at 306, 106 S.E.2d at 465. This standard would also be applicable if the case were tried without a reference. *See State v. Brooks*, 275 N.C. 175, 188, 166 S.E.2d 70, 77 (1969). Accordingly, we hold that following a compulsory reference, the test to determine a demand for jury trial is the same as that for a motion for directed verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure.

We now address plaintiff's contention that the Court of Appeals erred in affirming the order of confirmation for the reason that plaintiff had presented sufficient evidence of each element of adverse possession to take the case to the jury. The law is that

> [o]ne may assert title to land embraced within the bounds of another's deed by showing adverse possession of the portion

> claimed for twenty years under known and visible lines and boundaries (G.S. 1-40), but his claim is limited to the area actually possessed, and the burden is upon the claimant to establish his title to the land in that manner.

Wallin v. Rice, 232 N.C. 371, 373, 61 S.E.2d 82, 83 (1950); *see also Carswell v. Town of Morganton*, 236 N.C. 375, 377-78, 72 S.E.2d 748, 749 (1952). The adverse nature of the possession was defined thusly in *Locklear v. Savage*:

> It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner.

159 N.C. 236, 237-38, 74 S.E. 347, 348 (1912). Hence, the possession must be "open, notorious, and adverse." *Wilson Cty. Bd. of Educ. v. Lamm*, 276 N.C. 487, 490, 173 S.E.2d 281, 283 (1970). Additionally, the claimant may claim title by adverse possession only when he "has possessed the property under known and visible lines and boundaries . . . for 20 years." N.C.G.S. § 1-40 (2001).

Measured by this burden of proof, plaintiff's evidence, when considered in the light most favorable to plaintiff with every inference drawn in plaintiff's favor, is not sufficient to take the case to the jury. A review of the record reveals that it is devoid of evidence of known and visible boundaries as to six of the twelve lots surrounding the land. Five lots were at some point marked by fences, and one lot was at some point marked by a tree line; but even as to these lots the record is devoid of evidence that these boundaries were known and visible for the entire, required twenty-year period. Moreover, in his pleadings plaintiff alleges that the property to which plaintiff now claims title by adverse possession was originally part of a 1.43-acre tract shown on Exhibit A to the complaint. The east boundary of the property to which plaintiff now claims title was not established until the 0.67 acres was conveyed to defendants in 1998 as shown on Exhibit B to the complaint. According to Exhibit A the east boundary of the 1.43-acre tract was an undeterminable number of feet from the

east boundary shown on the 1997 survey, Exhibit B. Thus, from the evidence of record, what east boundary plaintiff claimed prior to 1997 is left to pure speculation. Plaintiff must adduce evidence demonstrating known and visible lines and boundaries on the ground. *See Scott v. Lewis*, 246 N.C. 298, 302, 98 S.E.2d 294, 297-98 (1957). Plaintiff must also demonstrate the existence of these boundaries for the requisite twenty-year period. *Id.*; N.C.G.S. § 1-40. In the record before this Court, nothing identifies the boundaries as they existed in January 1978, the date, according to his testimony, that plaintiff's adverse possession of the property commenced. Plaintiff introduced into evidence a survey prepared in 1997 to substantiate his claim. However, this map does not suffice to establish known and visible boundaries for twenty years. *See Brooks*, 275 N.C. at 181, 166 S.E.2d at 73. The location of these boundaries is critical inasmuch as plaintiff can claim title only to that land he has actually possessed. *Id.* at 187, 166 S.E.2d at 77. Plaintiff having failed to satisfy this element of adverse possession, his claim to title to the property also fails.

The Court of Appeals additionally concluded as did the trial court that plaintiff's evidence was not sufficient to show open, notorious, exclusive, and hostile possession. Having concluded that plaintiff's claim fails for the above-stated reason, we decline to address this additional issue.

[3] Finally, we note that the trial court adopted all findings and conclusions of the referee. On review of a compulsory reference, this action by the trial court was error. Under Rule 53(g)(2), the trial court "after hearing may adopt, modify or reject the [referee's] report in whole or in part, render judgment, or may remand the proceedings to the referee with instructions." N.C.G.S. § 1A-1, Rule 53(g)(2). Rule 53 does not differentiate between reference by consent and compulsory reference in authorizing permissible action by the trial court after a reference. In applying Rule 53 as codified in the statute, we must construe the provisions *in pari materia* and give effect as nearly as possible to every provision. *See Brown v. Flowe*, 349 N.C. 520, 523-24, 507 S.E.2d 894, 896 (1998). Consistent with this canon of construction and with a party's right to jury trial following a compulsory reference, we hold that in the context of a compulsory reference the trial court cannot adopt in full a referee's report containing findings of fact requiring assessment of witnesses' credibility. The trial court must, however, evaluate the evidence to determine if, taken in the light most favorable to the party demanding jury trial, the evi-

dence is sufficient to support that party's claim. If the evidence is insufficient as a matter of law to support the party's claim, the trial court may modify the report by striking the offending findings of fact and making its own conclusions, may adopt the report in part exclusive of those findings of fact and make its own conclusions, or may reject the report and then enter judgment.

In this case the trial court's error was not prejudicial, however, in that the trial court also reviewed the evidence and concluded that taken in the light most favorable to plaintiff, the evidence presented was insufficient to raise controverted issues of fact that would support plaintiff's claim. In particular, plaintiff failed to offer any evidence from which a jury could find the existence for twenty years of known and visible lines and boundaries of the disputed property to identify the extent of any possession claimed. Adoption by the trial court of the findings and conclusions of the referee was, therefore, surplusage. *See Britt v. Allen*, 291 N.C. 630, 635, 231 S.E.2d 607, 612 (1977) (holding that a statement in the order that the trial court had committed unspecified errors of law was surplusage and did not effect the trial court's discretionary ruling).

For the reasons stated herein, the opinion of the Court of Appeals is affirmed as modified.

MODIFIED AND AFFIRMED.

STATE OF NORTH CAROLINA v. RICHARD ALLEN STOKES

No. 275A02

(Filed 13 June 2003)

Evidence— rebuttal—impeachment testimony

The trial court did not err in a first-degree felony murder and felonious child abuse case by admitting in rebuttal as impeachment testimony defendant's statement to an officer about defendant's treatment of a minor child on the night of the minor child's death, made approximately nineteen hours after defendant was given his Miranda rights, because: (1) the cross-examination questions of defendant about his statement to the officer were

proper; (2) the officer was properly called as a rebuttal witness when the impeaching evidence pertained to the substance of defendant's statement; (3) even assuming arguendo that defendant properly preserved plain error review concerning whether the statement was in fact admitted as substantive evidence rather than as impeaching evidence, the alleged error did not arise to the level of plain error; (4) defendant failed to object to the prosecutor's characterization of the statement during closing argument, and it was not so grossly improper that the trial court abused its discretion by failing to intervene ex mero motu; and (5) the trial court instructed the jury that defendant's statement to the officer was being made for the limited purpose of impeaching defendant's truthfulness.

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. 211, 565 S.E.2d 196 (2002), ordering a new trial after appeal from a judgment entered 29 February 2000 by Judge Michael E. Beale in Superior Court, Davidson County. On 15 August 2002, the Supreme Court granted discretionary review of an additional issue. Heard in the Supreme Court 10 March 2003. Upon consideration of the briefs filed with this Court and after hearing oral argument, on 10 March 2003, this Court allowed the State's petition for discretionary review as to an additional issue.

Roy Cooper, Attorney General, by Robert J. Blum, Special Deputy Attorney General, for the State-appellant.

Danny T. Ferguson for defendant-appellee.

Robinson, Bradshaw & Hinson, P.A., by Joshua F.P. Long; and Seth H. Jaffe, General Counsel, on behalf of the American Civil Liberties Union North Carolina Legal Foundation, amicus curiae.

EDMUNDS, Justice.

Defendant was convicted of first-degree felony murder and of felonious child abuse and was sentenced to life imprisonment without parole. Defendant appealed to the Court of Appeals, which, in a split decision, found error and ordered a new trial. The State of North Carolina appealed as of right and petitioned for discretionary review as to additional issues. This Court allowed discretionary review as to one issue. After hearing oral argument, this Court sought briefing

from the parties as to an additional issue. We reverse the Court of Appeals and reinstate defendant's conviction.

The victim in the case, two-year-old Alexander Ray Asbury (Alex), was the son of Tricia Burnette (Tricia), who went by the name Tricia Asbury at the time of the offense. Alex, Tricia, and defendant had been living together for several months. At approximately 9:30 p.m. on 31 March 1998, Tricia put Alex to bed. She turned in about a half-hour later, and defendant followed shortly thereafter. Just before 4:00 a.m. the next morning, 1 April 1998, defendant yelled to Tricia from Alex's room that Alex was not breathing. Tricia called 911. Defendant attempted to perform CPR on Alex, but when the emergency medical technicians responded, they found that Alex was not breathing and had no pulse. Alex was transported to Wake Forest University Medical Center, where he was pronounced dead at 4:52 a.m.

On the afternoon of 1 April 1998, Detective Sergeant David McDade of the Davidson County Sheriff's Department went to the funeral home to meet defendant. After Detective McDade explained that he was participating in the investigation of Alex's death, defendant voluntarily accompanied Detective McDade to the Sheriff's Department, where he was advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). Defendant acknowledged that he understood his rights and said he was willing to talk to Detective McDade without a lawyer present. During the following extended interview, defendant made several statements. He began by claiming that he had nothing to do with Alex's death. He said that when he checked Alex around 4:00 a.m., he saw that Alex's fingers were blue. This statement was reduced to writing. About two hours later, defendant made an oral statement during which he said, "[I]f I did it, I don't remember it, just give me the death penalty or I will do it in jail." Detective McDade wrote this comment down, and shortly thereafter, defendant signed a similar written statement in which he said that he did not remember being abusive to Alex but that if he had been, it was not intentional. Later during this same interview, defendant admitted striking Alex: "I told Alex to go to sleep and I hit him in the head with my right hand half open, fingers closed. I guess I lost it." Detective McDade transcribed this statement, and defendant signed it. Questioning of defendant ended in the early morning hours of 2 April 1998. He was then arrested and taken to a jail cell.

Defendant's father and sister retained counsel for him at approximately 8:30 a.m. on 2 April 1998, and defendant met with his attorney

for about an hour at approximately 10:00 a.m. that day. However, at about noon on 2 April 1998, Davidson County Sheriff's Deputy Todd Varner, who then held the rank of patrol sergeant and had been participating in the investigation, went to defendant's cell to see who had been arrested in the case.[1] According to Varner, defendant asked him, "What do you want?" and Varner answered with the word "How." Varner described defendant's response as, "He just kept crying, 'I lost it, there ain't nothing I can do but the time now.' "

Defendant moved to suppress all statements made by him. After conducting an evidentiary pretrial hearing on the motion, Judge James C. Davis entered an order denying the motion to suppress. However, at defendant's trial before Judge Michael E. Beale, the State presented evidence in its case-in-chief of the statements made by defendant to Detective McDade before he met with his attorney but did not present evidence of defendant's later statement to Varner. In addition, Tricia's mother testified that, on the evening before he died, Alex had appeared healthy and active, though he had twice run into a piece of furniture and hit his head. She stated that the impacts did not cause a bruise or break the skin, and she did not feel that Alex needed medical treatment as a result of these mishaps.

Dr. Patrick Lantz, the forensic pathologist who performed the autopsy, testified as to his observations of Alex's body. He saw that Alex

> had a small bruise between his right eyebrow and the hairline, which was about a quarter of an inch in size, then he had a smaller one than that, a small little bruise right at the corner of his eyebrow on the right side. He also had a small little bruise on the left side. Looking through the hair, I could actually see that there was some bruising of the scalp on the right and left side in the hair, farther back on the forehead, both on the right and the left side.

He concluded that Alex's death was caused by "cerebral edema or swelling of the brain due to an intracranial injury from blunt trauma of the head." Dr. Lantz did not believe that Alex's injuries were consistent with running into a piece of furniture. Instead, it was his opinion that Alex's head trauma could be "consistent with a mature adult taking his right hand, folding it . . . and striking th[e] child."

1. Patrol Sergeant Varner had been promoted to lieutenant at the time of defendant's trial. For consistency and to avoid confusion, we shall refer to him as "Varner."

Dr. Lantz was also accepted as an expert in the field of battered-child syndrome. After reviewing the records maintained by other physicians who treated Alex, along with hospital records, Alex's computerized axial tomography scan, and other related materials, Dr. Lantz testified that he was of the opinion that Alex suffered from battered-child syndrome. In addition, another witness stated that she had observed injuries to Alex's ear and head approximately two months before his death.

Defendant testified on his own behalf. He stated that he did not notice anything unusual about Alex's condition when he helped Tricia put the child to bed the evening of 31 March 1998. He admitted that he smoked marijuana that night but denied that he ever smoked marijuana or drank alcohol around Alex. He testified that he checked on Alex around midnight and observed that he was breathing regularly. However, when he checked again around 3:55 a.m., he saw that Alex's fingers were blue. He attempted CPR on Alex while calling for Tricia to dial 911. He claimed that the admissions contained in his signed statements were coerced and not true. He also denied ever hitting Alex. In addition, defendant presented expert evidence supporting a theory that Alex suffered from Reyes Syndrome or a similar condition and that the injuries could have resulted from some cause other than being struck by a fist.

As noted above, the prosecution did not introduce evidence of defendant's statement to Varner during its case-in-chief. The first testimony pertaining to this encounter was provided by defendant. During his direct testimony, defendant stated that a uniformed individual approached and stood before his cell for several seconds. Defendant testified that he asked the individual, "[W]hat do you want?" According to defendant, the individual commented that he had children of his own, then asked defendant, "[W]hy did you do it?" Defendant testified that he responded by saying, "I didn't do anything." Defendant went on to testify that the individual asked, "[W]hy did you write this statement, confession?" and defendant responded, "I f---ed up." The uniformed individual then departed.

On cross-examination, defendant denied that the uniformed individual had said to him the word, "How." Over objection, he further denied telling this individual, "I lost it. Ain't nothing I can do but the time now." The prosecutor then called Varner as a rebuttal witness. Varner testified that, on his own initiative, he went to defendant's cell to see who had been charged in Alex's death. When defendant asked, "What do you want?" Varner testified that he responded by saying

only the word "How." Defendant then "just kept crying, 'I lost it, there ain't nothing I can do but the time now.' " Varner further testified that he and defendant swapped a few inconsequential comments, and then he left the cell area.

The Court of Appeals' majority held that the superior court erred in ruling that defendant's statement to Varner, made approximately nineteen hours after defendant was given his *Miranda* rights, was voluntary. The Court of Appeals concluded that the encounter was an interrogation and that enough time had passed and a sufficient number of legally significant events had taken place in the meantime to vitiate the *Miranda* warnings. Accordingly, the Court of Appeals held that the taking of defendant's statement violated defendant's Fifth Amendment right against self-incrimination. The dissenting judge disagreed and argued that defendant's statement was given voluntarily. *State v. Stokes*, 150 N.C. App. 211, 227, 565 S.E.2d 196, 207 (2002) (Hunter, J., dissenting). However, we are not called upon to determine whether the trial court correctly determined that the statement was admissible because the testimony was never offered as direct evidence. Instead, the statement was tendered only after defendant took the stand and, while under oath, denied making the comment described above to Varner. Therefore, we must determine whether defendant's statement was properly admitted in rebuttal as impeachment testimony.

First, assuming without deciding that the statement to Varner was made in violation of defendant's constitutional right against self-incrimination, we consider whether he could be cross-examined about the statement. This Court addressed a similar issue in *State v. McQueen*, 324 N.C. 118, 377 S.E.2d 38 (1989). In that case, the defendant was charged with the murder of a highway patrol officer. The State presented evidence that, as part of the offense, the defendant had also kidnapped an individual named Barker. *Id.* at 121-23, 377 S.E.2d at 40-42. The State's case included evidence that the defendant had left Barker's car while carrying a rifle, a pistol, and a box of ammunition. However, when the defendant was arrested, he had only two pocketknives in his possession. After his arrest, the defendant was advised of his *Miranda* rights, made several statements, and then told the investigators that he wanted a lawyer. *Id.* at 127-30, 377 S.E.2d at 43-45. At trial, the defendant's cross-examination of the arresting officers included questions that pointed out that the firearms had not been found. When the defendant took the stand, he testified that he had only a knife when he left Barker's car. On cross-

examination, the prosecutor asked the defendant about statements he made to investigators after asking for counsel. While suggesting that these statements were "otherwise inadmissible," this Court held that the questions were proper impeachment.

> "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment."

Id. at 134-35, 377 S.E.2d at 48 (quoting *Harris v. New York*, 401 U.S. 222, 225-26, 28 L. Ed. 2d 1, 4-5 (1971)). Accordingly, as in *State v. McQueen*, the cross-examination questions of defendant here about his statement to Varner were proper.

We next consider whether Varner was properly called as a rebuttal witness. "Under certain circumstances a witness may be impeached by proof of prior conduct or statements which are inconsistent with the witness's testimony." *State v. Whitley*, 311 N.C. 656, 663, 319 S.E.2d 584, 589 (1984); *see also* N.C.G.S. § 8C-1, Rule 607 (2001). We have held that when a witness is confronted with prior statements that are inconsistent with the witness' testimony, the witness' answers are final as to collateral matters, but where the inconsistencies are material to the issue at hand in the trial, the witness' testimony may be contradicted by other testimony. *State v. Green*, 296 N.C. 183, 192-93, 250 S.E.2d 197, 203 (1978). There can be no doubt that any statement defendant made to Varner about his treatment of Alex on the night of Alex's death is material to the central issue of this trial. Moreover, the impeaching evidence pertained to the substance of defendant's statement. *See State v. Williams*, 322 N.C. 452, 456, 368 S.E.2d 624, 626 (1988). Accordingly, we hold that Varner's testimony rebutting defendant's cross-examination responses to the prosecutor was properly admitted.

Defendant argues that the State is improperly changing its theory of the case. He points out that the State's position before the Court of Appeals was that the statement was admissible because it was given voluntarily. The Court of Appeals' opinion and dissent analyzed the

issue of the statement's admissibility as though it had been offered as substantive evidence. Defendant contends that this Court is limited to reviewing the issues raised in the dissent in the Court of Appeals and also that the State is precluded from raising a new theory for the first time before us. However, as defendant also properly acknowledges, this Court has the inherent power to supervise the other courts of this state. *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968). We allowed the State's petition for discretionary review as to this issue. Accordingly, we may consider whether defendant's statement to Varner was properly admitted as impeaching evidence.

Defendant also maintains that the statement was in fact admitted as substantive evidence rather than as impeaching evidence and that the error was compounded when the prosecutor argued to the jury that the statement should be considered as substantive evidence. As to the first of these contentions, although defendant made a pretrial motion to suppress the statement, he did not object when it was offered and admitted at trial. *See State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). In the absence of a contemporaneous objection, we review for plain error. *State v. Gary*, 348 N.C. 510, 518, 501 S.E.2d 57, 63 (1998). Because defendant has not asserted plain error, this review is waived. *See id.* However, even assuming *arguendo* that defendant properly preserved plain error review and that the trial court committed some error in admitting the statement, we do not find that the alleged error arises to the level of plain error. *See id.* As to defendant's second argument, relating to the prosecutor's characterization of the statement during closing argument, defendant again did not object. We have reviewed the prosecutor's argument and conclude that it was not so grossly improper (if it was improper at all) that the trial court abused its discretion in failing to intervene *ex mero motu*. *See State v. Richmond*, 347 N.C. 412, 433, 495 S.E.2d 677, 688 (1998). In addition, we note that the trial court instructed the jury as follows:

> The State contends, and the defendant denies, that the defendant made false, contradictory or conflicting statements. If you find that the defendant made such statements, they may be considered by you as a circumstance tending to reflect the mental process of a person possessed of a guilty conscience seeking to divert suspicion or to exculpate themselves and you should consider that evidence along with the other believable evidence

> in this case. However, if you find that defendant made such statements, they do not create a presumption of guilt and such evidence standing alone is not sufficient to establish guilt. Such evidence may not be considered by you in any way as tending to show premeditation and deliberation . . . .

This instruction was adequate to advise the jury that defendant's statement to Varner, which he denied making, was being admitted for the limited purpose of impeaching defendant's truthfulness.

In light of this result, we determine that this Court improvidently granted discretionary review as to whether the passage of time diluted the reading of defendant's *Miranda* rights.

The opinion of the Court of Appeals is reversed.

REVERSED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

BRENDA JOYCE HOLLEY, EMPLOYEE v. ACTS, INC., EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 482A02

(Filed 13 June 2003)

Workers' Compensation— findings of fact—causation—speculation—reasonable degree of medical certainty

The Industrial Commission's findings of fact in a workers' compensation case were not supported by competent evidence establishing causation between an employment-related injury and the development of deep vein thrombosis (DVT), because: (1) although expert testimony as to the possible cause of a medical condition is admissible if helpful to the jury, it is insufficient to prove causation when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation; (2) a review of the expert testimony revealed that neither of plaintiff employee's physicians could establish with any degree of medical certainty the required causal connection between plaintiff's accident and her DVT; and (3) evidence of plaintiff's age and medical history of hypertension, breast tumors, leg

cramps, and estrogen use suggested other potential causes of plaintiff's DVT.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 152 N.C. App. 369, 567 S.E.2d 457 (2002), remanding with instructions an opinion and award entered 26 February 2001 by the North Carolina Industrial Commission. Heard in the Supreme Court 13 March 2003.

Griffin, Smith, Caldwell, Helder & Helms, P.A., by Annika M. Brock; The Law Offices of George W. Lennon, by George W. Lennon; and Scudder & Hedrick, by Samuel A. Scudder, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Terry L. Wallace and Neil P. Andrews, for defendant-appellants.

Smith Moore LLP, by Jeri L. Whitfield and Caroline H. Lock, on behalf of the North Carolina Association of Defense Attorneys, amicus curiae.

LAKE, Chief Justice.

This case arises from proceedings before the North Carolina Industrial Commission and raises the issue of whether the Commission's findings of fact were supported by competent evidence establishing causation between an employment-related injury and the development of deep vein thrombosis (DVT), a condition caused by a blood clot in a deep vein which obstructs blood flow and causes inflammation.

At the time of the incident, plaintiff was forty-nine years old. She was on blood pressure medication to control her hypertension and was under a doctor's care to lose weight. Since 1995, plaintiff had been taking the estrogen replacement drug Premarin, which increases the risk of blood clots. Her medical history also included treatment for benign breast tumors and complaints of leg cramps. According to medical treatises relied on by the Commission, some of the risk factors for DVT are: age greater than forty; use of estrogen; history of tumors; and preexisting conditions such as heart disease, obesity and hypertension.

On 13 July 1996, while working as a certified nurses' assistant for employer-defendant ACTS, Inc., a retirement center/rest home facility, plaintiff twisted her leg on the carpet and felt a sudden pain in her

left calf. She reported the injury immediately but finished working her shift, and afterwards, went home to soak her injured leg. The next day, plaintiff sought medical care for her sore leg at Presbyterian Hospital, where she was examined by Dr. Jason Ratterree, an emergency room physician. Dr. Ratterree diagnosed plaintiff with a pulled calf muscle but wrote in his medical report that he might have suspected "DVT in etiology had not the patient told me that there was sudden pain during slight traumatic episode." Plaintiff was treated with anti-inflammatory and pain medications for a pulled calf muscle, was sent home with a bandage and crutches, and was ordered to stay off her left leg for three days. As a preventive measure, Dr. Ratterree told plaintiff to stop taking her estrogen replacement drug. If her pain increased, plaintiff was told to return to the hospital for a Doppler study of the leg to determine whether she might have a blood clot. Plaintiff returned to work on 22 July 1996, following a week of bed rest. Approximately five weeks later, following a weekend in bed with a stomach virus, plaintiff awoke with a painful, swollen leg. On 3 September 1996, she returned to the emergency room for treatment. On that date, her doctor ordered a Doppler study of her left leg, which revealed that plaintiff had DVT. After her release from the hospital three days later, plaintiff was seen regularly by internist Dr. Dietlinde Zipkin until 16 November 1996 when she returned to light-duty work. Plaintiff continued to experience leg pain and was hospitalized again in June of 1997 for "chronic DVT." She returned to work on 11 July 1997.

When plaintiff filed a workers' compensation claim, defendants denied payment on the grounds that plaintiff's medical problems stemmed from "a pre-existing condition that was not aggravated or accelerated by a compensable accident or occupational disease." On 31 August 1999, plaintiff filed a request for a hearing before the Commission seeking: lost wages; payment of medical expenses; payment for permanent partial disability; and payment for permanent injury to internal organs or parts of the body, which she claimed resulted from the accident at work. On 22 March 2000, a deputy commissioner heard the matter and, on 27 June 2000, filed an opinion and award concluding that plaintiff's DVT was not the result of her injury by accident to her left leg arising out of and in the course and scope of her employment, and denying all claims. On 24 January 2001, the full Commission reviewed the case and, on 26 February 2001, filed its opinion and award concluding that plaintiff's DVT was the result of a compensable injury at work and awarding benefits. One commissioner dissented, maintaining that the evidence failed to establish a

causal connection between the twisting injury and the DVT. Defendants gave notice of appeal to the Court of Appeals.

On 20 August 2002, a divided panel of the Court of Appeals held that competent evidence supported the full Commission's determination that plaintiff's accident on 13 July 1996 caused her DVT. *Holley v. ACTS, Inc.*, 152 N.C. App. 369, 567 S.E.2d 457 (2002). The dissenting judge held that plaintiff had failed to establish a causal connection between the compensable injury and her ensuing DVT and that the expert testimony was mere speculation. *Id.* at 378-79, 567 S.E.2d at 463-64.

The specific issue before this Court is whether there was competent evidence presented to establish a causal connection between the original injury by accident to plaintiff's leg on 13 July 1996 and her diagnosis of DVT on 3 September 1996. The Court of Appeals' majority determined that competent evidence was presented sufficient to support the Commission's findings of fact and conclusions of law. We disagree.

In deciding an appeal from an award of the Industrial Commission, appellate courts may set aside a finding of fact only if it lacks evidentiary support. *Saunders v. Edenton Ob/Gyn Ctr.*, 352 N.C. 136, 140, 530 S.E.2d 62, 65 (2000); *McRae v. Wall*, 260 N.C. 576, 578, 133 S.E.2d 220, 222 (1963). Although the Industrial Commission is the sole judge of the credibility and the evidentiary weight to be given to witness testimony, *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998), the Commission's conclusions of law are fully reviewable, *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000). "When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987).

In a workers' compensation claim, the employee "has the burden of proving that his claim is compensable." *Henry v. A.C. Lawrence Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 761 (1950). An injury is compensable as employment-related if " 'any reasonable relationship to employment exists.' " *Kiger v. Bahnson Serv. Co.*, 260 N.C. 760, 762, 133 S.E.2d 702, 704 (1963) (quoting *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E.2d 476, 479 (1960)). Although the employment-related accident "need not be the sole causative force to render an injury compensable," *Hansel v. Sherman Textiles*, 304 N.C.

44, 52, 283 S.E.2d 101, 106 (1981), the plaintiff must prove that the accident was a causal factor by a "preponderance of the evidence," *Ballenger,* 320 N.C. at 158-59, 357 S.E.2d at 685. *See also* 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 41, at 137 (5th ed. 1998).

In cases involving "complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). "However, when such expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000). "[T]he evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation." *Gilmore v. Hoke Cty. Bd. of Educ.*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942) (discussing the standard for compensability when a work-related accident results in death).

Treatises on evidence note that the standards for admissibility of expert opinion testimony have been confused with the standards for sufficiency of such testimony. *See* 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 137, at 549 n.57 (2d rev. ed. 1982); Dale F. Stansbury, *The North Carolina Law of Evidence* § 137, at 108 n.67a (Henry Brandis, Jr., 2d ed. Supp. 1970). Prior to 1983, an expert was not allowed to testify on causation "with outright certainty since that would supposedly invade the 'province of the jury.' " *Cherry v. Harrell*, 84 N.C. App. 598, 603, 353 S.E.2d 433, 436, *disc. rev. denied*, 320 N.C. 167, 358 S.E.2d 49 (1987); *see also* N.C.G.S. § 8C-1, Rule 704 (2001) (not changed since its adoption in 1983). Therefore, medical experts were asked only whether " 'a particular event or condition *could* or *might* have produced the result in question, not whether it did produce such result.' " *Lockwood v. McCaskill*, 262 N.C. 663, 668, 138 S.E.2d 541, 545 (1964) (quoting Stansbury, *North Carolina Evidence* § 137, at 332 (2d ed. 1963)). With the adoption of Rule 704 in 1983, experts were allowed to testify more definitively as to causation. N.C.G.S. § 8C-1, Rule 704. While the "could" or "might" question format circumvented the admissibility problem, it led to confusion that such testimony was sufficient to prove causation. *See Alva v. Charlotte Mecklenburg Hosp. Auth.*, 118 N.C. App. 76, 80-81, 453 S.E.2d 871, 874 (1995) (a case that erroneously relied on

Lockwood, an opinion on the *admissibility* of expert opinion testimony, to find "could" or "might" testimony *sufficient* to prove causation). Although expert testimony as to the *possible* cause of a medical condition is admissible if helpful to the jury, *Cherry*, 84 N.C. App. at 604-05, 353 S.E.2d at 437, it is insufficient to prove causation, particularly "when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation," *Young*, 353 N.C. at 233, 538 S.E.2d at 916.

In the case *sub judice*, the Court of Appeals' majority held that the Industrial Commission's findings of fact regarding plaintiff's DVT were not based on speculative expert medical testimony and were, therefore, competent to show that plaintiff's DVT was a result of her 13 July 1996 accident at work. *Holley*, 152 N.C. App. at 376-77, 567 S.E.2d at 462. However, a review of the expert testimony reveals that neither of plaintiff's physicians could establish the required causal connection between plaintiff's accident and her DVT.

In his deposition, Dr. Ratterree made a number of comments that demonstrate the speculative nature of his opinion. Dr. Ratterree testified that DVT is a consideration anytime a patient has calf pain, but he thought it was a "low possibility" in plaintiff's case given her sudden acute injury. Dr. Ratterree said that "by far 90 percent or greater" of his DVT patients have not suffered any injury. He testified that plaintiff could have been developing a blood clot prior to the injury at work, concluding: "It's just a galaxy of possibilities." On cross-examination, Dr. Ratterree responded to questioning as follows:

> Q. Can you say to a reasonable degree of medical certainty or a reasonable degree of medical probability that the incident related to you by Ms. Holley was a significant contributing factor in causing DVT?
>
> A. I can't say that, no.

Dr. Zipkin was equally uncertain about the etiology of plaintiff's DVT. In her letter of 14 April 1997 to plaintiff's attorney, Dr. Zipkin stated: "I am unable to say with *any degree of certainty* whether or not the above mentioned work injury is related to the development of her DVT." (Emphasis added.) During her deposition, Dr. Zipkin testified in part as follows:

> Q. . . . what, in your opinion, could or might have caused this DVT?
>
> A. I don't really know what caused the DVT.

Q. Is it fair to say that you can't state to a reasonable degree of medical certainty what caused the DVT in this particular incident?

A. It is fair to state, yes.

The entirety of the expert testimony in the instant case suggests that a causal connection between plaintiff's accident and her DVT was possible, but unlikely. Doctors are trained not to rule out medical possibilities no matter how remote; however, mere possibility has never been legally competent to prove causation. *See, e.g., Young*, 353 N.C. at 233, 538 S.E.2d at 916. Although medical certainty is not required, an expert's "speculation" is insufficient to establish causation. *See id.* As the foregoing testimony indicates, plaintiff's doctors were unable to express an opinion to any degree of medical certainty as to the cause of plaintiff's DVT.

When dealing with a complicated medical question such as the genesis of DVT, expert medical testimony is necessary to provide a proper foundation for the Commission's findings. "Reliance on Commission expertise is not justified where the subject matter involves a complicated medical question." *Click*, 300 N.C. at 168, 265 S.E.2d at 391. Therefore, we hold that the medical evidence as to causation in this case was insufficient to support the Industrial Commission's findings of fact and conclusions of law.

Finally, plaintiff argues that defendants failed to prove that plaintiff's preexisting conditions were the sole cause of her DVT and that, to the contrary, no evidence was presented that plaintiff's DVT was caused by anything other than her work-related accident. This argument is unpersuasive. Plaintiff has the burden to prove each element of compensability, *Harvey v. Raleigh Police Dep't*, 96 N.C. App. 28, 35, 384 S.E.2d 549, 553, *disc. rev. denied*, 325 N.C. 706, 388 S.E.2d 454 (1989); *see also Taylor v. Twin City Club*, 260 N.C. 435, 437, 132 S.E.2d 865, 867 (1963). Furthermore, evidence of plaintiff's age and medical history of hypertension, breast tumors, leg cramps, and estrogen use suggests other potential causes of plaintiff's DVT.

We hold that the entirety of causation evidence before the Commission failed to meet the reasonable degree of medical certainty standard necessary to establish a causal link between plaintiff's twisting injury and her DVT. The opinion of the Court of Appeals, affirming the Industrial Commission's findings of fact, is, therefore, reversed, and this case is remanded to that court for fur-

ther remand to the North Carolina Industrial Commission for disposition in accordance with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. ROBERT BRYAN SEXTON

No. 595PA02

(Filed 13 June 2003)

Arson— first-degree—malicious burning of an occupied dwelling with an incendiary device—instructions—malice

The trial court did not commit plain error by instructing the jury that it could find defendant guilty of malicious burning of an occupied dwelling with an incendiary device and first-degree arson of a mobile home if the jury found that defendant acted with implied malice, because: (1) the jury instruction was taken verbatim from the North Carolina pattern jury instructions, 2 N.C.P.I. Crim. 213.20; (2) there is no reason why the definition of malice used in homicide and arson cases should not also apply to the crime of malicious damage to an occupied real property by use of an incendiary device; and (3) there is no requirement that only express malice can be used to prove a violation of N.C.G.S. § 14-49.1.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 153 N.C. App. 641, 571 S.E.2d 41 (2002), finding no error after appeal of judgments entered 28 June 2001 by Judge Richard D. Boner in Superior Court, Gaston County. Heard in the Supreme Court 10 April 2003.

Roy Cooper, Attorney General, by Kevin L. Anderson, Assistant Attorney General, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

WAINWRIGHT, Justice.

On 3 July 2000, Robert Bryan Sexton (defendant) was indicted for willful and malicious burning of an occupied mobile home used as the dwelling house of another. *See* N.C.G.S. § 14-58.2 (2001) (first-

degree arson). On 7 August 2000, defendant was indicted for willful and malicious damage to occupied real property by use of an incendiary device pursuant to N.C.G.S. § 14-49.1, and for possession of a weapon of mass death and destruction pursuant to N.C.G.S. § 14-288.8.

Defendant was tried before a jury at the 25 June 2001 session of Superior Court, Gaston County. On 27 June 2001, the jury unanimously found defendant guilty of willful and malicious burning of an occupied mobile home used as the dwelling house of another, willful and malicious damage to real property by use of an incendiary device, and possession of a weapon of mass death and destruction. The trial court sentenced defendant to concurrent prison terms of a minimum of sixty-four and a maximum of eighty-six months' imprisonment on the first two convictions. For defendant's conviction for possessing a weapon of mass death and destruction, the trial court sentenced defendant to a maximum of nineteen and a minimum of twenty-three months' imprisonment but suspended this sentence and placed defendant on sixty months of supervised probation; the trial court also ordered that defendant pay restitution and attorney's fees.

Defendant's convictions and sentences stemmed from the burning of a trailer in a trailer park in Gaston County. The trailer park included five trailers. Joe Neal lived in one trailer. Joe was separated from his wife, Brenda Neal. Brenda lived in the trailer across from Joe. The Neals' three sons, Bobby Neal, Marvin Neal, and Danny Neal, lived with Joe and Brenda in these two trailers. Defendant lived with his girlfriend, Hilda Seeley, in a trailer directly behind Joe's trailer.

On 3 June 2000, defendant and Bobby Neal got into a confrontation when Bobby went to Seeley's trailer. Defendant told Bobby to get off the property and then pushed Bobby. Bobby threw an unopened beer can at defendant. Defendant went into the trailer, grabbed a baseball bat, and chased Bobby with the bat. When Bobby slipped, defendant and Bobby wrestled and fought in the mud. Bobby eventually took the bat away from defendant. Defendant then obtained a larger, metal bat; chased Bobby with this bat; and beat Bobby's truck with the bat. Joe Neal chased defendant off with a hatchet and wooden bat.

Around 7:00 or 8:00 a.m. the next day, defendant chased Bobby again, this time throwing a beer at Bobby. For the rest of the morning, defendant paced behind Joe Neal's trailer. Brenda Neal was cooking breakfast inside Joe's trailer. Brenda heard glass breaking in the

back of the trailer. Brenda went to the back of the trailer and saw smoke and flames coming up from under the back window. She went to the front porch and yelled for her sons. Bobby Neal was in Brenda's trailer at this time. Bobby ran out and saw defendant run from behind Joe's trailer to Seeley's trailer.

Bobby Neal called the police, and defendant fled into the woods. Within ten minutes, Joe's trailer was completely burned and destroyed. Police later found fuel cans at Seeley's trailer. Deputy Fire Marshall Eric Hendrix testified that the fire was started with an incendiary device.

On 28 June 2001, after being convicted and sentenced, defendant filed his notice of appeal in the Court of Appeals. In a unanimous opinion filed 5 November 2002, the Court of Appeals found no error in defendant's trial and sentence. On 19 December 2002, this Court granted defendant's petition for discretionary review as to two issues.

First, defendant argues that the trial court's jury instructions in the present case were improper. Specifically, defendant contends that the trial court erred in instructing the jury that it could find defendant guilty of malicious burning of an occupied dwelling with an incendiary device and first-degree arson of a mobile home if the jury found that defendant acted with implied malice. According to defendant, only express malice, that is "actual ill will, hatred, or animosity," is required for a defendant to be convicted of malicious damage of an occupied dwelling by use of an incendiary device. In short, defendant essentially argues that his convictions cannot be supported by anything other than express malice. Defendant therefore reasons that the trial court's instruction in the present case was error.

The actual jury instruction that was given is as follows:

> Malice means not only hatred, ill will, or spite as it is ordinarily understood; again, to be sure, that is malice; but it also means that condition of mind that prompts a person to intentionally inflict damage without just cause, excuse, or justification.

For purposes of clarity, we note that the first portion of the jury instruction above ("[m]alice means not only hatred, ill will, or spite as it is ordinarily understood; again, to be sure, that is malice. . . .") refers to express malice. The second portion of the instruction ("but it also means that condition of mind that prompts a person to intentionally inflict damage without just cause, excuse, or justification") refers to implied malice.

We also note that malice, like intent, is a state of mind and as such is seldom proven with direct evidence. Rather, malice is ordinarily proven by circumstantial evidence from which it may be inferred. *See State v. Richardson*, 328 N.C. 505, 513, 402 S.E.2d 401, 406 (1991); *State v. Childress*, 321 N.C. 226, 229-30, 362 S.E.2d 263, 265-66 (1987).

Defendant made no objection to this jury instruction at trial. Accordingly, to prevail on appeal, defendant must show that the trial court's instruction constituted plain error. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

The jury instruction given in the present case was taken verbatim from the North Carolina pattern jury instructions. 2 N.C.P.I. Crim. 213.20 (1999). The definition of malice in this jury instruction also tracks the definition of malice generally used in arson cases. *See, e.g.*, *State v. Allen*, 322 N.C. 176, 196, 367 S.E.2d 626, 637 (1988). In *Allen*, this Court stated that a burning is willful and malicious under the common law of arson if the burning was done " 'voluntarily and without excuse or justification and without any bona fide claim or right.' " *Id.* (quoting *State v. White*, 291 N.C. 118, 126, 229 S.E.2d 152, 157 (1976)). We further stated in *Allen* that no intent or animus against the property or owner is required. *Id.*

We also note that the malice definition used in the present case is the same definition of malice used in homicide cases. *See, e.g.*, *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982). We see no reason why the definition of malice used in homicide and arson cases should not also apply to the crime of malicious damage to an occupied real property by use of an incendiary device.

Our interpretation of the applicable definition of malice is further supported by a well-established commentary on criminal law. In their criminal law treatise, Professors Rollin Perkins and Ronald Boyce stated that cases speaking of malice as requiring actual ill will or resentment towards the property owner are "quite illogical" and result from "faulty analysis of the legal meaning of the word 'malice.' " Rollin Perkins & Ronald Boyce, *Criminal Law* 408 (3d ed. 1982). Perkins and Boyce further note:

> [T]he element of malice . . . requires either a specific intent to cause the destruction of, or substantial damage to, the property of another, or an act done in wanton and wilful disregard of the plain and strong likelihood of such harm, without any circumstances of justification, excuse or substantial mitigation. Stated

in other words: The mens-rea requirement of malicious mischief is a property-endangering state of mind, without justification, excuse or mitigation.

Id. at 413.

In support of his argument, defendant relies on a single sentence from this Court's decision in *State v. Conrad*, 275 N.C. 342, 168 S.E.2d 39 (1969). In *Conrad*, this Court stated, "The word 'malicious' as used in [section 14-49.1] connotes a feeling of animosity, hatred or ill will toward the owner, the possessor, or the occupant." *Id.* at 352, 168 S.E.2d at 46. As the State points out in its brief, malice was not an issue in *Conrad*. As such, this statement from *Conrad* is dicta. Moreover, nothing in the statement means that *only* express malice can be used to prove a violation of section 14-49.1.

Accordingly, we conclude that the trial court's instruction was proper.

This assignment of error is overruled.

Defendant also argues that the trial court erred in allowing the State to present evidence of "other crimes" in violation of the North Carolina Rules of Evidence. As to this issue, we conclude that discretionary review was improvidently allowed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

STATE EMPLOYEES ASSOCIATION OF NORTH CAROLINA, INC. v. STATE OF NORTH CAROLINA; MICHAEL F. EASLEY, GOVERNOR OF NORTH CAROLINA; EDWARD RENFROW, STATE CONTROLLER OF NORTH CAROLINA; AND DAVID T. McCOY, STATE BUDGET OFFICER OF NORTH CAROLINA

No. 9A03

(Filed 13 June 2003)

Associations; Declaratory Judgments— standing of employees association

A decision of the Court of Appeals that SEANC lacked standing to maintain a declaratory judgment action seeking to enjoin the State and certain of its officials from redirecting funds allocated to the State's retirement systems to attempt to balance the

budget rather than to fund the retirement systems is reversed for the reason stated in the dissenting opinion that a threat of immediate injury to each and every individual member of an association is not required in order for the association to have standing.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 154 N.C. App. 207, 573 S.E.2d 525 (2002), affirming an order entered 29 May 2001 by Judge Narley L. Cashwell in Superior Court, Wake County. Heard in the Supreme Court 7 May 2003.

State Employees Association of North Carolina, Inc., by Thomas A. Harris, General Counsel, for plaintiff-appellants.

Roy Cooper, Attorney General, by Norma S. Harrell, Alexander McC. Peters, and John R. Corne, Special Deputy Attorneys General, and Robert M. Curran, Assistant Attorney General, for defendant-appellees.

Southern Environmental Law Center, by Donnell Van Noppen III, Michelle B. Nowlin, and Sierra B. Weaver, on behalf of North Carolina Bar Association, North Carolina Academy of Trial Lawyers, North Carolina Association of Educators, North Carolina Citizens for Business and Industry, North Carolina Federation of Independent Businesses, North Carolina Forestry Association, North Carolina School Boards Association, Inc., North Carolina Chapter of the American Institute of Architects, North Carolina Automobile Dealers Association, North Carolina Association of Certified Public Accountants, North Carolina Association of Administrators, North Carolina Conference of the American Association of University Professors, Sierra Club, Conservation Council of North Carolina, Southern Environmental Law Center, Manufacturers and Chemical Industry Council of North Carolina, amici curiae.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals and remand this case to that court for consideration of the remaining assignments of error.

REVERSED and REMANDED.

DONNA PITTMAN, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. 70A03

(Filed 13 June 2003)

Public Officers and Employees— health care technician—termination for unacceptable personal conduct—insufficient evidence

A decision of the Court of Appeals upholding the termination of a health care technician at a State facility for unacceptable personal conduct is reversed for the reason stated in the dissenting opinion that the evidence supported the findings and conclusion of the Administrative Law Judge that the technician should be given only a written warning for unsatisfactory performance.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 155 N.C. App. —, 573 S.E.2d 628 (2002), affirming an order entered 13 July 2001 by Judge Knox V. Jenkins, Jr., in Superior Court, Johnston County. Heard in the Supreme Court 5 May 2003.

Mast, Schulz, Mast, Mills, Stem & Johnson, P.A., by David F. Mills, for petitioner-appellant.

Roy Cooper, Attorney General, by Thomas M. Woodward, Assistant Attorney General, for respondent-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals.

REVERSED.

STATE OF NORTH CAROLINA v. PAUL WILLIAM MARK, SR.

No. 5A03

(Filed 13 June 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 154 N.C. App. 341, 571 S.E.2d 867 (2002), finding no error after appeal of judgments entered 12 July 2001 by Judge Melzer A. Morgan, Jr., in Superior Court, Guilford County. Heard in the Supreme Court 5 May 2003.

Roy Cooper, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Patricia A. Duffy, Assistant Attorney General, for the State.

Douglas L. Hall for defendant-appellant.

PER CURIAM.

AFFIRMED.

VALERIE MESCHTER WILLIAMS v. JANICE T. LEVINSON, DURHAM CHILD CARE COUNCIL, INC. (FORMERLY KNOWN AS DURHAM DAY CARE COUNCIL, INC.), AND CHILD CARE SERVICES ASSOCIATION

No. 88A03

(Filed 13 June 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 155 N.C. App. —, 573 S.E.2d 590 (2002), affirming a judgment entered 26 February 2001 by Judge Evelyn W. Hill in Superior Court, Durham County. Heard in the Supreme Court 6 May 2003.

Moore & Van Allen, PLLC, by Lewis A. Cheek, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by C. Ernest Simons, Jr. and Susan H. Hargrove, for defendant-appellees Durham Child Care Council, Inc. and Child Care Services Association.

PER CURIAM.

AFFIRMED.

[357 N.C. 244 (2003)]

WILLIAM SCOTT GILBERT AND WIFE, ANGELA R. GILBERT v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANIES

No. 59A03

(Filed 13 June 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 155 N.C. App. —, 574 S.E.2d 115 (2002), reversing an order and partial judgment entered 25 July 2001 by Judge Ernest B. Fullwood in Superior Court, New Hanover County. Heard in the Supreme Court 6 May 2003.

Block, Crouch, Keeter & Huffman, L.L.P., by Auley M. Crouch, III, and Christopher K. Behm, for plaintiff-appellants.

Cox & Tillery, P.A., by J. Thomas Cox, Jr., for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. MARK MARCOPLOS, NANCY WOODS, PASCAL L. PITTS, LAURA WINBUSH VANDERBECK, JAMES EDWIN WARREN, AND RUTH C. ZALPH

No. 48A03

(Filed 13 June 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 154 N.C. App. 581, 572 S.E.2d 820 (2002), finding no error after appeal of judgments entered 9 August 2001 by Judge J.B. Allen, Jr., in Superior Court, Wake County. Heard in the Supreme Court 7 May 2003.

Roy Cooper, Attorney General, by William P. Hart, Special Deputy Attorney General, for the State.

Glenn, Mills & Fisher, P.A., by Stewart W. Fisher; and George Hausen, for defendant-appellants.

PER CURIAM.

Defendants appeal to this Court from the decision of the Court of Appeals on the basis of a dissent. We affirm the decision of the Court of Appeals.

Defendants, in their brief and at oral argument, further sought review in this Court of a constitutional issue originally presented to but not addressed by the Court of Appeals. We decline to consider this constitutional issue in the first instance. This matter is remanded to the Court of Appeals so that this issue may be addressed by that court.

AFFIRMED and REMANDED.

JOEL T. LEWIS, PETITIONER v. NORTH CAROLINA DEPARTMENT OF CORRECTION, RESPONDENT

No. 585A02

(Filed 13 June 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 153 N.C. App. 449, 570 S.E.2d 231 (2002), affirming an order entered 10 August 2001 by Judge A. Moses Massey in Superior Court, Stokes County. Heard in the Supreme Court 5 May 2003.

Randolph and Fischer, by J. Clark Fischer, for petitioner-appellee.

Roy Cooper, Attorney General, by Neil Dalton, Assistant Attorney General, and James Peeler Smith, Special Counsel, for respondent-appellant.

PER CURIAM.

AFFIRMED.

A. NEAL BRUMLEY, EXECUTOR OF THE ESTATE OF WILLIAM GLENN DELLINGER, DECEASED v. MALLARD, L.L.C. AND BONN A. GILBERT, JR., A/K/A BONN GILBERT

No. 658A02

(Filed 13 June 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 154 N.C. App. 563, 575 S.E.2d 35 (2002), affirming an order denying defendants' motion for summary judgment and an order granting plaintiff's motion for summary judgment entered 30 May 2001 by Judge James E. Lanning in Superior Court, Mecklenburg County. Heard in the Supreme Court 9 April 2003.

Richard H. Robertson for plaintiff-appellee.

Richard H. Tomberlin for defendant-appellants.

PER CURIAM.

AFFIRMED.

STATE v. POINDEXTER

[357 N.C. 248 (2003)]

STATE OF NORTH CAROLINA)
)
v.) ORDER
)
RONALD LEE POINDEXTER,)
A/K/A/ SAM PUGH)

No. 563A99-2

Pursuant to N.C.G.S. § 15A-1418, defendant's Motion for Appropriate Relief filed in this Court on 28 April 2003 is allowed for the limited purpose of entering the following order:

Defendant's Motion for Appropriate Relief sets forth the following two claims which are opposed by the State:

1. The trial court lacked jurisdiction to impose a death sentence upon Ronald Lee Poindexter, a/k/a/ Sam Pugh, a person with mental retardation; the death sentence violates state, federal, and international law, and must be vacated.

2. Ineffective assistance of trial counsel requires that defendant receive a new trial or, in the alternative, that his death sentence be vacated and the case remanded for the trial court either to impose a sentence of life imprisonment without parole, or to hold a new sentencing hearing.

Defendant's Motion for Appropriate Relief is hereby remanded to the Superior Court, Randolph County, for resolution of the issues raised by defendant's Motion for Appropriate Relief and the defenses raised by the State.

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 such other appropriate order as required. 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 22nd day of May, 2003.

Brady, J.
For the Court

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

12 JUNE 2003

No. 203A03 Case below: 156 N.C. App. 542	Beall v. Beall	1. Def's PDR Under N.C.G.S. § 7A-31 (COA02-743) 2. Def's NOA Based Upon a Dissent 3. Def's Motion to Dismiss Both Appeal and Petition for Discretionary Review	1. — 2. — 3. Allowed **05/19/03**
No. 243P03 Case below: 156 N.C. App. 697	Benton v. Sutherland Precision Framing	Plt's PWC to Review the Decision of the COA (COA02-548)	Denied
No. 047PA03 Case below: 154 N.C. App. 734	Bowen v. Mabry	1. Def's PDR Under N.C.G.S. § 7A-31 (COA02-357) 2. Def's PWC to Review the Decision of the COA	1. Allowed 2. Dismissed as Moot
No. 229P03 Case below: 157 N.C. App. 364	Boyd v. Howard	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-534)	Denied
No. 198P03 Case below: 156 N.C. App. 577	Brotherton v. Point on Norman, LLC	Def's (Point on Norman, LLC) PDR Under N.C.G.S. § 7A-31 (COA02-668)	Denied
No. 232P03 Case below: 157 N.C. App. 116	Carroll v. Living Ctrs. Southeast, Inc.	1. Defs' Motion for Temporary Stay (COA02-647) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Plt's Motion to Deny PDR	1. Allowed **05/07/03 Dissolved 06/12/03** 2. Denied 3. Denied 4. Dismissed as Moot
No. 225P03 Case below: 157 N.C. App. 325	Clontz v. St. Mark's Evangelical Lutheran Church	Def's (St. Mark's Evangelical Lutheran Church) PDR Under N.C.G.S. § 7A-31 (COA02-606)	Denied

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

12 JUNE 2003

No. 267P03 Case below: 157 N.C. App. 364	Ditscheiner v. Jelly Beans, LLC	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA02-486) 2. Def's Motion to Dismiss Appeal 3. Def's Conditional PDR as to Additional Issues	1. Denied 2. Dismissed as Moot 3. Dismissed as Moot
No. 087P03 Case below: 155 N.C. App. 603	Freeman v. Freeman	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-222)	Denied
No. 093P03 Case below: 155 N.C. App. 362	Harleysville Mut. Ins. Co. v. Narron	1. Plt's Motion for Temporary Stay (COA02-137) 2. Plt's Petition for Writ of Supersedeas 3. Plt's Motion to Withdraw Petition for Writ of Supersedeas	1. — 2. — 3. Allowed **05/22/03**
No. 268P03 Case below: 157 N.C. App. 317	Harleysville Mut. Ins. Co. v. Zurich-American Ins. Co.	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-720)	Denied
No. 140P03 Case below: 156 N.C. App. 217	Hollifield v. City of Hickory	Plts' PWC to Review the Decision of the COA (COA02-483)	Denied
No. 032P03 Case below: 154 N.C. App. 742	In re Mayhew	Respondent's (Mayhew) PDR Under N.C.G.S. § 7A-31 (COA02-47)	Denied
No. 212P03 Case below: 156 N.C. App. 628	Ivarsson v. Office of Indigent Def. Servs.	Plts' PDR Under N.C.G.S. § 7A-31 (COA02-36)	Denied **Brady, J., recused**
No. 236PA03 Case below: 157 N.C. App. 38	Johnson v. Board of Tr. of Durham Technical Cmty. Coll.	Def's PDR Under N.C.G.S. § 7A-31 (COA02-356)	Allowed

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No. 138P03 Case below: 156 N.C. App. 42	Johnson v. Piggly Wiggly of Pinetops, Inc.	Def's PDR Under N.C.G.S. § 7A-31 (COA02-263)	Denied
No. 097P03 Case below: 155 N.C. App. 169	Lakey v. U.S. Airways, Inc.	Defs' PDR Under N.C.G.S. § 7A-31 (COA02-244)	Denied
No. 206A03 Case below: 156 N.C. App. 429	Lancaster v. Maple Street Homeowners Ass'n	1. Plts' NOA Based Upon COA Dissent (COA02-666) 2. Def's NOA Based Upon a Constitutional Question 3. Def's PDR as to additional issues	1. — 2. Dismissed *ex mero motu* 3. Denied
No. 270A03 Case below: 157 N.C. App. 310	Lange v. Lange	1. Def's NOA (Dissent) (COA02-567) 2. Def's PDR as to Additional Issues 3. Plt's Conditional Petition as to Additional Issues	1. — 2. Denied 3. Dismissed as Moot
No. 651P02 Case below: 153 N.C. App. 200	Lee v. Brian Ctr.	Def's (Brian Center) PWC to Review the Decision of the COA (COA01-650)	Allowed
No. 197P03 Case below: 156 N.C. App. 622	Loy v. Martin	Defs' PDR Under N.C.G.S. § 7A-31 (COA02-540)	Denied
No. 204P03 Case below: 156 N.C. App. 697	McKinnon v. L & S Holding Co.	Def's (Key Benefit Services) PDR Under N.C.G.S. § 7A-31 (COA02-681)	Denied
No. 653A02 Case below: 154 N.C. App. 18	N.C. Forestry Ass'n v. N.C. Dep't of Envtl. & Natural Res.	1. Petitioner's NOA (Dissent) (COA01-1329) 2. Petitioner's PDR Under N.C.G.S. § 7A-31 3. Respondents' (State Agencies) Motion to Dismiss Certain Issues from Appeal 4. Intervenors' Motion to Dismiss Certain Issues from Appeal	1. — 2. Denied 3. Allowed as to issues two and three of NOA 4. Dismissed as moot

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No. 218P03 Case below: 156 N.C. App. 597	Pass v. Beck	Def's PWC to Review the Decision of the COA (COA02-669)	Denied
No. 081A03 Case below: 155 N.C. App. 372	Phillips v. A Triangle Women's Health Clinic, Inc.	1. Plt's NOA (Based Upon a Dissent) (COA01-1418) 2. Def's (Schnider) PDR as to Additional Issues	1. — 2. Allowed
No. 231P03 Case below: 156 N.C. App. 697	Reimann v. Research Triangle Inst.	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-1061)	Denied **Orr, J., recused**
No. 260P03 Case below: 157 N.C. App. 364	Severt v. Cox	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA02-409) 2. Def's (Kyle Ray Harris) Conditional PDR as to Additional Issues	1. Denied 2. Dismissed as Moot
No. 001P02-2 Case below: 155 N.C. App. 568	Shackleford-Moten v. Lenoir Cty. DSS	Plt's PDR Under N.C.G.S. § 7A-31 (COA00-1513-2)	Denied
No. 161P03 Case below: 156 N.C. App. 218	State v. Anderson	Def's PDR Under N.C.G.S. § 7A-31 (COA02-490)	Denied
No. 208P03 Case below: 156 N.C. App. 698	State v. Batten	1. Def's NOA Based Upon a Constitutional Question (COA02-984) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
No. 409P02-2 Case below: 149 N.C. App. 976	State v. Bell	Def's PWC to Review the Decision of the COA (COA01-811)	Denied
No. 196P03 Case below: 156 N.C. App. 671	State v. Blakney	Def's PDR Under N.C.G.S. § 7A-31 (COA02-592)	Denied

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No. 215P02-2 Case below: 158 N.C. App. 698	State v. Brooks	1. Def's NOA Based Upon a Constitutional Question (COA02-851) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed with instructions to correct clerical errors
No. 131P01-5 Case below: 153 N.C. App. 524	State v. Dove	1. Def's Petition for Rehearing on PDR/Petition to Have Error Corrected (COA01-1085) 2. Def's Petition for Rehearing 3. Def's Motion for Court to Determine if a Witness Charged With "Accessory After the Fact" Possesses "A Privilege Not to Testify"	1. Dismissed 2. Dismissed 3. Dismissed
No. 026P03 Case below: 154 N.C. App. 742	State v. Gant	1. Def's NOA Based Upon a Constitutional Question (COA2-393) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
No. 288P03 Case below: 157 N.C. App. 574	State v. Gonzalez	1. Def's NOA Based Upon a Constitutional Question (COA02-1173) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
No. 188P03 Case below: 156 N.C. App. 427	State v. Hall	Def's PDR Under N.C.G.S. § 7A-31 (COA02-460)	Denied
No. 072P03 Case below: 155 N.C. App. 221	State v. Harding	Def's PDR Under N.C.G.S. § 7A-31 (COA02-313)	Denied
No. 207P03 Case below: 145 N.C. App. 715	State v. Harrison	Def's PWC to Review the Decision of the COA (COA00-834)	Denied
No. 293P03 Case below: 153 N.C. App. 396	State v. Hyman	Def's PWC to Review the Decision of the COA (COA01-1397)	Denied

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No. 266P03 Case below: 157 N.C. App. 365	State v. Johnson	Def's PDR Under N.C.G.S. § 7A-31 (COA02-611)	Denied
No. 210P03 Case below: 156 N.C. App. 698	State v. Little	1. Def's NOA Based Upon a Constitutional Question (COA02-957) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
No. 205P03 Case below: 156 N.C. App. 523	State v. Morgan	Def's PDR Under N.C.G.S. § 7A-31 (COA02-620)	Denied
No. 237P03 Case below: 157 N.C. App. 143	State v. Murray	1. Def's NOA Based Upon a Constitutional Question (COA02-653) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Supplement NOA and PDR 4. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed 4. Allowed
No. 209P03 Case below: 156 N.C. App. 699	State v. Newsome	1. Def's NOA Based Upon a Constitutional Question (COA02-792) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
No. 068P03 Case below: 155 N.C. App. 209	State v. Oliver	1. Defs' NOA Based Upon a Constitutional Question (COA02-177) 2. Defs' PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
No. 269PA03 Case below: 157 N.C. App. 568	State v. Partridge	1. AG's Motion for Temporary Stay (COA02-1289) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/23/03** 2. Allowed 3. Allowed
No. 134P03 Case below: 156 N.C. App. 217	State v. Penn	Def's PDR Under N.C.G.S. § 7A-31 (COA02-488)	Denied

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No. 189P03 Case below: 156 N.C. App. 249	State v. Ramirez	Def's PDR Under N.C.G.S. § 7A-31 (COA02-453)	Denied
No. 192P03 Case below: 156 N.C. App. 699	State v. Samuels	Def's PDR Under N.C.G.S. § 7A-31 (COA02-687)	Denied
No. 250P03 Case below: 151 N.C. App. 751	State v. Smith	Def's PWC to Review the Decision of the COA (COA01-1185)	Denied
No. 083P03 Case below: 155 N.C. App. 500	State v. Smith	Def's PDR Under N.C.G.S. § 7A-31 (COA01-1360)	Denied
No. 317P03 Case below: 157 N.C. App. 638	State v. Thompson	Def's Motion for Temporary Stay (COA02-1220)	Denied
No. 234P03 Case below: 157 N.C. App. 143	State v. Williams	1. Def's NOA Based Upon a Constitutional Question (COA02-597) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
No. 217P03 Case below: 157 N.C. App. 22	State v. Wolfe	1. Def's NOA Based Upon a Constitutional Question (COA02-388) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
No. 224P03 Case below: 156 N.C. App. 357	Swain v. Preston Falls E., L.L.C.	Plts' PDR Under N.C.G.S. § 7A-31 (COA02-266)	Denied
No. 139P03 Case below: 156 N.C. App. 218	Taylor's Nursery, Inc. v. Baylor Boys, Inc.	Defs' PDR Under N.C.G.S. § 7A-31 (COA02-134)	Denied

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No. 213P03 Case below: 156 N.C. App. 512	Terry v. PPG Indus., Inc.	Defs' PDR Under N.C.G.S. § 7A-31 (COA02-342)	Denied
No. 235P03 Case below: 157 N.C. App. 143	Thompson v. Lee Cty.	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-711)	Denied

PETITIONS TO REHEAR

No. 293PA02 Case below: 357 N.C. 157	Colombo v. Stevenson	Defs' (George M. Stevenson, III and Susan Stevenson) Petition for Rehearing	Denied
No. 159A02 Case below: 357 N.C. 41	Wiley v. Williamson Produce	Def's Petition for Rehearing	Denied **05/27/03**

STATE OF NORTH CAROLINA v. HENRY LEE HUNT

No. 5A86-8

(Filed 16 July 2003)

Homicide— first-degree murder—short-form indictment—failure to list aggravating circumstances—constitutionality

The trial court did not err by denying a petitioner's writ of habeas corpus petition even though petitioner contends the short-form murder indictments used to charge him with two counts of capital first-degree murder and two counts of conspiracy to commit murder were rendered unconstitutional by the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556 (2002), based on the fact that the aggravating circumstances relied upon by the State at trial were not alleged in petitioner's indictments, because: (1) N.C.G.S. § 15A-2000(c)(1) provides that aggravating circumstances must be submitted to and found by the jury beyond a reasonable doubt; (2) the *Ring* case does not require that aggravating circumstances be alleged in state-court indictments; (3) constructive statutory notice under N.C.G.S. § 15A-2000(e) in which the eleven aggravating circumstances are listed for first-degree murder is adequate to satisfy the constraints of due process as dictated by the United States Constitution's Sixth Amendment and the North Carolina Constitution; and (4) if aggravating circumstances are the functional equivalent of elements for the purposes of complying with the Sixth Amendment notice requirement, this Court has already indicated that aggravators, being akin to other elements of murder such as premeditation and deliberation, do not necessarily have to be listed in the short-form murder indictment for a defendant to receive sufficient notice.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered 21 January 2003 by Judge Jack A. Thompson in Superior Court, Robeson County, denying defendant's petition for writ of habeas corpus. Heard in the Supreme Court 8 April 2003.

Roy Cooper, Attorney General, by G. Patrick Murphy, Barry S. McNeill, and William P. Hart, Special Deputy Attorneys General, for the State.

D. Stuart Meiklejohn, pro hac vice, and Steven L. Holley, pro hac vice, for defendant-appellant.

Hunter, Higgins, Miles, Elan & Benjamin, by Robert Neal Hunter, Jr.; and Gaskins & Gaskins, by Herman E. Gaskins, Jr., on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

Louis D. Bilionis on behalf of North Carolina Law Professors Anthony V. Baker; Sara Sun Beale; Louis D. Bilionis; John Charles Boger; Kenneth S. Broun; James E. Coleman, Jr.; Michael Kent Curtis; Marshall L. Dayan; Irving Joyner; Robert P. Mosteller; Eric L. Muller; Gene R. Nichol; J. Wilson Parker; H. Jefferson Powell; Richard A. Rosen; Fred J. Williams; and Ronald F. Wright, Jr., amici curiae.

North Carolina Conference of District Attorneys, by William D. Kenerly, amicus curiae.

BRADY, Justice.

Henry Lee Hunt (petitioner), convicted of two capital murders over seventeen years ago, challenges the lawfulness of the charging instruments used to indict him for first-degree murder. These instruments, known as "short-form indictments," have been used to charge murder suspects under North Carolina law for over a hundred years. This appeal therefore raises a question of critical importance to the legal validity of virtually every murder conviction secured in this state over the past century.

The dispositive issue in the present case is whether the United States Supreme Court's recent decision in *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556 (2002), renders North Carolina's short-form murder indictment unconstitutional. We conclude that it does not and therefore affirm the decision of the trial court.

Petitioner is currently incarcerated on North Carolina's death row. On 28 May 1985, petitioner was indicted in Superior Court, Robeson County, on two counts of first-degree murder and two counts of conspiracy to commit murder in connection with the killings of Jackie Ray Ransom and Larry Jones. Petitioner was indicted pursuant to short-form murder indictments authorized by N.C.G.S. § 15-144.

Petitioner was tried and convicted on all counts at the 18 November 1985 session of Superior Court, Robeson County. The facts

underlying petitioner's conviction were presented fully in our opinion reviewing petitioner's case on direct appeal. *See State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400 (1988). Briefly, those facts indicate that petitioner's codefendant, Elwell Barnes, recruited petitioner to assist in the killing of Jack Ransom. Barnes had agreed to kill Ransom for $2,000 so that Ransom's wife could obtain the proceeds of a life insurance policy. On 8 September 1984, petitioner killed Ransom. Believing that another individual, Larry Jones, had discussed Ransom's murder with police, petitioner shot and killed Jones on 14 September 1984.

Pursuant to our statutory capital sentencing procedures, the State introduced evidence to the jury supporting two aggravating circumstances for each of petitioner's first-degree murder convictions. As for the murder of Ransom, the State presented evidence as to the following aggravating circumstances: (1) a prior conviction for a felony involving the use or threat of violence to another person, N.C.G.S. § 15A-2000(e)(3) (1983) (amended 1994); and (2) capital felony committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). For the murder of Jones, the State introduced evidence supporting the following aggravating circumstances: (1) a prior conviction for a felony involving the use or threat of violence to another person, N.C.G.S. § 15A-2000(e)(3); and (2) murder committed for the purpose of avoiding or preventing a lawful arrest, N.C.G.S. § 15A-2000(e)(4). The jury found that the State had established each of the submitted aggravators beyond a reasonable doubt and recommended a sentence of death for each of the murders. The trial court entered judgments accordingly.

Petitioner sought and received extensive direct and collateral review of his convictions and sentences. On direct appeal, this Court found no error in petitioner's convictions and sentences. *Hunt*, 323 N.C. 407, 373 S.E.2d 400. The United States Supreme Court vacated the sentences of death and remanded the case to this Court with instructions to review the penalty phase of petitioner's trial in light of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). *Hunt v. North Carolina*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990). On remand, this Court found any error in the penalty proceeding harmless beyond a reasonable doubt and again found no reversible error in petitioner's convictions and sentences. *State v. Hunt*, 330 N.C. 501, 411 S.E.2d 806 (1992). The United States Supreme Court subsequently denied petitioner's writ of certiorari to review our decision. *Hunt v. North Carolina*, 505 U.S. 1226, 120 L. Ed. 2d 913 (1992).

Petitioner filed his first post-conviction motion for appropriate relief (MAR) pursuant to N.C.G.S. § 15A-1415 in Superior Court, Robeson County, on 3 December 1992. On 2 June 1994, several of petitioner's claims were dismissed as procedurally barred. This Court affirmed that dismissal. *State v. Hunt*, 336 N.C. 783, 447 S.E.2d 436 (1994). Beginning on 12 September 1994, the Superior Court conducted a five-week evidentiary hearing in connection with the remaining MAR claims. On 16 September 1996, the court denied petitioner's MAR. Both this Court and the United States Supreme Court denied writs of certiorari. *State v. Hunt*, 345 N.C. 758, 485 S.E.2d 304, *cert. denied*, 522 U.S. 861, 139 L. Ed. 2d 107 (1997).

On 10 April 1998, petitioner initiated federal habeas corpus proceedings under 28 U.S.C. § 2254. The United States District Court for the Eastern District of North Carolina granted the State's motion for summary judgment and denied petitioner's section 2254 petition. Petitioner appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the district court's order on 23 May 2002. *Hunt v. Lee*, 291 F.3d 284 (4th Cir. 2002). The United States Supreme Court denied certiorari review on 2 December 2002. *Hunt v. Lee*, — U.S. —, 154 L. Ed. 2d 517 (2002). Upon exhaustion of federal habeas corpus review, petitioner's execution was scheduled to occur between 12:01 a.m. and 12:00 p.m. on 24 January 2003.

On 23 December 2002, petitioner filed a petition for writ of habeas corpus in Superior Court, Orange County, pursuant to chapter 17 of the North Carolina General Statutes. Petitioner alleged that the Superior Court, Robeson County, did not have jurisdiction to try his case, as the indictments under which the court proceeded were defective. Specifically, petitioner contended that his indictments failed to allege: (1) the specific elements of intent, premeditation, and deliberation; and (2) the aggravating circumstances presented by the State in support of its contention that petitioner should receive the death penalty.

In an order entered 14 January 2002, the Orange County trial court denied in part and granted in part the petition for writ of habeas corpus. The trial court first denied petitioner's argument that the indictment failed to allege intent, premeditation, and deliberation. The trial court concluded that the argument was meritless based upon well-established case law from both this Court and the United States Supreme Court. However, the trial court granted a writ of habeas corpus as to petitioner's second argument based upon the United States Supreme Court's recent decision in *Ring*, 536 U.S. 584,

153 L. Ed. 2d 556. The trial court concluded that the court in which petitioner was convicted and sentenced did not have jurisdiction because, pursuant to *Ring*, the aggravating circumstances relied upon by the State at sentencing should have been alleged in petitioner's indictments. Pursuant to Rule 25(4) of the General Rules of Practice for the Superior and District Courts, the trial court concluded that the United States Supreme Court's decision in *Ring* rendered petitioner's second claim a "meritorious" challenge to the Superior Court's jurisdiction.

The trial court went on to conclude that if the petition "is deemed not to present a jurisdictional challenge, . . . it presents a meritorious non-jurisdictional challenge" and should be transferred to Robeson County "for disposition as a [MAR]." The State petitioned this Court for a writ of certiorari to review the trial court's order, but this Court denied the State's petition on 16 January 2003. *State v. Hunt*, 356 N.C. 686, 576 S.E.2d 333 (2003).

On 14 January 2003, petitioner filed a second MAR, along with a stay of execution, in Superior Court, Robeson County, alleging that he was factually innocent based upon evidence unavailable at the time of his trial. The trial court denied the second MAR and stay on 22 January 2003.

On 17 January 2003, Superior Court Judge Jack A. Thompson, who was assigned to Robeson County, held a hearing to consider the writ of habeas corpus returned to Superior Court, Robeson County, pursuant to Rule 25(4). Judge Thompson conducted a *de novo* review and thereafter entered an order on 21 January 2003 denying the petition. According to Judge Thompson, this Court had consistently rejected the very same arguments raised by petitioner: that the indictments should have contained the aggravating circumstances that the State intended to introduce at trial. Judge Thompson found that nothing in *Ring* required a different result or reconsideration of the issue raised. As such, Judge Thompson concluded that Superior Court, Robeson County, had subject matter jurisdiction over the crimes for which petitioner was indicted and denied the petition, as it lacked merit and presented no probable grounds for review. *See* N.C.G.S. § 17-4(4) (2001).

Thereafter, petitioner filed a petition for writ of habeas corpus with this Court to review Judge Thompson's 21 January 2003 order and further moved for stay of execution. On 22 January 2003, this Court allowed petitioner's motion for a temporary stay and allowed

the petition for writ of habeas corpus for the limited purpose of considering whether the failure to include aggravating circumstances in petitioner's indictments is inconsistent with *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556, and thus violative of the United States Constitution.

We begin our analysis of the above-stated issue with a brief history of those North Carolina statutes governing the crime of murder and proceedings in capital cases. Prior to any statutory codification of the crime of homicide, North Carolina common law divided homicide into three classes: (1) murder, the killing of a human being with malice aforethought, express or implied, for which the offender was punished by death; (2) manslaughter, a killing with sudden provocation and without malice, for which the convicted was "entitled to his clergy"; and (3) simple homicide, a killing that was justified or excusable, for which one would be deemed "unfortunate" but not punished. *State v. Boon*, 1 N.C. 191, 201-02 (1802); *see also State v. Rhyne*, 124 N.C. 847, 33 S.E. 128 (1899).

In 1893, our General Assembly codified the common-law crime of murder and divided it into two degrees, first-degree and second-degree murder. *See State v. Davis*, 305 N.C. 400, 422, 290 S.E.2d 574, 588 (1982). Under what is now N.C.G.S. § 14-17, the common-law definition of murder remained unchanged. *State v. Streeton*, 231 N.C. 301, 304, 56 S.E.2d 649, 652 (1949). Section 14-17 now provides:

> A murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction as defined in N.C.G.S. § 14-288.21, poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, a Class A felony, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to N.C.G.S. § 15A-2000, except that any such person who was under 17 years of age at the time of the murder shall be punished with imprisonment in the State's prison for life without parole. Provided, however, any person under the age of 17 who commits murder in the first degree while serving a prison sentence imposed for a prior murder shall be

> punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to N.C.G.S. § 15A-2000. All other kinds of murder, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or cocaine or other substance described in N.C.G.S. § 90-90(1)d., when the ingestion of such substance caused the death of the user, shall be deemed murder in the second degree, and any person who commits such murder shall be punished as a Class B2 felon.

N.C.G.S. § 14-17 (2001). However, the legislature "select[ed] from all murders denounced by the common law those deemed most heinous by reason of the mode of their perpetration and classifie[d] them as murder in the first degree, for which a greater punishment is prescribed." *Davis*, 305 N.C. at 422, 290 S.E.2d at 588. "Any other intentional and unlawful killing of a human being with malice aforethought, express or implied, remains murder as at common law, but is classified by the statute as murder in the second degree and a lesser sentence is prescribed." *Id.* at 423, 290 S.E.2d at 588.

In 1887, North Carolina first authorized the indictment of suspects for both first-degree and second-degree murder using a shortened version of an indictment. Act of Feb. 10, 1887, ch. 58, 1887 N.C. Sess. Laws 106 ("An act to simplify indictments in certain cases") (enacting what is now N.C.G.S. § 15-144). This unique charging instrument, which has become known in our parlance as the "short-form murder indictment," has been used in virtually every capital prosecution in North Carolina since then, and neither this Court nor the United States Supreme Court has ever deemed it unconstitutional. The importance of the short-form murder indictment is illustrated by its widely accepted use and impact.

Petitioner was indicted pursuant to two short-form murder indictments providing, in pertinent part, the following: "The jurors for the State upon their oath present that on or about the date of offense shown and in [Robeson County], [Henry Lee Hunt] unlawfully, willfully and feloniously and of malice aforethought did kill and murder [victim's name]." The indictments noted that they were sufficient to charge both first- and second-degree murder and that the offenses were committed in violation of N.C.G.S § 14-17.

In North Carolina, capital defendants are not only subject to indictment in accordance with N.C.G.S. § 15-144, but also receive

additional consideration concerning appointment of counsel in the case of indigency and are prosecuted under certain criminal procedures specifically reserved for capital cases. These additional protections ensure that such defendants receive all the due process of law to which they are entitled. Indigent capital defendants like petitioner receive the assistance of two attorneys, a lead and an associate attorney. N.C.G.S. § 7A-450(b1) (2001) (effective 1 July 1985). The associate attorney must be appointed "in a timely manner." *Id.* Subsequent to the time of Hunt's prosecution, this Court concluded that the failure to appoint a capital defendant assistant counsel is grounds for a new trial. *State v. Hucks*, 323 N.C. 574, 374 S.E.2d 240 (1988).

Chapter 15A, article 100 of our state's General Statutes, aptly titled "Capital Punishment," governs the procedures by which North Carolina capital defendants are prosecuted. N.C.G.S. § 15A-2000(a) provides, the same as it did at the time of petitioner's trial, notice to capital defendants that the trial court will hold a proceeding separate from the determination of their guilt to ascertain whether they should be sentenced to death or to life imprisonment. N.C.G.S. § 15A-2000(a)(1) (2001). A judge presides over the proceeding, which is held before a jury. The jury must determine the following: whether sufficient aggravating circumstance(s), as listed in N.C.G.S. § 15A-2000(e), exist; whether sufficient mitigating circumstance(s) exist; and based upon the weighing of the above-noted circumstances, whether defendant should be sentenced to death or to life imprisonment. N.C.G.S. § 15A-2000(b). The jury considers only the aggravating circumstances drawn from the exclusive list of eleven contained in N.C.G.S. § 15A-2000(e). The list contains neither a non-statutory category nor a catchall provision. The State must prove to the jury that the aggravating circumstances exist beyond a reasonable doubt before it can consider whether the aggravators support a sentence of death. N.C.G.S. § 15A-2000(c)(1). The defendant must demonstrate the existence of mitigating circumstances by a preponderance of the evidence. *State v. Holden*, 321 N.C. 125, 158-59, 362 S.E.2d 513, 534 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). The jury's recommendation that the defendant be sentenced to death must be unanimous. N.C.G.S. § 15A-2000(b).

In addition to these statutory protections, either party may request what has become known as a *Watson* hearing when there is a question as to the legal sufficiency of a set of facts supporting the aggravating circumstances. *State v. Blake*, 317 N.C. 632, 634 n.1, 346 S.E.2d 399, 400 n.1 (1986); *see also State v. Watson*, 310 N.C. 384, 388,

312 S.E.2d 448, 452 (1984) (acknowledging that a pretrial hearing at which the trial court could determine whether there was evidence of aggravating circumstances promoted "judicial economy and administrative efficiency"). At the hearing, the trial court must determine whether there is any evidence of the aggravating circumstances defined by N.C.G.S. § 15A-2000(e). *Blake*, 317 N.C. at 634 n.1, 346 S.E.2d at 400 n.1. Furthermore, Rule 24 of the General Rules of Practice for the North Carolina Superior and District Courts mandates that a pretrial conference be held in all cases where a defendant is charged with "a crime punishable by death." Gen. R. Pract. Super. & Dist. Cts. 24, 2003 Ann. R. N.C. 23, 23-24 (Lexis) (effective July 1994). At the "Rule 24 hearing," as it has become known, the parties must consider, among other things, the charges against the defendant and the existence of evidence of aggravating circumstances. *Id.* However, the State is not bound by the aggravating circumstances discussed at the hearing, nor can the trial court order the State to declare the exact aggravating circumstances upon which it will rely. *State v. Chapman*, 342 N.C. 330, 339, 464 S.E.2d 661, 666 (1995), *cert. denied*, 518 U.S. 1023, 135 L. Ed. 2d 1077 (1996).

It is against this backdrop that we consider whether the United States Supreme Court's decision in *Ring* renders unconstitutional North Carolina's short-form murder indictments, the form of indictment under which petitioner was charged. The United States Supreme Court's decisions in *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), laid the groundwork for the Court's decision in *Ring*. Briefly, in *Jones*, the Court examined the defendant's conviction and sentence under a federal carjacking statute. *Jones*, 526 U.S. at 229, 143 L. Ed. 2d at 317. In *Jones*, the defendant's sentence had been increased based upon the existence of what the government treated as a sentencing factor found by a trial judge and proven by a preponderance of the evidence. The United States Supreme Court concluded that the so-called sentencing factors were actually elements of separate offenses and that they "must be charged by indictment, proven beyond a reasonable doubt and submitted to a jury for its verdict." *Id.* at 251-52, 143 L. Ed. 2d at 331.

Similarly, in *Apprendi*, the United States Supreme Court examined a portion of New Jersey's hate-crime legislation that provided that a trial judge could increase a defendant's sentence beyond the statutory maximum if the judge found, by a preponderance of the evidence, that the underlying crime was motivated by race or other

impermissible factor. *Apprendi*, 530 U.S. at 468-69, 147 L. Ed. 2d at 442. The only issue before the Supreme Court was whether the above-noted statutory scheme violated the Sixth Amendment's guarantee to a trial by jury. The Court noted that the statutory labels "element" or "sentencing factor" were irrelevant in determining whether the Sixth Amendment required that the factors be proven to a jury beyond a reasonable doubt. *Id.* at 494, 147 L. Ed. 2d at 457. Rather, the inquiry should be whether "the required finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Id.* The Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 147 L. Ed. 2d at 455.

In *Ring*, the United States Supreme Court held that Arizona's capital sentencing scheme violated the Sixth Amendment right to trial by jury. *Ring*, 536 U.S. at 609, 153 L. Ed. 2d at 576-77. The Court concluded that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury" and be proven beyond a reasonable doubt. *Id.* at 609, 153 L. Ed. 2d at 577 (quoting *Apprendi*, 530 U.S. at 494 n.19, 147 L. Ed. 2d at 435 n.19).

Significantly, the United States Supreme Court in *Ring* observed that North Carolina was one of the twenty-nine states that "commit[s] sentencing decisions to juries" in death penalty cases. *Ring*, 536 U.S. at 608 n.6, 153 L. Ed. 2d at 576 n.6. This Court has previously held that North Carolina's capital sentencing scheme comports with both *Jones* and *Apprendi*. *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *State v. Lawrence*, 352 N.C. 1, 530 S.E.2d 807 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001); *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). We now hold that North Carolina's capital sentencing scheme complies with *Ring* in that aggravating circumstances must be submitted to and found by the jury beyond a reasonable doubt. *See* N.C.G.S. § 15A-2000(c)(1).

In North Carolina criminal prosecutions, the use of indictments is a well-established practice. Our state Constitution has consistently provided that

> no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when

> represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases.

N.C. Const. art. I, § 22; *accord* N.C. Const. of 1868, art. I, § 12 (1949); N.C. Const. of 1776, Declaration of Rights § 8. An indictment, as referred to in the above-noted constitutional provision, is "a written accusation of a crime drawn up by the public prosecuting attorney and submitted to the grand jury, and by them found and presented on oath or affirmation as a true bill." *State v. Thomas*, 236 N.C. 454, 457, 73 S.E.2d 283, 285 (1952). To be sufficient under our Constitution, an indictment "must allege lucidly and accurately all the essential elements of the offense endeavored to be charged." *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953).

> The purpose of such constitutional provisions is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial[;] and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty[,] to pronounce sentence according to the rights of the case.

Id.

Early common law required that indictments allege every element of the crime for which a defendant was charged, the manner in which the crime was carried out, and the means employed. *State v. Moore*, 104 N.C. 743, 750, 10 S.E. 183, 185 (1889) (noting that a particular short-form indictment would be invalid at common law because "it [did] not charge the means whereby the prisoner slew the deceased, nor the manner of the slaying"); 1 J.F. Archbold, *Criminal Procedure, Pleading and Evidence in Indictable Cases* 787 n.1 (8th ed. 1880) ("At common law, it is essentially necessary to set forth particularly the manner of the death and the means by which it was effected, and this statement may . . . be one of considerable length and particularity."). Until the 1800s, many states, including North Carolina, strictly adhered to the common-law pleading practices. 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.1(a) (2d ed. 1999) [hereinafter LaFave, *Criminal Procedure*]; *see also State v. Owen*, 5 N.C. 452, 453 (1810) (overturning verdict because indictment "did not set forth *the length and depth* of the mortal wounds").

In the mid-1800s, disturbed by the reversal of convictions based upon technical errors in criminal pleadings, many states began statutory reforms to relax certain common-law pleading requirements. 4 LaFave, *Criminal Procedure* § 19.1(b). At the time of the reform movement, North Carolina's Constitution "confer[red] upon the General Assembly power to regulate and prescribe criminal as well as civil procedure, not inconsistent with its provisions, 'of all the courts below the Supreme Court.' " *Moore*, 104 N.C. at 751, 10 S.E. at 186 (quoting N.C. Const. of 1868, art. IV, § 12); *cf.* N.C. Const. art. IV, § 12 ("Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State."). Thus, "within constitutionally mandated parameters[,] the legislature has the power to prescribe the form of a bill of indictment." *State v. Lowe*, 295 N.C. 596, 603, 247 S.E.2d 878, 883 (1978).

In 1811, reacting to a case in which the verdict was overturned based upon an indictment's failure to allege, among other things, the depth of the victim's wound, the North Carolina legislature passed what is now codified as N.C.G.S. § 15-153. *State v. Moses*, 13 N.C. 452, 463 (1830) ("The act of 1811 . . . passed the year after [the *Owen*] case was decided and we have reason to believe was caused by it.") (citing *Owen*, 5 N.C. 452). N.C.G.S. § 15-153 provides in substance the same as its 1811 ancestor, that an indictment

> is sufficient . . . if it expresses the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment.

N.C.G.S. § 15-153 (2001); *see also State v. Taylor*, 280 N.C. 273, 277, 185 S.E.2d 677, 680 (1972) (noting that N.C.G.S. § 15-153 "was designed to free the courts from the fetters of form, technicality and refinement not concerned with the substance of the charge").

The enactment of legislation authorizing the short-form murder indictment in 1887 was an attempt by the General Assembly to reform our criminal pleading practice. *See State v. Avery*, 315 N.C. 1, 12-14, 337 S.E.2d 786, 792-93 (1985); *Moore*, 104 N.C. at 750-51, 10 S.E. at 185-86; *see also* ch. 58, 1887 N.C. Sess. Laws at 106 (entitled "An act to simplify indictments in certain cases"). The statute authorizing the use of short-form murder indictments, N.C.G.S. § 15-144, provides the same now as it did when enacted: "[I]t is sufficient in describing mur-

der to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder [victim's name] . . . ." N.C.G.S. § 15-144 (2001).

Since the genesis of the short-form murder indictment in 1887, its validity has continually been avowed by the General Assembly. In 1893, when the legislature divided the common-law crime of murder into two degrees, it provided, by the same act, that "[n]othing herein contained shall be construed to require any alteration or modification of the existing form of indictment for murder." Act of Feb. 11, 1893, ch. 85, sec. 3, 1893 N.C. Sess. Laws 76, 76-77 (The relevant portion of the current version of the statute, N.C.G.S. § 15-172 (2001), provides the following: "Nothing contained in the statute law dividing murder into degrees shall be construed to require any alteration or modification of the existing form of indictment for murder."); *see also State v. Kirksey*, 227 N.C. 445, 448-49, 42 S.E.2d 613, 615 (1947) (noting that "the existing form of indictment" referred to in section 15-172 included short-form murder indictments as authorized by section 15-144).

This Court affirmed the General Assembly's intent to preserve the short-form murder indictment's usage, even after the most recent changes to the North Carolina Constitution and statutory changes to our criminal procedure laws. In 1971, North Carolina adopted the present incarnation of our state Constitution mandating the following: "In all criminal prosecutions, every person charged with a crime has the right to be informed of the accusation . . . ." N.C. Const. art. I, § 23. Shortly thereafter, in 1973, the General Assembly passed our Criminal Procedure Act (the Act), which was, as its name indicates, sweeping legislation regarding pretrial procedures in criminal prosecutions. Act of Apr. 11, 1974, ch. 1286, sec. 1, 1973 N.C. Sess. Laws (2d Sess.) 490, 490 ("An act to amend the laws relating to pretrial criminal procedure"). As part of the Act, the legislature provided that criminal pleadings must contain "[a] plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." *Id.* at 535 (codified as N.C.G.S. § 15A-924(a)(5)).

Upon examining a challenge to short-form murder indictments in light of the above-noted constitutional and statutory provisions, this Court expressly found that such indictments remained a valid charging instrument, as neither Article I, Section 23 of our state

Constitution nor N.C.G.S. § 15A-924(a)(5) expressly or implicitly repealed the statute authorizing the indictment's use. *Avery*, 315 N.C. at 14, 337 S.E.2d at 793. In sum, although changes were made to the way our courts indict for crimes other than murder, the short-form murder indictment remained a special instrument, statutorily distinguished from other indictments. The General Assembly again reaffirmed the validity of the short-form indictment by expanding its use to charge other serious felonies, including rape, *see* N.C.G.S. § 15-144.1 (2001) (enacted in 1977); *Lowe*, 295 N.C. at 603-04, 247 S.E.2d at 883-84 (affirming validity of short-form rape indictment), and statutory sex offense, *see* N.C.G.S. § 15-144.2 (2001) (enacted in 1979); *State v. Edwards*, 305 N.C. 378, 380, 289 S.E.2d 360, 362 (1982) (upholding short-form indictments charging sex offenses).

The Fifth and Sixth Amendments to the United States Constitution operate in tandem to guarantee those accused of a federal crime the right to indictment as the method by which they are "informed of the nature and cause of the accusations" against them. U.S. Const. amends. V, VI; *Harris v. United States*, 536 U.S. 545, 549, 153 L. Ed. 2d 524, 532 (2002); *see also Jones*, 526 U.S. at 252, 143 L. Ed. 2d at 331 (noting that the so-called sentencing factors were actually elements of separate crimes and must therefore be charged in indictment); *Almendarez-Torres v. United States*, 523 U.S. 224, 228, 140 L. Ed. 2d 350, 358 (1998) (noting that indictment must allege all of the elements of a crime); *Hamling v. United States*, 418 U.S. 87, 117, 41 L. Ed. 2d 590, 620 (1974) (same). The United States Constitution does not, however, apply the same principles to state-court prosecutions. For instance, the United States Supreme Court has never applied the Fifth Amendment's guarantee to indictment by a grand jury to state prosecutions. *Alexander v. Louisiana*, 405 U.S. 625, 633, 31 L. Ed. 2d 536, 543-44 (1972); *see also Hodgson v. Vermont*, 168 U.S. 262, 272, 42 L. Ed. 461, 464 (1897) ("[T]he words 'due process of law' in the Fourteenth Amendment of the Constitution of the United States do not necessarily require an indictment by a grand jury in a prosecution by a State for murder."); *Hurtado v. California*, 110 U.S. 516, 538, 28 L. Ed. 232, 239 (1884) (same). In observing that it had never applied the above-noted Fifth Amendment guarantee to states, the Supreme Court expressly stated that "the Due Process Clause . . . does not require the States to observe the Fifth Amendment's provision for presentment or indictment by a grand jury." *Alexander*, 405 U.S. at 633, 31 L. Ed. 2d at 543.

Perhaps most important, in *Apprendi* and *Ring*—cases pivotal to petitioner's claim in the present case—the United States Supreme Court clearly indicated that those decisions did not concern or have any applicability to allegedly defective indictments. *Ring*, 536 U.S. at 597 n.4, 153 L. Ed. 2d at 569 n.4 ("Ring does not contend that his indictment was constitutionally defective."); *Apprendi*, 530 U.S. at 477 n.3, 147 L. Ed. 2d at 447 n.3 ("Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment."). In *Apprendi*, the Court *expressly* recognized that the Fourteenth Amendment "has not . . . been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury.' " *Apprendi*, 530 U.S. at 477 n.3, 147 L. Ed. 2d at 447 n.3. In *Harris*, the United States Supreme Court recently affirmed that while only federal prosecutions require presentment or indictment by grand jury, the Sixth Amendment guarantee to trial by an impartial jury, including the right to have all elements proven beyond a reasonable doubt, applies in *both* state and federal prosecutions. *Harris*, 536 U.S. at 549, 153 L. Ed. 2d at 532-33.

In contrast to its application of the Fifth Amendment's indictment guarantee, the United States Supreme Court has unequivocally applied the Sixth Amendment's edict that the accused be informed of criminal accusations against him. *In re Oliver*, 333 U.S. 257, 273, 92 L. Ed. 682, 694 (1948). In defining the parameters of state criminal defendants' rights to notice under the Sixth Amendment, the Supreme Court has concluded that such defendants have a right to "*reasonable notice*" sufficient to ensure that they are afforded an opportunity to defend against the charges. *Id.* As stated by the Supreme Court over one hundred years ago in *Hodgson*,

> in *all* criminal prosecutions the accused must be informed of the nature and cause of the accusation against him; that in no case can there be, in criminal proceedings, due process of law where the accused is not thus informed, and that the information which he is to receive is that which will acquaint him with the essential particulars of the offen[s]e, so that he may appear in court prepared to meet every feature of the accusation against him.

168 U.S. at 269, 42 L. Ed. at 463 (emphasis added).

This Court has recognized that the Fifth Amendment's guarantee to indictment by a grand jury does not apply in the context of a challenge to state-court indictment. In *Wallace*, 351 N.C. 481, 528 S.E.2d

326, we examined a challenge to short-form indictments charging murder, rape, and sex offense in which the defendant claimed that the indictments failed to allege all elements of the crimes charged. In so doing, this Court acknowledged that the due process and notice requirements under the Sixth Amendment inured to state prosecutions, as stated by the Supreme Court in *Hodgson*. *Id.* at 507, 528 S.E.2d at 342-43. We further recognized that the Fifth Amendment's guarantee to indictment by a grand jury was not applicable to the states, and as such, "all the elements or facts which might increase the maximum punishment for a crime" do not necessarily need to be listed in an indictment. *Id.* at 508, 528 S.E.2d at 343. Our holding in *Wallace* is consistent with the United States Supreme Court's decision in *Ring*: that the Fifth Amendment would not require aggravators, even if they were fundamental equivalents of elements of an offense, to be pled in a state-court indictment.

Short-form indictments, including the ones used to charge petitioner in the instant case, comport with the statutory provisions governing indictment practices. Given the instrument's genesis and history, short-form murder indictments are special instruments that arose separate from and coexist with the statutory requirements of N.C.G.S. § 15A-924(a)(5), which mandates that indictments contain a "plain and concise factual statement in each count." Consistent with the concept of construing statutes *in pari materia*, our General Assembly could not have intended a conflict with other indictment statutes or a statutory violation arising from the use of short-form indictments. *See Brown v. Flowe*, 349 N.C. 520, 523-24, 507 S.E.2d 894, 896 (1998) (noting that "[w]hen multiple statutes address a single subject, this Court construes them *in pari materia* to determine and effectuate the legislative intent").

In support of his argument that the aggravating circumstances must have been pled in his indictments, petitioner relies heavily on our decision in *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001). In *Lucas*, this Court invalidated the defendant's two noncapital felony sentences, partially because certain factors increasing the defendant's sentences were not pled in his indictment. *Id.* at 597-98, 548 S.E.2d at 731. Defendant's application of *Lucas* misapprehends the law. In *Lucas*, we were not concerned with a short-form indictment. As we indicated in *Lucas*, if the State wishes to seek a firearm enhancement *in addition to* a conviction for murder, rape, or sex offense, the enhancement must be pled in the indictment, even if the charging instrument is a short-form indictment. *Id.* at 598, 548 S.E.2d

at 732. However, the principles of *Lucas* do not otherwise apply to short-form indictments.

Unlike a short-form indictment, the indictment in *Lucas* was not exempt from the statutory requirement, pursuant to N.C.G.S. § 15A-924, that indictments must state every element of the crime charged. It follows that crimes charged pursuant to a short-form indictment—murder, rape, and sex offense—are not governed by the principles espoused in *Lucas*. Such an application of *Lucas* comports with well-established case law holding that in prosecutions where short-form indictments are not used and the indictment alleges elements of a lesser crime, there is no statutory authority (sometimes referred to as "jurisdiction") to enter judgment based upon a verdict finding defendant guilty of the greater crime. *See State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983) (noting that although the legislature may prescribe the form of indictment sufficient to allege a crime without listing all elements and had done so in certain cases, it had not done so in the case of kidnapping); *State v. Perry*, 291 N.C. 586, 231 S.E.2d 262 (1977) (holding, prior to provisions for short-form rape indictments, that, unlike murder indictment, indictment sufficient to charge second-degree rape was not sufficient to charge first-degree rape); *see also State v. Moore*, 316 N.C. 328, 341 S.E.2d 733 (1986); *State v. Goss*, 293 N.C. 147, 235 S.E.2d 844 (1977). The legislature has thus made it clear that murder and other crimes for which it has authorized the use of short-form indictments are to be treated differently in the application of N.C.G.S. § 15A-924 (indictment must express the charge in a plain, intelligible, and explicit manner). *Cf.* N.C. Const. art. I, § 12 (treating capital crimes differently by prohibiting waiver of indictment in those cases); N.C.G.S. § 15A-642(b) (2001) (same); *Thomas*, 236 N.C. at 457, 73 S.E.2d at 285 (same).

As there is no statutory requirement that aggravating circumstances be pled in murder indictments, the only remaining potential bar to the use of the short-form murder indictment would be constitutional. *See State v. Harris*, 145 N.C. 456, 458, 59 S.E. 115, 116 (1907) (" 'To be informed of the accusation against him' is the requirement of our Bill of Rights, and unless such legislation is in violation of this principle or in contravention of some express constitutional provision, it should and must be upheld by the courts."). As noted *supra*, neither *Ring* nor *Apprendi* purports to address or dictate the contents of a state-court murder indictment. Furthermore, to this date, the United States Supreme Court has not applied the Fifth Amendment indictment requirements to the states. *See Alexander*,

405 U.S. at 633, 31 L. Ed. 2d at 543-44. Thus, in answering the question before the Court today, *Ring* does not require that aggravating circumstances be alleged in state-court indictments.

Our independent review of decisions from our sister states reveals that to this date every state court addressing the above-noted issue has held that *Ring* does not require that aggravating circumstances be alleged in the indictment. *See, e.g.*, *Stallworth v. State*, — So. 2d —, —, 2003 Ala. Crim. App. LEXIS 21, at *22-23 (Ala. Crim. App. Jan. 31, 2003) (No. CR-98-0366) (indicating that *Ring* did not change prior case law holding that aggravators do not need to be pled in an indictment); *Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla.) (per curiam) (rejecting arguments based upon *Ring*), *cert. denied*, — U.S. —, 154 L. Ed. 2d 564 (2002); *Terrell v. State*, 276 Ga. 34, —, 572 S.E.2d 595, 602 (2002) (concluding in a post-*Ring* challenge to an indictment that the indictment need not allege aggravating circumstances); *State v. Gilbert*, 103 S.W.3d 743, 747 (Mo. 2003) (*en banc*) (holding that *Ring* had no effect on the court's previous rejection of the argument that indictments need to allege aggravators); *State v. Oatney*, 335 Or. 276, —, 66 P.3d 475, 487 (2003) (holding that *Ring* did not address the issue of whether aggravators needed to be pled in the indictment and, therefore, that court's prior holding that an indictment need not contain aggravators remained unchanged); *State v. Berry*, — S.W.2d —, —, 2003 Tenn. Crim. App. LEXIS 316, *16 (Tenn. Crim. App. Apr. 10, 2003) (No. M2001-02023-CCA-R3-DD) (holding, post-*Ring*, that *Apprendi* did not apply to require the State to include aggravators in indictments).

The only possible constitutional implication that *Ring* and *Apprendi* may have in relation to our capital defendants is that they must receive reasonable notice of aggravating circumstances, pursuant to the Sixth Amendment's notice requirement. "The General Assembly has the undoubted right to enact legislation . . . to modify old forms of bills of indictment[] or [to] establish new ones, provided the form established is sufficient to apprise the defendant with reasonable certainty of the nature of the crime of which he stands charged." *Harris*, 145 N.C. at 457-58, 59 S.E. at 116.

As mentioned above, this Court has consistently and unequivocally upheld short-form murder indictments as valid under both the United States and the North Carolina Constitutions. *See, e.g.*, *Braxton*, 352 N.C. at 173-75, 531 S.E.2d at 437; *Wallace*, 351 N.C. at 503-08, 528 S.E.2d at 341-43; *State v. Kilpatrick*, 343 N.C. 466, 472, 471 S.E.2d 624, 628 (1996); *Avery*, 315 N.C. at 12-14, 337 S.E.2d at 792-93.

Relevant to our discussion herein, in previous challenges to the short-form murder indictment's failure to allege statutory aggravating circumstances, this Court has held that constructive, statutory notice via the statute in which the aggravators are listed—N.C.G.S. § 15A-2000(e)—is adequate to satisfy the constraints of due process as dictated by the United States Constitution's Sixth Amendment and the North Carolina Constitution. *Holden*, 321 N.C. at 154, 362 S.E.2d at 531 ("The notice provided by this statute is sufficient to satisfy the constitutional requirements of due process."); *State v. Young*, 312 N.C. 669, 675, 325 S.E.2d 181, 185 (1985) (holding that the statutory notice provided by section 15A-2000(e) is sufficient to satisfy constitutional requirements of due process); *State v. Williams*, 304 N.C. 394, 422, 284 S.E.2d 437, 454 (1981) (same), *cert. denied*, 456 U.S. 932, 72 L. Ed. 2d 450 (1982); *State v. Taylor*, 304 N.C. 249, 257, 283 S.E.2d 761, 768 (1981) (same), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983).

Petitioner argues that the above-noted cases do not support the argument that aggravators need not be pled in an indictment. Petitioner contends that the cases are inapplicable because this Court has analyzed aggravators as sentencing factors, rather than as elements of offenses, and that this reasoning is the basis for our conclusion that aggravators need not be pled in the indictment. *See, e.g.*, *State v. Golphin*, 352 N.C. 364, 396-97, 533 S.E.2d 168, 193-94 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001); *Taylor*, 304 N.C. at 257, 283 S.E.2d at 768. Petitioner also contends that these cases are no longer controlling because in at least one case, *Golphin*, 352 N.C. at 397, 533 S.E.2d at 193, we specifically relied upon the United States Supreme Court's decision in *Walton v. Arizona*, 497 U.S. 639, 111 L. Ed. 2d 511 (1990), which was expressly overruled by the Court in *Ring*.

Petitioner's arguments are unavailing for two reasons. First, this Court has concluded, post-*Apprendi*, that the failure to list other elements of first-degree murder, including premeditation and deliberation, in a short-form murder indictment does not violate either the North Carolina or the United States Constitution. *Braxton*, 352 N.C. at 173-75, 531 S.E.2d at 436-38. Thus, if aggravators are the functional equivalent of elements for the purposes of complying with the Sixth Amendment notice requirement, this Court has already indicated that aggravators, being akin to other elements of murder such as premeditation and deliberation, do not necessarily have to be listed in the short-form murder indictment for a defendant to receive sufficient

notice. Second, our reference to *Walton* in *Golphin* is of no import to the issue presented here, as *Ring* overruled only that portion of *Walton* referring to aggravators as sentencing factors for the purpose of defendant's Sixth Amendment right to trial by jury. *See Ring*, 536 U.S. at 609, 153 L. Ed. 2d at 576-77 (overruling "*Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty").

The nature of the aggravators themselves ensures that defendants will be reasonably apprised of the evidence that could lead to a sentence of death. N.C.G.S. § 15A-2000(e) limits to eleven the list of possible aggravators against which defendants must defend themselves. The list of aggravating circumstances is exclusive, relatively short, and contains no catchall provision. *Cf. Lynch v. State*, 841 So. 2d 362, 378 (Fla. 2003) (holding that there is no reason for the State to notify defendants of aggravators, as the list of aggravators that can be imputed to defendants is limited to those enumerated in the relevant state statute).

Petitioner argues that the analysis this Court applied in *Lucas* is squarely applicable to the instant case, as the firearm sentencing enhancement at issue in *Lucas* is indistinguishable from the aggravating circumstances at issue in the present case. We disagree. As noted *supra*, the application of our decision in *Lucas* is limited to those situations in which a short-form indictment is not the charging instrument. Furthermore, capital prosecutions present an inherently different situation than those in which defendants are indicted for crimes that may or may not subject them to a firearm or other sentencing enhancement. Unlike defendants for whom the State had an option to seek a firearm enhancement, neither capital defendants nor their attorneys will *ever* be blind-sided with aggravating circumstances. Just because a defendant is indicted for a certain noncapital crime, it does not necessarily follow that the State will later seek to attach a firearm enhancement. However, first-degree murder is the *only* crime to which the exclusive list of section 15A-2000(e) aggravators can apply. N.C.G.S. § 15A-2000(e) is necessarily implicated at the very moment a defendant is informed of the State's intent to seek the death penalty against him, or perhaps even earlier. As we have previously held, once N.C.G.S. § 15A-2000(e) has been triggered, the exclusiveness of the list of only eleven aggravators in that section is sufficient to provide reasonable notice. *See Holden*, 321 N.C. at 153-54, 362 S.E.2d at 531; *Young*, 312 N.C. at 675, 325 S.E.2d at 185;

Williams, 304 N.C. at 422, 284 S.E.2d at 454; *Taylor*, 304 N.C. at 257, 283 S.E.2d at 768. Given the limited applicability of section 15A-2000(e), due process does not require that short-form murder indictments state the aggravators or even allude to the statutory provision in which they are enumerated.

Moreover, as noted by *amici*, many complications would invariably arise if we required aggravators to be pled in murder indictments. These problems include determining whether the grand jury would need to be "death-qualified" and what procedures, if any, would be employed so that the State could acquire a superseding indictment containing aggravating circumstances it may discover after defendant has been indicted. In addition, with the aggravating circumstances already determined by the grand jury, both the State and the defendant may lose the benefit of the pretrial *Watson* hearing. These and other procedural challenges that our court system would inevitably have to confront are akin to the myriad of technical problems that short-form murder indictments were intended to alleviate when first authorized in 1887. *See* 4 LaFave, *Criminal Procedure* § 19.1(b), (c).

We are further persuaded that short-form murder indictments need not contain aggravators because they are not the only mechanism in place today by which capital defendants, with the assistance of their two attorneys, could receive *actual* notice of aggravating circumstances. The parties to a capital prosecution *must* consider the existence of aggravating circumstances at the Rule 24 hearing. *See* Gen. R. Pract. Super. & Dist. Cts. 24, 2003 Ann. R. N.C. at 23-24. Defendants have the option of requesting a bill of particulars as to the evidence of the aggravating circumstances the State may seek to introduce against defendant, although the State is not bound by the aggravators it discloses prior to trial. N.C.G.S § 15A-925(c). Certain aggravating circumstances and evidence related thereto may become evident during the pretrial discovery period, at a pretrial probable cause hearing held pursuant to N.C.G.S. § 15A-606, or at other pretrial proceedings. *See, e.g., Parker v. State*, 917 P.2d 980, 986-87 (Okla. Crim. App. 1996) (concluding that an indictment's failure to allege element of crime was cured by the defendant's actual notice of facts constituting the element at preliminary hearing), *cert. denied*, 519 U.S. 1096, 136 L. Ed. 2d 721 (1997). These additional protections also lend support to our holding that aggravating circumstances need not be alleged in an indictment. Given the above-noted discussion, we cannot conclude that *Ring* requires state-court murder indictments

to allege the aggravating circumstances to be presented against capital defendants.

VI.

For the first time on appeal, the State argues that the decisions of the United States Supreme Court supporting the petition for writ of habeas corpus do not provide petitioner with a means for relief, because the application of these decisions to petitioner is barred by *Teague v. Lane*, 489 U.S. 288, 103 L. Ed. 2d 334 (1989). In *Teague*, the United States Supreme Court held that new rules of criminal procedure cannot be applied retroactively on federal collateral review unless they fall within two narrow exceptions. *Id.* at 310, 103 L. Ed. 2d at 356. This Court adopted the application of *Teague* to collateral criminal proceedings in this state in *State v. Zuniga*, 336 N.C. 508, 444 S.E.2d 443 (1994). According to the State, any new rule contained in *Ring* and *Apprendi* should apply only to cases on direct review and to those cases falling into the two exceptions. Because we have reviewed petitioner's arguments and found them to be without merit, the State's argument is moot and warrants no further discussion.

In North Carolina, the short-form murder indictment has survived over a hundred years as a valid method for charging capital defendants with the crime of first-degree murder. This Court has consistently concluded that such an indictment violates neither the North Carolina nor the United States Constitution. Relevant to the issues presented by the case at issue, the United States Supreme Court and this Court have previously indicated that the Fifth Amendment to the United States Constitution does not apply to state prosecutions. As such, the Fifth Amendment does not require that aggravators be found by a grand jury and pled within the resulting indictment.

Despite petitioner's contentions to the contrary, nothing in the United States Supreme Court's decision in *Ring*, or any other case, requires us to reach a different result today. The trial court did not err in denying the petition for writ of habeas corpus. Accordingly, the trial court's order denying the writ is affirmed, and this Court's stay of execution is dissolved.

AFFIRMED.

IN THE MATTER OF: JOANIE STUMBO, STEVEN STUMBO, SCOTT STUMBO, UNKNOWN STUMBO

No. 321A01

(Filed 16 July 2003)

Parent and Child—juvenile neglect—obstruction of investigation

The trial court's order based upon a petition filed by the Department of Social Services (DSS) under N.C.G.S. § 7B-303 charging the parents with interference with or obstruction of an investigation is reversed because the investigative mandate of N.C.G.S. § 7B-302 regarding the abuse, neglect, or dependency of a juvenile was not properly invoked when: (1) before any investigation is initiated or interference with any such investigation ensues, the proper inquiry that must be made by DSS is whether an investigation is mandated based upon the first report or multiple reports that show a pattern of neglect; (2) there was no testimony by the investigator for DSS at the hearing and no written report by DSS regarding whether the anonymous caller's allegations rose to a level sufficient to constitute a report of neglect and require the statutorily mandated investigation; and (3) the factually incomplete circumstances of the instant case of a single report by an anonymous caller of an unsupervised, naked two-year-old child in the driveway of a house does not trigger the investigative requirements of N.C.G.S. § 7B-302.

Justice MARTIN concurring.

Chief Justice LAKE and Justice BRADY joining in concurring opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 143 N.C. App. 375, 547 S.E.2d 451 (2001), affirming an order entered 25 January 2000 by Judge Anna F. Foster in District Court, Cleveland County. On 8 November 2001, the Supreme Court retained respondents' notice of appeal as to a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1). Heard in the Supreme Court 11 February 2002.

John D. Church; and Yelton, Farfour, McCartney & Lutz, by Leslie Farfour Jr., for petitioner-appellee Cleveland County Department of Social Services.

Stam, Fordham & Danchi, P.A., by Paul Stam; and Home School Legal Defense Association, by Michael P. Farris, pro hac vice; James R. Mason, pro hac vice; and Scott W. Somerville, pro hac vice, for respondent-appellants James and Mary Stumbo.

Smith Helms Mulliss & Moore, LLP, by Neil A. Riemann; and Seth H. Jaffe, on behalf of the American Civil Liberties Union of North Carolina Legal Foundation, amicus curiae.

Lewis, Goldberg & Ball, P.C., by Michael L. Goldberg, pro hac vice, and Michael D. Hutchinson, pro hac vice; National Association of Social Workers, by Carolyn I. Polowy, General Counsel, pro hac vice; and Council for Children, Inc., by Brett Loftis, on behalf of the National Association of Social Workers and the National Association of Social Workers, North Carolina Chapter, amici curiae.

Roy Cooper, Attorney General, by R. Kirk Randleman, Assistant Attorney General, on behalf of the State of North Carolina, amicus curiae.

ORR, Justice.

This case arises out of an anonymous call to an unnamed caseworker in the Cleveland County Department of Social Services (CCDSS) during which the caller alleged that he or she had seen an unsupervised two-year-old child, naked in the driveway of a house. This information, along with the location of the home, was passed along to Tasha Lowery, an investigator with the CCDSS.

Approximately two hours later, Ms. Lowery investigated the anonymous report and was rebuffed by first the mother and then the father, Mary Ann and James Stumbo, in her attempt to talk in private with the child in question and with the child's siblings. As a result, CCDSS filed a "Petition to Prohibit Interference with or Obstruction of Child Protective Services Investigation" in the District Court, Cleveland County, pursuant to N.C.G.S. § 7B-303.

On 27 September 1999, a hearing was held on the petition, at which time both parents of the child and Ms. Lowery testified. The district court judge focused her inquiry exclusively on whether the parents had interfered with the investigation and concluded that the "parents of the minor children named in the petition obstructed or interfered with this investigation by refusing to allow Tasha Lowery as a representative of the Director of Social Services for Cleveland

County[] to observe or interview the Juveniles in private without lawful excuse." The court then ordered the parents "to not obstruct, interfere with the investigation as set forth in [N.C.G.S. §] 7B-303(a) and 7B-303(b)." The parents appealed to the Court of Appeals, which, in a divided decision, affirmed the trial court. The parents filed notice of appeal with this Court based upon the dissent and also based upon a constitutional question.

This Court is called upon to resolve and clarify the scope and authority under the pertinent statutes of a department of social services (DSS) to pursue this matter based upon the facts established by the record. Throughout the litigation of this case, the parents have cloaked their argument in the context of Fourth Amendment constitutional grounds.[1] As we have often noted, "the courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002). This is just such a case.

In examining the record before this Court, we find no direct evidence or record of the specific contents of the anonymous call made to the CCDSS. The only evidence is Ms. Lowery's testimony at the hearing as to what an unnamed caseworker told her:

> Q. Now, directing your attention to the time or near the time that this petition for non-interference was taken out, did you have occasion, Ms. Lowery, to receive a report involving any of the children that you have now identified in your petition for a non-interference order as Jonie Stumbo, . . .?
>
> A. Yes.

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1. We note that the Seventh Circuit Court of Appeals recently held that it was unconstitutional on Fourth Amendment grounds when Child Welfare employees interviewed a minor child at a private school "without a warrant or court order, probable cause, consent or exigent circumstances." *Doe v. Heck*, 327 F.3d 492, —— (7th Cir. 2003). In *Doe v. Heck*, the Bureau of Milwaukee Child Welfare received a report that a private school used corporal punishment as a form of discipline. The caseworkers went to the school and removed, without a warrant, court order, parental notification or consent, an eleven-year-old child from his classroom to interview him about the school's disciplinary procedures *Id.* The Seventh Circuit ultimately held that the caseworkers' investigation constituted a search because they "went to the school for the specific purpose of gathering information, an activity that most certainly constitutes a search under the Fourth Amendment." *Id.* at ——. The Seventh Circuit further held that the eleven-year-old was seized "within the meaning of the Fourth Amendment because no reasonable child would have believed he was free to leave." *Id.* at ——. Finally, the court held that the parents manifested a reasonable expectation of privacy by enrolling him in the private school and entrusting the child to school officials. *Id.* at ——.

Q. When was that?

A. September the 9th, 1999.

Q. What were you doing on September the 9th, 1999 when you received a report involving these children or how did you become involved with these children?

A. I was on what we call the emergency schedule, so I respond to any kind of immediate calls. I was on my way to follow up on additional report for my caseload when I was paged and given the information by a new caseworker.

Q. And what information did you receive?

A. The information I received that someone had saw a two-year old naked child in the driveway unsupervised.

Q. And did they give you a location or a general area where the child had been observed naked and unsupervised in the yard?

A. Yes.

Q. And what location were you given by the intake—

A. The indicator was on Wright Road in Kings Mountain. It was the last case on the right before you get to the subdivision on the left.

Q. The last case or the last house?

A. Last house.

The record does not reflect, nor did the testimony at the hearing provide, any further information about the facts of the incident that precipitated this litigation. There is no information either in the record or in the transcript of the hearing as to how long the child was outside unsupervised; the character of the surrounding area; or whether the child had ever been outside, naked and unsupervised before. Upon being called as a witness, James Stumbo attempted to explain what had happened, but the trial court sustained opposing counsel's objection to Mr. Stumbo's testimony. The trial court instructed Mr. Stumbo to confine his testimony to events that transpired at the time Ms. Lowery arrived at his home. All further evidence and the record before us relates solely to the effort by Ms. Lowery to interview the Stumbos' four children in private and the Stumbos' refusal to allow her to do so. Thus, without ever determining whether there was sufficient evidence of "neglect" to trigger the

investigative requirements of N.C.G.S. § 7B-302, this case proceeded to a statutorily mandated investigation and legal measures to prohibit the parents' interference with an investigation by the CCDSS. The focus of all parties was on the Fourth Amendment right of the Stumbos to refuse to let Ms. Lowery in their house and/or to interview the children in private.

As explained in the case of *In re Helms*, "[t]he determination of neglect requires the application of the legal principles set forth in N.C. Gen. Stat. § 7A-517(21) [now N.C.G.S. § 7B-101(15)] and is therefore a conclusion of law." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675-76 (1997). Thus, it is incumbent on the Court to determine whether, based on the evidence of record, the conduct complained of, if true, constituted neglect as envisioned by the General Assembly and as interpreted by the case law of this jurisdiction.

Before reviewing applicable case law on this question, we note that not every act of negligence on the part of parents or other care givers constitutes "neglect" under the law and results in a "neglected juvenile." Such a holding would subject every misstep by a care giver to the full impact of subchapter I of chapter 7B of the North Carolina General Statutes, resulting in mandatory investigations, N.C.G.S. § 7B-302 (2001); and the potential for petitions for removal of the child or children from their family for custodial purposes, N.C.G.S. ch. 7B, subch. I, art. 5 (2001); and/or ultimate termination of parental rights, N.C.G.S. ch. 7B, subch. I, art. 11 (2001).

A "neglected juvenile" is defined in part as one "who does not receive proper care, supervision, or discipline from the juvenile's parent . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2001). In order to adjudicate a juvenile neglected, our courts have additionally "required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide 'proper care, supervision, or discipline.' " *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (quoting former N.C.G.S. § 7A-517(21) (1989)), *quoted in Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676.

Our review of the numerous cases where "neglect" or a "neglected juvenile" has been found shows that the conduct at issue constituted either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile. For example, in *Powers*, the Court of Appeals ultimately adjudicated

four children neglected based on clear and convincing evidence of the mother's severe abuse of alcohol. *Powers v. Powers*, 130 N.C. App. 37, 502 S.E.2d 398, *disc. rev. denied*, 349 N.C. 530, 526 S.E.2d 180 (1998). The county DSS had received twenty-four reports about the care of the Powers children. *Id.* at 39, 502 S.E.2d at 400. DSS substantiated seven reports against the mother "based on her lack of supervision, alcoholism and emotional abuse or neglect." *Id.* During DSS' involvement, the mother was cited for driving while impaired on at least two occasions while her minor children were passengers. *Id.* at 39, 42, 502 S.E.2d at 399, 401. DSS reports showed that while at home the mother became substantially intoxicated and was unable to care for her younger children and that her alcohol abuse contributed to the emotional problems of her children. *Id.* at 43-44, 502 S.E.2d at 402.

In another child-neglect case, an elementary school principal reported to the county DSS that a five-year-old came to school with a bruise on her face and complained that her mother had been "digging into" her vagina with a washcloth during baths. *In re Thompson*, 64 N.C. App. 95, 96, 306 S.E.2d 792, 792 (1983). The trial court found as fact that the mother had "struck her child with a belt and, on at least three occasions while bathing the child, inserted her finger or a washcloth into the child's vagina and washed with sufficient force to cause the child to bleed." *Id.* at 99, 306 S.E.2d at 794. The mother was instructed to get counseling for the child, as well as for herself, both of which the mother failed to do. *Id.* at 100, 306 S.E.2d at 795. Although the trial court dismissed the petition for protective services, on appeal, the Court of Appeals, based on the clear and convincing evidence of neglect, vacated the order and remanded the case for further proceedings. *Id.* at 101, 306 S.E.2d at 796.

In the case of *In re Bell*, the county DSS first became involved when it received a report stating that four children under the age of six years had been left alone overnight. *In re Bell*, 107 N.C. App. 566, 421 S.E.2d 590, *appeal dismissed*, 333 N.C. 168, 426 S.E.2d 699 (1992). Ultimately, the trial court adjudicated the children in *Bell* neglected because DSS found that the parent did not keep adequate food in the house, that two children were not immunized against childhood diseases, and that the six-month-old baby had never been seen by a doctor. *Id.* at 567-68, 421 S.E.2d at 591.

In the aforementioned cases, the facts of the initial reports were "reports of neglect" as required by N.C.G.S. § 7B-302. In *Powers*, DSS received twenty-four reports that children were in harm's way

because of their mother's alcohol abuse, and thereby served to establish a pattern of conduct injurious to the children's welfare. *Powers*, 130 N.C. App. at 39-47, 502 S.E.2d at 400-04. In *Thompson*, although DSS received only one report, the report was an allegation of a serious sexual offense. *Thompson*, 64 N.C. App. at 96-104, 306 S.E.2d at 792-96. Finally, in *Bell*, the report that four children under the age of six were left alone overnight served to establish neglect of a serious and dangerous nature. *Bell*, 107 N.C. App. at 567-71, 421 S.E.2d at 591-93. The factually incomplete circumstances of the instant case (the one time citing of an unsupervised, naked two-year-old in her driveway) do not approximate those factual circumstances of the cases above; thus, we must conclude, as a matter of law, that the evidence of record does not constitute a report of "neglect."

Once a county DSS receives "a report of abuse, neglect, or dependency," the investigative mandates of N.C.G.S. § 7B-302 follow:

> When a report of abuse, neglect, or dependency is received, the director of the department of social services shall make a prompt and thorough investigation in order to ascertain the facts of the case, the extent of the abuse or neglect, and the risk of harm to the juvenile, in order to determine whether protective services should be provided or the complaint filed as a petition.

N.C.G.S. § 7B-302(a). It is this statute that sets off a chain of statutory and regulatory actions by the DSS. Once an investigation ensues, anyone who interferes with that investigation may be summoned to defend his or her actions and ultimately may be ordered by the trial court to cease from obstructing or interfering with the investigation. N.C.G.S. § 7B-303(a) (2001). Moreover, a non-interference order may be enforced by civil or criminal contempt. N.C.G.S. § 7B-303(f). In part, "interference" means "refusing to allow the director to have personal access to the juvenile, [and] refusing to allow the director to observe or interview the juvenile in private." N.C.G.S. § 7B-303(b). However, before any investigation is initiated or interference with any such investigation ensues, the proper inquiry that must be made by DSS is whether an investigation is mandated based upon the first report or multiple reports that show a pattern of neglect. Having commenced a N.C.G.S. § 7B-303 hearing, however, it is incumbent on the trial court to first ascertain whether a report of abuse, neglect, or dependency triggering the statutory mandates has been made. To the extent that the trial court in this case, as affirmed by the Court of Appeals majority concluded otherwise, that decision is in error.

One of the initial responsibilities of any department of social services is to screen a report for an ultimate determination of whether to investigate further. "Protective services shall include the . . . screening of complaints . . . ." N.C.G.S. § 7B-300 (2001). Administrative rule 10 NCAC 41I .0304, titled "Receiving Information: Initiating Prompt Investigations of Reports," governs the initial screening process and the determination of whether a statutorily mandated investigation is necessary. Though there is no regulation explaining to caseworkers how to screen initial reports, there are policies instructing them how to dismiss reports of abuse, neglect, or dependency when the factual circumstances do not warrant an investigation:

> (g) The county director must have an internal two-level review, including at a minimum the worker and the worker's supervisor, *prior to making a decision that information received does not constitute a report of abuse, neglect, or dependency.*
>
> (h) The county director must establish a process by which the person providing this information may obtain a review of the agency's decision *not* to accept the information as a report of abuse, neglect, or dependency.

10 NCAC 41I .0304(g), (h) (June 2002) (emphasis added). Thus, this regulation demonstrates that not all reports constitute "abuse, neglect, or dependency" and that the department must screen out those reports that do not merit a statutorily mandated investigation. In the case at bar, there was no testimony by Ms. Lowery at the hearing and no written report by CCDSS regarding whether the anonymous caller's allegations rose to a level sufficient to constitute a report of neglect and require the statutorily mandated investigation.

While acknowledging the extraordinary importance of protecting children from abuse, neglect, or dependency by prompt and thorough investigations, we likewise acknowledge the limits within which governmental agencies may interfere with or intervene in the parent-child relationship. "[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel v. Granville*, 530 U.S. 57, 68-69, 147 L. Ed. 2d 49, 58 (2000). Thus, under the specific facts of this

case, we conclude as a matter of law that the anonymous report was insufficient to invoke the extensive power and authority permitted by the General Assembly to the county departments of social services. The pointed question in this case, then, is whether an anonymous call reporting a naked child, two years of age, unsupervised in a driveway, in and of itself constitutes "a report of abuse, neglect, or dependency." We conclude that, standing alone, it does not.

The Juvenile Code is codified in chapter 7B of the North Carolina General Statutes. Subchapter I of that chapter deals with "Abuse, Neglect, Dependency." One of the stated purposes of the Juvenile Code is "[t]o provide for services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence." N.C.G.S. § 7B-100(3) (2001). Further, a "neglected juvenile" is defined as:

> A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C.G.S. § 7B-101(15).

It is obvious from this definition and the cases applying it that the circumstances constituting neglect involve serious and substantial allegations. "Neglect" is further linked with "abuse" and "dependency," thereby reinforcing the legislative conclusion that these are conditions that pose a serious threat to a juvenile's welfare. In fact, one of the specific grounds for terminating parental rights under N.C.G.S. § 7B-1111(a) is that "[t]he parent has . . . *neglected* the juvenile." N.C.G.S. § 7B-1111(a)(1) (2001) (emphasis added). Furthermore, under that statute, "[t]he juvenile shall be deemed to be . . . neglected if the court finds the juvenile to be . . . a neglected juvenile within the meaning of G.S. 7B-101." *Id.*

The statutes relied upon by CCDSS—N.C.G.S. § 7B-302, "Investigation by director; access to confidential information;

notification of person making the report," and N.C.G.S. § 7B-303, "Interference with investigation"—are predicated upon a report alleging abuse, neglect, dependency, or death caused by maltreatment. N.C.G.S. § 7B-301 (2001). Thus, before the mandated statutory requirement for an investigation under N.C.G.S. § 7B-302 is met, a report of neglect sufficient to meet the definition of N.C.G.S. § 7B-101(15) must be made. And, upon gathering sufficient evidence of neglect and substantiating a report of neglect, parents could ultimately have their parental rights terminated.

The conclusion we reach under these facts in no way endangers the ability of departments of social services to protect juveniles. In this case, a phone call to the parent by CCDSS (or by the anonymous caller) alerting the parent to the child's unsupervised presence outside potentially could have resolved the issue. Certainly, a call to the parents would have been a far more logical step toward protecting the child than the delay, unavoidable or otherwise, of approximately two hours to visit the home. Had there been a complaint of a pattern of lack of supervision of the child or other credible evidence that indicated a serious failing on the part of the parents to look after the child, then such conduct could rise to the level triggering the investigative mandate of N.C.G.S. § 7B-302. However, a single report of a naked, unsupervised two-year-old in the driveway of her home does not trigger the investigative requirements of N.C.G.S. § 7B-302.

By enacting chapter 7B, subchapter I, the General Assembly has provided a mandate to departments of social services in addressing reports of abuse, neglect, and dependency. As such, the departments are not precluded or prevented from inquiring or investigating reports that are of concern but do not, upon the information reported, rise to the level mandated by our laws for abuse, neglect, and dependency. Departments of social services may, and in many cases should, make inquiry but are not vested at that point with the full range of powers and duties governed by chapter 7B. Nor are the parents or care givers subject to those same powers and punitive measures. Subsequent inquiry may well prove otherwise, and the evidence may ultimately show grounds of abuse, neglect, or dependency sufficient to trigger the statutory investigative mandates. Such is not the case here.

On this record, we have a report of a circumstance that probably happens repeatedly across our state, where a toddler slips out of a house without the awareness of the parent or care giver—no matter how conscientious or diligent the parent or care giver might be. While

no one wants that to happen, such a lapse does not in and of itself constitute "neglect" under N.C.G.S. § 7B-101.

Having concluded that the investigative mandate of N.C.G.S. § 7B-302 was not properly invoked, it follows that the trial court's order based upon the petition filed pursuant to N.C.G.S. § 7B-303 charging the parents with interference with or obstruction of an investigation must fail. Therefore, the decision of the Court of Appeals affirming the order of the trial court must be reversed. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the District Court, Cleveland County, for entry of an order consistent with this opinion.

REVERSED AND REMANDED.

Justice MARTIN concurring.

I agree with the majority's conclusion that the trial court erred by granting a noninterference order pursuant to N.C.G.S. § 7B-303. The instant case presents issues of first impression, implicates federal and state constitutional rights, and raises matters of vital importance to the public. To provide guidance when noninterference orders are sought under section 7B-303, I respectfully concur by separate opinion.

The questions presented by the respondent-appellants are:

I. In a case brought pursuant to N.C. Gen. Stat. § 7B-303, must the government prove that there are reasonable grounds for suspecting that a person has abused or neglected a child?

II. Does the investigation mandated by N.C. Gen. Stat. § 7B-302 and implemented by N.C. Admin. Code tit. 10 § 411.0305 constitute a "search" for constitutional purposes, as Judge Greene argues in his dissent?

III. Is the court-ordered separation of a parent and child for the purpose of unrestricted personal interrogation of the child a "seizure" within the meaning of the Fourth Amendment to the United States Constitution?

The parties, petitioner Cleveland County Department of Social Services and respondents James and Mary Ann Stumbo, have thoroughly briefed and argued these legal questions. Amicus curiae briefs

addressing the important constitutional questions raised by the instant case have been filed by the American Civil Liberties Union of North Carolina Legal Foundation, Inc., the National Association of Social Workers and its North Carolina Chapter, and the State of North Carolina.

I.

It is beyond question that we will consider a constitutional question when "strong considerations of public necessity appear." *M. H. Rhodes, Inc. v. City of Raleigh*, 217 N.C. 627, 630, 9 S.E.2d 389, 391 (1940). The procedures for investigating child abuse allegations in North Carolina are a matter of critical public interest. According to the State, DSS received 102,158 reports of alleged abuse, neglect, and dependency during 2001. It is a matter of immense public importance that DSS be able to fulfill its vital mission while simultaneously ensuring that statutory procedures for DSS investigations comport with the Constitution. This case also presents a legal question of first impression—a definitive pronouncement by this Court would provide clarification for child protection workers and for citizens who interact with government actors executing routine investigatory protocols.

In its opinion, the majority analyzes the term "neglect" as used in N.C.G.S. § 7B-302. In my view, the cases cited by the majority, where a court found neglect after a comprehensive investigation, do not provide adequate guidance as to what does and does not "trigger" the investigative requirements of N.C.G.S. § 7B-302. Indeed, it is not desirable, or perhaps even possible, to attempt a comprehensive identification of the various scenarios that might warrant an initial investigation. Child abuse can be difficult to detect, and DSS faces an infinite variety of circumstances when forming a preliminary assessment as to whether a report of abuse may ultimately be substantiated. The application of DSS' expertise and discretion is therefore crucial in the initial stages of investigation.

Perhaps most important, this case implicates well-established and closely guarded constitutional rights. *See Corum v. University of North Carolina*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) (stating that the judiciary's "obligation to protect the fundamental rights of individuals is as old as the State"), *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992). The majority's analysis delays needed resolution of the constitutional questions briefed and argued by the parties. *See Rice v. Rigsby*, 259 N.C. 506, 511-12, 131 S.E.2d 469, 472-73 (1963)

(addressing a constitutional issue of "vast public importance," despite procedural default, where the parties had fully briefed and argued the issue). Put simply, the question of whether the State may lawfully enter a private residence as part of an investigatory protocol in the absence of any fact-specific justification is left unanswered.

As recognized by the majority, the Juvenile Code mandates that directors of county departments of social services "make a prompt and thorough investigation" when a report of child abuse, neglect, or dependency is received. N.C.G.S. § 7B-302(a) (2001). The purpose of the investigation is "to ascertain the facts of the case, the extent of the abuse or neglect, and the risk of harm to the juvenile, in order to determine whether protective services should be provided or the complaint filed as a petition." *Id.* The statute further provides that "the investigation and evaluation shall include a visit to the place where the juvenile resides." *Id.*

The North Carolina Administrative Code sets out the procedures for directors to follow in carrying out the mandate of chapter 7B of the General Statutes. 10 NCAC 41I .0101 (June 2002). Once prompted by a report of neglect, abuse, or dependency, directors "shall make a thorough investigation to assess . . . whether the specific environment in which the child or children is found meets the child's or children's need for care and protection." 10 NCAC 41I .0305(a)(1) (June 2002).

When conducting the evaluation required by section 7B-302 and the corresponding administrative regulations, no person is to obstruct or interfere with a director's "personal access to the juvenile" or refuse to allow a director to "observe or interview the juvenile in private." N.C.G.S. § 7B-303(b) (2001). To ensure that directors are provided access to conduct the investigation, they may seek a "noninterference order." N.C.G.S. § 7B-303(a). In the absence of a "lawful excuse, . . . the court may order the respondent to cease such obstruction or interference." N.C.G.S. § 7B-303(c).

The noninterference order envisioned by section 7B-303 is enforceable by civil or criminal contempt. N.C.G.S. § 7B-303(f). Thus, once such an order has been issued, a caregiver is faced with two options: (1) she can consent to the requests of the director, or (2) she can assert her constitutional right to freedom from impermissible searches and seizures as a "lawful excuse" for noncompliance and risk contempt of court. Such a statutory scheme necessarily implicates the Fourth Amendment to the United States

Constitution and the parallel guarantees of Article I, Section 20 of the North Carolina Constitution.

The Juvenile Code, chapter 7B of the General Statutes, appears to recognize the important constitutional issues at stake in emergency child protection situations, yet includes no textual provision to ensure compliance with constitutional guarantees in non-emergency or routine investigatory situations. According to N.C.G.S. § 7B-303(d), there must be "probable cause to believe . . . the juvenile is at risk of immediate harm" for issuance of an *ex parte* emergency order. As recognized by Judge Greene in his dissenting opinion at the Court of Appeals, this provision was "an obvious recognition by our Legislature of the need to protect the privacy interest of the person to be investigated in the face of a report of abuse/neglect of a child." *Stumbo*, 143 N.C. App. at 386 n.5, 547 S.E.2d at 458 n.5 (Greene, J., dissenting). If the government must show probable cause as a prerequisite to removal of a child in an emergency, it would seem imperative for this Court to consider the constitutional standard applicable to home entry and nonconsensual interviews during non-emergency investigatory protocols conducted by the government.

It is important to resolve this issue in light of the statutory obligation of directors to "make an immediate oral and subsequent written report" of their findings of abuse or neglect to the district attorney and the "appropriate local law enforcement agency." N.C.G.S. § 7B-307(a) (2001). Significantly, the district attorney, after receipt of this report, is required to initiate a criminal investigation and determine whether criminal prosecution of the parent or other caregiver is appropriate. *Id.* In light of these considerations, this Court should determine whether our child protection statutes may be construed in a constitutional manner. *See In re Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977) (discussing a court's duty to construe a statute in a constitutional manner, if possible).

Thus, the central issue in this case is whether, when conducting a routine, non-emergency investigation, the Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution allow a director to secure a noninterference order without particularized allegations of abuse or neglect supported by corroborative evidence.

At the outset, it should be noted that the Juvenile Code places the burden of proof on the government, the party seeking the noninterference order. N.C.G.S. § 7B-303(c). Moreover, the trial court is

required to utilize a heightened burden of proof for such proceedings. The trial court must find by "clear, cogent, and convincing evidence that the respondent, *without lawful excuse*, has obstructed or interfered with an investigation required by G.S. § 7B-302." *Id.* (emphasis added).

Against this backdrop, the petition in the present case alleged only that DSS "received a report alleging neglect of the above named children." The petition did not mention the nature of the actual allegations that were reported. As noted by the majority, the trial court did not allow evidence regarding the relevant circumstances and events surrounding the reported allegation. Instead, the trial court determined that such evidence did not relate to whether the Stumbos had a "lawful excuse" for refusing to cooperate with the investigation and that the purpose of the hearing was to determine only whether there was any interference in the investigation regardless of (1) whether the initiation of the investigation was justified, or (2) whether any of the Stumbos' constitutional rights were implicated by the government's investigatory protocol.

II.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. This right is applied to the states through the Fourteenth Amendment and has "been applied to the conduct of government officials in various civil activities." *O'Connor v. Ortega*, 480 U.S. 709, 714, 94 L. Ed. 2d 714, 721 (1987) (plurality opinion). A similar right is afforded by the North Carolina Constitution: "General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted." N.C. Const. art. I, § 20. "[A] governmental search and seizure of private 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 involving exigent circumstances." *State v. Cooke*, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982). We have called this tenet a " 'basic principle of Fourth Amendment law.' " *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997) (quoting *Payton v. New York*, 445 U.S. 573, 586, 63 L. Ed. 2d 639, 651 (1980)). Of the many privileges of living in a free society, few are val-

ued more than the constitutional right to be free from unreasonable warrantless searches in one's private residence.

I pause to observe that the trial court apparently concluded DSS was not a government actor for purposes of the Fourth Amendment. This is legally incorrect. The United States Supreme Court has "never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon 'governmental action'—that is, 'upon the activities of *sovereign authority.*' " *New Jersey v. T.L.O.*, 469 U.S. 325, 335, 83 L. Ed. 2d 720, 730 (1985) (quoting *Burdeau v. McDowell*, 256 U.S. 465, 475, 65 L. Ed. 1048, 1051 (1921)) (emphasis added). Federal courts which have considered this question arising under the United States Constitution have concluded, either explicitly or implicitly, that constitutional limitations apply to government officials who investigate child abuse. *See Wallis v. Spencer*, 202 F.3d 1126, 1136 (9th Cir. 2000); *Tenenbaum v. Williams*, 193 F.3d 581, 602 n.14 (2d Cir. 1999), *cert. denied*, 529 U.S. 1098, 146 L. Ed. 2d 776 (2000); *Calabretta v. Floyd*, 189 F.3d 808, 813-14 (9th Cir. 1999); *Franz v. Lytle*, 997 F.2d 784, 788-90 (10th Cir. 1993); *Wildauer v. Frederick Cty.*, 993 F.2d 369, 372 (4th Cir. 1993); *Good v. Dauphin Cty. Social Servs. for Children & Youth*, 891 F.2d 1087, 1092-97 (3d Cir. 1989); *Robison v. Via*, 821 F.2d 913, 919-20 (2d Cir. 1987); *White v. Pierce Cty.*, 797 F.2d 812, 815 (9th Cir. 1986). State appellate courts have reached similar conclusions. *See, e.g., H.R. v. State Dept. of Human Res.*, 612 So.2d 477, 479 (Ala. Civ. App. 1992); *Germaine v. State*, 718 N.E.2d 1125, 1130-31 (Ind. Ct. App.), *transfer denied*, 726 N.E.2d 316 (Ind. 1999); *C.R. v. State*, 937 P.2d 1037, 1040-41 (Utah Ct. App. 1997), *aff'd*, 982 P.2d 73 (Utah 1999).

Judicial recognition that DSS and its employees are government actors is simply an acknowledgment that "[t]he Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself *and all of its creatures.*" *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637, 87 L. Ed. 1628, 1637 (1943) (emphasis added). DSS is engaged in the noble duty of protecting children: "There is no more worthy object of the public's concern." *Wyman v. James*, 400 U.S. 309, 318, 27 L. Ed. 2d 408, 414 (1971). Despite the beneficial public purpose underlying this and perhaps every other governmental initiative in a free society, it is nonetheless a truism that the Bill of Rights exists "to protect unpopular individuals from retaliation . . . at the hand of an intolerant society." *McIntyre v. Ohio*

Elections Comm'n, 514 U.S. 334, 357, 131 L. Ed. 2d 426, 446 (1995). Unfounded allegations of child abuse unfairly stigmatize individuals, clearly making them "unpopular" within their local community. Thus, it is critical that the government bring forward particularized allegations supported by at least some evidence before carrying out the more intrusive aspects of its investigatory protocol.

The government argues that requiring a warrant prior to entering a private residence would be unduly burdensome and would frustrate the child abuse investigatory process. The United States Supreme Court has recognized that requiring a state actor, in certain situations, to procure a warrant prior to a search would unduly burden the government in light of the special circumstances presented. For instance, the United States Supreme Court has opined that a teacher need not obtain a warrant before searching a student because requiring a warrant "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *T.L.O.*, 469 U.S. at 340, 83 L. Ed. 2d at 733. The Supreme Court has reached a similar conclusion when evaluating the warrant requirement's applicability to other special circumstances. *See Griffin v. Wisconsin*, 483 U.S. 868, 880, 97 L. Ed. 2d 709, 721-22 (1987) (warrantless searches of probationer's home allowed when there were reasonable grounds to believe the search would uncover evidence of wrongdoing, because the supervisory arrangement of probation justified a departure from the traditional requirements of a warrant and probable cause); *O'Connor*, 480 U.S. at 724-25, 94 L. Ed. 2d at 727-28 (public employer hospital's search of doctor's desk reasonable without a warrant because of the special need to ensure that public agencies operate in an effective and efficient manner); *see also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664-65, 132 L. Ed. 2d 564, 582 (1995); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 678-79, 103 L. Ed. 2d 685, 710-11 (1989); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 633-34, 103 L. Ed. 2d 639, 670 (1989).

The dissenting judge at the Court of Appeals, a recognized authority on children's law in North Carolina, aptly described the tension between child protection laws and constitutional principles:

> Because of the substantial governmental interest in protecting children and the need to act quickly, as well as the additional time likely required to gather evidence in support of probable cause, it would be ill advised to utilize the probable cause standard. . . .

> [However,] due to the sanctity of private dwellings and the potential for criminal investigation/ prosecution arising from the section 7B-302 investigation, a total suspension of the probable cause standard is not appropriate. A total suspension would permit entry into a home and interviews with the reported victim child, based simply on a totally unsubstantiated report . . . .

Stumbo, 143 N.C. App. at 386, 547 S.E.2d at 457-58 (Greene, J., dissenting).

For these reasons, the Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution required the trial court to determine that there existed reasonable grounds for suspecting the Stumbos had neglected their daughter before issuing a noninterference order pursuant to section 7B-302. The trial court should have considered the nature, circumstances, and veracity of the allegations, as well as any underlying facts and surrounding circumstances the reporter may have provided. Because the reasonable grounds standard is less demanding than probable cause, it necessarily raises the possibility, however remote, that an aberrant government official, detached from the moorings of the warrant and probable cause requirements, might be tempted to cloak a criminal investigation under the shroud of a child abuse inquiry. Nonetheless, the reasonable grounds standard accommodates the government's noble efforts to reduce the incidence of child abuse and neglect without wholly abrogating the constitutional rights of children and caregivers.

Child abuse investigators can "effectively protect children without being excused from 'whenever practicable, obtaining advance judicial approval of searches and seizures.' " *Tenenbaum*, 193 F.3d at 604 (quoting *Terry v. Ohio*, 392 U.S. 1, 20, 20 L. Ed. 2d 889, 905 (1968)). As recognized by the Seventh Circuit, DSS is not unduly burdened by securing judicial approval before entering a home precisely because judicial approval is not required in exigent circumstances where the director deems immediate action necessary to protect the safety or welfare of a child. *Doe v. Heck*, 327 F.3d 492, 517 n.20 (7th Cir.), *amended*, —— F.3d ——, 2003 U.S. App. LEXIS 9353 (7th Cir. 2003). Even the most benign motive, however, "cannot justify a departure from Fourth Amendment protections." *Ferguson v. City of Charleston*, 532 U.S. 67, 85, 149 L. Ed. 2d 205, 221 (2001).

The government concedes that "[i]n approximately 99% of the child protection investigations conducted by a county department of

social services, Investigative Social Workers enter the homes with the consent of the parents, guardians, or caretakers." Yet the government argues that even the less-stringent reasonable grounds standard for the remaining 1% of these cases will leave "many North Carolina children . . . at risk of suffering grave harm." Nonetheless, permitting government actors "to search suspected places without evidence of the act committed" and to enter homes where an "offense is not particularly described" is tantamount to issuing a general warrant expressly prohibited by the North Carolina Constitution. N.C. Const. art. I, § 20. The United States Constitution similarly commands that a warrant must "particularly describ[e] the place to be searched and the persons or things to be seized." U.S. Const. amend. IV; *see also Vernonia Sch. Dist.*, 515 U.S. at 669-70, 132 L. Ed. 2d at 584-85 (describing the framers' distaste for general warrants); *Payton*, 445 U.S. at 583-84, 63 L. Ed. 2d at 650 (O'Connor, J., dissenting) (same). Thus, to the extent DSS investigations must comply with the Fourth Amendment, it suffices to say that this is a legal constraint imposed by the people through their Constitution.

The need to investigate reports of neglect and abuse is paramount, but so is the degree of intrusion allegedly sought by the director here. "[A] person's home is his castle." *State v. Sparrow*, 276 N.C. 499, 512, 173 S.E.2d 897, 906 (1970) (citing *Semayne's Case*, 77 Eng. Rep. 194, 195 (1604), and *State v. Mooring*, 115 N.C. 709, 711, 20 S.E. 182, 182 (1894)). Indeed, "[t]he sanctity of the home is a revered tenet of Anglo-American jurisprudence." *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). As such, child protection investigators must establish reasonable grounds that child abuse or neglect is present before searching a private home. If DSS is not required to produce a case-specific justification prior to its search, it in essence possesses the equivalent of an unconstitutional general warrant. Such unilateral and unbridled authority opens the door to the possibility that arbitrary, insincere, and unsubstantiated reports of neglect or abuse would provide an adequate basis for governmental intrusion into a private home, even in the face of a proper assertion of constitutional rights.

III.

The Court of Appeals majority concluded that a private interview conducted pursuant to a child abuse or neglect investigation did not constitute a seizure under the Fourth Amendment. *Stumbo*, 143 N.C. App. at 382, 547 S.E.2d at 455.

A noninterference order may issue if a parent refuses to allow the director "personal access to the juvenile," or refuses to "allow the director to observe or interview the juvenile in private." N.C.G.S. § 7B-303(b). "A 'seizure' triggering the Fourth Amendment's protections occurs . . . when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.' " *Graham v. Connor*, 490 U.S. 386, 395 n. 10, 104 L. Ed. 2d 443, 455 n.10 (1989) (quoting *Terry*, 392 U.S. at 19 n.16, 20 L. Ed. 2d. at 905 n.16). Whether a citizen has been so restrained depends upon the circumstances of each case and whether, under those circumstances, "a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980). Once the noninterference order was issued in the present case, with its attendant contempt sanctions for noncompliance, neither the juvenile nor any reasonable person would have felt at liberty to leave or to refuse to submit to the government's demand for a private interview.

Not surprisingly, federal appellate courts have concluded that a government actor's sequestration of a juvenile constitutes a seizure within the meaning of the Fourth Amendment. The Seventh Circuit recently concluded that a child who was "physically carried out of his home, placed in a car, and driven away from his family" by government actors, without the consent of his parents, had been seized within the meaning of the Fourth Amendment. *Brokaw v. Mercer Cty.*, 235 F.3d 1000, 1010 (7th Cir. 2000). The Ninth Circuit has stated:

> Officials may remove a child from the custody of its parent without prior judicial authorization only if the information they possess at the time of the *seizure* is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury.

Wallis, 202 F.3d at 1138 (emphasis added). In *Tenenbaum*, the Second Circuit concluded that a five-year-old was seized when she was taken from her school by a government official and was transported to a hospital where she was required to remain for several hours before being examined and returned to her parents. 193 F.3d at 602. Similarly, in *J.B. v. Washington Cty.*, 127 F.3d 919 (10th Cir. 1997), the appellate court approved a lower court ruling that temporary removal of a child from her home was a seizure implicating Fourth Amendment rights. *Id.* at 928.

The government has attempted to distinguish these cases on the basis that they involved the physical removal of a child, while the investigator here sought only an interview. Admittedly, in the present case it is difficult to ascertain the precise scope of the proposed interview. Nonetheless, the government has cited no authority in support of its proposition that we should reach a different result simply because physical removal of a child has not occurred. Under the North Carolina Constitution, any seizure is unlawful when justification for that seizure is "not particularly described and supported by evidence." N.C. Const. art. I, § 20. Similarly, physical restraint or removal is not a prerequisite to the occurrence of a seizure under the United States Constitution. *See Mendenhall*, 446 U.S. at 554, 64 L. Ed. 2d at 509 (listing several examples of a "seizure" within the meaning of the Fourth Amendment).

Even when performing the important role of protecting children from abuse and neglect, government action must still comport with the Constitution. Certainly, these protections are not implicated in every case; however, the Constitution protects citizens from the more egregious and aberrational departures from acceptable behavior. *See, e.g.*, *Brokaw*, 235 F.3d at 1007. At a minimum, the government must establish reasonable grounds to believe that child abuse or neglect is present before obtaining a noninterference order permitting a private interview pursuant to N.C.G.S. § 7B-303(b).

To clarify for purposes of future proceedings under chapter 7B, the statutory phrase "without lawful excuse" has ascertainable meaning and is not mere surplusage. *See State v. Buckner*, 351 N.C. 401, 408, 527 S.E.2d 307, 311 (2000) (when interpreting a statute, courts must give meaning to all of the statute's provisions). N.C.G.S. § 7B-303(c) requires a trial court to find by "clear, cogent, and convincing evidence that the respondent, *without lawful excuse*, has obstructed or interfered with an investigation required by G.S. § 7B-302. " N.C.G.S. § 7B-303(c) (emphasis added). As government officials, directors must demonstrate more than a parent or caregiver's refusal to comply with unsupported governmental demands: They must provide the trial court with particularized allegations supported by evidence. N.C. Const. art. I, § 20. When such allegations are anonymous, the trial court should carefully scrutinize DSS' proffered justification for search or seizure. *See generally Florida v. J.L.*, 529 U.S. 266, 270, 146 L. Ed. 2d 254, 260 (2000) ("anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity" absent suitable corroboration).

In the present case, the trial court should have made inquiry into the objections raised by the Stumbos. Once the Stumbos raised a constitutional objection, the director had the onus of demonstrating that a 7B-303 order should issue. Indeed, the statute makes clear that "[t]he burden of proof shall be on [the government]." N.C.G.S. § 7B-303(c). The trial court never considered the Stumbos' objection, thus ignoring the "lawful excuse" language of the statute and the Stumbos' properly raised constitutional objection. The trial court should have considered the allegations directed against the Stumbos as well as any evidence tending to show that such allegations were unfounded in determining whether the government should be permitted to enter a private home over the objections of its owner, or to interview the children in private without the consent of their parents.

I agree with the majority that the trial court erred by granting a noninterference order under the facts and circumstances of the instant case and therefore concur in the result reached by the majority opinion.

Chief Justice LAKE and Justice BRADY join in this concurring opinion.

ASHLEY STEPHENSON, INDIVIDUALLY, AND AS A RESIDENT AND REGISTERED VOTER OF BEAUFORT COUNTY, NORTH CAROLINA; LEO DAUGHTRY, INDIVIDUALLY, AND AS REPRESENTATIVE FOR THE 95TH DISTRICT, NORTH CAROLINA HOUSE OF REPRESENTATIVES; PATRICK BALLANTINE, INDIVIDUALLY, AND AS SENATOR FOR THE 4TH DISTRICT, NORTH CAROLINA SENATE; ART POPE, INDIVIDUALLY, AND AS REPRESENTATIVE FOR THE 61ST DISTRICT, NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND BILL COBEY, INDIVIDUALLY, AND AS CHAIRMAN OF THE NORTH CAROLINA REPUBLICAN PARTY AND ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED v. GARY O. BARTLETT, AS EXECUTIVE DIRECTOR OF THE STATE BOARD OF ELECTIONS; LARRY LEAKE, ROBERT B. CORDLE, GENEVIEVE C. SIMS, LORRAINE G. SHINN, AND CHARLES WINFREE, AS MEMBERS OF THE STATE BOARD OF ELECTIONS; JAMES B. BLACK, AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; MARC BASNIGHT, AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; MICHAEL EASLEY, AS GOVERNOR OF THE STATE OF NORTH CAROLINA; AND ROY COOPER, AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA

No. 94PA02-2

(Filed 16 July 2003)

Elections— legislative redistricting plans—failure to strictly comply with criteria

The trial court did not err by determining that the General Assembly's 2002 revised redistricting plans are unconstitutional because the evidence supports the trial court's findings of fact that the 2002 revised redistricting plans failed to be in strict compliance with virtually all *Stephenson I* criteria, including excessive division of counties; deficiencies in county groupings; and substantial failures in compactness, contiguity, and communities of interest.

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

Justice PARKER dissenting.

On appeal pursuant to N.C.G.S. § 7A-31(b) prior to determination by the Court of Appeals from an order and an amended order, both entered 31 May 2002 by Judge Knox V. Jenkins, Jr., in Superior Court, Johnston County. Heard in the Supreme Court 10 March 2003.

Haynsworth Baldwin Johnson & Greaves, LLC, by Thomas A. Farr and Phillip J. Strach; Maupin Taylor & Ellis, P.A., by James C. Dever, III and Terence D. Friedman; and Hunter Higgins Miles Elam & Benjamin, by Robert N. Hunter, Jr., for plaintiff-appellees.

Roy Cooper, Attorney General, by Edwin M. Speas, Jr., Chief Deputy Attorney General, and Tiare B. Smiley, Norma S. Harrell, Alexander McC. Peters, and Susan K. Nichols, Special Deputy Attorneys General, for defendant-appellants.

Robert P. Quinn, M.D., amicus curiae.

LAKE, Chief Justice.

The sole issue presently before this Court in this case is whether the trial court correctly determined that the General Assembly's 2002 revised redistricting plans are unconstitutional. After careful review, we conclude the trial court ruled correctly, and we therefore affirm.

The procedural history of this case is reported in detail in *Stephenson v. Bartlett*, 355 N.C. 354, 358-60, 562 S.E.2d 377, 381-83 (2002) (*Stephenson I*). We nonetheless recite the basic procedural history below to include events that have transpired since this Court issued its decision in *Stephenson I*.

In November 2001, the North Carolina General Assembly adopted legislative redistricting plans. *Id.* at 358, 562 S.E.2d at 381. We hereinafter refer to the General Assembly's 2001 redistricting plans, Senate Plan 1C and Sutton House Plan 3, as "the 2001 redistricting plans." On 13 November 2001, plaintiffs filed a complaint alleging that the 2001 redistricting plans violated the "Whole-County Provisions" (the WCP) of the North Carolina Constitution (the State Constitution). *Id.*; *see also* N.C. Const. art. II, §§ 3(3), 5(3). Plaintiffs argued that the WCP prohibited the General Assembly from dividing counties in creating legislative districts except to the extent required by federal law. *Stephenson I*, 355 N.C. at 358, 562 S.E.2d at 381.

On 19 November 2001, defendants removed the case to federal court. *Id.* at 358, 562 S.E.2d at 382. On 20 December 2001, the United States District Court for the Eastern District of North Carolina remanded the case back to state court. *Id.* The district court concluded that the case involved only issues of state law and that defendants' removal to federal court was thus improper. *Id.* The United States Court of Appeals for the Fourth Circuit subsequently denied defendants' motion to stay the district court's order of remand. *Id.*

On 20 February 2002, the trial court granted plaintiffs' motion for summary judgment. *Id.* The trial court concluded that the 2001 redistricting plans violated the WCP of the State Constitution. *Id.* at

358-59, 562 S.E.2d at 382. The trial court's order stated that "the General Assembly must preserve county lines to the maximum extent possible, except to the extent counties must be divided to comply with . . . the Voting Rights Act . . . and the U.S. Constitution." *Id.* at 359, 562 S.E.2d at 382.

On 30 April 2002, in *Stephenson I*, this Court modified and affirmed the trial court's decision, *id.* at 386, 562 S.E.2d at 398, and ordered the trial court to hold an expedited hearing on the feasibility of allowing the General Assembly the first opportunity to develop new plans, *id.* at 385, 562 S.E.2d at 398. However, this Court held that if the General Assembly was unable to develop revised constitutional plans meeting the guidelines established in *Stephenson I*, the trial court should adopt its own interim remedial plans and seek preclearance of any such plans from the United States Department of Justice (USDOJ). *Id.* This Court also "authorized [the trial court] to take all necessary remedial actions to ensure that the primary elections for legislative offices are conducted in a timely and expeditious manner and consistent with the general election scheduled for 5 November 2002." *Id.* at 381 n.7, 562 S.E.2d at 395 n.7.

On 6 May 2002, defendants sought an emergency stay of the *Stephenson I* decision in the United States Supreme Court, contending that *Stephenson I* violated the Voting Rights Act of 1965 (the VRA) and would require the enforcement of unprecleared state constitutional provisions. On 17 May 2002, Chief Justice Rehnquist denied the stay request, noting that because "there is no plan in North Carolina to hold elections in unprecleared districts, there are no grounds for granting a stay." *Bartlett v. Stephenson*, 535 U.S. 1301, 1304-05, 152 L. Ed. 2d 1015, 1018 (2002) (Rehnquist, C.J., in chambers).

On remand, the trial court concluded that sufficient time existed for the General Assembly to submit new redistricting plans and ordered that such plans be submitted by 20 May 2002. The trial court also stated: "No plan submitted by the General Assembly and approved by this court, or in the absence of such a plan, no plan adopted by the court, shall be administered in the 2002 elections until such time as it is precleared pursuant to Section 5 of the Voting Rights Act." On 17 May 2002, the General Assembly enacted new redistricting plans and submitted these plans to the trial court by the 20 May 2002 deadline. We hereinafter refer to the General Assembly's revised 2002 plans—identified by the General Assembly as "Fewer Divided Counties" and "Sutton 5"—as "the 2002 revised redistricting plans." On 31 May 2002, following a hearing, the trial court concluded

that the 2002 revised redistricting plans failed to satisfy the constitutional requirements specified in *Stephenson I*. Pursuant to our mandate in *Stephenson I*, the trial court developed interim House and Senate redistricting plans and ordered that these plans be used only in the 2002 legislative elections. On 12 July 2002, the USDOJ precleared the trial court's interim plans.

On 31 May 2002, defendants filed a notice of appeal. Additionally, on 2 June 2002, defendants petitioned this Court to issue a writ of supersedeas and a temporary stay of the trial court's 31 May 2002 order. On 4 June 2002, in consideration of the time constraints for preclearance and for conducting the 2002 elections, this Court denied defendants' petition for writ of supersedeas and motion for temporary stay. The 2002 general election was duly held pursuant to the trial court's precleared interim plans.

On 14 March 2003, following briefing and oral argument by the parties on defendants' appeal, this Court entered an order certifying the matter to the trial court for "additional findings of fact regarding the trial court's 31 May 2002 determination that the [2002 revised redistricting plans] are unconstitutional." This order further mandated that the parties be allowed to tender proposed findings of fact for the trial court's consideration in submitting its additional findings of fact and further order. On 28 March 2002, plaintiffs submitted proposed findings of fact for the trial court's consideration. Defendants declined to submit any proposed findings. On 17 April 2003, the trial court recertified the matter to this Court with submission of its additional findings of fact and conclusions of law. The parties submitted supplemental briefs addressing these further findings and conclusions of the trial court.

In our consideration and determination of whether the trial court correctly ruled that the 2002 revised redistricting plans were unconstitutional, we begin with the relevant provisions of the State Constitution. As stated in *Stephenson I*:

> The State Constitution specifically enumerates four limitations upon the redistricting and reapportionment authority of the General Assembly, summarized as follows:
>
> (1) Each Senator and Representative shall represent, as nearly as possible, an equal number of inhabitants.
>
> (2) Each senate and representative district shall at all times consist of contiguous territory.

(3) No county shall be divided in the formation of a senate or representative district.

(4) Once established, the senate and representative districts and the apportionment of Senators and Representatives shall remain unaltered until the next decennial census of population taken by order of Congress.

Stephenson I, 355 N.C. at 362-63, 562 S.E.2d at 384; *see also* N.C. Const. art. II, §§ 3, 5.

With respect to the State's role in redistricting, this Court further stated the following fundamental principles in *Stephenson I*:

"[I]ssues concerning the proper construction and application of . . . the Constitution of North Carolina can . . . be answered with finality [only] by this Court." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989); *see also PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81, 64 L. Ed. 2d 741, 752 (1980); *Murdock v. Mayor of Memphis*, 87 U.S. 590, 626, 22 L. Ed. 429, 441 (1874); *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984). Although there is a strong presumption that acts of the General Assembly are constitutional, it is nevertheless the duty of this Court, in some instances, to declare such acts unconstitutional. *Preston*, 325 N.C. at 448-49, 385 S.E.2d at 478; *see also Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60, 73 (1803) (stating that "[i]t is emphatically the province and duty of the judicial department to say what the law is"); *Bayard v. Singleton*, 1 N.C. 5, 6-7 (1787). Indeed, within the context of state redistricting and reapportionment disputes, it is well within the "power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan." *Scott v. Germano*, 381 U.S. 407, 409, 14 L. Ed. 2d 477, 478 (1965) (per curiam).

Stephenson I, 355 N.C. at 362, 562 S.E.2d at 384.

After a lengthy analysis of these constitutional provisions and applicable federal law, we outlined in *Stephenson I* the following requirements that must be present in any constitutionally valid redistricting plan:

[1.] . . . [T]o ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts. . . . In the formation of VRA districts

within the revised redistricting plans on remand, we likewise direct the trial court to ensure that VRA districts are formed consistent with federal law and in a manner having no retrogressive effect upon minority voters. *To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP, as herein established . . . .*

[2.] In forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal "one-person, one-vote" requirements.

[3.] In counties having a 2000 census population sufficient to support the formation of one non-VRA legislative district . . ., the WCP requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county.

[4.] When two or more non-VRA legislative districts may be created within a single county, . . . single-member non-VRA districts shall be formed within said county. *Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county.*

[5.] In counties having a non-VRA population pool which cannot support at least one legislative district . . . or, alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the . . . "one-person, one-vote" standard, the requirements of the WCP are met by combining or grouping the *minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard. Within any such contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping;* provided, however, that the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard.

[6.] The intent underlying the WCP must be enforced to the maximum extent possible; thus, *only the smallest number of*

counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard shall be combined[.]

[7.] . . . *[C]ommunities of interest should be considered in the formation of compact and contiguous electoral districts.*

[8.] . . . [M]ulti-member districts shall not be used in the formation of legislative districts unless it is established that such districts are necessary to advance a compelling governmental interest.

[9.] Finally, we direct that any new redistricting plans, including any proposed on remand in this case, *shall depart from strict compliance with the legal requirements set forth herein only* to the extent necessary to comply with federal law.

Stephenson I, 355 N.C. at 383-84, 562 S.E.2d at 396-98 (emphasis added).

With these constitutional restrictions at hand, the trial court examined the 2002 revised redistricting plans. In accordance with this Court's 14 March 2003 order, the trial court submitted mixed findings of fact and conclusions of law, consistent with our well-established law in this regard. *See Brown v. Charlotte-Mecklenburg Bd. of Educ.*, 269 N.C. 667, 670, 153 S.E.2d 335, 338 (1967); *Lowe v. Department of Motor Vehicles*, 244 N.C. 353, 359, 93 S.E.2d 448, 452 (1956). These include the following:

6. The court finds that the 2002 (Sutton 5) House and Senate Fewer Divided Counties Plans did not create VRA districts consistent with Section 2 of the Voting Rights Act in Wake County in the House and Wake, Forsyth and Mecklenburg Counties in the Senate.

7. The court finds that in Wake, Mecklenburg and Forsyth Counties, there has previously been established a finding of Section 2 liability under federal law (*see Thornburg v. Gingles*, [478 U.S. 30, 35 n.2, 92 L. Ed. 2d 25, 37 n.2 (1986),]) and due to demographic changes in population there exists the required *Gingles* preconditions by which a second VRA House District should be drawn in Wake County and more "effective" VRA Senate districts drawn in Wake, Mecklenburg and Forsyth Counties.

8. The General Assembly's May 2002 Fewer Divided Counties Senate and Sutton 5 House Plans fail to comply with the requirement that in forming districts, only the smallest number of counties necessary to comply with the one-person, one-vote requirement should be combined in forming multi-county groupings.

9. The General Assembly's failure to create the maximum number of two-county groupings in the May 2002 House Plan violates *Stephenson I. See Stephenson I*, 355 N.C. at 384, 562 S.E.2d at 397.

10. The 2002 House and Senate plans enacted by the General Assembly contain districts that are not sufficiently compact to meet the requirements of the equal protection clause in that the requirements of keeping local governmental subdivisions or geographically based communities of interest were not consistently applied throughout the General Assembly's plan producing districts which were a crazy quilt of districts unrelated to a legitimate governmental interest.

11. Plaintiffs have shown that it is possible to draft Senate and House redistricting plans, which do not violate any federal or state law and harmonize requirements of the state law with federal law. In submission of these plans, the plaintiffs have successfully rebutted the presumption of constitutionality due to state legislative enactments.

12. The defendants failed to offer any evidence that a compelling governmental interest—such as the requirements imposed by federal law or impossibility—required them to violate the requirements of the North Carolina Constitution in enacting the statute.

13. The plans enacted by the General Assembly are unconstitutional.

14. There did not exist sufficient time for the General Assembly to enact new redistricting statutes and conduct orderly elections in time for preclearance and the elections of 2002 after the May 22-23 hearing.

15. The House and Senate plans enacted by the General Assembly violate the WCP, as defined by *Stephenson I*.

16. The House and Senate plans enacted by the General Assembly violate Article II, Section 5 in that they contain districts that are not contiguous.

In *Stephenson I*, this Court harmonized the provisions of Article I, Sections 2, 3 and 5, and the WCP of Article II, Sections 3(3) and 5(3) of the State Constitution and mandated that in creating legislative districts, counties shall not be divided except to the extent necessary to comply with federal law, including the "one-person, one-vote" principle and the VRA. *Stephenson I*, 355 N.C. at 363-64, 562 S.E.2d at 384-85. Consistent with this premise and as the underlying redistricting standard set forth in *Stephenson I*, this Court stipulated: "Finally, we direct that any new redistricting plans, including any proposed on remand in this case, shall depart from strict compliance with the legal requirements set forth herein only to the extent necessary to comply with federal law." *Id.* at 384, 562 S.E.2d at 397.

Pursuant then to this standard, we look to and consider whether the trial court's findings of fact and conclusions of law were appropriate and adequate in determining that the 2002 revised redistricting plans were not in compliance with the *Stephenson I* criteria and were therefore unconstitutional. When the trial court conducts a trial without a jury, "the trial court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding." *Bailey v. State of North Carolina*, 348 N.C. 130, 146, 500 S.E.2d 54, 63 (1998); *see also Curl v. Key*, 311 N.C. 259, 260, 316 S.E.2d 272, 273 (1984). Once it has been determined that the findings of fact are supported by the evidence, we must then determine whether those findings of fact support the conclusions of law. *Kirby Bldg. Sys. v. McNiel*, 327 N.C. 234, 241, 393 S.E.2d 827, 831 (1990); *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984).

The trial court found and concluded that the 2002 revised redistricting plans failed to be in strict compliance with virtually all *Stephenson I* criteria, these findings including excessive division of counties; deficiencies in county groupings; and substantial failures in compactness, contiguity, and communities of interest. Specifically, with respect to defendants' revised Senate Plan, the trial court's findings of fact included the following:

[1. Defendants' revised Senate Plan] cuts across interior county boundaries in 28 locations[, substantially more times than shown by plaintiffs to be necessary, and such plan thus] fails to strictly comply with *Stephenson*'s WCP requirement.

. . . .

[2. The county clustering system used by defendants groups] *portions of counties* to structure individual county groups [in contravention of the *Stephenson* standard that] "the requirements of the WCP are met by combining or grouping the minimum number of *whole, contiguous counties* [to create districts within the grouping that] comply with the one-person, one-vote standard." [*Stephenson I*, 355 N.C. at 384, 562 S.E.2d at 397.]

[3. Defendants' revised Senate Plan has numerous violations of the *Stephenson* mandate that districts shall be compact, the trial court citing specific illustrative examples as follows:]

A. . . . District 14 in Wake County . . . is not compact. It is distinguished by 4 major appendages. Beginning in the northern tip, it moves southeast with jutting points that end in a downward facing cul-de-sac that embraces a portion of this plan's District 36. The boundary of District 14 then meanders toward the northeast, turns to the southeast and extends a curved "arm" that carves out a "bay" in the side of District 6.

B. District 11 . . . is not compact. Its eastern boundary has been drawn in such a manner that it runs southward, then swings to the northwest, then . . . curves around a portion of Nash County to District 10, before continuing to the south and cutting through Johnston County and severing communities of interest in that area. This design also results in there being a point, interior to District 11, where Johnston and Franklin counties meet.

C. Neither District 21 [nor District] 26 . . . is compact. District 21 stretches from the western boundary of Montgomery County then moves east across the boundary of Moore County in a jagged line that moves first east, then north, then east again, turns south, makes a right turn west, then again south, before moving north to close the district where Moore meets Chatham and Randolph Counties. The complementary effect of this district's boundary is that it

results in adjacent District 26 having a southward arm and an appendage, thereby failing to be compact.

. . . .

In addition to these three illustrative cases, this court finds overall that Senate Districts 6, 10, 11, 14, 16, 36, 44 in Johnston, Nash and Wake Counties of [defendants' revised Senate Plan] are not compact, particularly as compared to the way in which they might have been drawn as demonstrated by plaintiffs' [proposed Senate Plan].

Specifically, with respect to defendants' revised House Plan, the trial court's findings of fact included the following:

[1.] The shape of [District 14] contained a narrow "arm" that protruded north, and other protrusions to the south and south-southeast, leaving the district without compactness. . . .

. . . .

[2.] The court's examination of . . . District 33 in Wake County also revealed that its shape lacked compactness. Specifically, a narrow "arm" extended to the north, northeast and a pair of "arms" meandered south and southeast in a horseshoe manner around a portion of District 34.

. . . .

[3.] District 52 . . . had been drawn to remove Carthage, the seat of Moore County government, and place it in District 51. To better preserve "communities of interest," District 52, which is anchored in Moore County, was redrawn by the court to include the City of Carthage, the county seat.

. . . .

[4.] Districts 95 and 96 . . . split the communities of Mooresville and Statesville; the court modified Districts 95 and 96 to run east-west and eliminate the splits of these boundaries in keeping with the preservation of local governments as communities of interest.

. . . .

[5. Districts in the following counties] were drawn [in defendants' revised House Plan] in a manner that divides the county boundary in multiple locations. Comparisons . . . with the

[plaintiffs' House Plan] reveal[] potential ways in which these county boundary splits could be reduced in number and bring the plan into strict conformance with the *Stephenson* constitutional criteria[:]

A. In Forsyth County, [defendants' revised House Plan] crosses the county boundary in three places, but the plaintiffs' House Plan groups counties so that Forsyth County is cut only once.

B. In Harnett County, [defendants' revised House Plan] splits this county line in three locations, as compared with only one crossing of the Harnett line in plaintiffs' House Plan.

C. In [defendants' revised House Plan] Haywood County's line is cut in two locations, as compared with only one such cut in the plaintiffs' House Plan.

D. In New Hanover County, [defendants' revised House Plan] cuts the county boundary three times; plaintiffs' House Plan crosses New Hanover's county line only one time.

. . . .

Overall, within multi-county groupings, [defendants' revised House Plan] cuts county lines 48 times, as compared to the 43 county line traverses in plaintiffs' House Plan.

. . . .

[6. Defendants' revised House Plan contains numerous violations of the *Stephenson* mandate that districts shall be compact, the trial court citing specific illustrative examples as follows:]

A. Alamance County—District 63 features an "arm" that . . . cuts the county in an east-west direction that almost bisects District 64.

B. Cleveland County—District 110 runs from the northwest . . . but makes a sharp turn to the south, resulting in an appendage pointing toward South Carolina.

C. Rowan County—The common boundary between Districts 76 and 77 has a sharply irregular shape. . . .

D. Stanly County—The general shape of District 70 has the look of a lobster claw. . . .

E. Yancey County—District 118 . . . extends an "arm" from the eastern edge of Haywood County and meanders from the northeast to southeast in a manner that divides that county.

[7.] In addition . . . this court finds that . . . Districts 18, 41, 51, 52, 57, 58, 59, 60, 61, 62, 63, 64, 76, 77, 95, 96 and 118 are not compact and fail to strictly comply with *Stephenson*. More specifically, the court finds that the [defendants' revised House Plan] includes the following districts which are not compact and do not respect communities of interest:

[A.] . . . Districts 95 and 96, which both split the town of Mooresville in southern Iredell, and Statesville in northern Iredell, . . . could easily be drawn so that the community of Statesville is intact in a northern district, and the community of Mooresville is intact in a southern district.

[B.] . . . District 52 . . . is shaped like a "C" rather than being compact, and leaves out the county seat, Carthage.

[C.] . . . [T]he City of High Point [is divided] into four districts . . ., when it is possible to divide the city only three times while complying with the one-person, one-vote standard and the Voting Rights Act.

[D.] . . . Cabarrus County [is divided] into two districts which lack compactness, on a ragged line . . . splitting the communities of Concord and Kannapolis within the county. . . .

[E.] . . . Wake County has one less VRA district and uses irregularly shaped non-VRA districts. . . . Districts 34, 35, 36, 37 and 38 are all non-VRA districts, but have irregular shapes with "fingers" sticking out into other districts. It is possible to establish two, rather than just one VRA district in Wake County, and make the adjoining non-VRA districts more compact, as demonstrated by the configuration of districts in Wake County in plaintiffs' House Plan.

. . . .

[8.] This court finds that a district whose parts are "held together" by the mathematical concept of "point contiguity" does not meet the *Stephenson* criteria for contiguity. . . . This court holds that the term "contiguity," as used in *Stephenson*, means

> that two districts must share a common boundary that touches for a non-trivial distance. . . .
>
> . . . .
>
> Further, this court finds that the use of the "point" and "double point" constructs and "crisscrosses" can result in bizarre shapes that are not compact.
>
> . . . .
>
> . . . Districts 11, 21, 22, 26, 66, 68, 69, 95 and 96 . . . do not meet the contiguity requirement of *Stephenson*.

After thoroughly reviewing and considering the record on appeal, the briefs submitted by the parties, and the illustrative maps depicting each proposed redistricting plan, we conclude that the evidence supports the trial court's findings of fact, which establish numerous instances where the 2002 revised redistricting plans are constitutionally deficient. We further conclude that these findings of fact adequately support the trial court's conclusion that the 2002 revised redistricting plans fail to attain "strict compliance with the legal requirements set forth" in *Stephenson I* and are unconstitutional. *Stephenson I*, 355 N.C. at 384, 562 S.E.2d at 398. Accordingly, we affirm the trial court's determination that the 2002 revised redistricting plans are unconstitutional.

AFFIRMED.

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

Justice PARKER dissenting.

Although I continue steadfast in my views as expressed in my dissenting opinion in *Stephenson v. Bartlett*, 355 N.C. 354, 399, 562 S.E.2d 377, 407 (2002) (*Stephenson I*), I acknowledge that the holding in *Stephenson I* is the law of the case. Nevertheless, after carefully considering the record and weighing the well-established principle that acts of the legislature are presumed constitutional, *see Town of Spruce Pine v. Avery Cty.*, 346 N.C. 787, 792, 488 S.E.2d 144, 147 (1997); *Jenkins v. State Bd. of Elections*, 180 N.C. 169, 170, 104 S.E. 346, 347 (1920), I am constrained to dissent respectfully from the majority opinion. I find nothing in the record to support a holding that plaintiffs carried their heavy burden of showing that the redis-

tricting plans—House Sutton 5 and Senate Fewer Divided Counties—duly enacted by the legislature on 17 May 2002 did not comply with the redistricting provisions of the Constitution of North Carolina as amended by this Court in *Stephenson I*.

The message sent today is that the redistricting plans, enacted by the duly elected members of the General Assembly applying the methodology mandated by this Court in *Stephenson I*, fail to pass constitutional muster not because the plans violate the whole-counties provision or any other provision of the State Constitution, but because the trial court perceived that in certain instances counties could have been grouped, divided, or traversed in a different configuration by applying nonconstitutionally based redistricting principles of compactness and communities of interest. Decisions as to communities of interest and compactness are best left to the collective wisdom of the General Assembly as the voice of the people and should not be overturned unless the decisions are "clearly erroneous, arbitrary, or wholly unwarranted." *Wilkins v. West*, 264 Va. 447, 463, 571 S.E.2d 100, 108 (2002). Moreover, the only limitation on the legislature's discretion regarding contiguity is that imposed under Article II, Section 3(2) and Article II, Section 5(2) of the Constitution of North Carolina. *See Painter v. Wake Cty. Bd. of Educ.*, 288 N.C. 165, 177, 217 S.E.2d 650, 658 (1975) (holding that all power not limited by the State Constitution is vested in the people as expressed through their elected representatives); *see also State ex rel. Martin v. Preston*, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989). Definitions of "contiguity" applied in Iowa and Minnesota under different statutes, as referenced in the trial court's order, are thus irrelevant.

Lip service feigning deference to the presumption of constitutionality of legislative enactments and to the constitutional mandate of separation of powers, N.C. Const. art. I, § 6, is not sufficient. The evidence must be clear, and every doubt must be resolved in favor of a legislative enactment's constitutionality. *Jenkins*, 180 N.C. at 172, 104 S.E. at 348; *see also Turner v. City of Reidsville*, 224 N.C. 42, 46, 29 S.E.2d 211, 214 (1944) (stating that unconstitutionality must appear beyond a reasonable doubt). The evidence in this record does not meet that test. Accordingly, I vote to reverse the trial court.

IN RE: THE INVESTIGATION OF THE DEATH OF ERIC DEWAYNE MILLER AND OF ANY INFORMATION IN THE POSSESSION OF ATTORNEY RICHARD T. GAMMON REGARDING THAT DEATH

No. 303PA02

(Filed 22 August 2003)

1. Jurisdiction— petition in the nature of special proceeding—review of communications with attorney

The trial court had jurisdiction to hear a "Petition in the Nature of a Special Proceeding" filed by the State seeking review of communications between an attorney and his now-deceased client relevant to the criminal investigation of a third party. Jurisdiction presupposes the existence of a court with control over a subject matter and the superior courts routinely address matters of privilege and protected information. Although this proceeding was not initiated in strict accord with statutory procedures, common law flexibility permits the superior court to assume jurisdiction in proceedings of an extraordinary nature that do not fit neatly within statutory parameters.

2. Attorneys; Evidence— privileged communication—death of client

The attorney-client privilege survives the client's death.

3. Estates— defense of estate—no claim by or against estate—waiver of attorney-client privilege

The statute allowing an executrix to defend an estate, N.C.G.S. § 32-27(23), was not applicable where there was no claim by or against the estate, although the executrix submitted an affidavit purporting to waive the attorney-client privilege for the estate in a murder investigation.

4. Estates; Evidence— attorney-client privilege—not waivable by executrix

N.C.G.S. § 32-27 does not empower an executor or executrix to waive a decedent's attorney-client privilege.

5. Estates; Evidence— attorney-client privilege—power to waive—not granted by will

An executrix did not have the power to waive the deceased's attorney-client privilege where the will did not expressly grant her that power or any similar power. Although the State argued

that the executrix had re-opened the closed estate to waive the privilege in exchange for a release from civil liability by the family of a murder victim, the estate had been closed and had no assets, and the State's contention that the affidavit was filed for the benefit of the estate was not persuasive. Furthermore, N.C.G.S. § 28A-13-3(a) is inapplicable because its listing of the powers of an executrix implies the exclusion of powers not listed.

6. Attorneys— privileged communication—no balancing test for compelling disclosure

A proposed balancing test for compelling disclosure of communications between a client and an attorney was not appropriate. A balancing test would invite procedures and applications so lacking in standards, direction and scope that the privilege in practice would be lost to the exception.

7. Attorneys— privileged communication—not absolute

The primary goal of our adversarial system of justice is to ascertain the truth. While the attorney-client privilege is an essential component of our system of justice, the privilege is not absolute.

8. Attorneys— privileged communication—in camera review appropriate

The attorney-client privilege does not apply to all communications between an attorney and client and the responsibility for determining whether the privilege applies belongs to the court rather than the attorney. An in camera review of the content of the communication may be necessary because it is often impossible for the court to make its determination without knowing the substance of that communication. The trial court did not err in this murder prosecution by ordering the attorney of a deceased third party to provide the trial court with a sealed affidavit relating communications with his client so that the court could determine whether the attorney-client privilege applies.

9. Attorneys— privileged communication—scope

Communications between attorney and client about the criminal activity of a third party which do not tend to harm the interests of the client are not privileged and may be disclosed. However, the circumstances surrounding the client at the time he communicated with counsel should be considered; in this case,

the client presumably knew that he was a suspect in a murder investigation and statements in which he implicated himself as well as the third party were covered by the privilege.

10. Attorneys— privileged communication—disclosure—conditions

A rule or privilege should cease to apply when the justification for the rule or privilege is not furthered by its continued application. A client's wish that a communication with an attorney remain confidential is premised upon the possibility that disclosure might result in criminal liability, that disclosure might subject the client (or the client's estate) to civil liability, or that disclosure might harm the client's loved ones or his reputation. If the trial court should determine after an in camera review that any of these conditions apply, the communications should remain undisclosed. However, the purpose for the privilege no longer exists if the communications would have no negative impact on the client's interests.

11. Attorneys— privileged communication—in camera reviews—not fishing expeditions

The approval of in camera reviews of communications alleged to be within the attorney-client privilege in no way sanctions special proceedings or grand jury investigations as fishing expeditions.

On discretionary review pursuant to N.C.G.S. § 7A-31(b), prior to a review by the Court of Appeals, of an order requiring disclosure of communications between attorney and client entered 7 March 2002 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Supreme Court 15 October 2002.

Poyner & Spruill LLP, by David W. Long and Joseph E. Zeszotarski, Jr., for the respondent-appellant.

Roy Cooper, Attorney General, by William B. Crumpler, Assistant Attorney General; and C. Colon Willoughby, District Attorney, Tenth Prosecutorial District, for the State-appellee.

LAKE, Chief Justice.

This case involves the attorney-client privilege and raises the primary question of whether, in the context of a pretrial criminal investigation, there can be a viable basis for the application of an interest

of justice balancing test or an exception to the privilege which would allow a trial court to compel disclosure of confidential communications where the client is deceased, an issue of first impression for this Court.

On 2 December 2000, Eric D. Miller (Dr. Miller) died at Rex Hospital in Raleigh, North Carolina, as a result of arsenic poisoning. Investigation by law enforcement officials established the following: Dr. Miller was a post-doctoral research scientist and was married to Ann Rene Miller (Mrs. Miller). On the evening of 15 November 2000, Dr. Miller went bowling at AMF Bowling Center in Raleigh, North Carolina, with several of Mrs. Miller's co-workers. While at the bowling alley, Dr. Miller partially consumed a cup of beer given to him by Mrs. Miller's co-worker Derril H. Willard (Mr. Willard). Dr. Miller commented to those present that the beer had a bad or "funny" taste.

On 16 November 2000, Dr. Miller was hospitalized at Rex Hospital in Raleigh with symptoms later determined to be consistent with arsenic poisoning. Five days later, Dr. Miller was transferred to North Carolina Memorial Hospital in Chapel Hill, North Carolina, where he remained until discharge on 24 November 2000. Dr. Miller was physically unable to return to work and remained at home under the care of Mrs. Miller and his parents. Dr. Miller slowly regained his physical strength until the morning of 1 December 2000, when he became violently ill and was again hospitalized. On 2 December 2000, Dr. Miller died from arsenic poisoning.

Within one week of Dr. Miller's death, law enforcement officials interviewed all of the persons present at the bowling alley the night Dr. Miller consumed the suspect beer, with the exception of Mr. Willard. The police were unable to interview Mr. Willard. Mrs. Miller was interviewed on the day of her husband's death and stated that she had no idea why anyone would have poisoned Dr. Miller. Shortly after the autopsy was completed on Dr. Miller's body, it was cremated at the direction of Mrs. Miller. All of the investigators' subsequent requests to interview Mrs. Miller were rejected.

During the course of the investigation, law enforcement officials concluded that Mrs. Miller was involved in a relationship with her co-worker, Mr. Willard. Investigators subpoenaed telephone records for Mrs. Miller's home, office, and cellular phones for a period of time before the initial hospitalization of Dr. Miller until the day he died. An analysis of telephone records showed several calls between Mr.

Willard and Mrs. Miller, with a total of 576 total minutes of conversation. The evidence also showed an increase in the frequency and duration of these telephone calls immediately before and after the incident which occurred at the bowling alley. In addition, numerous e-mail messages between Mrs. Miller and Mr. Willard were found on Mrs. Miller's computer. During interviews with Yvette B. Willard (Mrs. Willard), the wife of Mr. Willard, investigators learned that Mr. Willard had acknowledged his romantic involvement with Mrs. Miller.

Shortly after Dr. Miller's death, Mr. Willard sought legal counsel from criminal defense attorney Richard T. Gammon (respondent), who, according to an affidavit of Mrs. Willard, advised Mr. Willard that he could be charged with the attempted murder of Dr. Miller. Within days after his meeting with respondent, Mr. Willard committed suicide. Mr. Willard left a will naming Mrs. Willard as the executrix of his estate.

On 20 February 2002, the State filed a "Petition in the Nature of a Special Proceeding" in Superior Court, Wake County, requesting that the trial court conduct a hearing and, if needed, an *in camera* examination to determine whether the attorney-client privilege should be waived or whether compelled disclosure of communications between respondent and Mr. Willard was warranted for the "proper administration of justice." On the same day, upon consideration of the petition and affidavit of Mrs. Willard filed therewith, the Honorable Donald W. Stephens, Senior Resident Superior Court Judge, entered an order requiring respondent to respond and appear before the Wake County Superior Court for a hearing on the petition. Respondent filed a motion to dismiss the petition asserting that the court lacked jurisdiction, which motion was denied.

On 7 March 2002, after a hearing, the trial court entered an order granting the State's petition and requiring respondent to provide the trial court with a sealed affidavit containing information relevant to the murder investigation into the death of Dr. Miller that was obtained from his attorney-client relationship with Mr. Willard. The order provided that the trial court would conduct an *in camera* review of the information contained in respondent's affidavit to determine if the interest of justice required disclosure of the information to the State. On 13 March 2002, the trial court entered an order staying compliance with the 7 March 2002 order pending appeal. The trial court's order designated the matter as immediately appealable. Respondent filed a notice of appeal to the Court of

Appeals. On 27 June 2002, this Court allowed the parties' joint petition for discretionary review prior to determination by the Court of Appeals.

In essence, this case presents the question of whether, during a criminal investigation, there can be a legal basis for the application of an interest of justice balancing test or an exception to the attorney-client privilege which would allow a trial court to compel the disclosure of confidential attorney-client communications when the client is deceased. The State asserts basically two propositions in support of disclosure: (1) that a deceased client's personal representative may waive the confidentiality of the communications, and (2) that in the interest of justice a trial court has the inherent authority to hear the State's petition and to apply a balancing test to determine by *in camera* review whether any disclosure should be made.

[1] Respondent asserts that the trial court first erred in denying his motion to dismiss on the ground that the court has no jurisdiction to hear this proceeding because of the manner in which it was instituted by the district attorney. Respondent contends that the only proper procedure for presenting this issue was before a grand jury, where, upon the assertion of the privilege, the issue would have to proceed further to a judge of the superior court for resolution. N.C.G.S. § 15A-623(h) (2001). We turn first to this consideration.

The parties agree that the State has initiated this matter as a cause in the nature of a special proceeding, N.C.G.S. § 1-2 (2001); N.C.G.S. § 1-3 (2001), and we note that while this action was not commenced in strict accord with the usual process as set forth in the North Carolina General Statutes, N.C.G.S. § 1-394 (2001); N.C.G.S. § 1A-1, Rule 3 (2001), it was initiated in the proper forum for special proceedings, the superior court, N.C.G.S. § 7A-246 (2001). Jurisdiction presupposes the existence of a court that has "control over a subject matter which comes within the classification limits designated by the constitutional authority or law under which the court is established and functions." *Jones v. Brinson*, 238 N.C. 506, 509, 78 S.E.2d 334, 337 (1953); *see also Perry v. Owens*, 257 N.C. 98, 101-02, 125 S.E.2d 287, 290 (1962); *State v. Hall*, 142 N.C. 710, 713, 55 S.E. 806, 807 (1906). Subject matters of privilege and protected information, such as the Fifth Amendment privilege against self-incrimination and issues arising out of discovery motions, are subjects which are routinely addressed within the jurisdiction of the superior court.

Although this proceeding was not initiated in strict accord with statutory procedures as set forth in N.C.G.S. § 1A-1, Rule 3, or by convening an "investigative grand jury," N.C.G.S. § 15A-622(h) (2001), our common law, as reflected throughout its development, demonstrates a practical flexibility and ingenuity to accommodate exigent circumstances where required in the interest of justice. This flexibility, as a virtual rule of necessity, will permit the superior court to assume jurisdiction in proceedings of an extraordinary nature that do not fit neatly within statutory parameters. This premise is well stated by former Judge (later Chief Justice) Burley Mitchell in the following language:

> Within the guidelines of our Constitution, the legislature is charged with the responsibility of providing the necessary procedures for the proper commencement of a matter before the courts. Occasionally, however, the proscribed procedures of a statutory scheme fail to embrace the unanticipated and extraordinary proceeding such as that disclosed by the record before us. In similar situations, it has been long held that courts have the inherent power to assume jurisdiction and issue necessary process in order to fulfill their assigned mission of administering justice efficiently and promptly. We believe that this is one of those extraordinary proceedings and that our rules of procedure should not be construed so literally as to frustrate the administration of justice.

In re Albemarle Mental Health Ctr., 42 N.C. App. 292, 296, 256 S.E.2d 818, 821, *disc. rev. denied*, 298 N.C. 297, 259 S.E.2d 298 (1979).

With respect to the inherent power of the superior court to issue an order in such circumstances, this Court has stated: "It is sufficient to note that situations occasionally arise where the prompt and efficient administration of justice requires that the superior court issue an order of the type sought here by the State." *In re Superior Court Order*, 315 N.C. 378, 380, 338 S.E.2d 307, 309 (1986). We thus conclude that in the instant case, pursuant to the petition filed by the State, the superior court had jurisdiction to hear and consider the merits of the State's petition.

[2] Before turning to the trial court's determination and the merits of the State's position, we consider the collateral issue of whether the attorney-client privilege survives the client's death.

While this Court has never specifically addressed this issue, this Court has presumed that the attorney-client privilege extends after a client's death by acknowledging the existence of the "testamentary exception" to the privilege. *In re Will of Kemp*, 236 N.C. 680, 73 S.E.2d 906 (1953). In recognizing the "testamentary exception," this Court has stated:

> "[I]t is generally considered that the rule of privilege does not apply in litigation, after the client's death, between parties, all of whom claim under the client; and so, where the controversy is to determine who shall take by succession the property of a deceased person and both parties claim under him, neither can set up a claim of privilege against the other as regards the communications of deceased with his attorney." 70 C.J., Witnesses, section 587.

Kemp, 236 N.C. at 684, 73 S.E.2d at 910; *see also* 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 129, at 129 (5th ed. 1998) (the testamentary exception to the attorney-client privilege applies "[w]hen, after the client's death, there is litigation, such as a will contest, in which all parties claim under the client").

The United States Supreme Court has also recognized the testamentary exception and has assumed that, based upon this exception, the attorney-client privilege continues after a client's death. *Swidler & Berlin v. United States*, 524 U.S. 399, 405, 141 L. Ed. 2d 379, 385 (1998) (citing *Glover v. Patten*, 165 U.S. 394, 407-08, 41 L. Ed. 760, 768 (1897)). The rationale for permitting disclosure under these circumstances is that it furthers the client's intent. *Id.*

Moreover, many jurisdictions have explicitly held that the attorney-client privilege survives the death of the client. *See, e.g.*, *State v. Macumber*, 112 Ariz. 569, 544 P.2d 1084 (1976); *Wesp v. Everson*, 33 P.3d 191 (Colo. 2001); *Mayberry v. State*, 670 N.E.2d 1262 (Ind. 1996); *District Attorney for Norfolk Dist. v. Magraw*, 417 Mass. 169, 628 N.E.2d 24 (1994); *McCaffrey v. Estate of Brennan*, 533 S.W.2d 264 (Mo. App. 1976); *Taylor v. Sheldon*, 172 Ohio St. 118, 173 N.E.2d 892 (1961); *Curato v. Brain*, 715 A.2d 631 (R.I. 1998); *South Carolina State Highway Dep't v. Booker*, 260 S.C. 245, 195 S.E.2d 615 (1973); *see also* 1 John W. Strong, *McCormick on Evidence* § 94, at 378 (Kenneth S. Broun et al. eds., 5th ed. 1999) [hereinafter *McCormick on Evidence*]. Consistent with these authorities and *In re Will of Kemp*, we hold that the attorney-client privilege does survive the death of the client.

[3] Turning now to the State's first contention, the State asserts that Mrs. Willard, as executrix of Mr. Willard's estate, effectively waived "any attorney-client privilege that may have existed" by submitting an affidavit purporting to waive the privilege on Mr. Willard's behalf. The State specifically argues that, as executrix of Mr. Willard's estate, Mrs. Willard was empowered to waive the privilege pursuant to two sections of the North Carolina General Statutes, section 32-27 (powers which may be incorporated by reference in a trust instrument) and section 28A-13-3 (powers of a personal representative or fiduciary). N.C.G.S. §§ 32-27, 28A-13-3 (2001). The trial court held that the estate of Mr. Willard waived the attorney-client privilege based upon the fact that Mr. Willard did not specifically take actions to preclude his estate from waiving the privilege upon his death.

Mr. Willard died leaving behind a will which named Mrs. Willard as executrix of his estate. Article VII of Mr. Willard's will sets forth the powers granted to the executor. Among those powers are (1) the power to "deal with any property" in the estate, including the power to make tax elections; and (2) all of the powers contained in N.C.G.S. § 32-27. Whether N.C.G.S. §§ 32-27 and 28A-13-3 apply to the instant case is a matter of statutory construction.

The primary goal of statutory construction is to "ensure that the purpose of the legislature is accomplished." *Woodson v. Rowland*, 329 N.C. 330, 338, 407 S.E.2d 222, 227 (1991); *see also State ex rel. Hunt v. North Carolina Reinsurance Facil.*, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981). " '[W]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it 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))." *Hlasnick v. Federated Mut. Ins. Co.*, 353 N.C. 240, 244, 539 S.E.2d 274, 277 (2000); *see also Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990).

Section 32-27(23) of the North Carolina General Statutes, titled "Litigate, Compromise or Abandon," empowers the executor "[t]o *compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate.*" N.C.G.S. § 32-27(23) (emphasis added). The State argues that the authority to "defend" implies the authority to gain knowledge of the decedent's recent confidential communications to his attorney when pertinent to the defense of the estate.

In the instant case, no claim has been inferred, threatened or made by or against Mr. Willard's estate. As a result, we do not interpret Mrs. Willard's actions as those taken to "defend" Mr. Willard's estate. This case comes before us as a "Petition in the Nature of a Special Proceeding," instituted by the State in an effort to gain alleged attorney-client privileged information held by respondent. Because there is no claim by or against Mr. Willard's estate, there is no basis for any defense of the estate, and we hold that N.C.G.S. § 32-27(23) is inapplicable.

[4] In addition to subsection (23), there are thirty-three additional powers enumerated in N.C.G.S. § 32-27 which were granted to Mrs. Willard pursuant to Mr. Willard's will. The clear wording of these provisions reveal that they are in no way applicable, and we thus find that none of these remaining powers grant an executrix the power to waive the decedent's attorney-client privilege. "Under the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list."[1] *Evans v. Diaz*, 333 N.C. 774, 779-80, 430 S.E.2d 244, 247 (1993); *see also Campbell v. First Baptist Church*, 298 N.C. 476, 482, 259 S.E.2d 558, 563 (1979). We find no basis under any concept of statutory construction to support the State's position on this point and thus hold that N.C.G.S. § 32-27 does not empower an executor or executrix to waive a decedent's attorney-client privilege.

[5] The State further asserts that Mrs. Willard had the power to waive the attorney-client privilege pursuant to the power granted to the personal representative of a decedent's estate in N.C.G.S. § 28A-13-3(a). Specifically, the State argues that because N.C.G.S. § 28A-13-3(a)(15) confers upon the executor the power to handle litigation on behalf of the estate, the executor also possesses, by necessary implication, the

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1. We find it noteworthy that whereas many jurisdictions have enacted provisions empowering a personal representative to claim and exercise (and by necessary inference also waive) the decedent's attorney-client privilege, the North Carolina General Assembly has enacted no such provision. *See* Alaska R. Evid. 503(c) (2002); Ark. Code Ann. § 16-41-101, Rule 502(c) (2002); Cal. Evid. Code § 953(c) (Deering 2003); Del. R. Evid. 502(c) (2002); Fla. Stat. Ann. § 90.502(3)(c) (2002); Haw. Rev. Stat. Ann. § 503(c) (Michie 2002); Idaho R. Evid. 502(c) (2002); Kan. Stat. Ann. § 60-426(b)(3)(iii) (2001); Ky. R. Evid. 503(c) (2002); Me. R. Evid. 502(c) (2002); Neb. Rev. Stat. § 27-503(3) (2002); Nev. Rev. Stat. 49.105(1) (2002); N.H. R. Evid. 502(c) (2002); N.J. Stat. Ann. § 2A:84A-20(1) (2002); N.M. R. Evid. 11-503(C) (2002); N.D. R. Evid. 502(c) (2002); Okla. Stat. tit. 12, § 2502(C) (2003); Or. Rev. Stat. § 40.225, R. 503(3) (2001); S.D. Codified Laws § 19-13-4 (Michie 2002); Tex. R. Evid. 503(c) (2002); Utah R. Evid. 504(c) (Michie 2002); Vt. R. Evid. 502(c) (2002); Wis. Stat. Ann. § 905.03(3) (2002).

power to waive confidentiality when the information to be gained may be critical to litigation involving the estate.

Section 28A-13-3 of the North Carolina General Statutes contains the "[p]owers of a personal representative or fiduciary." This section empowers a personal representative

> to perform in a reasonable and prudent manner every act which a reasonable and prudent man would perform *incident to the collection, preservation, liquidation or distribution of a decedent's estate so as to accomplish the desired result of settling and distributing the decedent's estate* in a safe, orderly, accurate and expeditious manner as provided by law, including but not limited to the powers [set out in this subsection].

N.C.G.S. § 28A-13-3(a) (emphasis added). Among the thirty-three specific powers N.C.G.S. § 28A-13-3 grants an executor or executrix, subsection (a)(15) confers the power "[t]o compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate." N.C.G.S. § 28A-13-3(a)(15). The State contends that this provision empowers Mrs. Willard, as executrix, to waive the attorney-client privilege on behalf of Mr. Willard.

In this regard, Mrs. Willard, acting as executrix of Mr. Willard's estate, reopened the estate "to handle legal matters" two days before the State filed its petition. At that time, the estate had been closed; it contained no assets; and as far as the record shows, there were no claims pending for or against the estate. Therefore, Mr. Willard's estate was not at risk of incurring civil liability. Because there were no assets in the estate, there was nothing for the executrix to collect, preserve, liquidate, or distribute. *See* N.C.G.S. § 28A-13-3(a).

The State nevertheless argues that Mrs. Willard filed her affidavit in an effort to protect the estate from civil liability arising from possible actions by the Miller family and that her action therefore fell within the purview of N.C.G.S. § 28A-13-3(a). Specifically, the State contends that because the Miller family released the estate from liability, "[i]t defies logic that the Millers acted unilaterally and without consideration. The most compelling logic is that the Millers' release was an agreed upon response to the waiver by Mrs. Willard." The State thus contends that the only way the estate of Mr. Willard could protect itself from the possibility of a civil lawsuit by the Miller family was to reopen the estate and execute an affidavit purporting to

waive the privilege as a condition precedent to the Millers' release of liability.

While enticing, we do not find this argument persuasive in light of the facts established in the record as a whole. We find it more plausible that the estate was not reopened in consideration of the Millers' release of civil liability since Mrs. Willard's affidavit was executed one week *before* the release was obtained. In addition, the actual document which purports to release Mr. Willard's estate from liability specifically states that such release was made "in consideration for the sum of one dollar." Nowhere in the document does it mention the affidavit executed by Mrs. Willard. As previously discussed, we find it relevant that Mr. Willard's estate had no assets at the time Mrs. Willard reopened it and executed her affidavit.

Accordingly, we find that the State's attempts to establish that the filing of Mrs. Willard's affidavit was for the benefit of Mr. Willard's estate are not persuasive. To the contrary, the record more strongly suggests that Mr. Willard's estate was reopened in order to enable Mrs. Willard to submit an affidavit to further the ongoing criminal investigation, and that Mrs. Willard's decision to waive the attorney-client privilege was not for a purpose related to the preservation of Mr. Willard's estate. Further, by again applying the doctrine of *expressio unius est exclusio alterius*, we hold that N.C.G.S. § 28A-13-3(a) is inapplicable to the instant case. We therefore conclude that because Mr. Willard's will did not expressly grant the executrix the power to waive his attorney-client privilege, or any powers similar thereto, Mrs. Willard does not have the power to waive Mr. Willard's attorney-client privilege.

[6] In its second basic contention, the State asserts that the trial court properly accepted the premise of a balancing test. The State argues that the information sought from respondent is not available from any other source, that the relief granted the State is narrow in that an *in camera* review by the trial court must occur before the State has access to any of the information, and that disclosure under such circumstances and procedure will cause no substantial harm to the attorney-client privilege and all that such privilege embodies.

After weighing the State's arguments for the public's interest in justice in the instant case against respondent's arguments for the public's interest in protecting the privilege, and before conducting an *in camera* review, the trial court concluded:

> [T]he State's and the public's interest in determining the identity of the person or persons responsible for the death of Eric Miller outweigh the public interest in protecting . . . the attorney-client privilege.

The public's interest in protecting the attorney-client privilege is no trivial consideration, as this protection for confidential communications is one of the oldest and most revered in law. The privilege has its foundation in the common law and can be traced back to the sixteenth century. Lloyd B. Snyder, *Is Attorney-Client Confidentiality Necessary?*, XV Geo. J. Legal Ethics 477, at 480 (Spring 2002); 8 John H. Wigmore, *Evidence* § 2290, at 542 (John T. McNaughton ed. 1961) (citing *Berd v. Lovelace*, 21 Eng. Rep. 33 (1577)). The attorney-client privilege is well-grounded in the jurisprudence of this State. *State v. McIntosh*, 336 N.C. 517, 523, 444 S.E.2d 438, 441 (1994); *State v. Tate*, 294 N.C. 189, 192, 239 S.E.2d 821, 824 (1978); *Carey v. Carey*, 108 N.C. 267, 270, 12 S.E. 1038, 1038 (1891). "[W]hen the relationship of attorney and client exists, all confidential communications made by the client to his attorney on the faith of such relationship are privileged and may not be disclosed." *McIntosh*, 336 N.C. at 523, 444 S.E.2d at 441 (citing *State v. Ballard*, 333 N.C. 515, 428 S.E.2d 178, *cert. denied*, 510 U.S. 984, 126 L. Ed. 2d 438 (1993)); *see also State v. Murvin*, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981); *State v. Van Landingham*, 283 N.C. 589, 601, 197 S.E.2d 539, 547 (1973); *Guy v. Avery Cty. Bank*, 206 N.C. 322, 322, 173 S.E. 600, 601 (1934); *Hughes v. Boone*, 102 N.C. 137, 159, 9 S.E. 286, 292 (1889).

There are exceptions to this general rule of application to all communications between a client and his attorney; however, the facts of this case do not fall under any one of the well-established exceptions. *See, e.g.*, *McIntosh*, 336 N.C. at 524, 444 S.E.2d at 442 (where uncontroverted evidence showed the defendant consulted with his attorney solely to facilitate his surrender, such communication relating to the surrender was not privileged); *State v. Taylor*, 327 N.C. 147, 152, 393 S.E.2d 801, 805 (1990) (when a client alleges ineffective assistance of counsel, the client waives the attorney-client privilege as to the matters relevant to the allegation); *State v. Brown*, 327 N.C. 1, 21, 394 S.E.2d 434, 446 (1990) (communications are not privileged when made in the presence of a third person not acting as an agent of either party); *In re Will of Kemp*, 236 N.C. at 684, 73 S.E.2d at 909-10 (the privilege is not applicable when an attorney testifies regarding the testator's intent to settle a dispute over an estate).

The rationale for having the attorney-client privilege is based upon the belief that only "full and frank" communications between attorney and client allow the attorney to provide the best counsel to his client. *Upjohn Co. v. United States*, 449 U.S. 383, 389, 66 L. Ed. 2d 584, 591 (1981); *see also McIntosh*, 336 N.C. at 523, 444 S.E.2d at 442. The privilege " 'rests on the theory that encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively, justly and expeditiously—benefits out-weighing the risks of truth-finding posed by barring full disclosure in court.' " *Ballard*, 333 N.C. at 522, 428 S.E.2d at 182 (quoting *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1046 (E.D.N.Y. 1976), *aff'd without opinion*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958, 53 L. Ed. 2d 276 (1977)).

In considering whether an attorney can be compelled to disclose confidential attorney-client communications, it is noteworthy that unlike other profession-related, privileged communications, the attorney-client privilege has not been statutorily codified. In article 7 of chapter 8 of our General Statutes, relating to competency of witnesses, the General Assembly has specifically addressed a method for disclosure of privileged communications. In N.C.G.S. § 8-53, the General Assembly has established the privilege for confidential communications between physician and patient, providing that confidential information obtained in such a relationship shall be furnished only on the authorization of the patient or, if deceased, the executor, administrator or next of kin of the patient. This statute further provides that "[a]ny resident or presiding judge in the district, either at the trial or prior thereto, or the Industrial Commission pursuant to law may, subject to [N.C.G.S. §] 8-53.6, compel disclosure if in his opinion disclosure is necessary to a proper administration of justice." N.C.G.S. § 8-53 (2001). Our General Assembly has also provided this same disclosure procedure and basis in its creation of the privilege for communications between psychologist and patient (N.C.G.S. § 8-53.3 (2001)), in the school counselor privilege (N.C.G.S. § 8-53.4 (2001)), in the marital and family therapy privilege (N.C.G.S. § 8-53.5 (1999)), in the social worker privilege (N.C.G.S. § 8-53.7 (1999)), in the professional counselor privilege (N.C.G.S. § 8-53.8 (2001)), and in the optometrist-patient privilege (N.C.G.S. § 8-53.9 (2001)).

With respect to statutorily established privileges, we also find it notable that with other types of privileged communications, such as the clergyman privilege, the General Assembly has made these in essence absolute by not including any provision for a judge to "com-

pel disclosure if in his opinion disclosure is necessary to a proper administration of justice." N.C.G.S. § 8-53. *See* N.C.G.S. § 8-53.2 (2001) (no disclosure of information between clergymen and communicants); N.C.G.S. § 8-53.6 (2001) (no disclosure of information obtained by a therapist doing marital counseling in alimony or divorce actions). Significantly, our General Assembly has not seen fit to enact such statutory provisions for the attorney-client privilege, and we must look solely to the common law for its proper application. N.C.G.S. § 4-1 (2001).

With regard to case law, the State asserts that the rationale in *Cohen v. Jenkintown Cab Co.*, 238 Pa. Super. 456, 357 A.2d 689 (1976), supports the application of a balancing test in the case *sub judice*. In *Cohen*, the court concluded that the "interests of justice" required disclosure of a deceased client's communications with his attorney. *Id.* at 461-64, 357 A.2d at 692-93. The court balanced the necessity of revealing the confidential communications against the possibility of harm to the client's estate, reputation, or rights and interests. *Id.* at 464, 357 A.2d at 693. The rationale supporting the decision in *Cohen* was that the attorney-client privilege exists to aid in the "administration of justice," and when this goal is frustrated by its application, the trial court can compel disclosure. *Id.* at 464, 357 A.2d at 693-94.

In response to the State's argument, respondent asserts that the United States Supreme Court's decision in *Swidler*, 524 U.S. 399, 141 L. Ed. 2d 379, is virtually indistinguishable from the instant case. The Court in *Swidler* explicitly rejected the balancing test as applied to the attorney-client privilege in *Cohen*. *Id.* at 409, 141 L. Ed. 2d at 388. In *Swidler*, Vincent W. Foster, Jr. was the Deputy White House Counsel when the Office of Independent Counsel investigated whether various crimes were committed during the 1993 dismissal of several employees from the White House Travel Office. *Id.* at 401, 141 L. Ed. 2d at 383. In July 1993, Foster met with an attorney at the firm of Swidler & Berlin for legal representation in regard to possible investigations which might be conducted into the employee firings. *Id.* Nine days after Foster met with his attorney, he committed suicide. *Id.* at 402, 141 L. Ed. 2d at 383.

In 1995, a federal grand jury issued subpoenas in order to obtain the handwritten notes made by Foster's attorney during the July 1993 meeting. *Id.* The federal district court reviewed the handwritten notes *in camera* and concluded that they were protected from disclosure by the attorney-client privilege and the work-product privi-

lege. *Id.* The Court of Appeals for the District of Columbia Circuit reversed, concluding that an exception to the attorney-client privilege applied. *In re Sealed Case*, 124 F.3d 230 (D.C. Cir. 1997), *rev'd sub nom. Swidler & Berlin v. United States*, 524 U.S. 399, 141 L. Ed. 2d 379. The Court of Appeals applied a balancing test and "determined that the uncertainty introduced by its balancing test was insignificant in light of existing exceptions to the privilege." *Swidler*, 524 U.S. at 402-03, 141 L. Ed. 2d at 384. The United States Supreme Court reversed the Court of Appeals, refusing to permit disclosure of the confidential communications between Foster and his attorney. *Swidler*, 524 U.S. 399, 141 L. Ed. 2d 379.

The United States Supreme Court reasoned that when a client communicates with his attorney, he may not then be aware of the possibility that his statements might later become part of a civil or criminal matter. *Id.* at 409, 141 L. Ed. 2d at 387. The Court also recognized the dangers associated with invoking exceptions to the attorney-client privilege:

> Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.

Id. at 407, 141 L. Ed. 2d at 386. Moreover, the Court expressly rejected the application of a balancing test to the attorney-client privilege when the client has died and the privileged information at issue is pursued to further a criminal investigation:

> Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application.

Swidler, 524 U.S. at 409, 141 L. Ed. 2d at 387-88.

In addition, the Supreme Judicial Court of Massachusetts has also decided this issue, and it too rejected the holding in *Cohen*. *In re John Doe Grand Jury Investigation*, 408 Mass. 480, 485, 562 N.E.2d 69, 71-72 (1990). In *John Doe*, a grand jury was investigating the

involvement of Charles Stuart in two deaths. *Id.* at 481, 562 N.E.2d at 69. The day before his own death, Charles Stuart spent two hours in conference with his attorney. *Id.* After his death, the State sought disclosure of the communications which transpired during the conference. *Id.*

In *John Doe*, the court emphasized that an "extraordinarily high value must be placed on the right of every citizen to obtain the thoughtful advice of a fully informed attorney concerning legal matters." *Id.* at 485, 562 N.E.2d at 71. The court concluded that a rule allowing for disclosure of attorney-client communications, even after the death of the client, would deter the client from being candid with his attorney. *Id.* As a result, the ability of the attorney, as an advisor, could be impaired. *Id.* The court concluded that the potential for ineffective assistance was in direct opposition to the traditional right to counsel and a beneficial attorney-client relationship. *Id.* The court in *John Doe* strictly upheld the sanctity of the attorney-client privilege.

In the instant case, as in *Swidler*, the client sought legal advice from an attorney just days before he committed suicide. The facts as reflected in the record support the assumption that Mr. Willard was well aware of the criminal investigation and discussed the circumstances surrounding the death of Dr. Miller with respondent and with Mrs. Willard. It is apparent that Mr. Willard attempted to keep the information he communicated to respondent private. Unlike his co-workers, Mr. Willard refused to speak with law enforcement officials regarding the death of Dr. Miller, and most notably, he chose to commit suicide before he was questioned or otherwise pressured to reveal whether he was involved in the death of Dr. Miller.

In assessing the adoption of a balancing test, as proposed by the State, we are cognizant of both the principal justification for such tests and the concerns for its application. Balancing tests provide trial courts with the flexibility to respond to unique circumstances and unanticipated situations. Bright-line rules, on the other hand, limit future judicial discretion and provide trial courts, and litigants, with predictability and consistency. *See* James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 Ariz. St. L.J. 773, 777 (1995). A strict balancing test involving the attorney-client privilege, in the context of the present case after the client's death, subjects the client's reasonable expectation of nondisclosure to a process without parameters or standards,

with an end result no more predictable in any case than a public opinion poll, the weather over time, or any athletic contest. Such a test, regardless of how well intentioned and conducted it may be, or how exigent the circumstances, would likely have, in the immediate future and over time, a corrosive effect on the privilege's traditionally stable application and the corresponding expectations of clients. Moreover, the proposed factors to be "balanced" are not capable of precise discernment or application in this case, or any case, and seem to add little to an assessment of whether the privilege should be waived. *See Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 214, 367 S.E.2d 609, 617 (1988) (rejecting the use of a balancing test).

The practical consequences of a balancing test include the difficulty of demonstrating equality of treatment, the decline of judicial predictability, and the facilitation of judicial arbitrariness. *See* Antonin Scalia, *Essay: The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989). These concerns are further well expressed as follows: "Simply stated, the balancing test (1) does not ensure, even in theory, that like cases will be treated alike, and (2) so muddies the areas of the law it comes to dominate that those governed by it are left without clear guidance about what behavior is permitted and what is not." Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. Rev. 585, 642 (1988). In light of these considerations, it appears that the application of a balancing test exception, even under such conditions as proposed by the State in the instant case, would invite procedures and applications so lacking in standards, direction and scope that the privilege in practice would be lost to the exception.

The attorney-client privilege is unique among all privileged communications. In practice, communications between attorney and client can encompass *all* subjects which may be discussed in any other privileged relationship and indeed all subjects within the human experience. As such, it is the privilege most beneficial to the public, both in facilitating competent legal advice and ultimately in furthering the ends of justice. We therefore conclude that the balancing test as proposed by the State is not appropriate and should not be applied under the circumstances of the instant case.

[7] The next step in our inquiry is to further examine the evidence or facts revealed in the record and determine whether any other reason or basis for exception to the privilege exists which would warrant disclosure of the information respondent possesses.

We recognize first in this regard that the primary goal of our adversarial system of justice is to ascertain the truth in any legal proceeding. This proposition has been well stated as follows:

> The pertinent general principle, responding to the deepest needs of society, is that society is entitled to every man's evidence. As the underlying aim of judicial inquiry is ascertainable truth, everything rationally related to ascertaining the truth is presumptively admissible. Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.

Elkins v. United States, 364 U.S. 206, 234, 4 L. Ed. 2d 1669, 1695 (1960) (Frankfurter, J., dissenting). "As has been said, the chief function of our judicial machinery is to ascertain the truth." *Estes v. Texas*, 381 U.S. 532, 544, 14 L. Ed. 2d 543, 551 (1965). "The object of the law is to ascertain the truth, and to base its judgments and decrees thereon." *Jones v. Bobbitt*, 90 N.C. 391, 394 (1884). "The law seeks to ascertain the truth and, upon it alone, to adjudge the rights of the parties." *Starr v. Southern Cotton Oil*, 165 N.C. 587, 590, 81 S.E. 776, 777 (1914). More recently, this Court has stated:

> At trial the major concern is the "search for truth" as it is revealed through the presentation and development of all relevant facts. To insure that truth is ascertained and justice served, the judiciary must have the power to compel the disclosure of relevant facts, not otherwise privileged, within the framework of the rules of evidence.

State v. Hardy, 293 N.C. 105, 125, 235 S.E.2d 828, 840 (1977).

While the attorney-client privilege is an essential component in our system of justice, many ethical and moral dilemmas exist as a result of this limitation on finding the truth. For example, one critic of the privilege has opined:

> Confidentiality rules invite attorneys to withhold information that could prevent harm to third parties in the course of representing their clients. The rules promote a culture of winning at any cost short of dishonesty while avoiding consideration of others.

Lloyd B. Snyder, *Is Attorney-Client Confidentiality Necessary?*, XV Geo. J. Legal Ethics 477, at 522. It is further well established that the attorney-client privilege is not absolute. When certain extraordinary circumstances are present, the need for disclosure of attorney-client communications will trump the confidential nature of the privilege. *See United States v. Zolin*, 491 U.S. 554, 105 L. Ed. 2d 469 (1989) (crime-fraud exception to attorney-client privilege). With these principles in mind, we turn to the resolution of the primary issue presented in this case.

[8] It is universally accepted and well founded in the law of this State that not all communications between an attorney and a client are privileged. *E.g., State v. Murvin*, 304 N.C. at 531, 284 S.E.2d at 294; *State v. Tate*, 294 N.C. at 192, 239 S.E.2d at 824; *Dobias v. White*, 240 N.C. 680, 684-85, 83 S.E.2d 785, 788 (1954). This Court has recognized a five-part test to determine whether the attorney-client privilege applies to a particular communication:

> "(1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege."

McIntosh, 336 N.C. at 523-24, 444 S.E.2d at 442 (quoting *State v. Murvin*, 304 N.C. at 531, 284 S.E.2d at 294). If any one of these five elements is not present in any portion of an attorney-client communication, that portion of the communication is not privileged. For example, pursuant to the second prong of this test, if it appears that a communication was not regarded as confidential or that the communication was made for the purpose of being conveyed by the attorney to others, the communication is not privileged. *McIntosh*, 336 N.C. at 524, 444 S.E.2d at 442 (citing *Dobias v. White*, 240 N.C. at 684-85, 83 S.E.2d at 788). In addition, the fourth prong of this test makes it clear that the attorney-client privilege cannot serve as a shield for fraud or as a tool to aid in the commission of future criminal activities; if a communication is not " 'made in the course of seeking or giving legal advice for a proper purpose,' " it is not protected. *See State v. Jennings*, 333 N.C. 579, 611, 430 S.E.2d 188, 204 (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 62, at 302 (3d ed. 1988)), *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993).

In the usual instance, it is impossible to determine whether a particular communication meets the elements of the test set forth in *McIntosh*, particularly the third and fourth prongs, without first knowing the substance of that communication. Thus, an *in camera* review of the content of an attorney-client communication may be necessary before a trial court is able to determine whether that communication is privileged:

> The burden is always on the party asserting the privilege to demonstrate each of its essential elements. This burden may not be met by "mere conclusory or ipse dixit assertions," or by a "blanket refusal to testify." Rather, sufficient evidence must be adduced, usually by means of an affidavit or affidavits, to establish the privilege with respect to each disputed item.

1 Scott N. Stone & Robert K. Taylor, *Testimonial Privileges* § 1.61, at 1-161 (2d ed. 1994) (citations omitted); *see also United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) ("The burden is on the proponent of the attorney-client privilege to demonstrate its applicability."); *Miles v. Martin*, 147 N.C. App. 255, 259-60, 555 S.E.2d 361, 364 (2001); *Multimedia Publ'g of N.C., Inc. v. Henderson Cty.*, 136 N.C. App. 567, 576, 525 S.E.2d 786, 792, *disc. rev. denied*, 351 N.C. 474, 543 S.E.2d 492 (2000).

More than a century ago, this Court held that the responsibility of determining whether the attorney-client privilege applies belongs to the trial court, not to the attorney asserting the privilege. *Hughes v. Boone*, 102 N.C. 137, 160, 9 S.E. 286, 292 (1889). Thus, a trial court is not required to rely solely on an attorney's assertion that a particular communication falls within the scope of the attorney-client privilege. In cases where the party seeking the information has, in good faith, come forward with a nonfrivolous assertion that the privilege does not apply, the trial court may conduct an *in camera* inquiry of the substance of the communication. *See State v. Buckner*, 351 N.C. 401, 411-12, 527 S.E.2d 307, 314 (2000) (trial court must conduct *in camera* review when there is a dispute as to the scope of a defendant's waiver of the attorney-client privilege, such as would be the case when a defendant has asserted an ineffective assistance of counsel claim); *State v. Taylor*, 327 N.C. at 155, 393 S.E.2d at 807 (same); *see also Willis v. Duke Power Co.*, 291 N.C. 19, 36, 229 S.E.2d 191, 201 (1976) (trial court may require *in camera* inspection of documents to determine if they are work-product).

We note that the United States Supreme Court has also placed its imprimatur on the need for *in camera* inspections in circumstances where application of the privilege is contested. *Zolin*, 491 U.S. 554, 105 L. Ed. 2d 469 (*in camera* review to determine whether the crime-fraud exception to attorney-client privilege applies); *United States v. Nixon*, 418 U.S. 683, 41 L. Ed. 2d 1039 (1974) (*in camera* review to determine whether communications are subject to the executive privilege). The necessity for an *in camera* review of attorney-client communications in some cases is also endorsed by the Restatement of the Law Governing Lawyers: "In cases of doubt whether the privilege has been established, the presiding officer may examine the contested communication *in camera*." Restatement (Third) of the Law Governing Lawyers § 86 cmt. f (2000). However, we note, as the Supreme Court did in *Zolin*, that the "disclosure of allegedly privileged materials to the [trial] court for purposes of determining the merits of a claim of privilege does not have the legal effect of terminating the privilege." *Zolin*, 491 U.S. at 568, 105 L. Ed. 2d at 488. Thus, the material or communication asserted to be privileged retains its confidential nature notwithstanding an *in camera* review, at least through the review process.

We therefore conclude that, in the instant case, the trial court's decision to conduct an *in camera* review of the communications between respondent and Mr. Willard was procedurally correct. The trial court did not err in ordering respondent to provide the trial court with a sealed affidavit containing the communications which transpired between Mr. Willard and respondent, for the purpose of determining whether the attorney-client privilege applies to any portion of the communication. Upon such review on remand, the trial court's threshold inquiry is to determine whether the information communicated between respondent and Mr. Willard, or any portion thereof, is in fact privileged.

[9] Turning now more specifically to the five-part *McIntosh* test, we note that the unique facts of the instant case, as reflected in the record, raise concerns, particularly regarding the application of the third and fourth prongs of the *McIntosh* test. As to the third prong, the communications must relate to a matter about which the attorney is being professionally consulted, and considering also the first prong of the test in this regard, it is clear that only those communications which are between the attorney and the client and which are part of the client's actual purpose for the legal consultation are privileged. *See Murvin*, 304 N.C. at 531-32, 284 S.E.2d at 294-95. While commu-

nications made by a client to an attorney which pertain to the culpability or interests of the client are privileged and ordinarily remain privileged after the client's death, communications between an attorney and a client that relate to or concern the interests, rights, activities, motives, liabilities, or plans of some third party, the disclosure of which would not tend to harm the client, do not logically fall within North Carolina's definition of attorney-client privileged information. With regard to the fourth prong of the *McIntosh* test, the communications must relate to communications between the attorney and the client for a proper purpose. While communications concerning the client's own criminal culpability and his defense is certainly privileged, it is difficult to fathom how any communications relating to a third party's criminal activity, concealment thereof or obstruction of justice could fall within such category, when disclosure thereof would not tend to harm the client. The concept of "proper purpose" relates not only to whether the communications involve the client's future illegal activity, obstruction of justice or activity directly or indirectly aiding a third party in some illegal activity, but it also relates only to communications that would properly benefit the client as opposed to a third party.

The author of one leading treatise on the law of evidence explained that the attorney-client privilege should be asserted only "by the person whose interest the particular rule of privilege is intended to safeguard." *McCormick on Evidence* § 92, at 368. This interpretation of the privilege is consistent with the privilege's underlying purpose:

> While once it was conceived that the privilege was set up to protect the lawyer's honor, we know that today it is agreed that the basic policy of the rule is that of encouraging clients to lay the facts fully before their counsel. They will be encouraged by a privilege which they themselves have the power to invoke. *To extend any benefit or advantage to someone as attorney, or as party to a suit, or to people generally, will be to suppress relevant evidence without promoting the purpose of the privilege.*

Id. at 369 (emphasis added). " 'There is a privilege of secrecy as to what passes between attorney and client, but it is the privilege of the client and he may waive it if he chooses. . . . *It is not the privilege of the court or any third party.*' " *Schaibly v. Vinton*, 338 Mich. 191, 196, 61 N.W.2d 122, 124 (1953) (quoting *Passmore v. Estate of Passmore*, 50 Mich. 626, 627, 16 N.W. 170, 171 (1883)) (emphasis added). Although an attorney may assert the privilege when neces-

sary to protect the interests of the client, the privilege belongs solely to the client. "The law of privileged communications between attorney and client is that the privilege is that of the client. *He alone is the one for whose protection the rule is enforced.*" *Ex parte Lipscomb*, 111 Tex. 409, 415, 239 S.W. 1101, 1103 (1922) (emphasis added); *see also Russell v. Second Nat'l Bank of Paterson*, 136 N.J.L. 270, 278, 55 A.2d 211, 217 (1947).

Our review of the North Carolina common law regarding the attorney-client privilege further supports our interpretation as to the extent of the third and fourth prongs of the *McIntosh* test and when they apply. In *State v. Murvin*, 304 N.C. 523, 284 S.E.2d 289, the defendant was suspected of breaking into a shipping company, stealing goods from its shop, and murdering the security guard. *Id.* at 524-25, 284 S.E.2d at 290-91. At the time these crimes occurred, Linda Sue Albertson was living with the defendant, and she acquired information implicating the defendant in the crimes. *Id.* at 525, 284 S.E.2d at 291. Approximately four years after these crimes were committed, Ms. Albertson executed an affidavit in the presence of her attorney in which she made statements implicating the defendant in the crimes. *Id.* at 530-31, 284 S.E.2d at 294. During the subsequent prosecution of the defendant, Ms. Albertson testified as to her knowledge of the defendant's culpability. *Id.* at 525, 530, 284 S.E.2d at 291, 294. On cross-examination, defense counsel questioned Ms. Albertson regarding statements contained in the affidavit which was previously executed in the presence of her attorney. *Id.* at 530, 284 S.E.2d at 294. The trial court sustained the State's objection on the basis that the affidavit "came within the scope of the attorney-client privilege." *Id.* The defendant was convicted, and he appealed to this Court. *Id.* at 526, 284 S.E.2d at 291-92.

In *Murvin*, this Court held that the attorney-client privilege did not apply to Ms. Albertson's affidavit. *Id.* at 532, 284 S.E.2d at 294-95. This Court's analysis included the following:

> The record discloses that Ms. Albertson was arrested on the evening of giving the affidavit to her attorney for receiving stolen goods. Ms. Albertson apparently was consulting with counsel with respect to that charge. When asked if the affidavit had anything to do with "what the law was trying to find you for," Ms. Albertson responded negatively.

Id. at 531-32, 284 S.E.2d at 295. Relying on the record, this Court determined that, at the time the affidavit was executed, Ms. Albertson

had "employed the attorney to represent her in a criminal matter unrelated to the present case." *Id.* at 530, 284 S.E.2d at 294. This Court then reasoned that "the communication did not relate to a matter concerning which Ms. Albertson had employed her attorney or for which she was professionally consulting him." *Id.* at 531, 284 S.E.2d at 294. Therefore, this Court concluded that the subject matter of the affidavit was not attorney-client privileged information. *Id.* at 532, 284 S.E.2d at 295. We find it particularly noteworthy that the substance of the affidavit tended to incriminate a third party and that there was no suggestion in *Murvin* that Ms. Albertson, the communicating client, was at risk of incurring any liability or harm as a result of the statements in the affidavit.

Pursuant then to this analysis, we believe that communications between attorney and client regarding any criminal activity of a third party, which do not tend to harm the interests of the client, do not satisfy the third and fourth prongs of the *McIntosh* test, and such communications are therefore not privileged. Accordingly, we hold that when a trial court, after conducting an *in camera* review as described below, determines that some or all of the communications between a client and an attorney do not relate to a matter that affected the client at the time the statements were made, about which the attorney was professionally consulted within the parameters of the *McIntosh* test, such communications are not privileged and may be disclosed.

With regard to the instant case, in determining whether Mr. Willard's statements to respondent should be disclosed, the trial court should consider the circumstances surrounding Mr. Willard at the time he communicated with counsel. In applying the *McIntosh* factors, the trial court should be mindful that the statements were made by Mr. Willard when he presumably knew he was a suspect in a criminal investigation. In this context, it is conceivable that statements by Mr. Willard which implicated a third party may have also implicated him in a crime. If so, those statements, if then revealed, would have subjected him to criminal liability. Therefore, at the time Mr. Willard made the statements, anything he said relating his collaborative involvement with a third party in the death of Dr. Miller was covered by the attorney-client privilege.

In limiting the application of the privilege by holding that attorney-client communications which relate solely to a third party are not privileged, we note that this rationale would not apply in a situation where the person communicating with the attorney was

acting as an agent of some third-party principal when the communication was made. *See State v. Van Landingham*, 283 N.C. at 602, 197 S.E.2d at 547. In that instance, the information would remain privileged because the third-party principal would actually be the client who is communicating with the attorney through the agent. Because the communication would relate to the third-party principal's interests, it would therefore be within the scope of matter about which the attorney was professionally consulted and thus would be privileged.

[10] We further conclude that in considering, by *in camera* review, whether communications asserted to be privileged should be disclosed, a trial court should additionally apply the maxim *cessante ratione legis, cessat ipsa lex*. When the underlying justification for the rule of law, or in this case the privilege, is not furthered by its continued application, the rule or privilege should cease to apply. "It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a law when that reason utterly fails." *Patton v. United States*, 281 U.S. 276, 306, 74 L. Ed. 854, 867 (1930). The application of this maxim was further well stated by the United States Supreme Court as follows:

> If the reasons on which a law rests are overborne by opposing reasons, which in the progress of society gain a controlling force, the old law, though still good as an abstract principle, and good in its application to some circumstances, must cease to apply as a controlling principle to the new circumstances.

Funk v. United States, 290 U.S. 371, 385, 78 L. Ed. 369, 377 (1933); *see also Williams v. Chapman*, 118 N.C. 943, 945, 24 S.E. 810, 811 (1896); *Locke v. Alexander*, 8 N.C. 412, 417 (1821). In this regard, and specifically with respect to the attorney-client privilege, the United States Supreme Court has stated that " 'since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose.' " *Zolin*, 491 U.S. at 562, 105 L. Ed. 2d at 484 (quoting *Fisher v. United States*, 425 U.S. 391, 403, 48 L. Ed. 2d 39, 51 (1976)). Thus, we further consider at this point in our analysis whether nondisclosure in the present case furthers the purpose for which the privilege exists.

When a client retains an attorney for legal advice in regard to an ongoing criminal investigation, the client's desire to keep the communication confidential is premised upon three possible consequences in the event of disclosure: (1) that disclosure might subject

the client to criminal liability; (2) that disclosure might subject the client, or the client's estate, to civil liability; and (3) that disclosure might harm the client's loved ones or his reputation. *See Swidler*, 524 U.S. at 407, 141 L. Ed. 2d at 386. Therefore, in determining whether the reasons for the privilege still exist after the client is deceased, the trial court should consider the *Swidler* factors. In the instant case, the trial court should consider whether these possible consequences would apply to, or would have any negative or harmful effect on, Mr. Willard's rights and interests if the State was permitted to obtain the information communicated between Mr. Willard and respondent. In the event the trial court, upon *in camera* review, should conclude that any of these consequences still apply to any portion of the communications, they should remain undisclosed. If, on the other hand, the trial court should determine that the communications asserted to be privileged would have no negative impact on Mr. Willard's interests, the purpose for the privilege no longer exists. When application of the privilege will no longer safeguard the client's interests, no reason exists in support of perpetual nondisclosure.

[11] We acknowledge that, while some risk of withholding information might remain if an attorney were permitted, even under this very narrow premise, to disclose privileged information after a client has died, the instant case presents unique circumstances in which there may be little or no risk of harm to the client. It is indeed a rare case where the full application of the above rationale would apply; therefore, trial courts should carefully analyze each individual factual situation on a case-by-case basis when determining whether to permit disclosure of information asserted to be privileged. In this regard, we emphasize that in approving *in camera* review pursuant to the narrow principles herein set forth, we are in no way sanctioning or suggesting any general application of special proceedings or grand jury investigations by prosecutors in the nature of fishing expeditions or otherwise which would tend to diminish in any way the great value to the public of the attorney-client privilege by its proper application through the judicial process.

In summary then, we hold that when a client is deceased, upon a nonfrivolous assertion that the privilege does not apply, with a proper, good-faith showing by the party seeking disclosure of communications, the trial court may conduct an *in camera* review of the substance of the communications. To the extent any portion of the communications between the attorney and the deceased client relate solely to a third party, such communications are not within the

purview of the attorney-client privilege. If the trial court finds that some or all of the communications are outside the scope of the attorney-client privilege, the trial court may compel the attorney to provide the substance of the communications to the State for its use in the criminal investigation, consistent with the procedural formalities set forth below. To the extent the communications relate to a third party but also affect the client's own rights or interests and thus remain privileged, such communications may be revealed only upon a clear and convincing showing that their disclosure does not expose the client's estate to civil liability and that such disclosure would not likely result in additional harm to loved ones or reputation. We do not reach the issue of whether any such information so provided by any attorney would be admissible in any future criminal prosecution. In the event a subsequent criminal prosecution ensues, the trial court would apply the rules of evidence to this information in the event it is tendered in evidence and determine then whether it is admissible against a defendant.

Upon *in camera* review, in the event the trial court concludes that any portion of the communications made between the client and the attorney is either not subject to the attorney-client privilege, or though privileged no longer serves the purpose of the privilege and may be disclosed, the attorney's affidavit and the information contained therein must nevertheless remain sealed and preserved in the records of the trial court for appellate review in the event of an immediate appeal. The trial court's determination of the applicability of the privilege or disclosure affects a substantial right and is therefore immediately appealable. *Cf. Sharpe v. Worland*, 351 N.C. 159, 166, 522 S.E.2d 577, 581 (1999) (a ruling on an interlocutory discovery order affects a substantial right when the assertion of a statutory privilege directly relates to the matter to be disclosed under the order). "It is elementary that *in camera* inspection . . . is always a procedure calling for scrupulous protection against any release or publication of [privileged] material." *Nixon*, 418 U.S. at 714, 41 L. Ed. 2d at 1067. Consequently, the trial court should carefully guard the contents of any materials it receives from the *in camera* review, even if it concludes that the information is not protected by the attorney-client privilege, so long as the party objecting to disclosure gives notice of immediate appeal.

In the instant case, in addition to his principal argument, respondent has also raised the issue of the confidential marital-communications privilege. Respondent contends that the trial court erred

when it considered Mrs. Willard's affidavit as a factor in issuing its 7 March 2002 order. Specifically, respondent asserts that, because the affidavit contains confidential information which was communicated between Mr. Willard and Mrs. Willard during their marriage, the material contained therein is privileged. In her affidavit, Mrs. Willard stated that, after his meeting with respondent, Mr. Willard told Mrs. Willard that respondent said he "could be charged with the attempted murder of Eric D. Miller."

In this regard, we note that in addition to the affidavit of Mrs. Willard, the State also submitted the affidavit of Lieutenant William C. Morgan, supervisor of the Major Crimes Task Force of the Raleigh Police Department, in which he states that, during his interviews with Mrs. Willard, he learned that Mr. Willard told Mrs. Willard that respondent said Mr. Willard could be charged with the attempted murder of Dr. Miller. The validity and admissibility of Lieutenant Morgan's affidavit in this special proceeding is not presently contested or at issue. In light of Lieutenant Morgan's affidavit, any possible error by the trial court in considering Mrs. Willard's affidavit is harmless.

In any event, we have resolved the principal issue in this appeal without consideration of Mrs. Willard's affidavit. Accordingly, the arguments relating to the confidential marital communications privilege are moot and need not be addressed. *See Campbell v. Pitt Cty. Mem'l Hosp., Inc.*, 321 N.C. 260, 266, 362 S.E.2d 273, 276 (1987); *Bellefonte Underwriters Ins. Co. v. Alfa Aviation, Inc.*, 310 N.C. 471, 473, 312 S.E.2d 426, 427-28 (1984); *Superior Foods, Inc. v. Harris-Teeter Super Markets, Inc.*, 288 N.C. 213, 227, 217 S.E.2d 566, 576 (1975). An issue is moot "when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 399, 474 S.E.2d 783, 787 (1996). " '[C]ourts will not entertain or proceed with a cause merely to determine abstract propositions of law.' " *Id.* (quoting *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)); *see also Benvenue Parent-Teacher Ass'n v. Nash Cty. Bd. of Educ.*, 275 N.C. 675, 679, 170 S.E.2d 473, 476 (1969); *Person v. Board of State Tax Comm'rs*, 184 N.C. 499, 505, 115 S.E. 336, 341 (1922); *Ginsberg v. Leach*, 111 N.C. 15, 16, 15 S.E. 882, 883 (1892). We note that, if a subsequent action is commenced, it will be for the trial court to determine whether any evidence, including the substance of Mrs. Willard's affidavit, is admissible at trial.

Based upon the foregoing, the decision of the trial court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

STATE OF NORTH CAROLINA v. SHAN CARTER

No. 479A01

(Filed 22 August 2003)

1. Witnesses— cross-examination—repetitive and confrontational

The trial court did not err during a capital sentencing proceeding by denying defendant the opportunity to further cross-examine and impeach the credibility of a State's witness. The court limited cross-examination only after it became repetitive and confrontational.

2. Sentencing— capital—prior inconsistent statement about another crime—extrinsic evidence excluded

The trial court did not err in a capital sentencing hearing by refusing to admit a signed police report about another crime as extrinsic evidence of a witness's prior inconsistent statement. The point in contention was a collateral matter only tenuously relevant, and the court exercised its discretion properly to prevent this sentencing proceeding from becoming a second trial for the prior crime.

3. Constitutional Law— double jeopardy—current murder introduced at sentencing for prior murder—life sentence not acquittal

A sentence of life imprisonment for a prior murder did not amount to an "acquittal" for this murder even though evidence of this murder was introduced at the capital sentencing hearing to support the course of conduct aggravating circumstance. Neither defendant's guilt nor the appropriate sentence in the present case were fully litigated in the prior trial, and defendant was convicted and sentenced in this case for offenses quite distinct from the offenses in the prior trial.

4. Sentencing— capital—prior life sentence excluded

There was no prejudicial error in a capital sentencing proceeding in the court's granting of the State's motion in limine to exclude defendant's life sentence in another case where the clerk of court testified about the earlier sentence without objection. Moreover, the sentence imposed for the prior murder was irrelevant to the sentencing recommendation in this case.

5. Criminal Law— self-defense—instructions

The trial court did not err in a first-degree murder prosecution by instructing the jury that defendant's conduct could be excused if it appeared necessary to the defendant and he believed it to be necessary that he kill the victim to save himself from death or great bodily harm. Although defendant argued that this instruction deprived defendant of self-defense even if the jury found that the victim suffered injuries greater than defendant had intended, an instruction identical in all relevant respects was approved in *State v. Richardson*, 341 N.C. 585.

6. Homicide— first-degree murder—short-form indictment—constitutional

A short-form first-degree murder indictment, which did not allege aggravating circumstances, was not unconstitutional. The structure and nature of the North Carolina capital punishment system provided defendant with reasonable and constitutionally sufficient notice of the aggravating circumstances that might be established by the State during defendant's capital sentencing proceeding. The indictment sufficiently alleged the elements of first-degree murder.

7. Sentencing— capital—death penalty—not arbitrary

The evidence fully supported the aggravating circumstances found by the jury in a capital sentencing proceeding, and there was no indication that the death sentences were imposed under the influence of passion, prejudice, or any other arbitrary consideration.

8. Sentencing— capital—death penalty—proportionate

A death sentence was proportionate where defendant was convicted of first-degree murder based on premeditation and deliberation, defendant was found guilty of two counts of murder, defendant had been convicted of a prior violent felony, the jury found the course of conduct aggravating circumstance, and

the jury expressly refused to find the statutory mitigating circumstances of mental or emotional disturbance or age.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of death entered by Judge Charles H. Henry on 19 March 2001 in Superior Court, New Hanover County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. On 22 July 2002, 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 2003.

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

Edwin L. West, III, for defendant-appellant.

MARTIN, Justice.

On 24 February 1997, Shan Carter (defendant) was indicted for the first-degree murders of Tyrone Baker and Demetrius Greene. He was also subsequently indicted for discharging a firearm into occupied property, in violation of N.C.G.S. § 14-34.1, and possession of a firearm by a convicted felon, in violation of N.C.G.S. § 14-415.1. Defendant was tried capitally at the 5 February 2001 session of Superior Court, New Hanover County. The jury found defendant guilty on all counts. Defendant's conviction of the first-degree murder of Baker was based on a theory of premeditation and deliberation. Defendant's conviction of the first-degree murder of Greene was based on a theory of premeditation and deliberation under the doctrine of transferred intent, and was also based on the felony murder rule with Baker's murder serving as the underlying felony. Following a capital sentencing proceeding, the jury recommended a sentence of death for each murder. The trial court entered judgment accordingly. The trial court also entered consecutive sentences of forty-six to sixty-five months for discharge of a firearm into an occupied vehicle and twenty to twenty-four months for possession of a firearm by a convicted felon. Defendant gave notice of appeal pursuant to N.C.G.S. § 7A-27(a).

The evidence admitted at the guilt-innocence proceeding tended to show the following: Defendant has been convicted several times of illegal drug possession and sale. In late 1996, defendant was involved in a number of break-ins and burglaries in Wilmington, North Carolina, including one at the home of Keith Lamont Richardson and

one at the home of a victim in the instant case, Tyrone Baker. Defendant, K'Wada Temony, and Damont White were all involved in the burglary of Baker's home, which resulted in the theft of approximately $35,000 in cash. At one point, defendant referred to this $35,000 as "death money." No evidence was admitted as to what, if anything, defendant may have stolen from Richardson. Richardson and Baker each eventually confronted defendant and his cohorts. One of these confrontations led to the convictions in the instant case.

Sometime near the end of November 1996, Baker kidnapped White and took him to Baker's apartment. Baker assaulted and threatened White in an attempt to discover the location of the missing $35,000. Baker then released White, who discussed the incident with Temony and defendant and alerted them that Baker was searching for those who had taken his money. In early February 1997, Richardson learned that defendant was the person who had broken into his home. Richardson subsequently saw defendant on the street and angrily confronted him about the break-in. During the confrontation, defendant drew a chrome .357 caliber revolver and Richardson fled. Defendant fired several shots, wounding Richardson's arm.

The instant charges stem from events occurring on the afternoon of 16 February 1997. On that afternoon, defendant and Temony were riding in defendant's car. They stopped near a crowd of ten to fifteen people gathered in front of a grocery store located at the intersection of 10th and Dawson Streets in Wilmington. A number of residents were out on the neighborhood streets that day. Defendant and Temony exited the car; defendant began conducting drug transactions. Baker was also near this intersection, having visited a friend's house across the street from the grocery store and a nearby barber shop.

Defendant apparently did not notice Baker approach the crowd. Defendant first became aware of Baker's presence when Baker attacked Temony, knocking him to the ground. Baker then approached defendant menacingly, with a jacket slung over his arm, concealing his hand. According to eyewitnesses, Baker was unarmed. Defendant claimed at trial that although he could not see a weapon, he feared Baker was armed and reacted in self-defense. Defendant testified: "I didn't want to shoot first, I wanted to go ahead . . . and do what I had to do before [Baker] did it to me. So I went ahead and pulled my gun out and I shot at him." As Baker approached, defend-

ant retreated, pulled a chrome .357 caliber revolver from under his jacket, and began shooting. Defendant testified that he pointed his gun towards the ground and intended only to force Baker away so that defendant could get to his car and leave. Defendant also testified that he did not intend to kill Baker and did not know at the time of the shooting whether any of the bullets actually hit Baker. After defendant fired the first shot, Baker turned and ran around the corner, moving down 10th Street. According to defendant, "[Baker] ran and I went behind him shooting at him."

D'April Greene and her three children lived in a housing project near 10th and Dawson. On 16 February 1997, D'April was gathering the children for a trip to the toy store. The trip was intended to reward the children for making good grades. Excited about the trip and anxious to ride in the front seat, D'April's eight-year-old son, Demetrius, ran ahead of the rest of his family. He ran across 10th Street and jumped into the front passenger seat of D'April's car, which was parked on 10th Street approximately one hundred feet south of the grocery store. As D'April and her other two children crossed the street towards the car, D'April began to hear "fussing" near the intersection of 10th and Dawson. This "fussing" was quickly followed by gunfire. D'April and other witnesses then saw Baker rounding the corner with defendant in pursuit.

As Baker ran down 10th Street, defendant followed him around the corner, continuing to fire between four and six shots. At some point, Baker ran in front of or near the Greene car in an attempt to cross 10th Street. During the course of the shooting, two of the bullets from defendant's revolver struck Baker, one in the leg and one in the torso. Baker staggered across the street, collapsed in a grassy area near the sidewalk, and died shortly thereafter. A stray bullet from defendant's revolver passed through the windshield of D'April Greene's car and struck Demetrius Greene in the head. Demetrius died shortly thereafter. Forensic evidence subsequently confirmed that the bullets that struck Baker and Greene all came from the same gun, most likely a revolver. Moreover, forensic evidence showed those bullets could not have been fired from a gun later found in Temony's possession.

Immediately after the shooting, defendant and Temony got into defendant's car and fled. They stopped briefly at defendant's home, abandoned defendant's car, and then went to a nearby motel. According to defendant, they spent the next two days in a motel room. Defendant claims he did not learn that Demetrius Greene had

been killed until he saw the evening news. At some point, Temony disposed of defendant's revolver.

Meanwhile, police interviewed D'April Greene and other witnesses and obtained an identification of defendant as the shooter. Police subsequently searched defendant's home and car. The officers found, among other things, gun holsters, drug trade paraphernalia, a shotgun, and some .357 caliber ammunition. On 18 February 1997, police received information that defendant had requested a taxicab at his motel. The officers used this opportunity to arrest defendant, sending a plain clothes officer to the motel to pose as a taxi driver. As the police arrived at the motel, defendant and Temony spotted them and ran. Defendant threw his jacket to the ground as he fled. After a brief foot chase, police arrested defendant and Temony.

Additional evidence admitted during the capital sentencing proceeding tended to show the following: In the early morning hours of 18 February 1997, two masked, armed intruders broke into an apartment on Ringo Drive in Wilmington and attacked Louis Tyson. The intruders forced Tyson to the floor and attempted to bind him with duct tape. The intruders beat Tyson while demanding money and then shot Tyson once in each leg. The intruders then fled. Paper dust masks and remnants of the duct tape were found at the scene. Defendant was linked to the Tyson attack by evidence that: (1) duct tape and paper dust masks matching those used during the Tyson attack were found in defendant's motel room after his arrest in the present case; (2) police found a shopping list, in defendant's handwriting, in the pocket of the jacket defendant dropped when fleeing the police, and among the items on the list were duct tape, masks, and gloves; and (3) bloodstains found on this same jacket were genetically matched to Tyson's blood.

Evidence was also introduced concerning the murder of Donald Brunson. In the early morning hours of 6 December 1996, two intruders broke into the house where Brunson lived. Ana Santiago, who was Brunson's girlfriend, and her son Carlos both lived with Brunson. The intruders awoke Brunson, Santiago, and Carlos at gunpoint and ordered them to lie down on the master bedroom floor. At some point, the intruders became angry. A shot was fired, and the intruders began beating Brunson. The intruders dragged Brunson to Carlos' room and continued to beat him until he was unconscious. Then they tied up all three victims. The intruders placed Brunson in Santiago's car and left, taking the car and Brunson with them. In the morning, the car was found near the local waste-water treatment plant.

Brunson's nearly nude body was found nearby. He had died as a result of gunshot wounds to his back. Temony and defendant were charged in connection with the Brunson case after their arrest in the present case. In connection with the Brunson murder, Temony pled guilty to second-degree murder, kidnapping, robbery, and burglary. Defendant was convicted of first-degree murder, kidnapping, and robbery with a dangerous weapon.

Defendant presented a number of family members and friends as witnesses during the capital sentencing proceeding. These witnesses testified as to defendant's childhood, which included frequent moves, the separation of his parents, and the deterioration of his relationship with his father. There was testimony that defendant had generally stayed out of trouble until he and his family moved to Wilmington. There was also testimony that defendant maintains a good relationship with his parents, siblings, nieces, and nephews.

The additional facts and descriptions of events at trial necessary to an understanding of defendant's arguments are set forth below.

[1] Defendant first contends the trial court erred by denying defendant the opportunity to fully cross-examine and impeach the credibility of one of the state's witnesses. During the capital sentencing proceeding, the state presented evidence describing the circumstances of the Brunson murder. Defendant's convictions arising from the Brunson murder were used in support of aggravating circumstances described in N.C.G.S. § 15A-2000(e)(2) (defendant previously convicted of a capital felony) and N.C.G.S. § 15A-2000(e)(3) (defendant previously convicted of a felony involving the use or threat of violence to the person). Ana Santiago appeared as a witness for the state and described the events that had occurred in the Brunson home on the night of the attack. During her testimony, she stated that there had been two intruders in the house that night.

During cross-examination, defendant questioned Santiago about prior statements she had made to police during the investigation of the Brunson murder and during her testimony at the Brunson murder trial. In those prior statements, Santiago had stated that three, not two, intruders had entered the Brunson home. Defendant questioned Santiago several times about these prior inconsistent statements without objection. Each time, Santiago claimed she did not recall making those prior statements. The trial court sustained the state's objections to further inquiry as to these statements and refused to admit a police report, signed by Santiago, stating that three men had

entered the Brunson home. On *voir dire*, the police report was admitted as an offer of proof. After some discussion with counsel, the trial court ruled that defendant had ample opportunity to cross-examine the witness on the issue and that further inquiry was irrelevant to the key fact for sentencing purposes—the existence of defendant's prior convictions.

A person may not be sentenced to death " 'on the basis of information which he had no opportunity to deny or explain.' " *Simmons v. South Carolina*, 512 U.S. 154, 161, 129 L. Ed. 2d 133, 141 (1994) (quoting *Gardner v. Florida*, 430 U.S. 349, 362, 51 L. Ed. 2d 393, 404 (1977) (plurality opinion)). Accordingly, under North Carolina law, at a capital sentencing proceeding both the state and the defendant may introduce evidence concerning the circumstances surrounding the defendant's prior crimes when those prior crimes support aggravating circumstances. *State v. McDougall*, 308 N.C. 1, 20-21, 301 S.E.2d 308, 320 (following *State v. Taylor*, 304 N.C. 249, 279, 283 S.E.2d 761, 780 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983)), *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983). Once the state introduces evidence of the circumstances surrounding these prior crimes, it is anticipated that the defendant may elicit testimony tending to temper that evidence. *State v. Jones*, 339 N.C. 114, 152, 451 S.E.2d 826, 846 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995).

The admission of evidence during a capital sentencing proceeding, however, is not strictly governed by the Rules of Evidence. N.C.G.S. § 15A-2000(a)(3) (2001); N.C.G.S. § 8C-1, Rule 1101(b)(3) (2001). In *McDougall*, this Court described the role of the trial court in controlling the presentation of evidence concerning the circumstances surrounding prior crimes to be used as aggravating circumstances at a capital sentencing proceeding:

> It is the duty of the trial judge to supervise and control the trial to prevent injustice to either party. The court has the power and duty to control the examination and cross-examination of the witnesses. The trial judge may ban unduly repetitious and argumentative questions as well as inquiry into matters of tenuous relevance. The extent of cross-examination with respect to collateral matters is largely within the discretion of the trial judge. The proper exercise of this authority will prevent the determination of this aggravating circumstance from becoming a "mini-trial" of the previous charge.

McDougall, 308 N.C. at 22, 301 S.E.2d at 321 (citations omitted); *see also State v. Locklear*, 349 N.C. 118, 158, 505 S.E.2d 277, 300 (1998) (trial court may exclude evidence during capital sentencing that is "repetitive, unreliable, or lacking an adequate foundation"), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999); *State v. Strickland*, 346 N.C. 443, 461, 488 S.E.2d 194, 205 (1997) (admissibility of evidence during capital sentencing is based upon considerations of whether the evidence is "pertinent and reliable"), *cert. denied*, 522 U.S. 1078, 139 L. Ed. 2d 757 (1998); *State v. Walls*, 342 N.C. 1, 51, 463 S.E.2d 738, 764-65 (1995) (a trial court may exclude evidence of a mitigating circumstance which is repetitive or unreliable), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996). A trial court has broad discretion over the scope of cross-examination in general and during a sentencing proceeding in particular. *State v. Moses*, 350 N.C. 741, 770-71, 517 S.E.2d 853, 871 (1999), *cert. denied*, 528 U.S. 1124, 145 L. Ed. 2d 826 (2000); *State v. Anderson*, 350 N.C. 152, 180, 513 S.E.2d 296, 313, *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326 (1999).

Defendant was not denied an opportunity to cross-examine Santiago concerning her prior statements. He was allowed to question Santiago repeatedly concerning her prior inconsistent statements. The transcript reveals that it was only after the tone of the cross-examination became repetitive and somewhat confrontational that the trial court asked defense counsel to "move along" and sustained the state's objections to defendant's repeated questions. The trial court properly exercised its broad discretion when it limited defendant's cross-examination in this manner.

[2] Nor did the trial court err in refusing to admit extrinsic evidence of Santiago's prior statement, namely, the signed police report. While the Rules of Evidence are not controlling in a sentencing proceeding, they can provide a helpful guide as to relevance. *State v. Greene*, 351 N.C. 562, 568, 528 S.E.2d 575, 579, *cert. denied*, 531 U.S. 1041, 148 L. Ed. 2d 543 (2000). As a general rule, under the Rules of Evidence, once a witness testifies about a collateral matter on cross-examination, the cross-examiner is bound by those answers of the witness and cannot contradict them with extrinsic evidence. 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 160 (5th ed. 1998); *see also State v. Burke*, 343 N.C. 129, 154, 469 S.E.2d 901, 913, *cert. denied*, 519 U.S. 1013, 136 L. Ed. 2d 409 (1996). Repetitive evidence on irrelevant points serves only to prolong the trial and confuse the jury. Broun, *North Carolina Evidence* at § 160.

In the present case, the exact number of attackers who entered the Brunson home was a collateral matter, and was only tenuously relevant to the fact that defendant was convicted of several felonies in connection with the Brunson murder. Santiago's prior inconsistent statements were relevant to her credibility and defendant was allowed to explore that issue. In sustaining the state's objection to admission of the police report, the trial court properly exercised its discretion to prevent the sentencing proceeding from becoming a second trial of the Brunson murder and to prevent an unnecessary digression into a collateral matter. Defendant's argument is without merit.

[3] Next, defendant argues the trial court erred by denying defendant's pretrial motion to dismiss. During the capital sentencing proceeding at defendant's earlier trial for the Brunson murder, the state introduced evidence of the murders of Tyrone Baker and Demetrius Greene in support of the aggravating circumstance described in N.C.G.S. § 15A-2000(e)(11) (the murder was part of a course of conduct in which the defendant engaged in other violent crimes). The state introduced the testimony of D'April Greene; Roderick Morgan, who was an eyewitness to the murders of Tyrone Baker and Demetrius Greene; and Dr. Almeida, who performed the autopsies of Tyrone Baker and Demetrius Greene. The Brunson jury found the existence of the course of conduct aggravating circumstance and recommended life imprisonment without parole.

D'April Greene, Roderick Morgan, and Dr. Almeida testified during the guilt-innocence proceeding in the instant case as well. Prior to trial, defendant moved to dismiss the murder charges on double jeopardy and collateral estoppel grounds. Defendant argued that the capital sentencing proceeding in the Brunson trial was, in part, a trial of the Baker and Greene murders. According to defendant, because the jury in the Brunson trial had already considered evidence of the Baker and Greene murders and had been authorized to impose a sentence of death based in part upon the Baker and Greene murders, defendant's life had already been placed in jeopardy once for those crimes. In effect, defendant argued, the jury's recommendation of life imprisonment without parole in the Brunson trial "acquitted" defendant of the death penalty for the Baker and Greene murders. In his written motion, defendant moved for dismissal of the murder charges. During the hearing on the motion, defendant argued in the alternative that if trial proceeded, the state should be collaterally estopped from seeking the death penalty. The trial court denied defendant's motion and noted his exception.

On appeal, defendant renews this argument. In his brief, defendant relies principally on *Ashe v. Swenson*, 397 U.S. 436, 25 L. Ed. 2d 469 (1970), to support his argument that the state should have been collaterally estopped from seeking the death penalty in the present case. In *Ashe*, the defendant was charged with seven separate crimes in the robbery of a group of six poker players. *Id.* at 437-38, 25 L. Ed. 2d at 472. The defendant was to be tried separately on each count but was acquitted on the first count for lack of evidence. The state then brought the defendant to trial on the second count. *Id.* at 439, 25 L. Ed. 2d at 472-73. The United States Supreme Court held that the doctrine of collateral estoppel, as embodied in the rule against double jeopardy, prevented further prosecutions of the defendant for other crimes arising out of those same facts. *Id.* at 446-47, 25 L. Ed. 2d at 477. According to defendant, the present case is analogous.

Defendant's reliance on *Ashe* is misplaced. *Ashe* stands for the proposition that once a jury has conclusively determined the existence or nonexistence of a fact, the state is collaterally estopped under the Double Jeopardy Clause from relitigating that same issue in a second criminal proceeding. *Id.* at 442-43, 25 L. Ed. 2d at 475; *see also Schiro v. Farley*, 510 U.S. 222, 232, 127 L. Ed. 2d 47, 58 (1994). The holding in *Ashe* turned on the fact that the only "rationally conceivable issue in dispute" was whether defendant was in fact one of the robbers, and the first jury had expressly found the evidence insufficient to prove that fact. 397 U.S. at 445, 25 L. Ed. 2d at 476. There was no issue as to whether the defendant in *Ashe* could be properly charged and punished for each of the robberies if he was, in fact, one of the robbers. *Id.* at 446, 25 L. Ed. 2d at 477. The acquittal of a defendant in a previous proceeding only "precludes the state from relitigating in a subsequent prosecution any issue *necessarily* decided in favor of the defendant in the former acquittal." *State v. McKenzie*, 292 N.C. 170, 175, 232 S.E.2d 424, 428 (1977). The key inquiry is, " 'taking into account the pleadings, evidence, charge, and other relevant matter, . . . whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' " *Ashe*, 397 U.S. at 444, 25 L. Ed. 2d at 475-76 (quoting Daniel K. Mayers & Fletcher L. Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 38-39 (1960)); *see also McKenzie*, 292 N.C. at 174, 232 S.E.2d at 428. Defendant has the burden of demonstrating that the issue he seeks to foreclose from relitigation was actually decided in the previous pro-

ceeding. *Schiro*, 510 U.S. at 233, 127 L. Ed. 2d at 59; *McKenzie*, 292 N.C. at 175, 232 S.E.2d at 428.

Defendant's argument is based on the fact that the state produced evidence at the present trial that was similar to evidence produced at the sentencing proceeding in the Brunson trial. The similarity of the evidence introduced in the two proceedings is not the test. *See State v. Alston*, 323 N.C. 614, 617, 374 S.E.2d 247, 249 (1988). The test is whether the jury in the Brunson trial could have rationally grounded its recommendation of life imprisonment on an issue other than the aggravating value of the Baker and Greene murders. *See id.*

Defendant's guilt of the offenses charged in the present case was never fully litigated during the Brunson trial, and neither was the appropriate sentence for the present crimes. Our examination of the transcript and exhibits from the Brunson trial, placed in the present record on appeal, reveals that the Brunson jury was never required to find the existence of all of the elements of first-degree premeditated and deliberate murder as to the Baker and Greene murders. Moreover, although some evidence of the Baker and Greene murders was presented to the Brunson jury, evidence concerning defendant's violent acts towards Keith Richardson and Louis Tyson was also presented during the sentencing and guilt-innocence proceedings of the Brunson trial. The jury's finding of the course of conduct aggravating circumstance in the Brunson trial could have been based on defendant's other violent acts and was not *necessarily* based on any finding as to the Baker and Greene murders. Defendant did not stand charged with the Baker and Greene murders during the Brunson trial, nor was he prosecuted for them. Although defendant's pattern of violent conduct, including the murders charged in the instant case, was possibly relevant to a determination of the appropriate punishment for the Brunson murder, the jury in the Brunson trial ultimately decided defendant's guilt and recommended a sentence for the Brunson murder alone.

This Court has rejected similar arguments in the past. In *State v. Williams*, 305 N.C. 656, 680-81, 292 S.E.2d 243, 258, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), the defendant was tried and convicted separately of two murders, committed hours apart in Gaston and Cabarrus Counties. The defendant was first tried and convicted for the Cabarrus County murder. Evidence of the Gaston County murder was introduced at the Cabarrus County trial to support a finding of an aggravating circumstance and defendant was sentenced to death. The defendant was then tried and convicted for the Gaston

County murder. The jury in the Gaston County case found that the Cabarrus County murder supported a finding of an aggravating circumstance and recommended a sentence of death.

On appeal, the defendant argued that because the jury at the Cabarrus County trial had already considered the facts of the Gaston County murder and had already sentenced him based in part upon those facts, he could not be tried for the Gaston County murder consistent with double jeopardy protections. In the alternative, the defendant argued that the Cabarrus County murder could not be used to support aggravating circumstances at the capital sentencing proceeding of the Gaston County trial. This Court flatly rejected the defendant's argument, noting: "The defendant was not convicted of nor punished for the [Gaston County murder] in the prior trial. The defendant has been convicted and sentenced only once for the [Gaston County murder] and will only once be punished therefor." *Id.* at 681, 292 S.E.2d at 258.

In a different case, a defendant was convicted of two murders and each murder was used to support the (e)(11) aggravating circumstance in the sentencing proceeding for the other murder. *State v. Pinch*, 306 N.C. 1, 29, 292 S.E.2d 203, 225, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *and overruled in part on other grounds by State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995), *and by State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995), *and by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), *and abrogated in part on other grounds by State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988). In his brief to this Court, the defendant argued this was unconstitutional because " '[t]he double jeopardy clause prohibits the prosecution from . . . obtaining a substantive conviction for a homicide and then using it again as an aggravating circumstance.' " *Id.* at 30, 292 S.E.2d at 225. This Court responded:

> [T]he jury's *consideration* of a defendant's commission of "other crimes of violence," in making its ultimate penalty recommendation for that defendant's conviction of a related but separate capital offense, is not logically equivalent to the defendant receiving multiple punishment for the same crime.

Id. at 31, 292 S.E.2d at 226; *see also State v. Boyd*, 343 N.C. 699, 719-20, 473 S.E.2d 327, 338 (1996) (in a double homicide, submission of the facts of one homicide to aggravate the sentence imposed in the

trial of the other homicide does not violate double jeopardy), *cert. denied*, 519 U.S. 1096, 136 L. Ed. 2d 722 (1997).

Although the instant case is not identical to these cases, defendant's argument is sufficiently analogous to the arguments discussed therein that we believe they control the outcome here. Defendant was not convicted of the Baker and Greene murders at the Brunson trial and has been convicted and sentenced only once for the Baker and Greene murders. The Brunson jury's consideration of the instant crimes as an aggravating circumstance in a prior capital sentencing proceeding is not logically equivalent to the defendant having already received either punishment or acquittal of the present crimes. The double jeopardy clause protects against a second prosecution or second punishment *for a single offense*. *Pinch*, 306 N.C. at 31, 292 S.E.2d at 226; *see also Schiro*, 510 U.S. at 229, 127 L. Ed. 2d at 56; *State v. Thompson*, 349 N.C. 483, 495, 508 S.E.2d 277, 284 (1998). In the case at bar, defendant was convicted and sentenced for two offenses quite distinct from the offenses tried at the Brunson trial. It was "entirely proper" for each jury to consider defendant's pattern of violent behavior when "determining whether defendant should pay the ultimate price for *each* life he took." *Pinch*, 306 N.C. at 32, 292 S.E.2d at 226. Accordingly, "we decline to adopt a position which would prevent the administration and availability of equal justice for equal crimes." *Id.* at 30, 292 S.E.2d at 225. Defendant's argument is without merit.

[4] Next, defendant argues the trial court erred during sentencing by excluding evidence as to the sentence recommended and imposed in the Brunson trial. Prior to the capital sentencing proceeding, the trial court allowed the state's motion *in limine* and precluded defendant from mentioning during opening statements that the jury in the Brunson trial had recommended a sentence of life imprisonment. During the sentencing proceeding, the trial court also sustained the state's objection to the admission of the full case file from the Brunson trial, which contained the jury's sentencing recommendation. According to defendant, this may have misled the jury into believing that defendant was already under a sentence of death for the Brunson murder. Defendant argues such a misled jury might erroneously assume that its death verdict would be superfluous. Thus, the jury might mistakenly believe that it bore no actual responsibility for defendant's death. According to defendant, the trial court's ruling is therefore contrary to the legal principles discussed in *Caldwell v. Mississippi*, 472 U.S. 320, 328-29, 86 L. Ed. 2d 231, 239 (1985).

At the outset, we note that the jury was made aware of defendant's sentence for the Brunson murder. The clerk of court testified as to defendant's sentence in the Brunson trial, and this testimony was admitted without objection. It is therefore difficult to see how the jury was misled on this issue. Assuming *arguendo* that the trial court erred at all in excluding such evidence, the fact that this same evidence was admitted without objection at a different point makes any alleged error likely harmless. *See State v. Lee*, 335 N.C. 244, 280, 439 S.E.2d 547, 565-66, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994).

Moreover, *Caldwell* is not controlling here. The constitutional violation described in *Caldwell* involved a prosecutor telling a jury that it need not feel the full weight of its responsibility for deciding a death sentence, because an appellate court would review its determination and make the final decision to impose the death penalty. *Caldwell*, 472 U.S. at 325-26, 86 L. Ed. 2d at 237-38. The United States Supreme Court held this argument misleading and prejudicial because " '[e]ven a novice attorney knows that appellate courts do not impose a death penalty, they merely review the jury's decision and that review is with a presumption of correctness.' " *Id.* at 331, 86 L. Ed. 2d at 241 (quoting with approval the dissenting opinion below, *Caldwell v. State*, 443 So. 2d 806, 816 (Miss. 1983) (Lee, J., dissenting)). In the present case, allowing the state's motion *in limine* and sustaining the state's objections could not have led the jury to believe that some other tribunal would finally decide defendant's sentence or that the jury's sentencing recommendation was somehow not binding. There is no indication that the trial court's rulings encouraged the jury to ignore its grave responsibility. As to the crimes charged in the instant case, the decision as to punishment was the jury's alone and neither side intimated otherwise.

Caldwell is based, at least in part, on the considerations articulated in a case that seems more directly relevant here, *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978) (plurality opinion). The general rule that the jury must not be misled as to its role in a capital sentencing proceeding is "rooted in a concern that the [capital] sentencing process should facilitate the responsible and reliable exercise of sentencing discretion." *Caldwell*, 472 U.S. at 329, 86 L. Ed. 2d at 239 (citing *Lockett* and several other cases). In *Lockett*, the United States Supreme Court held that a sentencer in a capital sentencing proceeding may "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of

the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. at 604, 57 L. Ed. 2d at 990.

The types of considerations described in *Lockett*, *Caldwell*, and other cases do not require the admission of the evidence proffered here. Even in light of these considerations, a trial court is not limited in its authority to exclude irrelevant evidence. *Lockett*, 438 U.S. at 604 n.12, 57 L. Ed. 2d at 990 n.12. In other cases, this Court has held that a defendant's potential or actual sentence for crimes other than the crime of which he or she stands convicted is irrelevant to a determination of a proper sentence and thus may be properly excluded. *Robinson*, 336 N.C. at 105-06, 443 S.E.2d at 319 (defendant's sentences for other crimes arising from the same transaction are irrelevant to sentencing determination); *Lee*, 335 N.C. at 279-80, 439 S.E.2d at 565 (trial court properly excluded as irrelevant evidence that defendant would be sentenced separately for his additional crimes); *see also State v. Reeves*, 337 N.C. 700, 720, 448 S.E.2d 802, 810 (1994) (convictions and sentences for other crimes are not mitigating evidence), *cert. denied*, 514 U.S. 1114, 131 L. Ed. 2d 860 (1995); *cf. State v. Robbins*, 319 N.C. 465, 518, 356 S.E.2d 279, 310 (defendant's status under the parole laws is irrelevant to a sentencing determination), *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). "That defendant is currently serving a life sentence for another unrelated crime is not a circumstance which tends to justify a sentence less than death for the capital crime for which defendant is being sentenced." *State v. Price*, 331 N.C. 620, 634, 418 S.E.2d 169, 177 (1992), *sentence vacated on other grounds*, 506 U.S. 1043, 122 L. Ed. 2d 113 (1993).

In sum, the jury heard the evidence defendant claims was wrongly excluded: that he had been sentenced to life imprisonment at his trial for the murder of Donald Brunson. Moreover, even if the evidence had been entirely excluded, there would be no error because the sentence imposed on defendant for the Brunson murder was irrelevant to the jury's sentencing recommendation in the present case. Defendant's argument is without merit.

[5] Defendant next argues that the trial court gave an erroneous instruction on the issue of self-defense. Prior to the jury deliberations at the end of the guilt-innocence proceeding, the trial court instructed the jury that defendant's conduct could be excused on the basis of self-defense if "it appeared necessary to the defendant and he believed it to be necessary to kill Tyrone Baker in order to save himself from death or great bodily harm." At trial, defendant admitted to

firing his gun generally in Baker's direction but claimed he aimed at the ground and did not mean to kill Baker. According to defendant, this instruction incorrectly required the jury to find that defendant believed it necessary to use a particular level of force, namely, deadly force, before he could claim self-defense. Defendant argues this instruction deprived him of the excuse of self-defense even if the jury found Baker had suffered injuries greater than defendant had anticipated.

We addressed this issue in *State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724 (1995). In *Richardson*, we approved a jury instruction that was, in all relevant respects, identical to the instruction at issue in the present case. *Id.* at 587, 597, 461 S.E.2d at 726, 731. Since *Richardson*, we have declined opportunities to reconsider the issue. *See, e.g.*, *State v. Laws*, 345 N.C. 585, 600, 481 S.E.2d 641, 649 (1997); *State v. Johnson*, 343 N.C. 489, 494, 471 S.E.2d 409, 412 (1996). After carefully examining defendant's argument, we find no reason to depart from our prior holdings. This argument is without merit.

[6] Defendant next contends that the short-form indictments charging him with murder erroneously failed to allege the aggravating circumstances serving as the basis for imposition of the death penalty. Defendant claims that aggravating circumstances must be alleged in his indictment pursuant to the United States Supreme Court decision in *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556 (2002).

Defendant's argument is foreclosed by this Court's decision in *State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593 (2003). As explained in *Hunt*, the United States Supreme Court's decision in *Ring* does not require that aggravating circumstances be alleged in a state-court murder indictment. *Id.* at 274, 582 S.E.2d at 604. This Court in *Hunt* also held that there is no statutory requirement that a short-form murder indictment contain aggravating circumstances. *Id.* at 272-73, 582 S.E.2d at 603-04. Prior to trial, defendant made a general assertion that failure to allege the aggravating circumstances in his indictment violated his due process rights. We review this alleged constitutional error pursuant to N.C.G.S. § 15A-1443(b). For reasons similar to those stated in *Hunt*, we determine beyond a reasonable doubt that the structure and nature of the North Carolina capital punishment system provided defendant with reasonable and constitutionally sufficient notice of the aggravating circumstances that might be established by the state during defendant's capital sentencing proceeding. *See id.* at 274-78, 582 S.E.2d at 604-06. This assignment of error is without merit.

Additionally, defendant contends that the short-form murder indictment used to charge him improperly alleged only the elements of second-degree murder and omitted the additional elements necessary to allege first-degree murder. Defendant concedes, as he must, that this Court has consistently rejected this argument. *See, e.g.*, *State v. Barden*, 356 N.C. 316, 383-84, 572 S.E.2d 108, 150 (2002), *cert. denied*, — U.S. —, 155 L. Ed. 2d 1074 (2003); *State v. Braxton*, 352 N.C. 158, 174-75, 531 S.E.2d 428, 437 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *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); *see also Hunt*, 357 N.C. at 275, 582 S.E.2d at 604. We have considered defendant's contention on this issue and find no reason to depart from our prior holdings.

[7] Having concluded that defendant's trial and capital sentencing proceeding were free from prejudicial error, we are required to determine: (1) whether the record supports the jury's finding of any aggravating circumstances upon which the sentencing court based its sentence of death; (2) whether the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2).

In the present case, defendant was convicted of two counts of murder, one count of discharging a firearm into occupied property, and one count of possession of a firearm by a convicted felon. The conviction for Tyrone Baker's murder was based on a theory of premeditation and deliberation. The conviction for Demetrius Greene's murder was based upon (1) a theory of premeditation and deliberation under the doctrine of transferred intent; and (2) the felony murder rule, with the Baker murder serving as the underlying felony. In each case, the jury found the same five statutory aggravating circumstances: (1) defendant had been previously convicted of a capital felony, N.C.G.S. § 15A-2000(e)(2); (2) defendant had been previously convicted of second-degree kidnapping, N.C.G.S. § 15A-2000(e)(3); (3) defendant had been previously convicted of armed robbery, N.C.G.S. § 15A-2000(e)(3); (4) defendant had been previously convicted of first-degree burglary, N.C.G.S. § 15A-2000(e)(3); and (5) the murder was part of a course of conduct that included the commission of other crimes of violence against other people, N.C.G.S. § 15A-2000(e)(11). The first four aggravating circumstances in each case were supported by defendant's various convictions in connec-

tion with the Brunson murder. The fifth circumstance in each case was supported by the evidence of defendant's involvement in the Richardson and Tyson shootings.

The trial court submitted to the jury four statutory mitigating circumstances as to each murder, including the catchall mitigating circumstance, N.C.G.S. § 15A-2000(f)(9). The jury found that only one statutory mitigating circumstance existed as to each murder: defendant acted under duress. N.C.G.S. § 15A-2000(f)(5) (2001). Of the thirteen nonstatutory mitigating circumstances which were submitted to the jury as to each murder, one or more jurors found that eleven circumstances existed and had mitigating value.

After thoroughly examining the record, transcript, and briefs in this case, we conclude the evidence fully supports the aggravating circumstances found by the jury. Moreover, we find no indication that the death sentences were imposed under the influence of passion, prejudice, or any other arbitrary consideration. Defendant does not contend otherwise.

[8] Defendant does contend, however, that the sentence imposed upon him is excessive and disproportionate. Accordingly, and in light of N.C.G.S. § 15A-2000(d)(2), we turn to our statutorily imposed duty of proportionality review. The purpose of our proportionality review " 'is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury.' " *State v. Atkins*, 349 N.C. 62, 114, 505 S.E.2d 97, 129 (1998) (quoting *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988)), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). In conducting our proportionality review, we compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

We have found the death penalty disproportionate in 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 State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*,

311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). After careful review, we conclude that the present case is not substantially similar to any case in which this Court has found the death penalty disproportionate.

There are a number of distinctions between the present case and the disproportionate cases. First, defendant was convicted of first-degree murder on the basis of premeditation and deliberation. This indicates "a more calculated and cold-blooded crime." *Lee*, 335 N.C. at 297, 439 S.E.2d at 575. The evidence strongly supported a finding of premeditated and deliberate murder. Here, defendant had been warned Baker was looking for him and had armed himself in anticipation of "doing what [he] had to do" if confronted. Defendant had been involved in a similar confrontation just a few days prior, and had shot and wounded Keith Lamont Richardson. Defendant had thus demonstrated a willingness and ability to shoot to kill at the slightest provocation. Further, defendant testified that during the instant shootings, Baker had immediately started running after defendant fired the first shot. Despite the fact that Baker was obviously in flight, defendant chased Baker some distance down the street, firing at him repeatedly and continuously until Baker collapsed.

Second, defendant was found guilty of two counts of first-degree murder. This Court has never found a death sentence disproportionate in a case where the defendant has been convicted of multiple murders. *State v. Goode*, 341 N.C. 513, 552, 461 S.E.2d 631, 654 (1995). The fact that defendant was convicted of the murder of Demetrius Greene on the basis of transferred intent does not change this analysis. "This Court has affirmed the death penalty in several cases involving death or serious injury to one or more persons other than the murder victim." *State v. McHone*, 334 N.C. 627, 648, 435 S.E.2d 296, 308 (1993), *cert. denied*, 511 U.S. 1046, 128 L. Ed. 2d 220 (1994). Defendant fired repeatedly and recklessly at his intended victim while he was running down a busy residential city street crowded with innocent people. Defendant's actions demonstrate an egregious and callous disregard for the sanctity of life and the safety of others. Only fate prevented defendant from being charged and convicted of several more murders.

Third, this Court has also never found a death sentence disproportionate where the defendant has been convicted of a prior violent felony. *State v. Jones*, 342 N.C. 457, 481, 466 S.E.2d 696, 708, *cert. denied*, 518 U.S. 1010, 135 L. Ed. 2d 1058 (1996). "A jury could well be

more willing to impose the death sentence on one who is prone to violence." *Id.*

Fourth, the jury found the existence of the course of conduct aggravating circumstance in connection with each murder. This Court has held that the course of conduct circumstance, standing alone, is sufficient to support a death sentence. *State v. Bacon*, 337 N.C. 66, 110 n.8, 446 S.E.2d 542, 566 n.8 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995). The evidence clearly shows that defendant's violent behavior on 16 February 1997 was not an isolated incident, but was indicative of a dangerous pattern of violence.

Fifth, and finally, the jury expressly refused to find two circumstances this Court has found key to a finding of disproportionality. Although the trial court submitted them, the jury refused to find either of the statutory mitigating circumstances described under N.C.G.S. § 15A-2000(f)(2) (murder committed while under the influence of a mental or emotional disturbance) and 15A-2000(f)(7) (defendant's age at the time of the crime). This Court has relied on similar types of considerations in the past when ruling a death sentence disproportionate. *Stokes*, 319 N.C. at 21, 352 S.E.2d at 664 (age and impaired mental incapacity); *see also Bondurant*, 309 N.C. at 693-94, 309 S.E.2d at 182 (severe inebriation).

We also compare the present case with cases in which this Court has found the death penalty proportionate. *See McCollum*, 334 N.C. at 240, 244, 433 S.E.2d at 162, 164. Although this Court considers all the cases in the pool of similar cases when engaging in proportionality review, "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *State v. Gregory*, 348 N.C. 203, 213, 499 S.E.2d 753, 760, *cert. denied*, 525 U.S. 952, 142 L. Ed. 2d 315 (1998). Here, for the reasons discussed above, we find this case more similar to cases in which we have found a sentence of death proportionate than to those in which we have found a sentence of death disproportionate. *See McCollum*, 334 N.C. at 244, 433 S.E.2d at 164.

"Whether a sentence of death is 'disproportionate in a particular case ultimately rest[s] upon the "experienced judgments" of the members of this Court.' " *State v. Carroll*, 356 N.C. 526, 555, 573 S.E.2d 899, 918 (2002) (quoting *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)), *cert. denied*, —— U.S. ——, 156 L. Ed. 2d 640 (2003). Based upon the characteristics of this defendant and the crimes he committed, we

are convinced that the death sentences recommended by the jury and ordered by the trial court in the instant case are not disproportionate.

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

NO ERROR.

STATE OF NORTH CAROLINA v. JAMES HOLLIS WATTS

No. 2A02

(Filed 22 August 2003)

1. Evidence— testimony—someone other than defendant committed crime

The trial court did not err in a capital first-degree murder, felonious breaking and entering, and robbery with a dangerous weapon case by excluding the testimony of a defense witness who testified during voir dire that she overheard defendant's coparticipant threaten the victim's life, because: (1) the fact that the coparticipant had a motive to kill the victim does not exclude the possibility that defendant was also involved in the murder of the victim; (2) any possible error in the exclusion of the witness's testimony was harmless when the jury was presented with testimony that the coparticipant was solely responsible for the murder; (3) although defendant now contends the exclusion of the testimony violated his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments, this issue was not raised before the trial court; and (4) although defendant contends the testimony was admissible under exceptions to the hearsay rule, the testimony was already determined to be properly excluded as irrelevant under the theory of third-party guilt.

2. Criminal Law— closing argument—coparticipant's fellow inmate did not come to testify voluntarily

The trial court did not abuse its discretion in a capital first-degree murder, felonious breaking and entering, and robbery with a dangerous weapon case by concluding that defense coun-

sel's closing argument, that the coparticipant's fellow inmate did not come back to North Carolina voluntarily to testify and that he was ordered to do so by a judge, was improper because: (1) even if the trial court erred by sustaining the State's objection, the error was harmless since the essence of the testimony was allowed in the argument after the objection was sustained; and (2) the inmate's testimony was not credible when it related to establishing that the coparticipant was the sole participant in the murder which contradicted testimony from other witnesses.

3. Sentencing— capital—acting in concert—*Enmund/Tison* instruction—defendant's intent to kill

The trial court did not abuse its discretion in a capital sentencing proceeding by failing to give the jury an *Enmund/Tison* instruction, even though the jury was given an acting in concert instruction, because: (1) the trial court's acting in concert instruction prevented the jury from concluding that defendant alone or acting with another, committed premeditated first-degree murder without also finding that defendant intended to kill the victim; and (2) although defendant contends the prosecutor improperly argued the meaning of acting in concert, any possible confusion was rendered harmless by the trial court's instructions and it is presumed that the jury followed the trial court's instructions.

4. Homicide— first-degree murder—indictment—failure to allege aggravating circumstance

Although defendant contends the failure of the indictment used to charge him with first-degree murder to allege any aggravating circumstance was a jurisdictional defect requiring that his death sentence be vacated and a sentence of life imprisonment without parole be imposed, this argument has already been rejected by our Supreme Court.

5. Sentencing— capital—mitigating circumstance—accomplice or accessory—minor participation

The trial court did not err in a capital sentencing proceeding by failing to submit the N.C.G.S. § 15A-2000(f)(4) mitigator that defendant was an accomplice in or accessory to the capital felony committed by another person and that his participation was relatively minor, because based on the evidence the jury could not reasonably have found that defendant played a relatively minor role in the murder of the victim.

6. Constitutional Law— effective assistance of counsel—failure to present mitigating evidence—waiver

A first-degree murder defendant's ineffective assistance of counsel claim based on defense counsel's failure to present any mitigating evidence during the capital sentencing phase has not been waived by his failure to raise the issue before the Supreme Court on direct appeal, because it does appear that there are evidentiary issues which may need to be developed before defendant will be in a position to adequately raise his potential claim.

7. 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 the aggravating circumstances under N.C.G.S. § 15A-2000(e)(4) that the murder was committed to avoid a lawful arrest, under N.C.G.S. § 15A-2000(e)(5) that the murder was committed while defendant was engaged in the commission of a robbery, and under N.C.G.S. § 15A-2000(e)(9) that the murder was especially heinous, atrocious, or cruel; and (2) defendant was convicted on the basis of malice, premeditation and deliberation, and under the felony murder rule.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge W. Erwin Spainhour on 19 July 2001 in Superior Court, Davidson County, upon a jury verdict finding defendant guilty of first-degree murder. On 22 August 2002, 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 9 April 2003.

Roy Cooper, Attorney General, by Jill Ledford Cheek and William P. Hart, Special Deputy Attorneys General, for the State.

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

LAKE, Chief Justice.

Defendant was indicted on 3 January 2000 for one count of first-degree murder, one count of felonious breaking and entering, and one count of robbery with a dangerous weapon. The cases came on for

trial at the 2 July 2001 Special Criminal Session of Superior Court, Davidson County.

On 18 July 2001, the jury returned a verdict of guilty as to all of the charges and, following a capital sentencing proceeding, recommended a sentence of death for the first-degree murder. Defendant was sentenced to death and further received a sentence of 11 to 14 months' imprisonment for felonious breaking and entering and a sentence of 117 to 150 months' imprisonment for robbery with a dangerous weapon. For the reasons that follow, we conclude that defendant's trial and sentences, including specifically his capital sentencing proceeding, were free of prejudicial error and that defendant's sentence of death is not disproportionate.

The evidence at trial showed that on the morning of 22 November 1999, Thomas Gene Owens returned to his home in Linwood, North Carolina, to find his wife, Joyce McBride Owens, the victim, lying in a pool of blood on their living room floor. The victim's body had numerous stab wounds and two gunshot wounds to the head. The victim's throat had been slit, and her left wrist had been tied with a black electrical cord.

The evidence further showed that earlier on the morning of 22 November, James Hollis Watts, defendant, and Alton Cline McIntyre, codefendant, had been to the victim's house. A few days before the murder, Johnny Pierce, defendant's friend, had talked with defendant and McIntyre about obtaining guns for him. On the day of the murder, defendant and McIntyre went to the victim's house with the intent of stealing guns known to be kept there. Defendant and McIntyre knocked on the victim's door. When the victim came to the door, defendant inquired as to whether her husband was home. After establishing that the victim was alone, defendant pulled out a semiautomatic gun and forced the victim into her house.

Defendant then ordered McIntyre to tie up the victim's hands. While McIntyre was attempting to tie the victim's hands with a black electrical cord, defendant took a kitchen knife and cut her throat. Defendant and McIntyre then stabbed the victim numerous times before she fell to the floor.

The evidence also showed that after disabling the victim, defendant and McIntyre went to the gun cabinet in the master bedroom and took two rifles, two shotguns, and one "muzzle loader." They also found and took two crossbows that were displayed on the wall. After taking the weapons, defendant took a pillow from the victim's bed,

put it over her head to muffle the sound, and shot the victim twice in the head.

After leaving the victim's house, defendant and McIntyre initially went to the home of defendant's girlfriend, Kathy Coleman. At Coleman's house, McIntyre changed clothes and washed off. Defendant and McIntyre then traveled to Salisbury, North Carolina, to the home of defendant's sister, Tanya Gentry. Gentry noticed that defendant looked as if he had "held something up and gutted it." Defendant explained the presence of blood on his clothes by telling Gentry that he and McIntyre had been hunting.

At Gentry's house, defendant disposed of the evidence. He gave his sister the two kitchen knives which were used to kill the victim and informed her they were "tater knives." Defendant also asked his sister to destroy his bloody clothes.

On or about 23 November 1999, defendant and McIntyre went to Pierce's home to sell the stolen weapons. Defendant and McIntyre received only "a couple hundred dollars" and a bag of marijuana as payment for the weapons.

Defendant acknowledges that several of the assignments of error presented in his brief are preservation issues, all of which we address as such later in this opinion. Further, we note that defendant has interspersed these preservation issues throughout his brief. Accordingly, we will address each of defendant's remaining substantive assignments of error sequentially, without numerical reference.

[1] In his first substantive assignment of error, defendant argues that the trial court erred by excluding the testimony of defense witness Chasity Hill. During *voir dire*, Hill testified that she overheard codefendant McIntyre threaten the victim's life. Defendant contends that this testimony was relevant to establish third-party guilt.

Hill dated the victim's grandson, Terry Owens, for almost two years. Around March 1997, while at the victim's home, Hill overheard the victim talking on the phone with McIntyre. Hill testified that the victim was "upset" after her conversation with McIntyre and that the victim told Hill that McIntyre had "threatened to kill her." The trial court concluded this testimony was not relevant. We agree.

When the evidence at issue is proffered to establish that someone other than the defendant committed the crime: " '[A]dmission of the

evidence must do more than create mere conjecture of another's guilt in order to be relevant. Such evidence must (1) point directly to the guilt of some specific person, and (2) be inconsistent with the defendant's guilt.' " *State v. Burr*, 341 N.C. 263, 293, 461 S.E.2d 602, 618 (1995) (quoting *State v. McNeill*, 326 N.C. 712, 721, 392 S.E.2d 78, 83 (1990)), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996); *see also State v. Brewer*, 325 N.C. 550, 564, 386 S.E.2d 569, 576 (1989), *cert. denied*, 495 U.S. 951, 109 L. Ed. 2d 541 (1990). Evidence tending to show that someone other than the accused had the opportunity to commit the crime, yet not tending to show that such person rather than the defendant actually committed the crime, is too speculative and remote to be relevant. *Burr*, 341 N.C. at 293, 461 S.E.2d at 618; *Brewer*, 325 N.C. at 564, 386 S.E.2d at 576.

Defendant's theory of the case was that McIntyre killed the victim because the victim stated that she intended to prove that McIntyre had committed a crime for which the victim's grandson had been punished. Further, defendant sought to establish that McIntyre included him in the crime to make it appear that a break-in and robbery were the motives behind the victim's murder.

The testimony that McIntyre allegedly threatened the victim was proffered to establish that McIntyre had a motive for killing the victim and that the murder by McIntyre was premeditated. While this evidence supported the conclusion that McIntyre was involved in killing the victim, it was not "inconsistent with the defendant's guilt." *See Burr*, 341 N.C. at 293, 461 S.E.2d at 618. The evidence presented at trial established that *both* men were involved in the vicious attack on the victim which resulted in her death. Further, the fact that McIntyre had a motive to kill the victim does not exclude the possibility that defendant was also involved in the murder of the victim. Accordingly, the testimony of Hill regarding an incident some nineteen months prior to the murder in this case was not relevant because it was not inconsistent with defendant's guilt.

Moreover, any benefit provided by Hill's testimony would have been cumulative. Julian Atwood, a fellow inmate with McIntyre, testified that McIntyre admitted to sole responsibility in the murder of the victim. Atwood also testified that defendant's involvement was limited to stealing the weapons from the victim's home. Because the jury was presented with testimony that McIntyre was solely responsible for the murder, any possible error in the exclusion of Hill's testimony was harmless.

Defendant contends that the exclusion of Hill's testimony violated his constitutional rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. This issue was not raised before the trial court. Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal. *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988). Accordingly, we will not address whether the exclusion of Hill's testimony violated defendant's constitutional rights.

Finally, defendant contends that Hill's testimony was admissible under exceptions to the hearsay rule. Having determined that this testimony was properly excluded as irrelevant under the theory of third-party guilt, we need not address this issue. This assignment of error is overruled.

[2] In his next assignment of error, defendant contends that the trial court erred in finding the following portion of defense counsel's closing argument improper:

> [DEFENSE COUNSEL]: From this morning I remember that Julian Atwood did not want to be here. He told you that he was in New Jersey, Cape May County Jail. Didn't want to come back to North Carolina, and they held a hearing and a judge ordered he be sent back to this—
>
> [PROSECUTOR]: Objection, your Honor. That was not the evidence.
>
> THE COURT: Objection sustained.
>
> [DEFENSE COUNSEL]: He came back to North Carolina. You heard that. He came in, 'cause he was in custody.

A defendant has a constitutional right to present a closing argument. *State v. Fletcher*, 354 N.C. 455, 474, 555 S.E.2d 534, 546 (2001), *cert. denied*, — U.S. —, 154 L. Ed. 2d 73 (2002). However, the scope and control of these arguments lies primarily within the discretion of the trial court. *State v. Carroll*, 356 N.C. 526, 536, 573 S.E.2d 899, 906 (2002), *cert. denied*, — U.S. —, 156 L. Ed. 2d 640 (2003). Upon objection, it is the duty of the trial court to censor remarks not warranted by the law or evidence. *State v. Barden*, 356 N.C. 316, 354, 572 S.E.2d 108, 133 (2002), *cert. denied*, — U.S. —, 155 L. Ed. 2d 1074 (2003). " 'This Court will not disturb the trial court's exercise of discretion over the latitude of counsel's argument absent any gross impropriety in the argument that would likely influence the jury's ver-

dict.' " *State v. Lloyd*, 354 N.C. 76, 113, 552 S.E.2d 596, 622 (2001) (quoting *State v. Cummings*, 353 N.C. 281, 297, 543 S.E.2d 849, 859, *cert. denied*, 534 U.S. 965, 151 L. Ed. 2d 286 (2001)).

The evidence defense counsel was arguing was admitted through Julian Atwood's testimony. During defense counsel's questioning of Atwood on direct examination, the following testimony was elicited:

> Q. Mr. Atwood, did you come back to Davidson County, North Carolina voluntarily?
>
> A. No.
>
> Q. Did a New Jersey Court order that you come back for this case?
>
> A. Yes.
>
> Q. Was that after a hearing?
>
> A. Yes.

Even if the trial court erred in sustaining the State's objection to defense counsel's argument, the error was harmless because it appears the essence of the above testimony was allowed in the argument after the objection was sustained. Further, Atwood's testimony was not credible. All of his testimony was related to establishing that McIntyre was the *sole participant* in the murder, testimony which was inconsistent with the testimony from the other witnesses. For instance, Johnny Pierce, the man who purchased the stolen weapons from defendant and McIntyre, testified that he was defendant's friend and that defendant introduced him to McInytre just days before the murder. Further, it was defendant who made contact with Pierce the night the weapons were sold to Pierce, and it was defendant who handled the negotiation and sale of the weapons.

Moreover, the trial court instructed the jury that when the arguments of counsel differed from the evidence presented, the jurors were to "rely solely upon your recollection of the evidence in your deliberations." In view of Atwood's testimony as a whole and the allowed portions of defense counsel's argument, the trial court's decision to limit defense counsel's closing argument was not an abuse of discretion. Accordingly, we hold that the trial court did not err in sustaining the State's objection. This assignment of error is overruled.

[3] In his next assignment of error, defendant contends that the trial court erred in failing to instruct the jury under *Enmund v. Florida*,

458 U.S. 782, 73 L. Ed. 2d 1140 (1982) and *Tison v. Arizona*, 481 U.S. 137, 95 L. Ed. 2d 127 (1987). In *Enmund*, the United States Supreme Court precluded the death penalty for a defendant convicted of first-degree murder who neither killed nor intended the killing. When addressing the Supreme Court's holding in *Enmund*, this Court has stated:

> "[T]he Eighth Amendment forbids the imposition of the death penalty on a defendant who aids and abets in the commission of a felony in the course of which a murder is committed by others, when the defendant does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."

Fletcher, 354 N.C. at 479, 555 S.E.2d at 549 (quoting *State v. McCollum*, 334 N.C. 208, 223, 433 S.E.2d 144, 151 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994)).

In *Tison v. Arizona*, the Supreme Court further interpreted its holding in *Enmund* by concluding that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." 481 U.S. at 158, 95 L. Ed. 2d at 145. "[N]o *Enmund/Tison* instruction is required when a defendant is convicted of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule." *Fletcher*, 354 N.C. at 479, 555 S.E.2d at 549; *see also State v. Robinson*, 342 N.C. 74, 88, 463 S.E.2d 218, 226 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 793 (1996).

Defendant argues that the trial court was required to give the *Enmund/Tison* instruction notwithstanding the fact that he was convicted of first-degree murder under the theory of premeditation and deliberation as well as under the felony murder rule. Specifically, defendant argues that there is a possibility that he could have been convicted of premeditated first-degree murder without the jury finding that he *intended* to kill the victim. Defendant further contends that this Court's holding in *Fletcher* is inapplicable to this case because the finding of premeditated murder in this case could have been based on a finding that defendant acted in concert.

Here, the State's evidence portrayed defendant as an actor in concert, and the jury was given an acting in concert instruction. By contrast, in *Fletcher*, the jury found the defendant guilty of premeditated first-degree murder under circumstances where the jury was not

given an instruction on acting in concert. 354 N.C. at 480, 555 S.E.2d at 550.

In the case *sub judice*, the trial court's acting in concert instruction prevented the jury from concluding that defendant committed premeditated first-degree murder without also finding that defendant *intended* to kill the victim. In pertinent part, the trial court instructed the jury:

> [I]f you find from the evidence beyond a reasonable doubt that on or about the alleged date *the defendant either by himself or acting with another intentionally killed* the victim with a deadly weapon and that this proximately caused the victim's death, *and that the defendant intended to kill the victim*, and that he acted with malice and premeditation and with deliberation, it would be your duty to return a verdict of first-degree murder on the basis of malice, premeditation, and deliberation. However, if you do not so find or have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty of first-degree murder on the basis of malice, premeditation, and deliberation.

(Emphasis added.)

Because the jury instructions explicitly required, for a finding of first-degree murder on the basis of premeditation and deliberation, that defendant, alone or acting with another, "*intentionally* killed the victim," it would have been most improbable and in clear contravention of the instructions for the jury to have found defendant guilty under the premeditation and deliberation theory without also concluding that "defendant intended to kill the victim." The jury is presumed to have followed the trial court's instructions. *See State v. Cummings*, 352 N.C. 600, 623, 536 S.E.2d 36, 53 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001).

Finally, defendant argues that during closing argument, the prosecutor improperly argued the meaning of "acting in concert." Defendant suggests that the prosecutor's argument on acting in concert could have allowed the jury to find that defendant was guilty of premeditated first-degree murder without also finding that defendant *intended* to murder the victim. The prosecutor argued to the jury as follows:

> [F]or a person to be guilty of a crime, it is not necessary that he, himself, do all of the acts necessary to constitute the crime. If two or more persons join in a purpose to commit robbery with a

> dangerous weapon, felony breaking or entering, each of them if actually or constructively present is not only guilty of that crime . . . but he is also guilty of any other crime committed by the other in the pursuance of the common purpose . . . as a natural or probable consequence thereof.

Defendant made no objection to this argument at trial. While this Court will review a prosecutor's argument even though no objection was made at trial, there must be gross impropriety in order for this Court to hold that the trial court erred by failing to intervene *ex mero motu*. *Carroll*, 356 N.C. at 536, 573 S.E.2d at 906; *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979).

In the instant case, any possible confusion created by the prosecutor's closing argument was rendered harmless by the trial court's instructions. The instructions conformed to the requirements of *Enmund* by requiring the jury to find that defendant "intend[ed] to kill" the victim. 458 U.S. at 798, 73 L. Ed. 2d at 1152. Moreover, this Court can presume that the jury followed the trial court's instructions. *See Barden*, 356 N.C. at 381-82, 572 S.E.2d at 149; *State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208, *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993).

Accordingly, defendant's argument that he was entitled to an instruction under *Enmund* and *Tison* is without merit. This assignment of error is overruled.

[4] In his next assignment of error, defendant argues that the failure of the murder indictment to allege any aggravating circumstance was a jurisdictional defect requiring that his death sentence be vacated and a sentence of life imprisonment without parole be imposed. We considered and rejected this argument recently in *State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593 (2003). Accordingly, this assignment of error is overruled.

[5] In defendant's final assignment of error, he argues that the trial court erred in failing to submit to the jury and to instruct the jury on the (f)(4) mitigator. *See* N.C.G.S. § 15A-2000(f)(4) (2001) ("The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor."). Specifically, defendant contends that the testimony of defense witness Julian Atwood supported submission of the (f)(4) mitigating circumstance. Based upon our review of the record, we disagree.

Defendant concedes that he did not request the submission of this circumstance at trial. However, a trial court has no discretion in determining whether to submit a mitigating circumstance when "substantial evidence" in support of the circumstance has been presented. *Fletcher*, 354 N.C. at 477, 555 S.E.2d at 547; *State v. Skipper*, 337 N.C. 1, 44, 446 S.E.2d 252, 276 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995). The test for determining if the evidence is "substantial evidence" is " 'whether a juror could reasonably find that the circumstance exists based on the evidence.' " *State v. Kemmerlin*, 356 N.C. 446, 478, 573 S.E.2d 870, 892 (2002) (quoting *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)). The defendant bears the burden of producing "substantial evidence" of a circumstance before its submission to the jury is proper. *State v. Holmes*, 355 N.C. 719, 736, 565 S.E.2d 154, 166-67, *cert. denied*, — U.S. —, 154 L. Ed. 2d 412 (2002); *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).

"In order to be entitled to an instruction on [(f)(4)], it is necessary that there be evidence tending to show (1) that defendant was an accomplice in or an accessory to the capital felony committed by another, and (2) that his participation in the capital felony was relatively minor." *State v. Stokes*, 308 N.C. 634, 656, 304 S.E.2d 184, 197 (1983). At trial, Atwood testified that McIntyre admitted to being the sole participant in the murder of the victim and that defendant's participation was limited to the break-in and armed robbery. Atwood further testified that McIntyre stated that he had given defendant the idea that they were only going to steal the weapons, although McIntyre had always planned to "shut this lady [the victim] up."

Several disinterested witnesses discredited Atwood's testimony that McIntyre was the sole actor in the murder of the victim. Tanya Gentry, defendant's sister, testified that when defendant arrived at her home on the day of the murder, he was covered in blood in a way that made it appear that he had "held something up and gutted it." Further, defendant asked Gentry to destroy his bloody clothes. Defendant introduced McIntyre to Johnny Pierce, the man who purchased the stolen weapons from defendant and McIntyre, just days after the murder. Defendant also called Pierce to inform him that they were coming to his house with the weapons. Moreover, defendant handled the negotiation and sale of the weapons to Pierce. Kathy Coleman, defendant's girlfriend, testified that after the murder, defendant gave her the victim's jacket. These disinterested witnesses

presented testimony which was inconsistent with the account of events provided by Atwood.

Based on the evidence, the jury could not reasonably have found that defendant played a "relatively minor" role in the murder of the victim. Therefore, the trial court did not err in not submitting to the jury and instructing the jury on the (f)(4) mitigating circumstance. This assignment of error is overruled.

[6] In an additional argument, not formally designated as an issue for review by this Court, defendant asserts a potential claim for ineffective assistance of counsel (IAC). Defendant bases his argument on defense counsel's failure to present any mitigating evidence during the sentencing phase. Defendant asserts that his IAC claim cannot be presented adequately on direct appeal because information necessary to develop this claim is outside the record. Specifically, defendant contends that he would need to look at all mitigating evidence which was obtained by defense counsel, as well as mitigating evidence that was reasonably available yet not acquired by defense counsel.

In *State v. Long*, 354 N.C. 534, 540, 557 S.E.2d 89, 93 (2001), this Court previously addressed this issue and concluded that a defendant is not required to raise an IAC claim on direct appeal in all situations. Further, "given the nature of IAC claims, 'defendants likely will not be in a position to adequately develop many IAC claims on direct appeal.' " *Id.* (quoting *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002)).

Based upon our review of the record as it relates to this issue, it does appear there are evidentiary issues which may need to be developed before defendant will be in a position to adequately raise his potential IAC claim. Accordingly, we hold that defendant's IAC claim has not been waived by his failure to raise the issue before this Court on direct appeal.

PRESERVATION ISSUES

Defendant raises additional issues which he concedes have been previously decided contrary to his position by this Court: (1) the trial court erred by trying defendant for first-degree murder under the short-form indictment, (2) the trial court erred in its jury instructions on defendant's burden of proof as to mitigating circumstances, (3) the trial court erred in giving a jury instruction allowing the jury to determine whether the nonstatutory mitigating circumstances

found to exist had mitigating value, (4) the trial court erred in its jury instructions on Issues Three and Four which did not require jurors to consider mitigating circumstances found in Issue Two, (5) the trial court's instructions on (e)(9) were unconstitutionally vague and overbroad, and (6) North Carolina's death penalty scheme is unconstitutional.

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

PROPORTIONALITY REVIEW

[7] Having concluded that defendant's trial and capital sentencing proceeding were free of prejudicial error, we must now review the record and determine: (1) whether the evidence supports the aggravating circumstances found by the jury and upon which the sentencing court based its sentence of death; (2) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor; and (3) whether the sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2). After a thorough review of the transcript, record on appeal, briefs, and oral arguments of counsel, we are convinced that the evidence supported the jury's finding of the three aggravating circumstances submitted. We further conclude that nothing in the record suggests that defendant's death sentence was imposed under the influence of passion, prejudice or any other arbitrary factor. We therefore turn to our final statutory duty of proportionality review.

We must determine whether the imposition of the death penalty in defendant's case is proportionate, looking at both the defendant and the crime. *See State v. Robinson*, 336 N.C. 78, 133, 443 S.E.2d 306, 334 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995). The jury found the existence of three aggravating circumstances: (1) the murder was committed to avoid a lawful arrest, N.C.G.S. § 15A-2000(e)(4); (2) the murder was committed while defendant was engaged in the commission of a robbery, N.C.G.S. § 15A-2000(e)(5); and (3) the murder was especially heinous, atrocious or cruel, N.C.G.S. § 15A-2000(e)(9).

The trial court submitted two statutory mitigating circumstances; however, the jury found the existence of only one: the "catchall" circumstance, which includes "[a]ny other circumstance arising from the evidence which the jury deems to have mitigating value." N.C.G.S. § 15A-2000(f)(9). The trial court also submitted five nonstatutory mitigating circumstances, and the jury found the existence of all five: (1) defendant did not resist arrest when he was arrested without an arrest warrant, (2) defendant allowed officers to search his car when he was arrested without an arrest warrant, (3) defendant helped officers recover evidence of his crimes, (4) defendant did not have a history of significant violent behavior, and (5) defendant came from a dysfunctional family.

In our proportionality review, we begin by comparing this case to those cases where this Court has determined that the sentence of death was disproportionate. This Court has found the death penalty disproportionate in eight cases: *Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870; *Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

This case is not substantially similar to any case in which this Court has found the death penalty disproportionate. First, defendant was convicted on the basis of malice, premeditation and deliberation and under the felony murder rule. " 'The finding of premeditation and deliberation indicates a more cold-blooded and calculated crime.' " *State v. Haselden*, 357 N.C. 1, 30, 577 S.E.2d 594, 612 (2003) (quoting *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.' " *Carroll*, 356 N.C. at 555, 573 S.E.2d at 917 (quoting *State v. Bone*, 354 N.C. 1, 22, 550 S.E.2d 482, 495 (2001), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231 (2002)).

In the present case, defendant was also convicted of additional crimes against the victim: felonious breaking and entering of her

home and robbery with a dangerous weapon. This Court has determined that two of the aggravating circumstances found, (e)(5) and (e)(9), standing alone, are sufficient to sustain death sentences. *See Haselden*, 357 N.C. at 30, 577 S.E.2d at 612; *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).

It is also proper for this Court to compare this case to those cases where we have found the death penalty to be proportionate. *State v. Williams*, 355 N.C. 501, 591, 565 S.E.2d 609, 661 (2002), *cert. denied*, — U.S. —, 154 L. Ed. 2d 808 (2003). Although this Court reviews all of the cases in the pool when engaged in our duty of proportionality review, we have repeatedly stated that we will not discuss or cite each of these cases every time we carry out this duty. *Haselden*, 357 N.C. at 31, 577 S.E.2d at 613; *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). It suffices to say here that we conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which juries have consistently returned recommendations of life imprisonment.

Finally, the similarity of the cases is not the last word on the subject of proportionality. *State v. Wiley*, 355 N.C. 592, 642, 565 S.E.2d 22, 55 (2002), *cert. denied*, — U.S. —, 154 L. Ed. 2d 795 (2003); *State v. Daniels*, 337 N.C. 243, 287, 446 S.E.2d 298, 325 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995). Similarity "merely serves as an initial point of inquiry." *Daniels*, 337 N.C. at 287, 446 S.E.2d at 325. Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *Haselden*, 357 N.C. at 31, 577 S.E.2d at 613 (quoting *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994)).

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

NO ERROR.

STATE OF NORTH CAROLINA v. PAUL ANTHONY BROWN

No. 145A02

(Filed 22 August 2003)

1. Indigent Defendants— motion for state-funded expert assistance—substance induced mood disorder

The trial court did not abuse its discretion in a double first-degree murder case by denying the indigent defendant's ex parte motion for an additional expert on substance induced mood disorder, because: (1) defendant failed to meet his burden of showing particularized need when the trial court had already appointed a psychologist for defendant and nothing prevented that psychologist from consulting with other experts; (2) the original psychologist who diagnosed defendant's disorder testified concerning substance induced mood disorder during the sentencing phase of defendant's trial and that psychologist is an expert in drug abuse; (3) defendant failed to show how he was deprived of a fair trial without the additional expert assistance given the availability of two psychologists to assist him in the preparation of his case; and (4) defendant has not demonstrated a reasonable likelihood that the additional expert could have materially assisted him in the preparation of his case.

2. Evidence— prior crimes or bad acts—malicious wounding—impeachment

The trial court did not err in a double first-degree murder case by denying defendant's motion in limine seeking to prevent the State from using his 1986 Virginia conviction for malicious wounding to impeach him during cross-examination even though defendant contends under N.C.G.S. § 8C-1, Rule 403 that the probative value of the conviction was substantially outweighed by the danger of unfair prejudice to him, because: (1) N.C.G.S. § 8C-1, Rule 609 governs whether a prior conviction may be used to impeach a witness; (2) the language of Rule 609(a) that the evidence "shall be admitted" is mandatory, leaving no room for the trial court's discretion; and (3) although Rule 609(b) requires a balancing test for a conviction more than ten years old, the conviction in this case is less than ten years old.

3. Homicide— first-degree murder—indictment—failure to allege aggravating circumstance

Although defendant contends the failure of the indictment used to charge him with first-degree murder to allege any aggravating circumstance was a jurisdictional defect requiring that his death sentence be vacated and a sentence of life imprisonment without parole be imposed, this argument has already been rejected by our Supreme Court.

4. Sentencing— nonstatutory mitigating circumstances—kicked drug habit—did not intend injury or harm to victim

The trial court did not err in a double first-degree murder case by failing to peremptorily instruct the jury on two nonstatutory mitigating circumstances including that defendant successfully kicked his drug habit and that defendant did not intend any injury or harm to the victim toddler, because: (1) the evidence supporting these two mitigating circumstances were not controverted; and (2) while the trial court declined to provide peremptory instructions on these mitigating circumstances, the trial court nonetheless submitted both mitigating circumstances for the jury's consideration.

5. 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) defendant was convicted under the felony murder rule with the underlying felony being the first-degree murder of another victim that was committed with premeditation and deliberation; (2) the murders occurred inside the home; (3) none of the cases in which the death penalty has been disproportionate has involved the murder of a small child; and (4) the jury found the aggravating circumstances under N.C.G.S. § 15A-2000(e)(3) that defendant had been previously convicted of a violent felony and under N.C.G.S. § 15A-2000(e)(10) that defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Howard E. Manning, Jr., on 11 August 2000 in Superior Court, Wayne County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 12 March 2003.

Roy Cooper, Attorney General, by Barry S. McNeill, Special Deputy Attorney General, for the State.

James R. Glover for defendant-appellant.

WAINWRIGHT, Justice.

On 14 April 1997, a Wayne County grand jury indicted Paul Anthony Brown (defendant) for the first-degree murder of Latashonette Cox and the first-degree murder of an infant, David Dishon Franklin. Defendant was tried capitally before a jury at the 30 March 1998 session of Superior Court, Wayne County. On 7 April 1998, the jury found defendant guilty of the premeditated, first-degree murder of Latashonette Cox. On the same date, the jury found defendant guilty of the first-degree murder of David Franklin under the felony murder rule.

At the time of defendant's trial, defendant was challenging his 1986 conviction in Virginia for malicious wounding. The State planned to use this prior conviction as an aggravating circumstance in the capital sentencing proceeding in the present case. Because of defendant's pending challenge to his Virginia conviction, the trial court in the present case postponed the sentencing portion of defendant's trial until the completion of the proceedings in Virginia. Defendant's challenge to his 1986 Virginia conviction was ultimately unsuccessful.

The trial court subsequently entered an order arresting judgment on the murder conviction for Latashonette Cox because it merged into the felony murder conviction of David Franklin. Accordingly, the sentencing proceeding of the case considered only the murder conviction for David Franklin. On 11 August 2000, following a capital sentencing proceeding, the jury in the present case recommended that defendant receive a sentence of death. The trial court entered judgment in accordance with that recommendation.

Evidence presented at the guilt-innocence phase of the trial showed that defendant and victim Cox were in a romantic relationship. Victim Franklin was the eighteen-month-old child of one of victim Cox's friends, Jessica Franklin.

On 21 December 1996, shortly before midnight, defendant and victim Cox got into an argument. Cox kicked defendant out of the apartment and told him to "get her presents from under the tree." Defendant left the apartment but was clearly upset. Around 11:45

p.m., defendant went to the residence of Mary Cox, victim Cox's mother, and complained that victim Cox had "kicked him out." Defendant appeared upset and Mary Cox could tell defendant had been drinking.

Defendant returned to victim Cox's apartment about twenty-five to thirty minutes after Cox had asked him to leave. Jessica Franklin allowed defendant into the apartment and spoke with him briefly. Franklin dozed off in a chair, but was startled by gunshots. Franklin watched as defendant shot and killed victim Cox and victim Franklin while they lay in bed. Victim Cox was leaning back in the bed in a defensive position and victim Franklin was on his back.

Jessica Franklin ran from the apartment and frantically knocked on the door of Cymantha Tate's apartment. Franklin was hysterical and said, "He shot my baby. He shot my sister." (Jessica Franklin commonly referred to victim Cox as her "sister," even though the two were unrelated.) Tate told Franklin to call the police and left the residence to help Franklin. As Franklin and Tate were returning to Tate's apartment, they saw defendant's vehicle driving away from the apartment complex. The police arrived within a few minutes. Franklin told police that defendant kept a nine-millimeter gun inside the residence and that defendant had committed the shootings.

Police Officer C.H. Newsome responded to the scene of the murders. He checked both victims and concluded they were dead. When Officer Newsome swept the apartment for the gunman, he found two children sleeping in another room.

At approximately 12:45 a.m. on 22 December 1996, Emergency Medical Technician Jerry Barnes and his partner responded to the call at the murder scene. They checked both victims and verified that they were dead.

In the early morning of 22 December 1996, Goldsboro Police Officer Ron Melvin searched the crime scene and found eight shell casings and seven bullet fragments. State Bureau of Investigation Special Agent Al Langly was admitted at trial as an expert in forensic firearms examination. Special Agent Langly analyzed the evidence submitted to him by the Goldsboro Police Department. He determined that eight bullets had been fired. He further concluded that all eight bullets had been fired from the same gun. Special Agent Langly also determined that the weapon used in the murders was a nine-millimeter, semiautomatic handgun that would have held eight or nine

bullets in the clip. The gun would have had a safety device that had to be manually switched off.

On 22 December 1996, Dr. John Butts, chief medical examiner for the State of North Carolina, participated in autopsies on the bodies of both victims. Dr. Butts was admitted at trial as an expert in forensic pathology.

The autopsy of victim Franklin, the infant, revealed that Franklin had three gunshot wounds—one to his right chin, one to his right chest, and one to his right abdomen. Franklin had two exit wounds in his back. One bullet struck Franklin in the jawbone and came to rest against the base of his skull. A second bullet struck Franklin in the chest and damaged his heart and left lung before exiting his back. A third bullet struck Franklin in the abdomen and damaged his liver and right lung before exiting his back. All of Franklin's wounds were secondary wounds, meaning that the bullets passed through the body of victim Cox before striking Franklin. The cause of Franklin's death was multiple gunshot wounds.

The autopsy of victim Cox revealed that Cox's death was also caused by multiple gunshot wounds. Indeed, victim Cox suffered at least ten gunshot wounds. Among Cox's injuries was a gunshot wound from a bullet that struck the inner corner of her right eye, struck her jaw, and exited her body through the neck. This wound indicated the gun was in close proximity to Cox when it was fired. Another bullet struck the base of Cox's left ear, passed through the spinal canal, damaged the sixth and seventh vertebra in her neck, and lodged in her shoulder. This wound would have caused instant paralysis in the lower extremities. At least three bullets that passed through Cox's hand were described as defensive wounds, incurred while attempting to ward off an attack. Extensive internal bleeding continued for a time following the shooting; this showed that Cox's heart continued to beat during this time.

PRETRIAL ISSUES

[1] In his first assignment of error, defendant argues that his state and federal constitutional rights to due process and effective assistance of counsel were violated when the trial court denied his *ex parte* motion for an expert on "substance induced mood disorder."

The trial court approved defendant's initial *ex parte* application for the assistance of a mental health expert, and defense counsel chose Dr. Gary Bachara, a psychologist, to review defendant's mental

status. Based on his testing and examination of defendant, Dr. Bachara concluded that defendant was suffering from "substance induced mood disorder, which . . . brings on a psychosis." However, because Dr. Bachara contended that he was only "generally familiar" with this disorder, he recommended that defendant's counsel retain "a specialist in order to explain the diagnosis and the physiology of this diagnosis" to the jury. Defendant's counsel subsequently contacted Dr. Brian McMillen, with the Department of Pharmacology and Toxicology at the East Carolina University School of Medicine, who informed them of the fee for his services. Defendant's counsel accordingly made an *ex parte* motion for the appointment of Dr. McMillen as an expert in substance induced psychosis. The trial court denied this motion.

Indigent criminal defendants are entitled to mental health experts upon a showing to the trial judge that "[the defendant's] sanity at the time of the offense is to be a significant factor at trial." *Ake v. Oklahoma*, 470 U.S. 68, 83, 84 L. Ed. 2d 53, 66 (1985). Although *Ake* dealt specifically with expert psychiatric assistance, this Court has repeatedly extended the rationale in *Ake* to other areas of expert assistance. *See, e.g., State v. Moore*, 321 N.C. 327, 344, 364 S.E.2d 648, 656 (1988) (fingerprint expert); *State v. Penley*, 318 N.C. 30, 51-52, 347 S.E.2d 783, 795-96 (1986) (pathologist); *State v. Johnson*, 317 N.C. 193, 199, 344 S.E.2d 775, 779 (1986) (medical expert). Thus, we have held that a defendant can obtain state-funded expert assistance only upon a particularized showing that: " '(1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it will materially assist him in the preparation of his case.' " *State v. Parks*, 331 N.C. 649, 656, 417 S.E.2d 467, 471 (1992) (quoting *Moore*, 321 N.C. at 335, 364 S.E.2d at 652); *see also* N.C.G.S. § 7A-450(b) (2001) (requiring the State to provide indigent persons with "the necessary expenses of representation"). The determination of whether a defendant has made an adequate showing of particularized need lies largely within the discretion of the trial court. *State v. Cummings*, 353 N.C. 281, 293, 543 S.E.2d 849, 856, *cert. denied*, 534 U.S. 965, 151 L. Ed. 2d 286 (2001). While particularized need is a fluid concept determined on a case-by-case basis, " '[m]ere hope or suspicion that favorable evidence is available is not enough.' " *State v. Page*, 346 N.C. 689, 696-97, 488 S.E.2d 225, 230 (1997) (quoting *State v. Holden*, 321 N.C. 125, 136, 362 S.E.2d 513, 522 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988)), *cert. denied*, 522 U.S. 1056, 139 L. Ed. 2d 651 (1998).

In the present case, defendant's written motion for additional expert assistance was presented and heard *ex parte*. At the *ex parte* hearing, defense counsel informed the court that Dr. Kenneth Feigenbaum, a Virginia state-appointed forensic psychologist, had previously diagnosed defendant with "a substance induced psychosis type of situation" in connection with defendant's 1986 Virginia trial for malicious wounding. Dr. Feigenbaum concluded that defendant's ingestion of phencyclidine (PCP) had caused defendant to be unable to distinguish right from wrong at the time of the assault. In the present case, defendant contended that the appointment of Dr. McMillen was necessary to support either an insanity or diminished capacity defense. Moreover, defendant contended that the expert testimony would be necessary in a collateral challenge of the Virginia conviction, which the State intended to use as an aggravating circumstance.

Based on the evidence presented by defendant, the trial court concluded that defendant had not met his burden of showing particularized need. The trial court noted that it had already appointed a psychologist for defendant and that "nothing is to prevent Dr. Bachara from consulting with other experts."

After thoroughly reviewing the entire record,[1] we find no error in the trial court's decision to deny defendant's *ex parte* motion for the appointment of Dr. McMillen. Dr. Bachara interviewed and tested defendant over a period of four consecutive weeks for "four or five hours" at a time. From these interviews, Dr. Bachara concluded that defendant suffered from "a substance induced mood disorder, which actually brings on a psychosis." Defendant has failed to show what Dr. McMillen could have contributed to the confirmation of Dr. Bachara's already-completed diagnosis. Moreover, Dr. Feigenbaum, the original psychologist who diagnosed defendant's disorder, testified concerning substance induced mood disorder during the sentencing phase of defendant's trial. In a separate portion of his brief, defendant concedes that Dr. Feigenbaum is an expert in drug abuse.

Defendant has failed to show us that he was "deprived of a fair trial without the expert assistance" of Dr. McMillen, given the availability of both Dr. Bachara and Dr. Feigenbaum to assist him in the

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1. At defendant's request, the written *ex parte* motion requesting the appointment of an additional expert witness was sealed. We thoroughly examined the documents under seal and concluded that the contents provide no additional evidence which would have enabled defendant to meet his burden of demonstrating "particularized need."

preparation of his case. *See Parks*, 331 N.C. at 656, 417 S.E.2d at 471. Likewise, defendant has not demonstrated "a reasonable likelihood" that Dr. McMillen "[c]ould [have] materially assist[ed] him in the preparation of his case." *Id.* Rather, defendant has offered " 'little more than undeveloped assertions that the requested assistance would be beneficial.' " *State v. Artis*, 316 N.C. 507, 512, 342 S.E.2d 847, 851 (1986) (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 323-24 n.1, 86 L. Ed. 2d 231, 236 n.1 (1985)). Accordingly, we find no abuse of discretion in the trial court's decision to deny defendant's *ex parte* motion that Dr. McMillen be appointed as an expert on substance induced mood disorder.

This assignment of error is without merit.

[2] In his next assignment of error, defendant objects to the trial court's denial of his motion *in limine* seeking to prevent the State from using his 1986 Virginia conviction for malicious wounding to impeach him during cross-examination. Defendant contends that his conviction could not be used for impeachment purposes because the "probative value [of the conviction was] substantially outweighed by the danger of unfair prejudice" to him. N.C.G.S. § 8C-1, Rule 403 (1992).

Whether a prior conviction may be used to impeach a witness is governed by N.C.G.S. § 8C-1, Rule 609, which provides in pertinent part:

> (a) *General Rule.*—For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime punishable by more than 60 days confinement shall be admitted if elicited from him or established by public record during cross-examination or thereafter.
>
> (b) *Time limit.*—Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to

use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

N.C.G.S. § 8C-1, Rule 609(a), (b) (1992) (amended 1999).

In the present case, the trial court noted that defendant was convicted in 1986 of malicious wounding and that defendant remained in prison for this offense until 1991 or 1992. Defendant's trial in the present case occurred in 1998. Accordingly, the 1986 Virginia conviction does not fall under the exclusionary provisions of Rule 609(b) because the date of trial in the present case is well within ten years from the date of defendant's release from confinement in Virginia. *See id.*

Defendant nonetheless urges this Court to apply the balancing test of N.C. R. Evid. 403 to his conviction. Defendant's argument fails to take into account the clearly expressed intent of the legislature. The language of Rule 609(a) ("shall be admitted") is mandatory, leaving no room for the trial court's discretion. Moreover, while N.C. R. Evid. 609(b) requires a balancing test of the probative value and prejudicial effect of a conviction more than ten years old, this provision is explicitly absent from 609(a). Indeed, the official comments to Rule 609(a) reveal an unequivocal intention to diverge from the federal requirement of a balancing test. N.C.G.S. § 8C-1, Rule 609 official commentary, para. 4 ("Subdivision (a) also deletes the requirement in Fed. R. Evid. 609(a) that the court determine that the probative value of admitting evidence of the prior conviction outweighs its prejudicial effect to the defendant."). We therefore hold that the trial court did not err in denying defendant's motion *in limine* seeking to exclude his 1986 conviction.

This assignment of error is without merit.

[3] In another assignment of error, defendant argues that the failure of the murder indictment to allege any aggravating circumstance was a jurisdictional defect requiring that his death sentence be vacated and a sentence of life imprisonment without parole be imposed. We considered and rejected this argument in *State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593 (2003).

This assignment of error is therefore without merit.

CAPITAL SENTENCING PROCEEDING

[4] Defendant next assigns as error the trial court's failure to peremptorily instruct the jury on two nonstatutory mitigating

circumstances. Specifically, defendant argues that peremptory instructions were warranted on the following nonstatutory mitigating circumstances: (1) defendant "successfully kicked his drug habit," and (2) defendant "did not intend any injury or harm to David Dishon Franklin."

A trial court is required to give a peremptory instruction on a mitigating circumstance only when the evidence supporting the mitigating circumstance is uncontroverted. *State v. Womble*, 343 N.C. 667, 683, 473 S.E.2d 291, 300 (1996), *cert. denied*, 519 U.S. 1095, 136 L. Ed. 2d 719 (1997). In the present case, the evidence supporting the two mitigating circumstances at issue was not uncontroverted. Moreover, while the trial court declined to provide peremptory instructions on these mitigating circumstances, the trial court nonetheless submitted both mitigating circumstances for the jury's consideration. As such, defendant was not deprived of the potential benefit of the mitigating circumstances. Accordingly, we find no error in the trial court's refusal to peremptorily instruct the jury on these mitigating circumstances.

First, the evidence was controverted as to whether defendant had "successfully kicked his drug habit." At trial, the prosecutor properly argued that the evidence was in dispute as to whether defendant in fact had a drug habit. Dr. Kenneth Feigenbaum testified that PCP does not provide an extended physiological craving and does not usually cause any withdrawal. Dr. Feigenbaum further testified that PCP addiction "tends to be primarily psychological." While Dr. Feigenbaum testified at one point that defendant had suffered "some degree of addiction," Dr. Feigenbaum later testified that defendant's condition could also be referred to as PCP "abuse." Dr. Feigenbaum admitted that he "was not being very technical" about differentiating between addiction and abuse. Dr. Feigenbaum then agreed that the distinction between abuse and addiction is an important one because "a person can abuse a drug and be an abuser by choice or a person can be an addict and perhaps have less of a choice when they take a drug."

In any event, the record does not reveal uncontroverted evidence that defendant had a "drug habit." As such, the trial court properly refused to peremptorily instruct the jury on this mitigating circumstance.

Similarly, the evidence was controverted as to whether defendant "did not intend any injury or harm to David Dishon Franklin." When

defendant requested a peremptory instruction on this mitigating circumstance, the trial court properly stated, "I'm not going to give a peremptory on that. One of the reasons is I'm really getting into a question of opinion on that, the Court's opinion, and I think the jury's job is to consider what happened, not mine." Additionally, during the sentencing proceeding, Jessica Franklin testified that when she allowed defendant back into the apartment on the night of the murders, she told defendant that "[victim Cox] was back there [in the bedroom] putting my baby to sleep." Defendant responded, "Oh," and became very quiet. This evidence reveals that defendant may have had notice that victim Franklin was in the bedroom where defendant entered and fired numerous shots into the bed.

We cannot say that the evidence that defendant did not intend to harm victim Franklin was uncontroverted. Accordingly, the trial court properly refused to give the jury a peremptory instruction on the mitigating circumstance.

This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises two additional issues that this Court has previously decided contrary to defendant's position: (1) the failure of the indictment to allege premeditation and deliberation, or that the killing occurred in the course of a specified felony, and (2) the definition of mitigating circumstances in the trial court's charge to the jury.

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

[5] 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) (2001).

As a collateral matter, we first note that defendant argues that this Court's standards for proportionality review are vague and arbi-

trary, depriving him of his constitutional rights to notice, to effective assistance of counsel, to due process, and to be free from cruel and unusual punishment. We have previously rejected this issue in *State v. Simpson*, 341 N.C. 316, 358-59, 462 S.E.2d 191, 215-16 (1995), *cert. denied*, 516 U.S. 1161, 134 L. Ed. 2d 194 (1996), and see no reason to depart from our prior holding.

In the present case, the trial court ordered that defendant's first-degree murder conviction for victim Cox be merged into defendant's first-degree felony murder conviction for victim Franklin. Following a capital sentencing proceeding, the jury found both aggravating circumstances submitted: (1) defendant had been previously convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3); and (2) defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person, N.C.G.S. § 15A-2000(e)(10).

The trial court submitted three statutory mitigating circumstances for the jury's consideration: (1) defendant has no significant history of prior criminal history, N.C.G.S. § 15A-2000(f)(1); (2) the capital felony was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); and (3) the catchall mitigating circumstance of "[a]ny other circumstance arising from the evidence which the jury deems to have mitigating value," N.C.G.S. § 15A-2000(f)(9). The jury did not find that any of these statutory mitigating circumstances existed. Of the thirty-five nonstatutory mitigating circumstances submitted by the trial court, the jury found twenty to exist.

After thoroughly examining the record, transcripts, briefs, and oral arguments, we conclude the evidence fully supports the aggravating circumstances found by the jury. Moreover, we find no indication the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We now turn to our final statutory duty of proportionality review.

The purpose of proportionality review is to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *Holden*, 321 N.C. at 164-65, 362 S.E.2d at 537. Additionally, proportionality review 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 found the death sentence disproportionate in eight cases. *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

We conclude that this case is not substantially similar to any case in which this Court has found the death penalty disproportionate. First, defendant was convicted under the felony murder rule, with the underlying felony being the first-degree murder of victim Cox. "We find it significant that in none of the cases in which this Court has found the death penalty disproportionate were there multiple victims or multiple major felonies committed during the crime." *State v. Gregory*, 348 N.C. 203, 213, 499 S.E.2d 753, 760, *cert. denied*, 525 U.S. 952, 142 L. Ed. 2d 315 (1998). Defendant committed a premeditated and deliberate murder of victim Cox, firing at least eight rounds from a semiautomatic handgun into her body at close range. Some of these bullets apparently passed completely through victim Cox's body, entering and fatally wounding eighteen-month-old David Franklin as he lay on the bed beside victim Cox. These murders occurred inside the home, a factor we have noted to "shock[] 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. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

We additionally note that none of the cases in which the death penalty has been held disproportionate has involved the murder of a small child. "[S]uch a factor [weighs] heavily against this adult defendant, as we have stated before that murders of small children, as well as teenagers, 'particularly [shock] the conscience.' " *State v.*

Walls, 342 N.C. 1, 72, 72 n.3, 463 S.E.2d 738, 777, 777 n.3 (1995) (quoting *State v. Artis*, 325 N.C. 278, 344, 384 S.E.2d 470, 508 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), and noting that although *Artis* is no longer in the proportionality pool, "the principle remains the same"), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996).

Finally, "[i]n none of the cases in which the death penalty was found to be disproportionate has the jury found the (e)(3) aggravating circumstance." *State v. Peterson*, 350 N.C. 518, 538, 516 S.E.2d 131, 143 (1999), *cert. denied*, 528 U.S. 1164, 145 L. Ed. 2d 1087 (2000). "The jury's finding of the prior conviction of a violent felony aggravating circumstance is significant in finding a death sentence proportionate." *State v. Lyons*, 343 N.C. 1, 27, 468 S.E.2d 204, 217, *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996). In the present case, the jury found not only the (e)(3) aggravating circumstance, it also found the (e)(10) aggravating circumstance. *See* N.C.G.S. § 15A-2000 (e)(10) (2001) ("The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.")

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 that pool when engaging in our statutorily mandated duty of proportionality review, we have repeatedly stated that "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.*; *accord Gregory*, 348 N.C. at 213, 499 S.E.2d at 760. 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 judgements' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). Based upon the characteristics of this defendant and the crimes he committed, we are convinced that the sentence of death recommended by the jury and ordered by the trial court in the instant case is neither disproportionate nor excessive.

Accordingly, we conclude defendant received a fair trial and capital sentencing proceeding, free from prejudicial error. The judg-

ment of the trial court sentencing defendant to death must therefore be left undisturbed.

NO ERROR.

WILLIAM J. WISE AND LYNN P. WISE v. HARRINGTON GROVE COMMUNITY ASSOCIATION, INC., AND TOM FITZGERALD, TAMARA JAMES, DAVE BECHERER, STEWART JOSLIN, BILL SCHULTZ, AND MIKE DALTON, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE HARRINGTON GROVE COMMUNITY ASSOCIATION BOARD OF DIRECTORS

No. 428A02

(Filed 22 August 2003)

Deeds— restrictive covenants—planned community—declaratory judgment

A fine levied by defendant homeowners association, created prior to 1999, against plaintiff homeowners under N.C.G.S. § 47F-3-102(12) for violation of architectural standards in a planned community arising out of the construction of a retaining wall for a swimming pool was ultra vires and void, because: (1) the articles of incorporation and bylaws at issue do not authorize defendant to fine anyone, the architectural standards in effect when this action arose do not properly authorize defendant to issue fines, and our Supreme Court declines to create such a power by implication in light of the legal rule that restrictive covenants must be strictly construed; (2) the North Carolina Planned Community Act (PCA) does not retroactively authorize defendant to fine plaintiffs for violations of restrictive covenants in the declaration despite the lack of express authorization in the declaration itself, in defendant's articles of incorporation, or in the corresponding bylaws; and (3) where the declaration of a homeowners association created prior to 1999 is silent as to whether an association has power to fine its own members but provides, as in the instant declaration, for amendment of the declaration of provisions, the homeowners association may obtain the power to fine its members as described under N.C.G.S. § 47F-3-102(12) by following the prescribed amendment procedure and by adding appropriate language to the declaration.

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. 344, 566 S.E.2d 499 (2002), affirming a judgment entered 2 April 2001 by Judge Gary Trawick in Superior Court, Wake County. Heard in the Supreme Court 7 April 2003.

Hunton & Williams, by William D. Dannelly and Julie Beddingfield, for plaintiff-appellants.

Jordan Price Wall Gray Jones & Carlton, by Henry W. Jones, Jr.; Hope Derby Carmichael; and Brian S. Edlin, for defendant-appellees.

MARTIN, Justice.

This is a declaratory judgment action brought by real property owners against their homeowners association. The facts, as reflected in the record on appeal, are as follows: In 1999, William and Lynn Wise (plaintiffs) purchased a home in the Harrington Grove subdivision in Raleigh, North Carolina. Plaintiffs' home, as well as every other home in Harrington Grove, is subject to the "Declaration of Covenants, Conditions and Restrictions of the Harrington Grove Homeowner's Association, Inc." (the declaration), recorded with the Wake County Register of Deeds in May 1987.

The declaration provides that plaintiffs, and all others owning real property in Harrington Grove, automatically become voting and assessment-paying members of the Harrington Grove Community Association, Inc. (defendant), a nonprofit North Carolina corporation. The declaration assigns defendant various powers and obligations concerning enforcement of the covenants in the declaration, upkeep of the common areas, and maintenance of the subdivision's aesthetic appeal. Defendant's articles of incorporation allow it to exercise "all of the powers and privileges and perform all duties and obligations of the Association as set forth in the Declaration." In turn, defendant's bylaws vest all powers granted to it under the declaration in a board of directors. The bylaws also provide for the creation of an architectural control committee (ACC).

From time to time, defendant's board has adopted and published "Architectural Standards & Construction Specifications." The ACC uses these standards to evaluate whether proposed construction projects will obtain official ACC approval. The architectural standards in effect when the present action arose purport to authorize the imposi-

tion of monetary fines on association members for violations of the architectural standards. These standards were approved by defendant's board but have never been added to the declaration pursuant to its formal amendment procedure and have never been recorded. As discussed more fully below, no provision of the declaration, the articles of incorporation, or the bylaws expressly provides for the imposition of fines on association members.

Shortly before closing on the purchase of their home, plaintiffs obtained the ACC's approval for construction of an in-ground swimming pool on their lot. Plaintiffs began pool construction approximately one week after closing. During construction, plaintiffs installed a retaining wall varying in height from eleven to twenty-seven inches. After learning of the retaining wall, the ACC revoked its earlier approval and retroactively denied plaintiffs' request for approval of the pool construction as to the retaining wall. By letter dated 13 May 1999, defendant alerted plaintiffs that the ACC had proposed the levying of a fine against plaintiffs for violation of the covenants found in the declaration. On 7 July 1999, defendant's board met to consider the fine and heard presentations from plaintiffs and the ACC. After the board meeting, defendant asserted that the wall was constructed without the required ACC approval and imposed a fine.

Plaintiffs filed the present action seeking, in relevant part, a declaratory judgment that defendant's attempt to levy a fine against plaintiff was *ultra vires* and void. On 2 April 2001, the trial court denied plaintiff's motion for partial summary judgment as to the declaratory judgment action, and declared that defendant was authorized to levy a fine against plaintiffs. The Court of Appeals affirmed the trial court's ruling, holding that a power to impose fines under N.C.G.S. § 47F-3-102(12) is automatically and retroactively granted to homeowners associations created prior to 1 January 1999 unless an association's declarations or articles of incorporation expressly provide otherwise. *Wise v. Harrington Grove Cmty. Ass'n*, 151 N.C. App. 344, 353, 566 S.E.2d 499, 503 (2002). Since the declaration does not expressly discuss a power to impose fines, the Court of Appeals held that defendant possessed such a power solely by virtue of the statute. *Id.*

In dissent, Judge Wynn observed that N.C.G.S. § 47F-3-102 provides that the enumerated powers are retroactively provided to a homeowners association "subject to" an association's declaration and

articles of incorporation. *Id.* at 354-55, 566 S.E.2d at 505 (Wynn, J., dissenting). Because the declaration only mentioned a lawsuit for damages or injunctive relief as defendant's remedy for a covenant violation, Judge Wynn concluded that defendant lacked legal authority to impose a fine on plaintiffs. *Id.* Plaintiffs appeal based upon this dissent. N.C.G.S. § 7A-30(2) (2001).

The question presented to this Court is whether the North Carolina Planned Community Act (the PCA or the Act) retroactively authorizes defendant to fine plaintiffs for violations of restrictive covenants in the declaration despite the lack of express authorization in the declaration itself, in defendant's articles of incorporation, or in the corresponding bylaws (collectively referred to as "organizational documents"). We hold that the PCA does not automatically grant defendant such a power, and we therefore reverse.

I.

In 1998, the General Assembly enacted the PCA, a series of statutes regulating the creation, alteration, termination, and management of planned subdivision communities. *See generally* Act of Oct. 15, 1998, ch. 199, 1998 N.C. Sess. Laws 674 (codified as amended at N.C.G.S. ch. 47F). As codified at the time plaintiffs initiated the present action,[1] the PCA purports to apply, with some exceptions not relevant to the instant case, to "all planned communities" in North Carolina. N.C.G.S. § 47F-1-102(a),(b) (2001). Harrington Grove meets the statutory definition of a "planned community" because property owners in Harrington Grove, by virtue of their ownership of a lot, are obligated to pay monies to defendant for the maintenance of certain real estate that is described in the declaration, other than their own lots. *See* N.C.G.S. § 47F-1-103(23) (2001). The PCA provides that all planned communities must incorporate an "association" consisting of everyone owning lots located in the planned community. N.C.G.S. § 47F-3-101 (2001). The PCA then grants a series of powers to those associations pursuant to N.C.G.S. § 47F-3-102.

According to the commentary to the PCA, however, the Act does not apply in its entirety to planned communities created prior to 1 January 1999:

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1. The General Assembly has since amended N.C.G.S. § 47F-1-102. Act of Aug. 27, 2002, ch. 112, 2002 N.C. Sess. Laws 271; N.C.G.S. § 47F-1-102 (Supp. 2002). As noted throughout this opinion, the amendment has altered the relevant statutory language.

> The Act is effective January 1, 1999 and applies in its entirety to all planned communities created on or after that date. . . . G.S. 47F-3-102 (1) through (6) and (11) through (17), G.S. 47F-3-107(a), (b) and (c), G.S. 47F-3-115 and G.S. 47F-3-116 also apply to planned communities created prior to January 1, 1999.

N.C.G.S. § 47F-1-102, N.C. cmt. (2001).[2] The PCA therefore has limited applicability to the Harrington Grove subdivision, a planned community created in 1987. Among the statutory provisions the PCA purports to apply to older planned communities like Harrington Grove is N.C.G.S. § 47F-3-102(12), the provision cited by the courts below as providing defendant legal authorization to impose a fine on plaintiffs.

At the outset, we note that retroactive application of the PCA potentially disturbs the common law rights of persons owning property in a planned community created prior to the PCA's enactment. This Court has long acknowledged and discussed the creation of subdivisions and the enforcement of common plans of development. *See, e.g., Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 436-37, 527 S.E.2d 40, 42-43 (2000); *Hawthorne v. Realty Syndicate, Inc.*, 300 N.C. 660, 665, 268 S.E.2d 494, 497 (1980); *Sedberry v. Parsons*, 232 N.C. 707, 710-11, 62 S.E.2d 88, 90 (1950); *Myers Park Homes Co. v. Falls*, 184 N.C. 426, 430-31, 115 S.E. 184, 186 (1922). Prior to enactment of the PCA, the creation and enforcement of residential development plans similar to Harrington Grove were largely accomplished through the use of common law restrictive real estate covenants.[3] *See, e.g., Karner*, 351 N.C. at 436-37, 527 S.E.2d at 42-43; *East Side Builders, Inc. v. Brown*, 234 N.C. 517, 522, 67 S.E.2d 489, 492 (1951).

As a general rule, "[r]estrictive covenants are valid so long as they do not impair the enjoyment of the estate and are not contrary to the public interest." *Karner*, 351 N.C. at 436, 527 S.E.2d at 42; *cf. Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299,

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2. In 2002, the General Assembly essentially codified this commentary as part of N.C.G.S. § 47F-1-102(c). Ch. 112, 2002 N.C. Sess. Laws at 272-73. *Compare* N.C.G.S. § 47F-1-102 (2001) *with* N.C.G.S. § 47F-1-102 (Supp. 2002).

3. While planned communities like the one at issue here are similar to condominiums in some respects, homeowners in such planned communities do not own undivided interests in common areas of the subdivision. 2 James A. Webster, *Webster's Real Estate Law in North Carolina* § 30-2(a), at 1304 (Patrick K. Hetrick & James B. McLaughlin, Jr., eds., 5th ed. 1999) [hereinafter *Webster's Real Estate*]. Condominiums are governed by N.C.G.S. ch. 47C. *Id.* No issue is raised in this case as to N.C.G.S. ch. 47C.

305 (1985) (describing freedom of contract generally). Restrictive covenants are "legitimate tools" of developers so long as they are "clearly and narrowly drawn." *J.T. Hobby & Son, Inc. v. Family Homes of Wake Cty., Inc.*, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981). The original parties to a restrictive covenant may structure the covenants, and any corresponding enforcement mechanism, in virtually any fashion they see fit. *See Runyon v. Paley*, 331 N.C. 293, 299, 416 S.E.2d 177, 182 (1992) ("an owner of land in fee has a right to sell his land subject to any restrictions he may see fit to impose"). A court will generally enforce such covenants " 'to the same extent that it would lend judicial sanction to any other valid contractual relationship.' " *Karner*, 351 N.C. at 436, 527 S.E.2d at 42 (quoting *Sheets v. Dillon*, 221 N.C. 426, 431, 20 S.E.2d 344, 347 (1942)). As with any contract, when interpreting a restrictive covenant, "the fundamental rule is that the intention of the parties governs." *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967). Therefore, under the common law, developers and lot purchasers were free to create almost any permutation of homeowners association the parties desired. Not only could the restrictive covenants themselves be structured as the parties saw fit, a homeowners association enforcing those covenants could conceivably have a wide variety of enforcement tools at its disposal.

"Statutes in derogation of the common law . . . should be strictly construed." *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 479, 495 S.E.2d 711, 715, *cert. denied*, 525 U.S. 1016, 142 L. Ed. 2d 449 (1998). This is particularly true where a statute is "penal in nature," *Elliott v. N.C. Psychology Bd.*, 348 N.C. 230, 235, 498 S.E.2d 616, 619 (1998), or where the statute "infringe[s] upon the common law property rights of others," *Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988). A fine is commonly defined as a "pecuniary punishment" or a "penalty." *Black's Law Dictionary* 759 (4th ed. 1968). Any statute authorizing imposition of a monetary fine is, therefore, necessarily punitive or penal in nature. Moreover, any fine upheld on the facts of the present case directly implicates plaintiffs' right to use their property as they choose. "Every person owning property has the right to make any lawful use of it he sees fit, and restrictions sought to be imposed on that right must be carefully examined . . . ." *Vance S. Harrington & Co. v. Renner*, 236 N.C. 321, 324, 72 S.E.2d 838, 840 (1952).

It is with these considerations in mind that we turn to the text of the relevant statute.

> Subject to the provisions of the articles of incorporation or the declaration and the declarant's rights therein, the association may:
>
> . . . .
>
> (12) After notice and an opportunity to be heard, impose reasonable fines or suspend privileges or services provided by the association (except rights of access to lots) for reasonable periods for violations of the declaration, bylaws, and rules and regulations of the association[.]

N.C.G.S. § 47F-3-102(12).

Defendant essentially argues that this statute abolishes homeowners associations created by contract in favor of uniform, statutorily created homeowners associations. Defendant insists that even when the original restrictive covenants are silent on the matter, and even when there is no evidence of any intent to create the powers listed in N.C.G.S. § 47F-3-102, the commentary to N.C.G.S. § 47F-1-102 grants all homeowners associations created prior to 1999 a variety of sweeping new powers listed in N.C.G.S. § 47F-3-102, including the power to financially penalize association members for violations of the restrictive covenants. This proposed interpretation would drastically alter the common law rules respecting the rights and intentions of parties to a restrictive covenant. Notably, one commentator attempting to predict the legal effect of the PCA described the potential for "a fundamental shift in the balance of power from private property owners to" homeowners associations, which he characterized as "private governments." 2 *Webster's Real Estate Law* § 30A-1, at 1231.[4] Because defendant's proposed interpretation of the PCA would infringe upon a homeowner's existing common law property rights as well as the common law rule that the intentions of the parties control the scope of existing restrictive covenants, we must strictly construe N.C.G.S. § 47F-3-102 and reject defendant's more expansive interpretation.

The language of N.C.G.S. § 47F-3-102 does not, in and of itself, authorize defendant to exercise the powers listed therein. First, the

4. Approximately twenty million housing units, home to approximately fifty million Americans, are governed by homeowners associations and similar entities. Community Associations Institute, *Data on U.S. Community Associations, at* http://www.caionline.org/about/facts.cfm (2003). Units governed by such associations account for an estimated four out of every five housing starts in the past five to eight years. *Id.*

statute uses the word "may" when listing association powers. N.C.G.S. § 47F-3-102. The word "may," when used in a statute, is generally construed as permissive rather than mandatory. *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978); *Felton v. Felton*, 213 N.C. 194, 198, 195 S.E. 533, 536 (1938). Therefore, the statute does not require homeowners associations to wield the enumerated powers, but merely provides them an option to do so. Second, the statute explicitly states that the listed powers are "*subject to* the provisions of the articles of incorporation or the declaration." N.C.G.S. § 47F-3-102 (emphasis added). The word "subject," in this context, means "contingent on or under the influence of some [other] action." *Merriam Webster's Collegiate Dictionary* 1172 (10th ed. 1998). In common legal parlance, the phrase "subject to" is defined as "[l]iable, subordinate, subservient, inferior, obedient to; governed or affected by." *Black's Law Dictionary* 1594; *see also State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 347 (1984) (construing the same phrase). Thus, the General Assembly explicitly acknowledged that the powers described in N.C.G.S. § 47F-3-102 were contingent on, subordinate to, and governed by the legal instruments creating a homeowners association.[5]

Interpreted as a whole, this statute does not automatically grant the listed powers to all homeowners associations. Instead, it appears N.C.G.S. § 47F-3-102 merely allows the alteration of an association's declaration, articles of incorporation, and by-laws to permit the exercise of these powers by associations in existence prior to 1999. Since these documents control the number and type of legal powers that a homeowners association may exercise under the PCA, the outcome of the present case turns on the language of the specific organizational documents at issue.

II.

In turning to interpret defendant's organizational documents, we are mindful that, like all other restrictive covenants, this declaration must be "strictly construed in favor of the unrestricted use of

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5. Notably, after the 2002 amendments, the PCA expressly provides that its provisions "do not invalidate existing provisions of the declaration, bylaws, or plats and plans of those planned communities." Ch. 112, sec. 2, 2002 N.C. Sess. Laws at 271; N.C.G.S. § 47F-1-102(d) (Supp. 2002). While this subsequent amendment obviously does not control our disposition of the present case, it appears the legislature intended to clarify and codify the originally intended meaning of the PCA's provisions. *See Spruill v. Lake Phelps Vol. Fire Dep't, Inc.*, 351 N.C. 318, 323, 523 S.E.2d 672, 676 (2000) (in construing a statute with reference to an amendment, the legislature presumably either alters or clarifies the statute's meaning).

property." *Rosi v. McCoy*, 319 N.C. 589, 592, 356 S.E.2d 568, 570 (1987); *see also J.T. Hobby*, 302 N.C. at 70, 274 S.E.2d at 179; *Cummings v. Dosam, Inc.*, 273 N.C. 28, 32, 159 S.E.2d 513, 517 (1968). "The law looks with disfavor upon covenants restricting the free use of land. . . . Any doubt or ambiguity will be resolved against the validity of the restriction." *Cummings*, 273 N.C. at 32, 159 S.E.2d at 517; *see also Stegall v. Housing Auth. of Charlotte*, 278 N.C. 95, 100, 178 S.E.2d 824, 828 (1971).

The articles of incorporation and bylaws at issue do not authorize defendant to fine anyone. The articles of incorporation provide that defendant may exercise its powers and perform its duties only "as set forth in the Declaration." Under the articles, defendant is empowered to collect only "charges and assessments" and may do so "by any lawful means . . . pursuant to the terms of the Declaration." The bylaws provide that defendant's board may exercise only those powers delegated to it under the articles of incorporation, declaration, or other bylaws. In terms of a monetary collection of any sort, the bylaws speak only to "assessments" and refer to article V of the declaration for more explicit guidance. The articles of incorporation and bylaws limit defendant's powers to those described in the declaration, and therefore, it is only in the declaration that one finds any detailed description of defendant's powers.

Article V of the declaration, six and one-half pages and fourteen sections long, provides a description of assessments and how they are levied and collected. Assessments are collected solely for the purpose of fairly apportioning the cost of maintaining the subdivision's common areas. Article V provides a specific process for calculating assessments, as well as a means of enforcing and collecting arrearages. These charges clearly constitute an annual contractual obligation of all association members, however, and are not punitive in nature. This interpretation is consistent with the common legal definition of an assessment: "the process of ascertaining and adjusting the shares respectively to be contributed by several persons towards a common beneficial object according to the benefit received." *Black's Law Dictionary* 149-50. On the other hand, a "fine," as discussed above, is penal in nature. Neither party contends that article V is controlling, as this case clearly involves a fine rather than an assessment. Article V is instructive, however, insofar as it demonstrates that where the original parties to the declaration intended to provide defendant with a specific power to impose a monetary obligation on association members, they were capable of doing so and in fact provided a detailed procedure for doing so.

Article VII, the article relevant to the instant case, specifically describes the ACC's power to withhold its official approval as to any construction proposal. In contrast to article V, which provides a clear outline of powers that defendant may exercise and the appropriate procedures for doing so, article VII does not expressly describe any power or procedure for collecting "fines" from association members as a result of alleged violations of the architectural controls. Therefore, the architectural controls outlined in article VII are presumably enforced pursuant to the general enforcement provisions found in article VIII. *Cf. Security Nat'l Bank v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 93, 143 S.E.2d 270, 275 (1965) (a contract must be interpreted as a whole and in the context of all its provisions).

Article VIII permits defendant, in a proceeding at law or equity, "to restrain violation or to recover damages resulting from any violation of the terms of the declaration." "Presumably the words which the parties select [for inclusion in a contract are] deliberately chosen and are to be given their ordinary significance." *Briggs v. American & Efird Mills, Inc.*, 251 N.C. 642, 644, 111 S.E.2d 841, 843 (1960). Article VIII does not mention "fines" as a proper method for ensuring performance of the covenants. In a typical action for breach of a real estate covenant, "the measure of damages is the amount which will compensate the injured party for the loss which fulfillment of the contract could have prevented or the breach of it has entailed." *Norwood v. Carter*, 242 N.C. 152, 155, 87 S.E.2d 2, 4 (1955). "[T]he chief concern . . . is to make the plaintiff whole and to secure to him his rights under the contract." *Martin v. Stiers*, 165 F. Supp. 163, 167 (M.D.N.C. 1958) (citing *Norwood*, 242 N.C. 152, 87 S.E.2d 2), *aff'd per curiam*, 264 F.2d 795 (4th Cir. 1959). In certain cases, a court may issue a mandatory injunction to restrain a violation. *See, e.g.*, *Ingle v. Stubbins*, 240 N.C. 382, 82 S.E.2d 388 (1954) (mandatory injunction issued to require the removal of a building constructed in violation of a restrictive covenant). As discussed above, a fine is generally imposed purely as a pecuniary penalty and has no relation to an actual loss suffered by a party. A fine is not listed in article VIII as a proper means of enforcing the declaration and is a remedy wholly distinct from those listed. Therefore, article VIII does not grant defendant the power to impose a fine on plaintiffs.

Moreover, the architectural standards in effect when this action arose do not properly authorize defendant to issue fines. In order to be binding against subsequent purchasers such as plaintiffs, restrictive covenants must not only be in writing, *Cummings*, 273 N.C. at 32,

159 S.E.2d at 517, but also must be duly recorded, *Hege v. Sellers*, 241 N.C. 240, 248, 84 S.E.2d 892, 898 (1954). Prior to enactment of the PCA and in the absence of express covenants placed in each conveyed deed, a developer could legally bind purchasers of his subdivided lots to restrictive covenants only by recording a development plat and a declaration that carefully described any restrictions on the use of the subdivided lots, along with any relevant amendments thereto. *See* 2 *Webster's Real Estate* § 18-4, at 833; *see also* N.C.G.S. §§ 47-21, 47-30(g) (2001) (permitting recorded deeds to incorporate other recorded instruments by reference); *Kaperonis v. N.C. State Highway Comm'n*, 260 N.C. 587, 597-98, 133 S.E.2d 464, 471 (1963) (where lots are sold by reference to a recorded plat, the effect of the reference is to incorporate the plat into the deed).

Article VII permits defendant to provide "objective standards and guidelines" for the construction approval process but does not authorize the creation of a separate mechanism for enforcing architectural standards. Although the architectural standards adopted by defendant's board purport to grant defendant a fining power, these standards never became part of the recorded declaration and therefore cannot be enforced as mere amendments to or extensions of the restrictive covenants discussed above. To the extent the architectural standards provide "objective standards and guidelines" that aid in the construction approval process, they fulfill a valid role described in the recorded declaration. The standards are unenforceable for lack of recordation, however, to the extent they purport to authorize defendant to levy fines against plaintiffs.

The declaration presents no ambiguity as to the lack of defendant's power to fine plaintiffs. Even if the language of the declaration was ambiguous, any proper interpretation would rely upon the circumstances existing at the time the covenant was created. *Runyon*, 331 N.C. at 305, 416 S.E.2d at 186; *Long*, 271 N.C. at 268, 156 S.E.2d at 239. The surrounding circumstances provide valuable insight as to the mutual intentions and expectations of the parties. A particularly important circumstance to consider is the law existing at the time the covenant was created. A real estate covenant is a contract, and parties are generally presumed to take into account all existing laws when entering into a contract. *Poole & Kent Corp. v. C.E. Thurston & Sons, Inc.*, 286 N.C. 121, 129, 209 S.E.2d 450, 455 (1974). "It is a well recognized principle of law in this jurisdiction that the laws in force at the time of the execution of a contract become a part of the contract. This embraces laws which affect the contract's validity, con-

struction, discharge and enforcement." *Pike v. Wachovia Bank & Tr. Co.*, 274 N.C. 1, 16, 161 S.E.2d 453, 465 (1968). "Contracts should be interpreted in the light of established principles of law." *Goodyear v. Goodyear*, 257 N.C. 374, 377, 126 S.E.2d 113, 116 (1962).

Prior to the enactment of the PCA, restrictive covenants were generally enforceable only by an action at law for damages or by a suit in equity for an injunction. 9 Richard R. Powell, *Powell on Real Property* § 60.07 (1997); 2 *Webster's Real Estate* § 18-4, at 832; *see generally Runyon*, 331 N.C. at 299-313, 416 S.E.2d at 182-91 (discussing the enforcement of restrictive covenants at law and equity). Here, the parties acknowledged this principle of law and expressly memorialized it in the declaration: In the event of breach, the declaration permits defendant to sue for resulting money damages or to seek an appropriate injunction. If the restrictive covenants at issue here were construed to grant defendant the power to fine, defendant would be permitted to impose financial punishment for construction of unapproved structures in addition to recouping any compensable loss or halting the undesired construction. As explained above, the declaration does not expressly describe any such power. In view of the lack of any such express language and considering the mechanisms for enforcement of restrictive covenants commonly accepted prior to enactment of the PCA, we cannot say that the parties to the declaration ever contemplated that defendant would have the power to fine homeowners in Harrington Grove.

In short, the organizational documents for Harrington Grove do not expressly empower defendant to fine plaintiffs for violations of the architectural standards. In light of the legal rule that restrictive covenants must be strictly construed, *Rosi*, 319 N.C. at 592, 356 S.E.2d at 570, we decline to create such a power by implication. "The courts are not inclined to put restrictions in deeds where the parties left them out." *Hege*, 241 N.C. at 249, 84 S.E.2d at 899.

III.

Our holding does not prevent recently created homeowners associations from fining their members in appropriate circumstances. The PCA applies in its entirety to all homeowners associations formed on or after 1 January 1999. Any person purchasing real estate in such a planned community can reasonably be charged with constructive notice of the prospective operation of the PCA and the powers it confers upon the homeowners association. *See Poole & Kent*, 286 N.C. at 129, 209 S.E.2d at 455 (parties to a contract are presumed to act

with full knowledge of the existing law); *cf. Paul L. Whitfield, P.A. v. Gilchrist*, 348 N.C. 39, 43-44, 497 S.E.2d 412, 415 (1998) (statute serves as public notice that compliance with its terms is required). Automatic application of PCA provisions to homeowners associations created on or after 1 January 1999 may therefore be viewed as consistent with the reasonable legal expectations of buyers purchasing homes in planned communities created after that date. We note, however, that the relevant legal instruments creating a homeowners association may withhold the statutory powers described under N.C.G.S. § 47F-3-102 from a homeowners association, if those instruments expressly so provide.

Similarly, our holding does not forbid defendant, or any other homeowners association formed prior to 1999, from taking advantage of the statutory powers created under the PCA, provided the legal authority for the exercise of those powers is properly established. Where the declaration of a homeowners association created prior to 1999 is silent as to whether an association has the power to fine its own members, but provides, as the instant declaration does, for amendment of the declaration provisions, the homeowners association may certainly obtain the power to fine its members as described under N.C.G.S. § 47F-3-102(12) by following the prescribed amendment procedure and by adding appropriate language to the declaration.[6]

Finally, we do not decide any issue as to the effect of N.C.G.S. § 47F-3-102 on an association formed prior to 1999 where the corresponding declaration expressly provides the homeowners association the power to fine its members. This is not an issue drawn into focus by these proceedings, and to reach this question would be to render an unnecessary advisory opinion. It is no part of the function of the courts to issue advisory opinions. *City of Greensboro v. Wall*, 247 N.C. 516, 519, 101 S.E.2d 413, 416 (1958).

Accordingly, we reverse the decision of the Court of Appeals and remand to that court for further remand to the Superior Court, Wake County, for entry of summary judgment in favor of plaintiffs.

REVERSED AND REMANDED.

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6. We note that the PCA, as amended, prescribes an amendment process for associations created prior to 1999. Ch. 112, sec. 2, 2002 N.C. Sess. Laws at 272-73; N.C.G.S. § 47F-1-102 (Supp. 2002).

STATE OF NORTH CAROLINA v. BRANDON CABOTT JONES

No. 115A02

(Filed 22 August 2003)

1. Constitutional Law— effective assistance of counsel— motion to dismiss counsel

The trial court did not abuse its discretion in a double first-degree murder, robbery with a dangerous weapon, and felonious breaking or entering case by denying defendant's numerous pre-trial motions to dismiss counsel based on an alleged breakdown in communication including failure to return defendant's phone calls and failure to visit defendant in almost ten months, because: (1) despite counsel's consistent failure to communicate personally with defendant, defendant failed to show that his counsel's actions did not meet an objective standard of reasonableness as defined by professional norms when counsel continued to communicate with defendant in writing and through his co-counsel; (2) counsel continued to work on defendant's case and kept close contact with his co-counsel; (3) the trial court questioned defense counsel and ascertained that he was qualified both by education and experience; and (4) our Supreme Court will not engage in a line-by-line comparison of different defendants' trials to determine whether there was ineffective assistance of counsel in any of the trials.

2. Constitutional Law— right to testify—trial court's failure to inquire sua sponte

The trial court did not abuse its discretion in a double first-degree murder, robbery with a dangerous weapon, and felonious breaking or entering case by failing to inquire sua sponte whether defendant wanted to testify on his own behalf, because: (1) defendant acknowledged that our Supreme Court has never required a trial court to determine whether a defendant wants to testify on his own behalf; and (2) defendant had two defense attorneys representing his interests.

3. Robbery— ownership of stolen property—no variance between evidence and indictment

In a felony murder prosecution in which armed robbery was the underlying felony, there was no variance between the evidence and the robbery indictment as to ownership of the stolen

property, even though the indictment alleged that defendant took a briefcase and money "from the presence, person, place of business, and residence of" the murder victim and the State elicited evidence of property stolen from the victim's son, where the jury could infer that the stolen briefcase belonged to the victim from testimony by the victim's wife that the briefcase contained "their personal papers," including a marriage certificate and a marriage license.

4. Sentencing— capital—aggravating circumstance—pecuniary gain

The trial court committed plain error in a double first-degree murder case by its instruction to the jury on the pecuniary gain aggravating circumstance under N.C.G.S. § 15A-2000(e)(6) and defendant is entitled to a new capital sentencing proceeding, because: (1) the trial court's sentencing instruction improperly directed the jury to find the pecuniary gain aggravating circumstance based on its determination that defendant committed robbery with a dangerous weapon; and (2) the trial court did not explain or describe to the jury what constituted pecuniary gain.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Richard L. Doughton, on 15 August 2001 in Superior Court, Gaston County, upon a jury verdict finding defendant guilty of first-degree murder. On 24 June 2002, 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 10 March 2003.

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

Staples Hughes, Appellate Defender, by Barbara S. Blackman, Assistant Appellate Defender, for defendant-appellant.

ORR, Justice.

Defendant, Brandon Cabott Jones, was indicted on 13 September 1999 for the first-degree murders of Donald James Hunt and Devan Lashawn Bynum, for three counts of kidnapping, for one count of robbery with a dangerous weapon, and for one count of felonious breaking or entering. The trial court dismissed the kidnapping counts at the close of the State's evidence during the guilt-innocence phase of defendant's trial.

Defendant was tried capitally. The jury found defendant guilty of all charges, specifically finding him guilty of both murders under the felony murder rule. Following a capital sentencing proceeding, the jury recommended a sentence of death for the murder of Donald James Hunt and a sentence of life imprisonment for the murder of Devan Lashawn Bynum. The trial court entered judgments accordingly. The trial court additionally imposed a consecutive sentence of eleven to fourteen months' imprisonment for the breaking and entering conviction and arrested judgment on the robbery conviction, as it was the underlying felony in the felony murder conviction.

Evidence presented during the guilt-innocence phase tended to show the following: On 13 August 1999 at approximately 2:00 p.m., defendant, Damon Demond Stafford, and Devan Lashawn Bynum broke into the home of Donald James Hunt (Mr. Hunt); his wife, Janie Hunt (Mrs. Hunt), and their son, Donald James Hunt, Jr. (Hunt, Jr.), in Gastonia, North Carolina. Hunt, Jr. was asleep on a cot in the living room, and Mr. and Mrs. Hunt were asleep in their bedroom. Hunt, Jr. and Mrs. Hunt became aware of the intruders' presence when they were awakened by a loud noise originating from the back door. Mrs. Hunt and Hunt, Jr. heard one of the intruders say, "Police, police." Hunt, Jr. testified that he heard one of them say, "Get down on the floor." After one of them directed Hunt, Jr. at gunpoint to get on the floor, Bynum asked Hunt, Jr. if he was called "D.J." and if he drove a black Explorer. After receiving an affirmative answer, Bynum hit Hunt, Jr. in the head with a gun.

Mr. Hunt awoke when one of the intruders held a gun to his head and told him to get up. The intruder directed Mr. and Mrs. Hunt to go into the living room and to lie on the floor. All three intruders held Mr. and Mrs. Hunt and their son at gunpoint, demanding money and drugs. The evidence is unclear as to which one of the assailants took $2,500 and jewelry from Hunt, Jr. A short time after entering the home, the intruders asked Hunt, Jr. if he had any more money. He told them that he had money behind a drawer upstairs. Bynum took Mrs. Hunt upstairs at gunpoint while defendant stood on the couch holding a gun on Hunt, Jr. Bynum made Mrs. Hunt lie on the floor while he looked for the money. After an unsuccessful attempt, Bynum took Mrs. Hunt back downstairs. One of the assailants said, "[Y]'all think this is a joke? You think we are playing?" Bynum or Stafford said, "Y'all about to die for this s—." "Starting with this b----- right here." At that point, Bynum hit Mrs. Hunt in the head with a gun, and Mr. Hunt got up from the floor and grabbed Bynum. Bynum and Mr. Hunt strug-

gled over the gun, ultimately moving into the bedroom, with Stafford entering the bedroom behind them. While Mr. Hunt, Bynum, and Stafford were in the bedroom, defendant continued to hold Hunt, Jr. at gunpoint. Both Mrs. Hunt and Hunt, Jr. testified that they heard gunshots coming from the bedroom. The evidence showed that as a result of their struggle both Mr. Hunt and Bynum had been shot. After the shooting, defendant and Stafford assisted Bynum as the three ran from the home, taking a briefcase with them.

Stafford, Bynum, and defendant then went to Bynum's girlfriend's apartment. Upon arrival, Stafford asked a neighbor, Teresa Nolan, to call the police. However, Stafford changed his mind and said, "We're taking him to the hospital." Defendant and Stafford drove Bynum to Carolinas Medical Center in Charlotte, twenty-five miles from Gastonia. They took Bynum into the emergency room and left the hospital.

Mr. Hunt suffered multiple gunshot wounds and died that afternoon at Gaston Memorial Hospital from an acute hemorrhage secondary to a gunshot wound to the abdomen. Bynum died from three gunshot wounds prior to arriving at the hospital. Defendant was arrested three days after the shootings at a Days Inn Motel in Charlotte. The police recovered jewelry and money in the amount of $1,378.24 from defendant's room. Police arrested Stafford in Winston-Salem seven days after the shootings.

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

Guilt-Innocence Phase Issues

[1] On 17 August 1999, the trial court appointed Public Defender Kellum Morris to represent defendant. On 5 April 2000, the trial court appointed attorney Rick Beam as co-counsel. Defendant argues in his first question presented that the trial court erred or abused its discretion by denying defendant's numerous pretrial motions to dismiss counsel. Defendant claims that the attorney-client relationship deteriorated because of a breakdown in communication, warranting dismissal of defense counsel.

Defendant filed *pro se* pretrial "Motions to Withdraw" on 6 November 2000, 19 February 2001, and 23 April 2001, asking for Morris' dismissal as counsel. Defendant also wrote two undated let-

ters to Judge Jesse B. Caldwell expressing his dissatisfaction with Morris' services. In defendant's first letter to Judge Caldwell, he complained (1) that Morris had not made an attempt to schedule a bond hearing for the fifteen-month period that Morris had been representing him, (2) that Morris displayed a lack of interest in his case evidenced by Morris' discussion of a plea agreement as opposed to going to trial, and (3) that defendant's chance of being found not guilty would be greater if he obtained a "productive counselor." In his second letter to Judge Caldwell, defendant complained that Morris had not visited him in almost seven months.

Judge Richard D. Boner heard and denied defendant's first motion to dismiss counsel on 16 February 2001. Judge Caldwell heard and denied defendant's second motion to dismiss counsel on 5 March 2001. At this second hearing, defendant complained that Morris had not returned his phone calls, had not kept his family informed about his case, and had not visited him in almost ten months. Judge Larry G. Ford heard defendant's third motion to dismiss counsel on 21 May 2001 and entered an order denying that motion on 22 May 2001. At this third hearing, defendant alleged that Morris had been untruthful, that Morris had not reviewed discovery with him, and that Morris represented many other cases. Defendant contends that his letters and three hearings provided enough information to dismiss Morris as his defense counsel.

This Court uses an abuse of discretion standard to determine whether the trial court erred in denying a motion to have defense counsel removed. *State v. Hutchins*, 303 N.C. 321, 336, 279 S.E.2d 788, 798 (1981) (holding that "the decision of whether appointed counsel shall be replaced is a matter committed to the sound discretion of the trial court"). Abuse of discretion occurs when the trial court's ruling is "manifestly unsupported by reason." *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998).

> In order to establish prejudicial error arising from the trial court's denial of a motion to withdraw, a defendant must show that he received ineffective assistance of counsel. To establish ineffective assistance of counsel, defendant must satisfy a two-prong test which was promulgated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984).

State v. Thomas, 350 N.C. 315, 328-29, 514 S.E.2d 486, 495 (citation omitted), *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999).

> "[D]efendant must first show that counsel's performance fell below an objective standard of reasonableness as defined by professional norms. . . . Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error. Thus, defendant must show that the error committed was so grave that it deprived him of a fair trial because the result itself is considered unreliable."

Id. at 328, 514 S.E.2d at 495 (quoting *State v. Lee*, 348 N.C. 474, 491, 501 S.E.2d 334, 345 (1998)) (citations omitted) (second alteration in original).

We conclude that defendant did not satisfy the *Strickland* test. *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984).

The North Carolina Revised Rules of Professional Conduct establish the professional standards guiding attorney conduct. Rule 1.4(a)(4) of the North Carolina Revised Rules of Professional Conduct requires that a lawyer "promptly comply with reasonable requests for information." 27 NCAC 02 Rule 1.4(a)(4) (June 2003). The comment to Rule 1.4(a)(4) provides that

> [w]hen a client makes a reasonable request for information, . . . paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Id. at cmt. [4]. Defendant has failed to show that Morris' actions did not meet "an objective standard of reasonableness as defined by professional norms," *Thomas*, 350 N.C. at 328, 514 S.E.2d at 495, set out in Rule 1.4(a)(4) of the North Carolina Revised Rules of Professional Conduct.

At the 5 March 2001 hearing, Judge Caldwell addressed defendant's 19 February 2001 *pro se* "Motion to Withdraw Counsel." Defendant stated that Morris had not returned his phone calls and had not visited him in almost ten months. Morris responded as follows:

> I have seen Mr. Jones more than the two times he talks about, but there has been some conflict, and I have sent my investigators down there to talk to Mr. Jones. . . . Part of the problem in terms

> of seeing Mr. Jones is he spent a significant amount of his time in incarceration in Mecklenburg County because he has pending charges over there, and I don't always know when Mr. Jones is being taken from Gaston to Mecklenburg County to address the pending charges over there.
>
> I have not had much contact with Mr. Jones except in writing since he filed that—the first motion—what he calls a motion to withdraw, although we continue to work on the preparation of his defense.

Judge Caldwell stated that "there [was] absolutely no specific allegations of conflict or ineffective representation by Mr. Morris." Judge Caldwell also stated that "Attorney Morris [had] visited with the defendant and [had] communicated with him and [had] caused his investigators to communicate with him . . . and that Attorney Morris [had] been unable to confer with the defendant in the Gaston County Jail for significant periods of time by reason of the defendant's incarceration . . . in the Mecklenburg County Jail." Accordingly, on 21 March 2001, Judge Caldwell entered an order denying defendant's motion to dismiss.

At the 21 May 2001 hearing, Judge Ford addressed defendant's 23 April 2001 *pro se* "Motion to Withdraw Counsel." At the hearing, defendant contended that he had interrupted a visit that Morris had with another client in July 2000 and that defendant saw Morris in court two months prior but that other than those two instances Morris had not visited him in a year. Morris explained to Judge Ford that as long as defendant was filing motions seeking his withdrawal, he would not visit defendant; however, he did send his co-counsel, attorney Beam. Morris explained that he never "ceased to work on the case [or] to communicate periodically with Mr. Beam." Morris further contended that defendant did not agree with his assessment of the case.

Despite Morris' consistent failure to communicate personally with defendant, defendant has failed to show that Morris' actions did not meet the "objective standard of reasonableness *as defined by professional norms*." *Thomas*, 350 N.C. at 328, 514 S.E.2d at 495 (emphasis added). Unlike the attorney for the defendant in *Wiggins v. Smith*, — U.S. —, 156 L. E. 2d 471 (2003), who conducted virtually no investigation of his client's background, Morris did communicate with defendant in writing and through his co-counsel, attorney

Beam. Morris also continued to work on defendant's case and to keep close contact with Beam.

> The concerns expressed by defendant relating to the frequency he received visits from his attorneys are untenable. While it is no doubt true that the effective assistance of counsel includes the development and nurturing of an attorney-client relationship, we conclude that repeated visits to a defendant's jail cell at a particular level of frequency are not necessarily incident to that development. An attorney is obligated to consult with his client whenever the need arises. Furthermore, an attorney ought to keep his client informed of the status of his case. These duties are clear and hardly open to question. The issue, however, which is posed by this assignment is not whether these duties exist but whether defense counsel failed to so conduct [himself] and thereby denied defendant his sixth amendment right to the effective assistance of counsel.

Hutchins, 303 N.C. at 336, 279 S.E.2d at 798. Since defendant has not met the first prong of the *Strickland* test, we need not address the second prong. Furthermore, it is instructive that the trial court "questioned defense counsel and ascertained that he was qualified, both by education and experience." *State v. Gray*, 292 N.C. 270, 281, 233 S.E.2d 905, 913 (1977).

To further support his contention that Morris' representation was ineffective, defendant compares his defense theory to that proffered by co-defendant Stafford in his trial. The United States Supreme Court has stated that

> [n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

Strickland, 466 U.S. at 688-89, 80 L. Ed. 2d at 694. As such, this Court will not engage in a line-by-line comparison of different defendants' trials to determine whether there was ineffective assistance of counsel in any of the trials.

Accordingly, the hearing judges did not abuse their discretion in denying defendant's motions to dismiss Morris as counsel. Since

defendant did not meet the two-pronged *Strickland* test, it follows that the denials of defendant's motions were not "manifestly unsupported by reason." *T.D.R.*, 347 N.C. at 503, 495 S.E.2d at 708. This assignment of error is overruled.

[2] Next, defendant argues that the trial court erred in failing to inquire *sua sponte* whether defendant wanted to testify on his own behalf. Defendant acknowledges that this Court has never required a trial court to determine whether a defendant wants to testify in his or her own behalf. *See State v. Hayes*, 314 N.C. 460, 474-75, 334 S.E.2d 741, 750 (1985) (holding that "[i]n the absence of an indication to the trial court that [defendant] wished to take the stand, it cannot be said that the court denied the defendant his right to testify"). However, defendant asks this Court to "require affirmative record documentation that the defendant understood that he had the right to testify, that the decision was his alone to make and could not be overridden by counsel, and that consequences flow from the exercise and waiver of the right."

Defendant argues that just as an accused's failure to request counsel on his own does not constitute a waiver of counsel in the context of custodial interrogations, defendant's failure to notify the trial court on his own cannot constitute a waiver of defendant's right to testify. We reject this argument. Unlike an accused in a custodial interrogation, defendant in this case had two defense attorneys representing him. We find no reason to overrule our decision in *Hayes*.

[3] Defendant next contends that the State's failure to prove robbery with a dangerous weapon made the evidence insufficient to establish felony murder. The robbery indictment alleged that defendant took a briefcase and $3,525 "from the presence, person, place of business, and residence of Donald James Hunt." Likewise, the murder indictment alleged that defendant murdered "Donald James Hunt." Defendant argues that the prosecution elicited evidence about property being stolen from the person of "Donald James Hunt, Jr.," not from the person of "Donald James Hunt," thereby going "outside the four corners" of the robbery indictment.

Defendant cites to *State v. Bell* for the proposition that an indictment is invalid when it names one person as the victim, but the evidence establishes that the victim was another. *State v. Bell*, 270 N.C. 25, 29, 153 S.E.2d 741, 744 (1967). In *Bell*, this Court held that the trial court should have granted the defendant's motion for judgment of

nonsuit because a "fatal variance [existed] between the indictment and the proof on [the] record." *Id.* The indictment charged that defendant robbed "Jean" Rogers and the "entire proof and the record [was] that the person robbed was 'Susan' Rogers." *Id. Bell* is distinguishable from the case at bar because contrary to defendant's claim, there *is* evidence that the briefcase belonged to the senior Donald James Hunt. Mrs. Hunt reported to the police that the perpetrators "took a briefcase that contained *their* personal papers such as marriage certificate, marriage license, birth certificate, car title and insurance papers." Mrs. Hunt's statement allowed the jury to infer that the briefcase belonged to Mr. Hunt because she identified the contents as "their" personal papers. Given that the personal papers Mrs. Hunt mentioned included a marriage certificate and a marriage license, the jury could properly infer that the briefcase belonged to Mr. Hunt, not to his son, Donald Hunt, Jr. We conclude that there is no fatal variance between the indictment and the evidence, hence, defendant's assignment of error is overruled.

Sentencing Proceeding Issues

While defendant raises numerous sentencing issues, we need address only one.

[4] Defendant contends that the trial court committed plain error in instructing the jury on the pecuniary gain aggravating circumstance. *See* N.C.G.S. § 15A-2000(e)(6) (2001). Defendant claims that the trial court's instructions "set forth an irrebuttable presumption that the aggravator existed based on the jury's determination that Mr. Jones was guilty of felony murder." We agree.

" '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. Berry*, 356 N.C. 490, 523, 573 S.E.2d 132, 153 (2002) (quoting *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)). "To constitute plain error, an error in the trial court's instruction must be [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. Robinson*, 342 N.C. 74, 81, 463 S.E.2d 218, 223 (1995) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 793 (1996).

The trial court instructed the jury as follows regarding the pecuniary gain aggravating circumstance:

> Number 1, was the murder committed for pecuniary gain? This possible aggravating circumstance may be considered in both of the two cases involving the victims Donald James Hunt and Devan Lashawn Bynum. 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 in either or both cases, that when the defendant killed the victim, the defendant was in the commission of robbery with a dangerous weapon, 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 in either or both of the cases so found. If you do not so find or have a reasonable doubt as to one or more of these things in either or both of these cases, you will not find this aggravating circumstance in that case or cases so found, and will so indicate by having your foreperson write no in that space in that case or cases.

(Emphasis added.)

The State argues that the trial court's instruction on the pecuniary gain aggravating circumstance was proper because it tracked the pattern jury instructions. The relevant portion of the pattern instruction for pecuniary gain is listed as follows:

> If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, the defendant (*describe pecuniary gain, e.g., had been hired to do so*), you would find this aggravating circumstance . . . .

N.C.P.I.—Crim. 150.10 (Oct. 1998). The emphasized portion of this instruction directs the trial judge to describe the pecuniary gain. If the trial judge did not explain or describe to the jury what constitutes pecuniary gain in a felony murder, the jury's finding of robbery with a dangerous weapon or any other felony invoking felony murder would automatically mandate the finding of the aggravator. Thus, the occurrence of a robbery with a dangerous weapon does not and cannot automatically allow the jury to find the existence of the (e)(6)

pecuniary gain aggravating circumstance. Given that the jury had already convicted defendant of robbery with a dangerous weapon in the guilt-innocence phase, the sentencing instruction left the jury with no discretion whether to find or not find the pecuniary gain aggravating circumstance. Thus, the trial judge should have described what constituted the pecuniary gain.

The State cites to *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995), to support the trial judge's instruction in this case. The jury instruction on pecuniary gain in *Bacon* was as follows:

> If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim *the defendant expected to share in the life insurance proceeds on the life of the victim*, you would find this aggravating circumstance . . . .

Id. at 99, 446 S.E.2d at 559 (emphasis added). This Court in *Bacon* held that the trial court's instruction was in accordance with the North Carolina pattern jury instructions. The State contends that the trial court's instruction in the case at bar was in accordance with the pattern jury instructions and with the trial court's instruction in *Bacon*. However, there is a critical distinction between the trial court's instruction in the present case and the trial court's instruction in *Bacon*. The trial court's instruction in *Bacon* did precisely what the pattern jury instructions called for: it described the pecuniary gain ("the defendant expected to share in the life insurance proceeds on the life of the victim"). *Id.* Unlike in *Bacon*, the trial court's instruction in this case did not describe the actual pecuniary gain. The instruction simply directed that if the jury found robbery with a dangerous weapon, then the jury would find the pecuniary gain aggravating circumstance. As such, *Bacon* does not lend support to upholding the trial court's instruction in this case.

Furthermore, the State relies on *State v. Daniels* to support the trial court's instruction in this case. *State v. Daniels*, 337 N.C. 243, 446 S.E.2d 298 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995). However, just as in *Bacon*, the trial court's instruction in *Daniels* specifically described the pecuniary gain:

> If you find from the evidence, beyond a reasonable doubt, that when the defendant killed the victim, *the defendant intended to or expected to obtain money from the victim*, you would find this aggravating circumstance . . . .

Id. at 280, 446 S.E.2d at 321 (emphasis added). Therefore, the *Daniels* instruction is also distinguishable from the trial court's instruction in the instant case because the trial court in *Daniels* described the pecuniary gain. *See State v. Barden*, 356 N.C. 316, 383, 572 S.E.2d 108, 150 (2002) (describing the pecuniary gain where the trial court instructed, "[I]f 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."), *cert. denied*, — U.S. —, 155 L. Ed. 2d 1074 (2003); *State v. White*, 355 N.C. 696, 710, 565 S.E.2d 55, 64 (2002) (describing the pecuniary gain where the trial court instructed, "[I]f you find from the evidence and beyond a reasonable doubt that when the defendant killed the victim, *the defendant obtained money as a result*, you would find this aggravating circumstance."), *cert. denied*, — U.S. —, 154 L. Ed. 2d 900 (2003); *State v. Davis*, 353 N.C. 1, 36, 539 S.E.2d 243, 266 (2000) (describing the pecuniary gain where the trial court instructed, "If you find, from the evidence beyond a reasonable doubt, that when the defendant killed the victim, that *the defendant took personal property or other items belonging to [the victim] and that he intended or expected to obtain money or property or any other thing that can be valued in money*, you would find this aggravating circumstance."), *cert. denied*, 534 U.S. 839, 151 L. Ed. 2d 55 (2001); *State v. Bishop*, 343 N.C. 518, 556, 472 S.E.2d 842, 863 (1996) (describing the pecuniary gain where the trial court instructed, "[I]f you find from the evidence beyond a reasonable doubt, that when the defendant killed [the victim], or someone acting in concert with him killed her, *the defendant took jewelry, silver and credit cards*, you would find this aggravating circumstance"), *cert. denied*, 519 U.S. 1097, 136 L. Ed. 2d 723 (1997); *State v. Jennings*, 333 N.C. 579, 620, 430 S.E.2d 188, 209 (describing the pecuniary gain where the trial court instructed, "[I]f you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, *the defendant stood to benefit from the remaining partnership accounts at . . . Merrill Lynch in the name of the decedent*, you would find this aggravating circumstance), *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993).

The State cites several cases that upheld the *submission* of the pecuniary gain aggravating circumstance in felony murder convictions. *See State v. Chandler*, 342 N.C. 742, 755, 467 S.E.2d 636, 643 (holding that the pecuniary gain aggravating circumstance was properly submitted in a burglary-felony murder case), *cert. denied*, 519 U.S. 875, 136 L. Ed. 2d 133 (1996); *Daniels*, 337 N.C. at 280, 446 S.E.2d

at 321 (holding that the prosecution provided sufficient evidence to support the pecuniary gain aggravating circumstance); *State v. Jones*, 327 N.C. 439, 452, 396 S.E.2d 309, 316 (1990) (holding that both the pecuniary gain aggravating circumstance and the course of conduct aggravating circumstance were properly submitted); *State v. Williams*, 317 N.C. 474, 486, 346 S.E.2d 405, 413 (1986) (holding that the pecuniary gain aggravating circumstance may be considered in a robbery-murder case). However, the State's use of these cases is misplaced, as defendant does not challenge the *submission* of the pecuniary gain aggravating circumstance based on robbery-felony murder in this assignment of error. Defendant finds fault with the trial court's jury instruction creating the *de facto* existence of the pecuniary gain aggravating circumstance if the jury found that defendant committed robbery with a dangerous weapon. None of these cases cited by the State are instructive, as they do not address defendant's specific assignment of error.

By instructing the jury that if it found that defendant committed robbery with a dangerous weapon, it would also find the pecuniary gain aggravating circumstance, the trial court nullified the significance of evidence tending to show that defendant did not commit the capital felony for pecuniary gain. Because the instruction did not allow the jury to consider the evidence relating to whether "the killing was for the purpose of getting money or something of value," we cannot say that this error could not have influenced the jury's finding of this aggravating circumstance. *Chandler*, 342 N.C. at 754, 467 at 643 (quoting *Jennings*, 333 N.C. at 621, 430 S.E.2d at 210). On the evidence presented, we conclude that the error in the trial court's instruction had a probable impact on the jury's recommendation of death, and it therefore constituted plain error.

Because the trial court's sentencing instruction improperly directed the jury to find the pecuniary gain aggravating circumstance based upon its determination that defendant committed robbery with a dangerous weapon, we are satisfied that the instruction constituted plain error. Accordingly, we vacate defendant's death sentence and remand this case to the trial court for a new capital sentencing proceeding.

Proportionality

Defendant argues that his death sentence is disproportionate and is imposed under the influence of passion, prejudice, and other arbitrary factors. To support his contention, defendant points out

that he was not the triggerman, that he was not present in the room in which the shootings took place, and that the triggerman received a life sentence. As defendant's death sentence is vacated and his case is remanded for a new capital sentencing proceeding, it is inappropriate for this Court to conduct a proportionality review. *See* N.C.G.S. § 15A-2000(d)(2).

NO ERROR AS TO GUILT-INNOCENCE.

DEATH SENTENCE VACATED; REMANDED FOR NEW CAPITAL SENTENCING PROCEEDING.

IN THE MATTER OF: MARGARET KAY MAY, DOB: 06-19-89

No. 566A02

(Filed 22 August 2003)

Juveniles— delinquency—affray—public place—terror

The trial court erred by adjudicating a juvenile delinquent based on its determination that the juvenile had committed the offense of common law affray arising out of an altercation between two juvenile residents at a group home, because: (1) the evidence failed to establish that an altercation in which the juvenile participated occurred in a location that satisfies the requisite "public place" element; (2) there were no individuals passing by the property who were within view or earshot of the altercation; and (3) the four witnesses, two who were there by virtue of their employment and the other two by virtue of having been assigned to live there, did not qualify as persons who might transform the facility from a private place into a public place since such altercations do not cause "terror to the people" when their presence is akin to that of family members who bear witness to a fight between siblings on the grounds of the family residence.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 153 N.C. App. 299, 569 S.E.2d 704 (2002), reversing an order entered 28 August 2001 by Judge Ernest J. Harviel in District Court, Alamance County. Heard in the Supreme Court 8 April 2003.

Roy Cooper, Attorney General, by Kathleen U. Baldwin, Assistant Attorney General, for the State-appellant.

Staples Hughes, Appellate Defender, by Anne M. Gomez, Assistant Appellate Defender, for juvenile-appellee.

BRADY, Justice.

The dispositive issue presented for review is whether the evidence presented at the hearing was sufficient to establish that an altercation in which the juvenile participated occurred in a location that satisfies the requisite "public place" element of the common-law criminal offense of affray. We conclude that the evidence fails to establish that the juvenile's conduct occurred in a qualifying "public place," and, as a consequence, we affirm the decision of the Court of Appeals.

The facts and circumstances of this case are undisputed. On 1 August 2001, in response to the report of an alleged fight, law enforcement officers were called to the grounds of the Methodist Home for Children (the Home), a group home for children in Alamance County. The juvenile, an eleven-year-old resident of the Home, was involved in an altercation with another juvenile resident.

Testimony presented at the hearing from two employees of the Home established that the altercation in question began as an argument between the two residents. According to the employees, the argument escalated into a physical confrontation that included pushing, shoving, grabbing, scratching, and pulling hair. Laura Jane Glascoss, a resident counselor at the Home and a witness to the altercation, testified that the fight began at an unspecified location on the front grounds of the Home and abated shortly thereafter. Ms. Glascoss further testified that the fight rekindled "after a pause" and that the second round of "shoving back and forth" had "fizzled out" before law enforcement arrived.

David Hughins, another employee of the Home, testified that he was working near the front of the Home when he heard "yelling" from the ground's "hill area" in the distance. Mr. Hughins initially thought that the noise was a consequence of residents playing together. From his vantage point, he could see four residents and Ms. Glascoss moving back toward the Home. Mr. Hughins further testified that as the group moved to within "a hundred feet" of him, he could see that two of the residents had begun fighting. He then ran toward the combatants and separated them. The two residents continued "running their

mouth[s] back at each other" as the group neared the front steps of the Home. The verbal assaults escalated into a new round of pushing and shoving. As the employees were not able to control the combatants, Mr. Hughins sought the intervention of law enforcement.

Mr. Hughins and Ms. Glascoss were the only witnesses to testify at the 23 August 2001 hearing. Neither of the two residents involved in the fight testified, and the juvenile presented no evidence on her behalf. The judge concluded that the juvenile had committed the common-law offense of affray and, accordingly, ruled that the State had proved the allegations contained in the juvenile petition beyond a reasonable doubt. The judge adjudicated the juvenile delinquent as defined by N.C.G.S. § 7B-1501(7). In the dispositional phase of the hearing, the judge ordered the juvenile to serve fourteen days in the Guilford Detention Center, with seven of those days stayed on the condition that the juvenile comply with the rules and regulations of the Home.

Upon appeal by the juvenile, a divided panel of the Court of Appeals reversed the ruling, holding that the evidence was insufficient to establish that the common-law offense of affray had occurred. *In re May*, 153 N.C. App. 299, 303, 569 S.E.2d 704, 708 (2002). The Court of Appeals concluded that there was insufficient evidence demonstrating that the altercation occurred in a public place—an essential element of an affray. The court reasoned that the altercation in question occurred on private property, not in a location open to the public. *Id.*

On appeal to this Court, the State contends that the inquiry into what constitutes an affray should not be limited to determining whether the site involved private or public property. According to the State, a more expansive inquiry would yield a finding that an affray had, in fact, occurred in the instant case. While we are unpersuaded by the State's argument that an affray occurred in the instant case, we determine that the Court of Appeals' narrow analysis of what constitutes a "public place" for the purpose of defining an affray merely contributes to what is already a murky area of the law. The concerns raised by the State therefore prompt us to clarify our law regarding the common-law offense of affray.

HISTORY AND ELEMENTS OF THE LAW OF AFFRAY

The common-law offense of affray has a long history, with American origins dating back to the eighteenth century and before.

Historically, the essential elements of affray have proved remarkably durable, surviving through the ages without substantive change. *Compare In re Drakeford*, 32 N.C. App. 113, 118, 230 S.E.2d 779, 782 (1977) (describing the offense as a fight between two or more persons, in a public place, that causes terror to the people), *with* 1 William Hawkins, *A Treatise of the Pleas of the Crown* 134-40 (Morton J. Horwitz & Stanley N. Katz eds., Arno Press 1972) (1724) (same). However, whether emanating from North Carolina, other states, or even beyond our continental shores,[1] case law has failed to provide a clear and concise definition of a "public place" for purposes of establishing this essential element of an affray. This lack of clarity is reflected in the omission of the offense of affray in the *North Carolina Pattern Jury Instructions for Criminal Cases*. Also contributing to the confusion is the failure of case law to provide a means for determining whether the fight in question caused terror to the public—the offense's third essential element. Therefore, we examine the case *sub judice* with three goals in mind: (1) to establish the criterion to assess whether a fight's attendant facts and circumstances, if proved, satisfy the "public place" element of an affray; (2) to establish the criterion to assess whether a fight caused "terror to the people"; and (3) to apply the above-referenced criteria to the present case to determine if the State met its burden of proving all three elements of affray at the hearing.

An affray is defined at common law as a fight between two or more persons in a public place so as to cause terror to the public. *State v. Wilson*, 61 N.C. 237, 237 (1867) (per curiam); *see also State v. Huntly*, 25 N.C. 418, 421 (1843) (per curiam) (recognizing that the term "affray" is derived from the French word "*effrayer*," meaning to affright). Thus, in order to prove the offense, the State must prove beyond a reasonable doubt three essential elements of the crime: (1) that there was a fight between two or more persons; (2) that the fight occurred in a "public place"; and (3) that the fight caused terror to persons who qualify as members of the public.

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1. Courts and legal scholars from around the globe have also struggled with the issue of establishing the elements of an affray. For example, in the United Kingdom, where the common-law crime has been recognized for nearly 500 years, vigorous debate over what constitutes a qualifying "public place" persists to this day. As in the instant case, much of the argument centers on developing a means for determining if a particular place was public and if witnesses to the altercation were subject to its terror. *See, e.g.*, A.T.H. Smith, *Metamorphosis of Affray*, 136 New L.J. 521 (1986); *Constituent Elements of Affray:* Cobb v. DPP, 57 J. Crim. L. pt. 2, at 133 (Neil McKittrick ed., May 1993).

Neither of the parties in the instant case takes issue with the hearing judge's conclusion that a fight took place or that it involved two persons—the juvenile and another resident of the Home. As a consequence, this, the first element of affray, is deemed satisfied and need not be further considered.

This Court has not specifically defined the parameters of what constitutes a "public place" for purposes of establishing the second element of an affray. However, examples taken from our case law indicate that the offense may be committed in two distinct types of locales that qualify as "public places." The first type includes places generally considered public by the nature of their use or intended use. Parcels and places owned and/or maintained by either a government entity or a private business and that are open to public traffic are included in this grouping. Examples include roads, streets, highways, sidewalks, shopping malls, apartment complexes, parks, and commons. Cases assessing alleged affrays that occurred in such locations have concluded, without exception, that they satisfy the "public place" requirement. *See, e.g., State v. Griffin,* 125 N.C. 692, 34 S.E. 513 (1899) (indicating that a road could be considered a qualifying public place); *Huntly,* 25 N.C. 418 (concluding that an affray occurred where the facts indicated that defendant was on a county highway).

The second type of "public place" for purposes of proving an affray is private property that is situated near enough to public thoroughfares that citizens using such thoroughfares could bear witness to the altercation. Although no precise definition of such qualification has emerged from our state's case law, examples that have been held to satisfy the "public place" requirement include private property within view or earshot of a sidewalk or street. *See, e.g., State v. Gladden,* 73 N.C. 150 (1875) (indicating that a grocery store, a private business establishment, and an adjoining commercial stable, all of which were situated near a public roadway, would have qualified as a public place for purposes of an affray).[2] The above-

2. Although the Court of Appeals' dissent in the instant case cites to *State v. Fritz,* 133 N.C. 725, 45 S.E. 957 (1903), as an example of private property serving as a public place for purposes of affray, *May,* 153 N.C. App. at 304, 569 S.E.2d at 708 (Hunter, J., dissenting), we note that the facts and circumstances in *Fritz* fail to reflect that the fight took place on private property or that it had occurred within view or earshot of a public street or thoroughfare. In its summary of the facts and circumstances, the Court in *Fritz* described the fight as taking place at "a certain corner tree." *Fritz,* 133 N.C. at 726, 45 S.E. at 958. Neither the location of the tree nor its relation to other landmarks, private or public, was further specified.

noted examples generally comport with the treatise-based definitions of "public places" for purposes of an affray. *See, e.g.*, Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 480 (3d ed. 1982) (noting that the term "public place" includes "any place open to public view and close enough to the public so that fighting there may tend to cause public alarm").

As for the third element of affray—that the fight caused "terror to the people"—prior cases have established that such terror may be demonstrated where the fight at issue " 'affrighteth and maketh men affraid.' " *Huntly*, 25 N.C. at 421 (quoting 3 Edwardo Coke, *Institutes of the Laws of England* *158). Thus, it is clear that actual fear experienced by members of the public satisfies the terror element. In *Fritz*, 133 N.C. 725, 45 S.E. 957, this Court implied that *members of the public* were assumed to be terrorized by virtue of their presence at an alleged affray, even though there was no evidence that any of the seven spectators had actually been placed in peril. This Court, however, has not definitively resolved the question of whether "terror to the people" may simply be presumed if the fight occurs in a qualifying public place, even if no members of the public were there to witness the event. Other states that have approved such presumed terror include Alabama, *see Carwile v. State*, 35 Ala. 392, 394 (1860) (concluding that an affray occurred where the fight took place at a location that could be seen from the street), and South Carolina, *see State v. Sumner*, 36 S.C.L. 53, 53 (S.C. Ct. App. 1850) (indicating that the affray in question took place "in the corporate limits" of a city).

APPLICATION OF THE LAW OF AFFRAY TO THE INSTANT CASE

The undisputed evidence presented at the hearing showed that the juvenile fought with a fellow juvenile resident on the grounds of the Home where the two were living in August 2001. As indicated *supra*, the evidence satisfies the first element of affray, that there was, in fact, a fight, and we therefore need not consider this element further.

We will accordingly examine the hearing judge's ruling that the fight at issue occurred in a "public place," the second element necessary to prove an affray. As neither party offered any evidence showing, or even suggesting, that the fight took place on the first type of qualifying locale—a place generally considered public by the nature of its use or intended use—this type of "public place" has no bearing on the instant case.

We therefore confine our examination of the "public place" requirement to the second qualifying type: private property that is situated near enough to public thoroughfares that individuals using such thoroughfares could bear witness to the altercation. This Court must determine if there is ample evidence showing that the site of the altercation occurred in a place, although private property, that qualifies as a public place for purposes of proving the offense of affray.

The key to resolving the "public place" question in the case *sub judice* hinges less on the evidence actually presented than on potential evidence that was not introduced at the district court hearing. There are simply too many relevant questions regarding the "public place" element of affray that are unanswered by the evidence presented at the hearing. For instance, where precisely did the altercation take place? The record shows that the incident originated on or near a walkway on the grounds of the group Home. The record also shows that the altercation originated more than one hundred feet from the Home and continued as the combatants moved toward the front steps of the Home. However, no evidence was offered estimating the overall size of the property, describing the general characteristics of its terrain, or depicting the distance and characteristics of its surrounding properties. From hearing testimony, the most we can ascertain about the Home's grounds is that it extends over one hundred feet from one of the Home's structures and that there is a "hill area" located in front of the property. Another pertinent unanswered question is whether the altercation was within earshot or view of individuals who were or could have been present on adjacent public lands or thoroughfares. However, there is no way to discern this information because there is no evidence in the record indicating how far the property extended *beyond* the location of the altercation or if the property's terrain and fixtures precluded individuals not on the property from witnessing the altercation. As a consequence, we conclude that the State failed to prove beyond a reasonable doubt that the fight occurred in a "public place." Therefore, there was insufficient evidence to establish the second element of affray.

Concluding that the State has failed to satisfy one essential element of the offense in question would normally end our examination as to whether there is sufficient evidence to convict a defendant of that offense. However, proof of the third element of affray—that the fight in question caused terror to the people—may, in certain narrowly defined circumstances, satisfy the second element, that is, the fight occurred in a "public place." A fight that occurs on private prop-

erty, beyond the view and earshot of the general public, may nevertheless be witnessed by individuals who happen to be on the property and who are subject to the terror of the altercation. If so, the establishment of the third essential element of affray—that terror to the public occurred—satisfies the second element that the fight happened in a "public place."

We therefore examine whether there was sufficient evidence to establish that the altercation in question caused terror to the people, in order to provide clarity to our jurisprudence regarding the common-law offense of affray. Thus, this Court must evaluate whether the State's evidence proves beyond a reasonable doubt that the witnesses to the fight were members of the public who were, in fact, frightened by the fight.

Our examination of the record indicates there were no individuals passing by the property who were within view or earshot of the altercation. Thus, the question of whether the third element—terror to the people—was established is limited to determining if any or all of the four individuals who actually witnessed the event were subject to terror.

As discussed *supra*, our state's appellate courts have yet to classify precisely those persons who may be subject to the terror of an apparent affray that occurs on private property. A comprehensive 200-year survey of case law of North Carolina and other states yields no standard for adequately classifying witnesses who may or may not require protection from the terror associated with fights that occur on private property. An examination of affray-related cases reveals a series of decisions suggesting a standard akin to what United States Supreme Court Justice Potter Stewart candidly referred to as an "I know it when I see it" mind-set concerning the terror element. *Jacobellis v. Ohio*, 378 U.S. 184, 197, 12 L. Ed. 2d 793, 804 (1964) (Stewart, J., concurring). In some cases, courts are persuaded by the number of witnesses, while in others, the courts have deemed the number of witnesses irrelevant. Yet, in other cases, the courts' paramount consideration is the relationship between the witnesses and the combatants, while others do not consider that relationship a factor for consideration.

In *Fritz*, 133 N.C. at 728, 45 S.E. at 958, the case that has been cited as the definitive North Carolina affray case, this Court held a century ago that the actual presence of *seven* spectators to a fight placed them in harm's way and, therefore, rendered them subject to

the fight's terror. The analysis of the opinion, however, did not identify the relationship, or lack thereof, between the combatants and the terrorized witnesses.

In an opinion predating *Fritz*, the Alabama Supreme Court held that where two among just three persons fight in a field surrounded by a forest that is situated a mile from any highway or other public place, the third person witnessing the event was not a qualifying member of the public for purposes of experiencing the terror associated to an affray. *Taylor v. State*, 22 Ala. 15, 16 (1853). Similar to our Court's holding in *Fritz*, Florida's court of appeals held that the number of witnesses, *without even considering their relations to the combatants*, can sometimes satisfy the terror element for purposes of determining whether an affray occurred on private property. *D.J. v. State*, 651 So. 2d 1255, 1256 (Fla. Dist. Ct. App. 1995) (per curiam) (holding that the presence of approximately one-hundred witnesses to a fight on private property is enough to show potential for terror). Georgia's Supreme Court, however, concluded that the presence of not "more than a dozen or fifteen people" who witnessed a fight among six others on private property were not among those members of the public who could be terrorized by the fight. *Gamble v. State*, 113 Ga. 701, 703, 39 S.E. 301, 302 (1901). Thus, when it comes to numbers, seven spectators *can* be enough, *Fritz*, 133 N.C. at 728, 45 S.E.2d at 958, and one hundred spectators is certainly enough, *D.J.*, 651 So. 2d at 1256, but fifteen witnesses is inadequate, *Gamble*, 113 Ga. at 703, 39 S.E. at 302, and so is one, *Taylor*, 22 Ala. at 16, reflecting a state of inconsistency among the various jurisdictions.

Regardless of jurisdiction, the current state of the law provides no definitive criteria or examples by which to judge the terror element of a fight that occurs on private property. Our review of the above and other cases not cited herein has led us to conclude that the correct analysis in evaluating whether a fight caused terror to the people is to examine the *associations* between combatants and witnesses, rather than arbitrarily relying upon the number of spectators.

The Georgia Supreme Court's decision in *Gamble* provides a semblance of circumstances most analogous to the case at issue. We conclude that the analysis in *Gamble* is most persuasive and is enhanced with a compendium of law addressing factors to consider when deciding if spectators to a fight on private property were subject to the fight's terror.

In *Gamble,* 113 Ga. at 702, 39 S.E. at 302, a fight arose at a dance party held at a private home. The court in *Gamble* first determined there was insufficient evidence showing that the fight occurred within view or earshot of a public thoroughfare. *Id.* at 703, 39 S.E. at 302. The court then examined whether the other guests qualified as members of the public for purposes of the terror element of an affray and ultimately concluded they did not qualify. In the Georgia court's view, while a private locale may be rendered public when people are afforded the privilege of being there without invitation, such a place is *not* made public when it hosts an "assemblage of persons at a social party by express invitation." *Id.* As a consequence, the court concluded that the party guests who witnessed the altercation could not be included among those members of the public who could be terrorized by the fight. *Id.* at 703-04, 39 S.E. at 302-03.

In the instant case, we note that the spectators to the fight at issue—two adult employees of the Home and two juvenile residents of the Home—were associates of the combatants. In addition, the two adults were employed by the Home; regularly spent time there; and assisted in the Home's daily operations, including assessing and supervising its residents. The two resident witnesses lived at the Home along with the two combatants and other juvenile residents. None were social guests of the Home, at least not within the context of the holding in *Gamble.* However, we are aware of no precedent that would serve to distinguish the status of the four witnesses from that of invited guests. Our research shows that the presence of employees who are witnesses to a fight at a private facility has not been assessed for purposes of the terror element of an affray, nor has the presence of witnesses who live among combatants who fight at such a place. Nevertheless, two of the four witnesses were present at the facility by virtue of their employment, and the others were present by virtue of having been assigned to live there. Consequently, none of the four individuals was there by happenstance. *Id.* As a result, these four witnesses do not qualify as persons who might transform the facility from a private place into a public place. Both in our legal analysis and in a practical sense, we can find no justification for qualifying the four on other grounds. These four individuals had strong ties to the facility and either lived with the combatants or were employed at the facility. In our view, their presence is akin to that of family members who bear witness to a fight between siblings on the grounds of the family residence. Such altercations, put simply, cannot cause "terror to the people" within the meaning of the law of affray. As a consequence, we conclude that the fight in the instant case fails

to present one of those narrowly defined circumstances in which the second element of affray (that the fight occurred in a public place) is established by proof of the third element (that the fight caused terror to the people). Therefore, there was insufficient evidence to establish the second element of the common-law offense of affray.

We hold that the State failed to meet its burden to produce evidence sufficient to support either the second element of affray (that the fight occurred in a public place) or even the third element of affray (that the fight caused terror to the people) in its case against the juvenile. Thus, we conclude that the hearing judge erroneously denied the juvenile's motion to dismiss.

For the reasons stated herein, the decision of the Court of Appeals is affirmed.

AFFIRMED.

STATE OF NORTH CAROLINA v. CORNELIUS ALVIN NOBLES

No. 156A98-2

(Filed 22 August 2003)

Constitutional Law— Confrontation Clause—capital sentencing–absent witness—transcript of prior trial

The trial court erred during a capital sentencing proceeding by admitting the trial transcript of the testimony of an out-of-state rape victim in support of the prior violent felony aggravating circumstance. The record does not reflect any attempt to locate and produce the witness, as required by the Confrontation Clause.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a 26 September 2000 judgment imposing a sentence of death entered by Judge Charles Henry, at a capital sentencing proceeding held in Superior Court, Sampson County, upon defendant's conviction of first-degree murder. Heard in the Supreme Court 15 October 2002.

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

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

MARTIN, Justice.

Defendant was tried capitally at the 11 August 1997 session of Superior Court, Sampson County. The jury found defendant guilty of six counts of discharging a firearm into occupied property and further found defendant guilty of the first-degree murder of his wife, Ronita E. Nobles. The trial court sentenced defendant to consecutive sentences of forty to fifty-seven months each for four of the six counts of discharging a firearm into occupied property. The trial court arrested judgment for the conviction of the sixth count of discharging a firearm into occupied property and used it as the predicate felony supporting felony murder. Following a capital sentencing proceeding, the jury recommended a sentence of death for the murder, and the trial court entered judgment in accordance with that recommendation.

On appeal, this Court found no error in the guilt-innocence phase of the trial with regard to the convictions for first-degree murder and discharging a firearm into occupied property. *State v. Nobles*, 350 N.C. 483, 517, 515 S.E.2d 885, 905-06 (1999) (*Nobles I*). Because of instructional error at the capital sentencing proceeding, we vacated the death sentence and remanded the case for a new capital sentencing proceeding. *Id.*

On remand, a capital sentencing proceeding was held at the 25 August 2000 session of Sampson County Superior Court. The jury found two aggravating circumstances: (1) defendant had previously been convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3) (2001); and (2) defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person, N.C.G.S. § 15A-2000(e)(10). The jury rejected the three statutory mitigating circumstances submitted: (1) the murder was committed while the defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(6); and (3) the statutory catchall, N.C.G.S. § 15A-2000(f)(9). The jury

found twenty-five nonstatutory mitigating circumstances. On 26 September 2000, the jury unanimously recommended that defendant be sentenced to death, and the trial court entered judgment in accordance with that recommendation.

Defendant argues that the trial court improperly admitted evidence in support of the (e)(3) aggravating circumstance, "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). Defendant was convicted of rape in 1988. At the time of defendant's capital sentencing proceeding in August 2000, the victim from this prior crime (K.S.) was not a resident of North Carolina. To establish the (e)(3) aggravating circumstance, the prosecution introduced K.S.'s transcribed testimony from the 1988 rape trial. During the state's presentation of evidence, the prosecutor and his assistant role-played K.S.'s testimony from the previous trial, including cross-examination.

Defendant objected to the presentation of the transcript, arguing that unless K.S. testified in person and was subject to cross-examination, defendant's confrontation rights would be violated. On appeal, defendant argues the trial court committed reversible error by admitting the prior testimony of an available witness at the sentencing proceeding. Specifically, defendant maintains that he was not afforded the right to confront the witnesses against him, guaranteed by the Confrontation Clauses of the North Carolina Constitution, N.C. Const. art. I, § 23, and the United States Constitution, U.S. Const. amend. VI. Defendant further maintains that the admission of the testimony from the previous criminal trial violated his rights to due process and to a fair and reliable sentencing proceeding.

"The Confrontation Clause of the Sixth Amendment, made applicable to the states by the Fourteenth Amendment, guarantees a criminal defendant the right 'to be confronted with the witnesses against him.' " *State v. Jaynes*, 353 N.C. 534, 554, 549 S.E.2d 179, 195 (2001) (quoting U.S. Const. amend. VI), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 220 (2002). " 'The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.' " *Lilly v. Virginia*, 527 U.S. 116, 123-24, 144 L. Ed. 2d 117, 126 (1999) (quoting *Maryland v. Craig*, 497 U.S. 836, 845, 111 L. Ed. 2d 666, 678 (1990)). We have generally construed the right to confrontation under our state constitution consistent with its federal counterpart. *See, e.g., State v. Fowler*, 353 N.C. 599, 614-15, 548 S.E.2d 684, 696 (2001), *cert. denied*, 535 U.S.

939, 152 L. Ed. 2d 230 (2002); *State v. Jackson*, 348 N.C. 644, 653-54, 503 S.E.2d 101, 107 (1998); *State v. Deanes*, 323 N.C. 508, 524, 374 S.E.2d 249, 260 (1988), *cert. denied*, 490 U.S. 1101, 104 L. Ed. 2d 1009 (1989). As the United States Supreme Court stated in *Pointer v. Texas*, 380 U.S. 400, 405, 13 L. Ed. 2d 923, 927 (1965), "[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." As such, the transcribed testimony of a witness from a prior judicial proceeding is generally admissible only in those instances where the government has demonstrated the unavailability of the witness to testify in person. *See White v. Illinois*, 502 U.S. 346, 353-54, 116 L. Ed. 2d 848, 858 (1992); *Ohio v. Roberts*, 448 U.S. 56, 65, 65 L. Ed. 2d 597, 607 (1980); *Mancusi v. Stubbs*, 408 U.S. 204, 211, 33 L. Ed. 2d 293, 300 (1972); *Barber v. Page*, 390 U.S. 719, 722, 20 L. Ed. 2d 255, 258-59 (1968).

In *Roberts*, the United States Supreme Court stated that the Confrontation Clause envisions

> "a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

448 U.S. at 63-64, 65 L. Ed. 2d at 606 (quoting *Mattox v. United States*, 156 U.S. 237, 242-43, 39 L. Ed. 409, 411 (1895)). The Court in *Roberts* applied a two-pronged test to evaluate a Confrontation Clause challenge to the admission of the preliminary hearing testimony of a witness not produced at the defendant's subsequent criminal trial. *Id.* at 65-66, 65 L. Ed. 2d at 607-08. Under the so-called "Rule of Necessity" prong, the state must either produce or demonstrate the unavailability of the witness. *Id.* at 65, 65 L. Ed. 2d at 607. A " 'witness is not "unavailable" for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial.' " *Id.* at 74, 65 L. Ed. 2d at 613 (quoting *Barber*, 390 U.S. at 724-25, 20 L. Ed. 2d at 260) (alterations in original). The second prong requires the state to show that the challenged statements possess sufficient "indicia of reliability." *Id.* at 65-66, 65 L. Ed. 2d at 607-08.

This Court has also recognized the constitutional "preference for live testimony," which is premised upon the fundamental "importance of cross-examination, 'the greatest legal engine ever invented for the discovery of truth.' " *Jackson*, 348 N.C. at 654, 503 S.E.2d at 107 (quoting *White*, 502 U.S. at 356, 116 L. Ed. 2d at 859). As argued by defendant, "[w]hen two versions of the same evidence are available, long-standing principles of the law of hearsay, *applicable as well to Confrontation Clause analysis*, favor the better evidence." *United States v. Inadi*, 475 U.S. 387, 394, 89 L. Ed. 2d 390, 398 (1986) (emphasis added). "While the Confrontation Clause and rules of hearsay may protect similar values, it would be an erroneous simplification to conclude that the Confrontation Clause is merely a codification of hearsay rules." *Jackson*, 348 N.C. at 649, 503 S.E.2d at 104 (citing *California v. Green*, 399 U.S. 149, 155, 26 L. Ed. 2d 489, 495 (1970)). In determining whether the admission of statements at trial violates the Confrontation Clause, this Court has adopted the two-part *Roberts* test. *Fowler*, 353 N.C. at 615, 548 S.E.2d at 696. It is well settled in this jurisdiction that while the Rules of Evidence do not apply at sentencing, the right to confront witnesses does. *State v. Holmes*, 355 N.C. 719, 733, 565 S.E.2d 154, 165, *cert. denied*, — U.S. —, 154 L. Ed. 2d 412 (2002); *State v. McLaughlin*, 341 N.C. 426, 458, 462 S.E.2d 1, 18-19 (1995), *cert. denied*, 516 U.S. 1133, 133 L. Ed. 2d 879 (1996). Thus, the two-part *Roberts* analysis necessarily governs the admissibility of statements introduced during a capital sentencing proceeding.

In resolving the issue of whether the previous trial testimony was admissible at defendant's sentencing proceeding, we must first determine whether the state established that K.S. was constitutionally unavailable to testify. In short, we must determine whether the record shows that the state made good-faith efforts to locate and present K.S. *See Roberts*, 448 U.S. at 74, 65 L. Ed. 2d at 613.

The state relies on our decision in *State v. Prince*, 270 N.C. 769, 154 S.E.2d 897 (1967), and argues that the prior testimony of a witness is admissible when the witness is located out of state. *Id.* at 772, 154 S.E.2d at 899. In *Prince*, defendant objected to the former testimony of a witness who was deployed in Vietnam at the time of trial. *Id.* at 773, 154 S.E.2d at 899. *Prince* is inapposite to the instant case, however, as the state has not demonstrated, or even alleged, that K.S. was not present within the United States.

In any event, approximately one year after *Prince*, the United States Supreme Court rejected the assumption that "the mere

absence of a witness from the jurisdiction was sufficient ground for dispensing with confrontation." *Barber*, 390 U.S. at 723, 20 L. Ed. 2d at 259. "[I]f there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation. 'The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.' " *Roberts*, 448 U.S. at 74, 65 L. Ed. 2d at 613 (quoting *Green*, 399 U.S. at 189 n.22, 26 L. Ed. 2d at 514 n.22 (Harlan, J., concurring)). The prosecution need not exhaust every possible alternative for producing a witness. *State v. Grier*, 314 N.C. 59, 68, 331 S.E.2d 669, 676 (1985). Nonetheless, to demonstrate constitutional unavailability, the state's good-faith efforts must include, at a minimum, an attempt to contact the witness and request his or her presence at the proceeding.

Turning to the facts of the present case, the transcript provides little insight as to whether the state undertook any effort whatsoever to produce K.S. During jury selection, when questioned about the forecasted length of the proceeding and the issues likely to arise during sentencing, the state indicated that it intended to offer the challenged transcript to support the (e)(3) aggravating circumstance. According to the state:

> She's not in North Carolina. She's out of state and though I'm aware we could do an out-of-state subpoena, the problem with that is she was reluctant—I mean, she was unwilling, uncooperative four years ago—three years ago to come back and the availability of again—I don't, of course, that's a different issue. We will be seeking to just put in her transcript of her testimony to show the circumstances of the aggravating factor, E 3.

The trial court indicated that it did not want to engage in a discussion of the admissibility of the transcript at that time and assured defense counsel that it would have an opportunity to be heard before the actual evidentiary hearing. As promised, the trial court heard from defense counsel following jury selection. Defense counsel objected to the introduction of the transcript, citing the heightened need for reliability in capital cases and defendant's Confrontation Clause rights as guaranteed under the North Carolina and United States Constitutions. The trial court overruled the objection and concluded that "the main issues . . . are reliability and relevance and maybe something in the body of the testimony that [defense counsel] may find the court needs to consider." During the sentencing proceeding, defense counsel reiterated the previous objection but was again overruled.

It is unclear from the transcript whether the state attempted to contact K.S. prior to the instant sentencing proceeding or whether prosecutors simply relied on their recollections from the 1997 proceedings in this case. Regardless, there is simply insufficient evidence in the instant record to support a conclusion that the state employed good-faith efforts to contact and produce K.S. To begin with, the only reference to the witness occurred during jury selection, at which time the trial court indicated it did not want to discuss the admissibility of the previous trial transcript. Second, the state did not present a witness to testify, offer other evidence, or otherwise demonstrate good-faith efforts to locate and present K.S. *Cf. State v. Hunt*, 339 N.C. 622, 645-46, 457 S.E.2d 276, 289-90 (1994) (previous trial testimony properly admitted where witness was unavailable because he asserted his constitutional right against self-incrimination); *State v. Swindler*, 129 N.C. App. 1, 5, 497 S.E.2d 318, 321 (detective's testimony that a witness was unavailable because she was in the hospital following a heart attack sufficient to establish unavailability), *aff'd per curiam*, 349 N.C. 347, 507 S.E.2d 284 (1998). Accordingly, the state did not adequately demonstrate, on this record, that K.S. was constitutionally unavailable to testify in person before the jury.

Moreover, this Court has examined the concept of "unavailability" as it relates to the hearsay rules under the North Carolina Rules of Evidence. Even though there exists a preference for face-to-face confrontation at trial, Rule 804 recognizes an exception to this requirement. *Hunt*, 339 N.C. at 645, 457 S.E.2d at 289. This exception permits the admission of out-of-court statements when a declarant is determined to be "unavailable" as defined in N.C.G.S. § 8C-1, Rule 804(a). N.C.G.S. § 8C-1, Rule 804(b) (2001). The Rules of Evidence do not apply at capital sentencing proceedings; however they are instructive and "may be helpful as a guide to reliability and relevance" in capital sentencing. *State v. Greene*, 351 N.C. 562, 568, 528 S.E.2d 575, 579, *cert. denied*, 531 U.S. 1041, 148 L. Ed. 2d 543 (2000).

Although out-of-court testimony offered to prove the truth of the matter asserted is generally inadmissible as hearsay, the Rules of Evidence provide several exceptions to this rule of exclusion when a witness is "unavailable." *State v. Williams*, 355 N.C. 501, 535, 565 S.E.2d 609, 629 (2002), *cert. denied*, — U.S. —, 154 L. Ed. 2d 808 (2003). Under the Rules of Evidence, a witness is considered "unavailable" when that witness:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) Testifies to a lack of memory of the subject matter of his statement; or

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means.

N.C.G.S. § 8C-1, Rule 804(a). Before a trial court may admit hearsay testimony under Rule 804(b), it must find that at least one of the conditions listed in Rule 804(a) has been satisfied. *See, e.g.*, *State v. King*, 353 N.C. 457, 478, 546 S.E.2d 575, 592 (2001), *cert. denied*, 534 U.S. 1147, 151 L. Ed. 2d 1002 (2002). The proponent of the statement bears the burden of satisfying the requirements of unavailability under Rule 804(a). *State v. Artis*, 325 N.C. 278, 304, 384 S.E.2d 470, 484 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). The state did not satisfy any of the criteria for demonstrating unavailability as set forth in Rule 804(a). Although the statutory definition of unavailability is not dispositive of the constitutional issue presented here, it nonetheless bolsters our conclusion that the state did not properly demonstrate K.S.'s unavailability to testify at defendant's capital sentencing proceeding.

The (e)(3) aggravating circumstance may be proven in a variety of ways. We have held that the most appropriate way to show the presence of a previous conviction that satisfied the (e)(3) aggravator is the introduction of a duly authenticated court record or certified copy of the judgment. *State v. Silhan*, 302 N.C. 223, 272, 275 S.E.2d 450, 484 (1981), *overruled on other grounds by State v. Sanderson*, 346 N.C. 669, 679, 488 S.E.2d 133, 138 (1997). In fact, we have expressly stated this is the "preferred method for proving a prior conviction." *State v. Maynard*, 311 N.C. 1, 26, 316 S.E.2d 197, 211, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984). The state may also present *witnesses* to prove the circumstances of prior convictions and is not limited to the introduction 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). Nonetheless, once the state decides to present the testimony of a witness to a capital sentencing jury, the Confrontation Clause requires the state to undertake good-faith efforts to secure the "better evidence" of live testimony before resorting to the "weaker substitute" of former testimony. *Inadi*, 475 U.S. at 394-95, 89 L. Ed. 2d at 398.

The state's failure to undertake good-faith efforts to locate and produce K.S. constitutes reversible error under the facts and circumstances of the present case. The resulting constitutional error was arguably exacerbated by the state's closing argument. The prosecutor affirmatively represented during argument that he "wasn't able to bring [K.S.]" before the jury to testify. He also described K.S.'s testimony as "uncontradicted." Such statements are troubling, particularly in light of our admonition in *Nobles I* that the prosecution should not make insinuations during closing argument that are not supported by the record. *Nobles*, 350 N.C. at 517, 515 S.E.2d at 905.

When considering what evidence is necessary to support the (e)(3) aggravating circumstance and how to summarize that evidence during closing argument, prosecutors must walk a fine line. While the formal rules of evidence do not apply to capital sentencing proceedings, counsel and trial courts must nonetheless carefully evaluate the probative value of evidence against its potential to unfairly prejudice a jury. This is particularly true in capital proceedings, where the United States Supreme Court has indicated that fact-finding procedures adhere to a "heightened standard of reliability." *Ford v. Wainwright*, 477 U.S. 399, 411, 91 L. Ed. 2d 335, 347 (1986) (plurality opinion).

The Confrontation Clause requires a showing by the state that it attempted in good faith to contact the potential witness, that it attempted in good faith to inquire into her willingness and availability to testify, and that it presented the results of this inquiry to the trial court. The instant record does not adequately reflect that the state undertook these constitutionally mandated efforts to locate and produce K.S. In fact, the present record does not demonstrate that K.S. was even contacted for purposes of determining her availability to testify at defendant's capital sentencing proceeding.[1] "The right of

1. The parties have not cited any authority as to whether, for purposes of a capital sentencing proceeding, out-of-state witnesses must be subpoenaed as a prerequisite to a finding of constitutional unavailability. *See, e.g.*, N.C.G.S. § 15A-813 (2001). Because, as indicated above, the record does not reflect that the state made

confrontation may not be dispensed with so lightly." *Barber*, 390 U.S. at 725, 20 L. Ed. 2d at 260. Accordingly, we are required to order a new capital sentencing proceeding.

DEATH SENTENCE VACATED; REMANDED FOR NEW CAPITAL SENTENCING PROCEEDING.

ANGELA DAWES, ADMINISTRATRIX OF THE ESTATE OF EFFIE HENDRICKS v. NASH COUNTY AND NASH COUNTY EMERGENCY MEDICAL SERVICES, A DIVISION OF NASH COUNTY

No. 117A02

(Filed 22 August 2003)

Immunity— sovereign—insurance—exclusion—acts of EMTs

Sovereign immunity did not provide a defense to a county for a wrongful death action arising from the actions of its emergency medical technicians (EMTs) and summary judgment should not have been granted for the county. Although defendant argued that a provision in the county's insurance policy exempting EMTs from an exclusion should be read as applying to EMTs in their individual capacity, that contention is not supported by the plain language of the policy.

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. 641, 559 S.E.2d 254 (2002), affirming an order signed 2 November 2000 by Judge Quentin T. Sumner in Superior Court, Nash County. Heard in the Supreme Court 14 October 2002.

Duffus & Melvin, P.A., by R. Bailey Melvin, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr., and Mark A. Davis, for defendant-appellees.

ORR, Justice.

This case arises out of a negligence claim against emergency medical technicians (EMTs) employed by defendant Nash County.

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any attempt to locate and produce K.S., we do not reach this question in the present case.

Plaintiff contends that Nash County has waived the defense of sovereign immunity by purchasing an insurance policy pursuant to N.C.G.S. § 153A-435. Defendant Nash County argues that the proper interpretation of the policy does not provide insurance coverage for the county under the facts of this case and that sovereign immunity mandated summary judgment for the County. The trial court and a majority of the Court of Appeals agreed with defendant's position. For the reasons set forth below, we do not agree, and we therefore reverse the Court of Appeals.

On 5 September 1998, Nash County Emergency Medical Services (Nash County EMS) responded to a call for assistance concerning plaintiff's aunt, Effie Hendricks. Ms. Hendricks collapsed while attending her brother's funeral, was helped to a bed within the church, and was sitting up when EMTs arrived on the scene. Shortly after the EMTs began attending to Ms. Hendricks, she slumped over and stopped breathing. The EMTs tried several times to intubate Ms. Hendricks in order to give her oxygen, but they were unsuccessful. Upon arrival at the Nash County General Hospital emergency room, the attending physician was able to intubate Ms. Hendricks. She was diagnosed with severe anoxic encephalopathy[1], more commonly referred to as a lack of oxygen to the brain. Ms. Hendricks remained in a coma in the hospital for the week following her collapse and died on 12 September 1998.

On 19 July 2000, plaintiff Angela Dawes, as administratrix for the estate of Effie Hendricks, filed a wrongful death action against Nash County EMS. She subsequently filed an amended complaint naming Nash County and Nash County EMS, a division of Nash County, as defendants. In her amended complaint plaintiff alleged that defendants were negligent in the following respects:

(a) The paramedics who arrived on the scene failed to supply Ms. Hendricks with supplemental oxygen between 3:34 p.m. and 3:48 p.m.

(b) The Valium, which was given to Ms. Hendricks, was given in too small of a dose to have the desired effect of helping the paramedics intubate Ms. Hendricks.

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1. Anoxic is "having less than the normal amount of oxygen in the cells or tissues of the body." 2 J.E. Schmidt, M.D., *Attorneys' Dictionary of Medicine and Word Finder* A-397 (2001). Encephalopathy is a "disease of the brain." 1 J.E. Schmidt, M.D., *Attorneys' Dictionary of Medicine and Word Finder* E-87 (2001).

(c) The paramedics made repeated attempts at intubation which greatly delayed Ms. Hendricks' arrival at Nash General Hospital.

(d) Defendant's employees who cared for and treated Ms. Hendricks failed to exercise reasonable and ordinary care and diligence in the use of their skill and the application of their knowledge to Ms. Hendricks' case.

(e) Defendant's employees who cared for and treated Ms. Hendricks failed to exercise their best judgment in the treatment and care of Ms. Hendricks.

(f) Defendant's employees who cared for and treated Ms. Hendricks failed to possess the required degree of learning, skill and ability necessary to the practice of their profession which others similarly situated normally possess.

(g) Defendant was negligent in such other respects as may be shown at trial.

Defendant Nash County EMS subsequently filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. Defendants Nash County and Nash County EMS also filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

In an order signed 2 November 2000, the trial court granted the motion for judgment on the pleadings in favor of Nash County EMS and the motion for summary judgment based on sovereign immunity in favor of Nash County and Nash County EMS. Plaintiff appealed to the Court of Appeals, which affirmed the trial court's grant of summary judgment based on the affirmative defense of sovereign immunity for Nash County. Plaintiff presented no argument in its brief to the Court of Appeals as to the trial court's grant of judgment on the pleadings and summary judgment for Nash County EMS. Thus, the only issue before the Court of Appeals, and now before this Court, is whether Nash County is entitled to summary judgment based on sovereign immunity.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). The movant has the burden

of proof. *Roumillat v. Simplistic Enters.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992); *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985); *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975). "The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). In this case, the trial court ruled that summary judgment was appropriate because defendant properly asserted the affirmative defense of sovereign immunity to bar plaintiff's claim, and the Court of Appeals affirmed that ruling.

Sovereign immunity stands for the proposition that the "the State cannot be sued except with its consent or upon its waiver of immunity." *Paul L. Whitfield, P.A. v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 414 (1998); *see also Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983). "The counties are recognizable units that collectively make up our state, and are thus entitled to sovereign immunity under North Carolina law," *Archer v. Rockingham Cty.*, 144 N.C. App. 550, 553, 548 S.E.2d 788, 790 (2001), *disc. rev. denied*, 355 N.C. 210, 559 S.E.2d 796 (2002), unless the county waives immunity or otherwise consents to be sued.

N.C.G.S. § 153A-435 provides that such a waiver is manifested by the purchase of liability insurance. N.C.G.S. § 153A-435 provides in pertinent part:

> (a) A county may contract to insure itself and any of its officers, agents, or employees against liability for wrongful death or negligent or intentional damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment. The board of commissioners shall determine what liabilities and what officers, agents, and employees shall be covered by any insurance purchased pursuant to this subsection.
>
> *Purchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function. . . .*

> (b) If a county has waived its governmental immunity pursuant to subsection (a) of this section, any person, or if he dies, his personal representative, sustaining damages as a result of an act or omission of the county or any of its officers, agents, or employees, occurring in the exercise of a governmental function, *may sue the county for recovery of damages. To the extent of the coverage of insurance purchased pursuant to subsection (a) of this section, governmental immunity may not be a defense to the action.*

N.C.G.S. § 153A-435 (2001) (emphasis added). "A county may, however, waive such immunity through the purchase of liability insurance." *Doe v. Jenkins*, 144 N.C. App. 131, 134, 547 S.E.2d 124, 126 (2001), *disc. rev. dismissed as moot*, 355 N.C. 284, 560 S.E.2d 798, *and disc. rev. denied*, 355 N.C. 284, 560 S.E.2d 799 (2002). However, "[i]mmunity is waived only to the extent that the [county] is indemnified by the insurance contract from liability for the acts alleged." *Combs v. Town of Belhaven*, 106 N.C. App. 71, 73, 415 S.E.2d 91, 92 (1992), *quoted in Doe*, 144 N.C. App. at 134, 547 S.E.2d at 126.

In this case, it is uncontested that Nash County purchased a comprehensive insurance policy covering the time period in which the alleged acts of negligence took place. This policy included a separate section covering general liability that provides specifically in part the following:

> —SECTION II—
>
> GENERAL LIABILITY COVERAGE
>
> A. Coverage Agreement
>
> The Fund agrees, subject to the limitations, terms, and conditions hereunder mentioned:
>
> 1. to pay on behalf of the Participant all sums which the Participant shall be obligated to pay by reason of the liability imposed upon the Participant by law or assumed by the Participant under contract or agreement for damages on account of Personal Injuries, including death at any time resulting therefrom, suffered or alleged to have been suffered by any person or persons (excepting employees of the Participant injured in the course of their employment)[.]

Subsection H of section II defines the "Covered Persons" under the policy:

1. the Participant—the covered political subdivision named in the Contract Declarations[;]
2. any elected or appointed official of the Participant while acting within the scope of his authority, or apparent authority, expressed or implied, but only with respect to his liability while acting within the scope of his authority;
3. any employees of the Participant while acting within the scope of their duties, as such; and
4. any person or organization while acting as agent for the Participant, within the scope of his duties.

Further, the policy contained certain enumerated exclusions in subsection E of section II, titled "Exclusions Applicable to General Liability." Defendant contends that the exclusion in paragraph 18 of subsection E, titled "Hospital and Health Clinic Professional Liability," removes the alleged negligent acts of the EMTs in question from coverage under the general liability section, and thus, sovereign immunity is not waived by virtue of the county's insurance policy. That exclusion provides as follows.

18. Hospital and Health Clinic Professional Liability

    To Personal Injury to any person arising out of the rendering of or failure to render any of the following professional services:

    a. medical, surgical, dental, or nursing treatment to such person or the person inflicting the injury including the furnishing of food or beverages in connection therewith; or
    b. furnishing or dispensing of drugs or medical, dental, or surgical supplies or appliances; or
    c. handling of or performing post-mortem examinations on human bodies; or
    d. service by any person as a member of a formal accreditation or similar professional board or committee participant, or as a person charged with the duty of executing directives of any such board or committee.

> ** **However, this exclusion shall not apply to liability of county employed or county volunteer Emergency Medical Technicians.**

Plaintiff contends that the proviso at the bottom of subsection E, paragraph 18, removes EMTs from the exclusions and thus subjects Nash County to liability based upon its waiver of sovereign immunity. Defendant counters this argument by contending that this proviso applies to EMTs working in their individual capacity and not their official capacity and that sovereign immunity was therefore not waived.

Defendant argues that the exclusions were written broadly and that the proviso was written narrowly. Therefore, defendant contends the policy's intent was to "insure[] emergency medical technicians employed by Nash County for claims against them in their individual capacities alleging negligence in the performance of emergency ambulance services (to which sovereign immunity does not apply) without separately insuring Nash County for claims directly against it (since the County is protected from such claims by sovereign immunity)." Defendant further argues that had the intent of the policy been to provide coverage for EMTs, then the proviso would have been written as follows: "However, this exclusion shall not apply to any liability <u>arising out of or in connection with</u> the acts or omissions of county employed Emergency Medical Technicians." Defendant reasoned, and the Court of Appeals agreed, that the single use of the word "liability" in the proviso must refer only to the personal liability of EMTs, not to official liability, because "[s]uits against governmental employees in their official capacity do not lead to 'liability' against the individual governmental employee." *Dawes v. Nash Cty.*, 148 N.C. App. 641, 648 n.1, 559 S.E.2d 254, 259 n.1 (2002).

Our courts have long followed the traditional rules of contract construction when interpreting insurance policies. *See Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978); *McDowell Motor Co. v. New York Underwriters Ins. Co.*, 233 N.C. 251, 253, 63 S.E.2d 538, 540 (1951). As our Court explained in *Woods*,

> [t]he various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance com-

> pany and in favor of the policyholder. Whereas, if the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.

295 N.C. at 506, 246 S.E.2d at 777.

The fallacy in defendant's argument, though innovative and persuasive, is contained in the specific terms of the policy setting forth the coverage agreement. Defendant Nash County contracted with North Carolina Counties Liability and Property Insurance Pool Fund (the Fund) to create the policy at issue. Nash County is the "Participant" or the party insured as stated on the declarations page. As we stated earlier, the policy specifically provides: "The Fund agrees . . . to pay on behalf of the *Participant* all sums which the *Participant* shall be obligated to pay by reason of the liability *imposed upon the Participant* . . . under contract or agreement for damages on account of *Personal Injuries, including death* at any time resulting therefrom, suffered or alleged to have been suffered by any person or persons . . . including but not limited to, . . . Incidental Malpractice . . . ." (Emphasis added.) In subsection K of section II, "incidental malpractice" is defined as "emergency professional medical services rendered or which should have been rendered to any person or persons . . . by . . . Technicians employed by or acting on behalf of the *Participant*." (Emphasis added.) "Technician" is defined in the policy as "a certified first responder, certified emergency medical technician, certified intravenous technician, certified paramedic, or ambulance driver."

"Where a policy defines a term, that definition is to be used." *Woods*, 295 N.C. at 505-06, 246 S.E.2d at 777. Thus, the above portions of the policy plainly provide that the Fund will pay *"on behalf of the Participant"* damages incurred as the result of actions taken by the County's EMTs whether employed or voluntary. This coverage provision is consistent with the plain language of the proviso.

The exclusions in paragraph 18 "*shall not* apply to liability of county employed or county volunteer Emergency Medical Technicians." (Emphasis added.) Nothing in the coverage provision of the policy provides coverage for EMTs in their individual capacity. Coverage for liability to be paid by the Fund is available only when it is imposed against the participant (defendant Nash County) or

selected covered persons (as defined in subsection H of section II) acting in an official capacity. In order for defendant's argument to prevail, the policy in question would need to provide coverage for, and agree for the Fund to pay for, liability incurred by EMTs in their individual capacities. Nothing in the coverage agreement provides for any other entity or personnel to be insured or covered other than the participant county and those county officials and employees named in section II, subsection H, titled "Covered Persons." The argument by defendant interpreting the proviso at the bottom of section II, subsection E, paragraph 18 to cover EMTs in an individual capacity simply is not supported by the plain language of the policy. The insurer (the Fund) has in no way obligated itself to cover and pay for acts by individuals not a party to the insurance contract and for whose acts the participant is not responsible except in their official capacities.

As we have concluded that the insurance policy in question does provide coverage for defendant County for the acts of its EMTs, the County's defense of sovereign immunity cannot prevail. Therefore, we reverse the decision of the Court of Appeals, which affirmed the trial court's grant of summary judgment for the County, and we remand this case to that court for further remand to the Superior Court, Nash County, for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

J. ALAN BARRINGER AND WIFE, JENNIE S. BARRINGER v. MID PINES DEVELOPMENT GROUP, L.L.C.

No. 519A02

(Filed 22 August 2003)

Negligence; Evidence— diverted attention—phychological test results

A decision by the Court of Appeals finding error in the trial of an action to recover for injuries sustained by plaintiff when he tripped on an electrical cord at a buffet table is reversed for the reasons stated in the dissenting opinion in the Court of Appeals that (1) the trial court's refusal to give plaintiff's requested instruction on diverted attention was not error because it was not a proper statement of the law and was not supported by the evidence, and (2) the results of a psychological test administered to plaintiff by a psychologist who did not testify were properly admitted into evidence under Rule of Evidence 803(6).

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 152 N.C. App. 549, 568 S.E.2d 648 (2002), reversing a judgment entered 2 August 2000 and an order entered 27 October 2000 by Judge Ronald L. Stephens in Superior Court, Wake County, and remanding for new trial. Heard in the Supreme Court 13 March 2003.

The Jernigan Law Firm, by Leonard T. Jernigan, Jr.; N. Victor Farah; and Lauren R. Trustman, for plaintiff-appellees.

Cranfill, Sumner & Hartzog, L.L.P., by David H. Batten, Patrick H. Flanagan, and Jaye E. Bingham, for defendant-appellant.

PER CURIAM.

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

REVERSED.

ROBERT ANTHONY DAVID)
)
v.) ORDER
)
SHARON ALICIA FERGUSON)

No. 583P02

Plaintiff's petition for discretionary review is allowed for the limited purpose of remanding to the North Carolina Court of Appeals for reconsideration in light of *Rosero v. Black* (No. 322A02), filed on 13 June 2003. The temporary stay allowed on 2 December 2002 is dissolved.

By order of the Court this 19th day of June, 2003.

Orr, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
STEVEN MARK FINNEY	)	

No. 258A03

The Attorney General's motion to dismiss defendant's appeal is allowed.

On its own motion, the Court allows discretionary review as to the following issues:

1. Whether the trial court erred in admitting the hearsay testimony of Detective Harper as to statements allegedly made to him by the unavailable complainant.

2. Whether the trial court erred in not allowing the defendant to introduce the prior sworn testimony of the unavailable complainant.

3. Whether the trial court erred in its instruction on first-degree rape.

By order of the Court in Conference, this 21st day of August, 2003.

Brady, J.
For the Court

STATE OF NORTH CAROLINA)
)
v.) ORDER
)
HENRY LEE HUNT)

No. 5A86-10

The State petitions this Court to issue its writs of certiorari and prohibition to review the 9 September 2003 Order of the Honorable Gary Locklear, Superior Court Judge Presiding, staying the execution of capital defendant Henry Lee Hunt scheduled for Friday, 12 September 2003, moves the Court to prohibit further evidentiary hearing, and moves the Court to vacate the stay of execution entered by the trial court. Having reviewed the contentions of the parties and authorities cited by the parties, the Court hereby allows the State's petition for writ of certiorari for the limited purpose of entering the following order:

N.C.G.S. § 15-187 authorizes death by lethal injection as the sole manner of execution in North Carolina, and directs that "[a]ny person convicted of a criminal offense and sentenced to death shall be executed *only* by the administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent." N.C.G.S. § 15-187 (2001) (emphasis added). N.C.G.S. § 15-188 similarly provides: "In accordance with G.S. 15-187, the mode of executing a death sentence must *in every case* be by administering to the convict or felon a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent until the convict or felon is dead." N.C.G.S. § 15-188 (2001) (emphasis added). The North Carolina Department of Correction (DOC) administers three drugs: thiopental sodium (a sedative that is commonly referred to by the trademark name, Pentothal); pancuronium bromide (a muscle relaxant that is commonly referred to by the trademark name, Pavulon); and potassium chloride (a drug that stops the heart from beating).

The reasonable interpretation of the statutes in question is that in using the word "only" in N.C.G.S. § 15-187, the Legislature limited the method of execution in North Carolina to lethal injection, as opposed to asphyxiation by gas or other methods, as had been the practice in North Carolina prior to the amendment of N.C.G.S. § 15-187 in 1998. Prior to 1983, the method of execution in North Carolina was asphyxiation by lethal gas. N.C.G.S. § 15-187 (1978). Effective 5 July 1983, the Legislature amended N.C.G.S. § 15-187 and other related statutes

to provide that "at least five days prior to his execution date, [a person sentenced to death could] elect in writing to be executed by the administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent." Act of July 5, 1983, ch. 678, sec. 1, 1983 N.C. Sess. Laws 652. From 1983 until 1998, there were two methods of execution available in North Carolina—a death row inmate could elect to be executed by lethal injection, but if the inmate made no such election his execution would proceed by asphyxiation with a lethal gas. In 1998, the Legislature again amended N.C.G.S. § 15-187 and related statutes to make lethal injection the sole method of execution in North Carolina, thus eliminating asphyxiation with a lethal gas as an execution method. Act of Oct. 30, 1998, ch. 212, sec. 17.22(a), 1998 N.C. Sess. Laws 937, 1204. It was not until the 1998 amendment that the word "only" was inserted in N.C.G.S. § 15-187.

The addition of "only" to N.C.G.S. § 15-187 does not reflect a legislative intent to limit the drugs or chemicals that can be used during a lethal injection execution, but rather limits the method of execution in North Carolina solely to lethal injection instead of asphyxiation by lethal gas or some other method. *See State v. Buckner*, 351 N.C. 401, 408, 527 S.E.2d 307, 311 (2000) (noting that "when interpreting a statute, courts must look to the intent of the legislature," and "'[i]ndividual expressions must be construed as a part of the composite whole and be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit.'") (quoting *State v. Tew*, 326 N.C 732, 739, 392 S.E.2d 603, 607 (1990)). This Court has held that "[t]he will of the legislature 'must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied.'" *State v. Oliver*, 343 N.C. 202, 212, 470 S.E.2d 16, 22 (1996) (quoting *State ex rel. N.C. Milk Comm'n v. National Food Stores*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967)). Moreover, "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *Mazda Motors of Am., Inc. v. Southwestern Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979) (citations and quotations omitted).

The adverb "only" modifies "shall be executed," not "an ultra-short-acting barbiturate in combination with a chemical paralytic agent." By utilizing "only" in the statute, the Legislature did not intend

to limit the categories of drugs or chemicals that DOC can administer in carrying out lethal injection executions to "only" an ultrashort-acting barbiturate in combination with a chemical paralytic agent.

Further support for this Legislative intent can be found in N.C.G.S. § 15-188, which provides: "In accordance with G.S. 15-187, the mode of executing a death sentence must in every case be by administering to the convict or felon a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent until the convict or felon is dead." N.C.G.S. § 15-188. The phrase "must in every case be" modifies "the mode of executing a death sentence," again clearly indicating that the Legislature sought to limit the method of execution in North Carolina, not the manner in which that method (lethal injection) could be carried out. *Id.*

The State's emergency petition for writ of prohibition and the State's motion to prohibit further evidentiary hearing are ALLOWED.

Having reviewed the contentions of the parties and authorities cited by the parties, defendant's petition for writ of certiorari to review the denial of his third motion for appropriate relief based upon an allegation of actual innocence is DENIED.

The State's motion to vacate the stay of execution is ALLOWED.

By order of the Court in Conference, this 11th day of September, 2003.

Brady, J.
For the Court

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

Anderson v. Black & Decker Case below: 157 N.C. App. 716	No. 334P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-794)	Denied
Barnes v. Erie Ins. Exch. Case below: 156 N.C. App. 270	No. 187P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-197)	Denied
Bass v. Durham Cty. Hosp. Corp. Case below: 158 N.C. App. 217	No. 349A03	1. Def's (Rich) NOA Based Upon a Dissent (COA02-841) 2. Def's (Rich) PDR as to Additional Issues 3. Def's (Durham County Hospital) NOA Based Upon a Dissent 4. Def's (Durham County Hospital) PDR as to Additional Issues	1. — 2. Denied 3. — 4. Denied
Bennett v. Harmon Case below: 146 N.C. App. 447	No. 202P03	1. Plt's PWC to Review the Decision of the COA (COA00-1055) 2. Plt's PWC to Review the Order of the COA 3. Plt's Motion to Expedite Petition to Review Public Records Act (PWC to Review Order of COA)	1. Denied 2. Denied 3. Dismissed
Brown v. Woodrun Ass'n Case below: 157 N.C. App. 121	No. 233P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-704)	Denied
Campbell v. Anderson Case below: 156 N.C. App. 371	No. 190P03	Defs' PDR Under N.C.G.S. § 7A-31 (COA02-574)	Denied

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Dalenko v. Wake Cty. Dep't of Human Servs. Case below: 157 N.C. App. 49	No. 240P03	1. Plt's NOA Based Upon a Constitutional Question (COA02-377) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal 4. Defs' Conditional PDR as to Additional Issues 5. Plt's Motion for Temporary Stay 6. Plt's Petition for Writ of Supersedeas 7. Plt's Alternative Petition for Writ of Mandamus 8. Plt's (Carol Bennett) PWC to Review the Order of the COA 9. Plt's (Louis Dalenko Estate by Carol Bennett) PWC to Review the Order of the COA	1. — 2. Denied 3. Allowed 4. Dismissed as Moot 5. Denied **08/18/03** 6. Denied **08/18/03** 7. Denied **08/18/03** 8. Denied 9. Denied
Department of Transp. v. Airlie Park, Inc. Case below: 156 N.C. App. 63	No. 143PA03	Def's (Airlie Park, Inc.) PDR Under N.C.G.S. § 7A-31 (COA02-766)	Allowed
Dye v. Dye Case below: 135 N.C. App. 385	No. 180P03-2	1. Def's PWC to Review the Orders of the District Court (COA98-1324) 2. Def's PWC to Review the Decision of the COA 3. Def's Motion to Terminate This Case and All Child Support From All Malfeasant Motions and Orders from 12/86	1. Dismissed 2. Denied 3. Dismissed
Ellis v. White Case below: 156 N.C. App. 16	No. 179P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA01-1577)	Denied
Gifford v. Linnell Case below: 157 N.C. App. 530	No. 298P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-521)	Denied
Harleysville Mut. Ins. Co. v. Narron Case below: 155 N.C. App. 362	No. 093P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-137)	Denied
Harold Lang Jewelers, Inc. v. Johnson Case below: 156 N.C. App. 187	No. 166P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-429)	Denied **Martin, J. recused**

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Holcomb v. Colonial Assocs., L.L.C. Case below: 153 N.C. App. 413	No. 581A02	1. Plt's PWC as to Additional Issues (COA01-1067) 2. Defs' Conditional PWC as to Additional Issues	1. Denied 2. Denied
Howerton v. Arai Helmet, Ltd. Case below: 158 N.C. App. 316	No. 383PA03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-612)	Allowed
Hummel v. University of North Carolina Case below: 156 N.C. App. 108	No. 131PA03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-398)	Allowed
Hummer v. Pulley, Watson, King & Lischer, P.A. Case below: 157 N.C. App. 60	No. 239P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-477)	Denied **Edmunds, J., recused**
Hunter-McDonald, Inc. v. Edison Foard, Inc. Case below: 157 N.C. App. 560	No. 281P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-942)	Denied
Hyde v. Anderson Case below: 158 N.C. App. 307	No. 319P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-1039)	Denied
In re Butts Case below: 157 N.C. App. 609	No. 296A03	1. AG's Motion for Temporary Stay (COA02-531) 2. AG's Petition for Writ of Supersedeas 3. AG's NOA Based Upon a Dissent 4. AG's PDR as to Additional Issues 5. Respondent's (Travis Ray Butts) Motion to Dismiss State's PDR 6. Respondent's (Travis Ray Butts) Motion to Amend the Record on Appeal	1. Allowed **06/06/03** 2. Allowed 3. — 4. Allowed 5. Denied 6. Allowed
In re Estes Case below: 157 N.C. App. 513	No. 290P03	Petitioner's (Iredell County Department of Social Services) PDR Under N.C.G.S. § 7A-31 (COA02-971)	Denied
In re Laney Case below: 156 N.C. App. 639	No. 211P03	Respondent's (Shevalo Laney) PDR Under N.C.G.S. § 7A-31 (COA02-640)	Denied

In re Will of Barnes Case below: 157 N.C. App. 144	No. 262A03	1. Heirs-at-law to Estate of Francis M. Barnes' NOA Based Upon a Constitutional Question (COA01-1437) 2. Caveators, Beneficiaries of the 1967 Will of Francis M. Barnes' PDR as to Additional Issues 3. East Carolina University Athletic Fund's (State of N.C.) PDR as to Additional Issues 4. Heirs-at-law to Estate of Francis M. Barnes' Motion to Dismiss Appeal Filed by Caveators 5. Heirs-at-law to Estate of Francis M. Barnes' Motion to Dismiss Appeal Filed by East Carolina University Athletic Fund (State of N.C.) 6. Propounder of the 1989 Last Will and Testament of Francis M. Barnes (Joseph Thigpen) and Propounder Church of the Advent's Conditional PDR of Additional Issues 7. Propounder of the 1989 Last Will and Testament of Francis M. Barnes (Joseph Thigpen) and Propounder Church of the Advent's Conditional Petition for Remand of Issues Not Ruled on by the COA 8. Propounder and Church of the Advent's Motion to Dismiss NOA Filed by Caveators 9. Propounder and Church of the Advent's Motion to Dismiss NOA Filed by the State of N.C.	1. Dismissed ex mero motu 2. Denied 3. Denied 4. Denied 5. Denied 6. Denied 7. Denied 8. Denied 9. Denied
J.H. Batten, Inc. v. Jonesboro United Methodist Church Case below: 158 N.C. App. 542	No. 354P03	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA02-633) 2. Plt's Conditional PDR as to Additional Issues	1. Denied 2. Dismissed as Moot
Johnson v. Herbie's Place Case below: 157 N.C. App. 168	No. 246P03	Defs' (Herbie's Place and Bill Kennedy) PDR Under N.C.G.S. § 7A-31 (COA02-298)	Denied
Jolly v. Garcia's, Inc. Case below: 151 N.C. App. 597	No. 433P02	Def's Motion to Withdraw NOA and PDR (COA01-1421)	Allowed **06/30/03**

Jordan v. Earthgrains Cos. Case below: 155 N.C. App. 762	No. 120P03	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA01-1481) 2. Def's Conditional PDR as to Additional Issues	1. Denied 2. Dismissed as Moot
Kogut v. Rosenfeld Case below: 157 N.C. App. 487	No. 306A03	1. Def's NOA Based Upon a Dissent (COA02-264) 2. Def's PWC as to Additional Issues	1. — 2. Allowed
Mangum v. Johnson Case below: 157 N.C. App. 364	No. 285P03	1. Plts' PDR to Review the Decision of the COA (COA02-190) 2. Plts' Motion for Order Deeming PDR as Timely Filed 3. Plts' Motion for Leave to Convert PDR Filed on June 3, 2003 into a PWC	1. Denied 2. Allowed 3. Dismissed as Moot
Monroe v. City of New Bern Case below: 158 N.C. App. 275	No. 364P03	1. Def's NOA Based Upon a Constitutional Question (COA02-498) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed ex mero motu 2. Denied
N.C. Dep't of Env't & Natural Res. v. Carroll Case below: 157 N.C. App. 717	No. 329PA03	Respondent's PDR Under N.C.G.S. § 7A-31 (COA02-714)	Allowed
Roe v. Children's School Case below: 156 N.C. App. 218	No. 174P03	1. Def's PDR Under N.C.G.S. § 7A-31 (COA02-376) 2. Def's PWC to Review the Order of the COA	1. Denied 2. Denied
Rowe v. N.C. Farm Bureau Mut. Ins. Co. Case below: 157 N.C. App. 364	No. 271P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-539)	Denied
Shaw v. Price Waterhouse Coopers, LLP Case below: 157 N.C. App. 573	No. 308P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-923)	Denied
Smith v. First Choice Servs. Case below: 158 N.C. App. 244	No. 357P03	Def's (State Farm Fire and Casualty Company) PDR (COA02-814)	Denied

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State v. Allen Case below: Stokes County Superior Court	No. 374P03	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PWC to Review Order of Superior Court 4. AG's Motion for Extension of Time to File State's Responses to Def's PWC and Petition for Writ of Supersedeas	1. Allowed **7/24/03** Stay dissolved **08/21/03** 2. Denied 3. Denied 4. Allowed **7/30/03**
State v. Amerson Case below: 158 N.C. App. 543	No. 382P03	1. Def's NOA Based Upon a Constitutional Question (COA02-375) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
State v. Barlowe Case below: 157 N.C. App. 249	No. 230P03	1. AG's Motion for Temporary Stay (COA02-579) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed pending determination of the State's PDR **05/09/03** Stay dissolved **08/21/03** 2. Denied 3. Denied
State v. Batchelor Case below: 157 N.C. App. 421	No. 295P03	1. Def's PDR Under N.C.G.S. § 7A-31 (COA02-484) 2. AG's Motion to Dismiss Appeal	1. Denied 2. Dismissed as Moot
State v. Bennett Case below: 157 N.C. App. 717	No. 331P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-572)	Denied
State v. Bilal Case below: 154 N.C. App. 521	No. 292P03	1. Def's PWC to Review the Decision of the COA (COA02-182) 2. AG's Motion to Dismiss PDR (treated as PWC-D)	1. Denied 2. Dismissed as Moot
State v. Blackburn Case below: 157 N.C. App. 573	No. 302P03	1. Def's NOA Based Upon a Constitutional Question (COA02-489) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed

State v. Blake Case below: 157 N.C. App. 365	No. 253P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1141)	Denied
State v. Bowes Case below: 159 N.C. App. 18	No. 394A03	AG's Motion for Temporary Stay (COA02-323)	Allowed **07/30/03**
State v. Boyd Case below: 154 N.C. App. 302	No. 367P03	Def's PWC to Review the Decision of the COA (COA01-1155)	Denied
State v. Brewer Case below: 158 N.C. App. 313	No. 359P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-994)	Denied
State v. Brown Case below: 357 N.C. 382	No. 145A02	AG's Motion to Unseal *Ex Parte* Motion in Clerk's File N.C. R. App. P. 37	**See Opinion Filed 08/22/03**
State v. Caldwell Case below: 157 N.C. App. 573	No. 274P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-553)	Denied
State v. Clifton Case below: 158 N.C. App. 88	No. 342P03	1. Def's PWC to Review the Decision of the COA (COA02-601) 2. Def's Motion to Amend PWC to Review the Decision of the COA	1. Denied 2. Allowed
State v. Cooper Case below: 157 N.C. App. 142	No. 249P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-776)	Denied
State v. Covington Case below: 156 N.C. App. 698	No. 307P03	Def's PWC to Review the Decision of the COA (COA02-121)	Denied
State v. Covington Case below: 151 N.C. App. 749	No. 373P03	Def's PWC to Review the Decision of the COA (COA02-131)	Denied

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State v. Curry Case below: 156 N.C. App. 219	No. 222P03	1. Def's PWC to Review the Decision of the COA (COA02-678) (filed as a NOA-Constitutional Question) 2. Def's PWC to Review the Decision of the COA (filed as a PDR)	1. Dismissed ex mero motu 2. Denied
State v. Deal Case below: 157 N.C. App. 574	No. 291P03	1. Def's NOA Based Upon a Constitutional Question (COA02-811) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed ex mero motu 2. Dismissed
State v. Diaz Case below: 155 N.C. App. 307	No. 297P03	Def's (Ruben Aburto Diaz) PWC to Review the Decision of the COA (COA02-145)	Denied
State v. Edwards Case below: 157 N.C. App. 365	No. 257P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1266)	Denied
State v. Fisher Case below: 158 N.C. App. 133	No. 356A03	1. Def's NOA Based Upon a Dissent (COA01-1504) 2. Def's NOA Based Upon a Constitutional Question 3. Def's PDR as to Additional Issues 4. AG's Motion to Dismiss Appeal 5. AG's PDR as to Additional Issues	1. — 2. — 3. Denied 4. Allowed 5. Denied
State v. Foster Case below: 158 N.C. App. 313	No. 353P03	1. Def's NOA Based Upon a Constitutional Question (COA02-787) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
State v. Gardner Case below: 157 N.C. App. 574	No. 289P03	1. Def's PWC to Review the Decision of the COA (COA02-1098) 2. Def's PWC to Review the Order of the COA	1. Denied 2. Denied
State v. Gillespie Case below: 158 N.C. App. 313	No. 355P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1213)	Denied

State v. Groenewold Case below: 157 N.C. App. 574	No. 309P03	1. Def's NOA Based Upon a Constitutional Question (COA02-810) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
State v. Hackler Case below: 157 N.C. App. 574	No. 276P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1126)	Denied
State v. Howard Case below: 158 N.C. App. 226	No. 365P03	1. Def's NOA Based Upon a Constitutional Question (COA02-703) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
State v. Hunt Case below: Robeson County Superior Court	No. 005A86-8	Def's Conditional Motion to File a Reply Brief Pursuant to Rule 28(h)(1) of the North Carolina Rules of Appellate Procedure	Denied **07/15/03**
State v. Hunt Case below: Robeson County Superior Court	No. 005A86-9	Def's PWC to Review the Order of the Superior Court	Denied **07/15/03**
State v. Jones Case below: Wake County Superior Court	No. 395A91-7	1. Def's Motion for Stay of Execution of Judgment 2. Def's PWC to Review the Order of Superior Court 3. Def's Other Remedial Writ to Review Arbitrariness of Death Sentence (Received 8-11-03) 4. Def's Motion to Vacate Disproportionate and Excessive Death Penalty (Received 8-7-03)	1. Denied **08/14/03** 2. Denied **08/14/03** 3. Denied **08/14/03** 4. Denied **08/14/03**
State v. Jones Case below: 158 N.C. App. 465	No. 384P03	Def's PWC to Review the Decision of the COA (COA02-996)	Denied **Wainwright, J. recused**
State v. Keel Case below: Edgecombe County Superior Court	No. 134A93-10	1. Def's PWC to Review the Order of the Superior Court 2. Def's PWC to Review the Order of the Superior Court 3. Def's PWC to Review the Order of the Superior Court (on Bypass from COA)	1. Denied 2. Denied 3. Denied

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State v. Leak Case below: 153 N.C. App. 525	No. 341P03	1. Def's PWC to Review the Decision of the COA (COA02-346) (Filed as a Notice of Appeal Based Upon a Constitutional Question) 2. Def's PWC to Review the Decision of the COA (Filed as a PDR) 3. Def's PWC to Review the Order of the Superior Court	1. Dismissed ex mero motu 2. Denied 3. Denied
State v. LeGrande Case below: Stanly County Superior Court	No. 462A01	Def's PWC to Review the Order of the Superior Court	Denied
State v. Loza-Rivera Case below: 159 N.C. App. 468	No. 439P03	AG's Motion for Temporary Stay (COA02-951)	Allowed pending determination of the State's PDR **08/19/03**
State v. Mahatha Case below: 157 N.C. App. 183	No. 261P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-322)	Denied
State v. Martinez Case below: 158 N.C. App. 105	No. 286P03	1. Def's NOA Based Upon a Constitutional Question (COA02-471) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
State v. McClary Case below: 157 N.C. App. 70	No. 238P03	1. Def's NOA Based Upon a Constitutional Question (COA02-504) 2. AG's Motion to Dismiss 3. Def's PDR Under N.C.G.S. § 7A-31	1. — 2. Allowed 3. Denied
State v. McCollum Case below: 157 N.C. App. 408	No. 305A03	1. Def's Motion for Temporary Stay (COA02-797) 2. Def's NOA Based Upon a Dissent 3. Def's PDR as to Additional Issues	1. Allowed 2. — 3. Denied
State v. McGinnis Case below: 151 N.C. App. 750	No. 343P03	Def's PWC to Review the Decision of the COA (COA01-1029)	Denied

State v. McPherson Case below: 158 N.C. App. 745	No. 380P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1187)	Denied
State v. Meadows Case below: 158 N.C. App. 390	No. 372P03	1. Def's NOA Based Upon a Constitutional Question (COA02-734) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
State v. Meyer Case below: Cumberland County Superior Court	No. 379A95-4	Def's PWC to Review the Order of the Superior Court	Denied **Orr, J. recused**
State v. Miller Case below: 159 N.C. App. 608	No. 438A03	1. AG's Motion for Temporary Stay (COA02-589) 2. AG's Petition for Writ of Supersedeas 3. AG's NOA Based Upon a Dissent	1. Allowed **08/20/03** 2. Allowed 3. —
State v. Muhammad Case below: 157 N.C. App. 575	No. 303P03	1. Def's NOA Based Upon a Constitutional Question (COA02-1052) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed ex mero motu 2. Denied
State v. Muldrow Case below: 150 N.C. App. 440	No. 195P03	Def's PWC to Review the Decision of the COA (COA01-1082)	Denied
State v. Murphy Case below: 157 N.C. App. 718	No. 321P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1130)	Denied
State v. Murray Case below: 154 N.C. App. 631	No. 337P03	Def's PWC to Review the Decision of the COA (COA02-157)	Denied
State v. O'Neal Case below: 157 N.C. App. 365	No. 265P03	1. Def's NOA Based Upon a Constitutional Question (COA02-532) 2. AG's Motion to Dismiss Appeal for Lack of Substantial Constitutional Question 3. Def's PDR Under N.C.G.S. § 7A-31	1. — 2. Allowed 3. Denied

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State v. Outlaw Case below: 159 N.C. App. 423	No. 425P03	AG's Motion for Temporary Stay (COA02-584)	Denied **08/14/03**
State v. Parker Case below: Sampson County Superior Court	No. 152A97-2	Def's PWC to Review the Order of the Superior Court	Denied
State v. Parker Case below: 157 N.C. App. 575	No. 272P03	Def's (Boone) PDR Under N.C.G.S. § 7A-31 (COA02-386)	Denied
State v. Phelps Case below: 156 N.C. App. 119	No. 165A03	1. Def's NOA Based Upon a Dissent (COA02-149) 2. Def'S NOA Based Upon a Constitutional Question 3. Def's PDR as to Additional Issues 2. AG's Motion to Dismiss Appeal	1. — 2. — 3. Denied 2. Allowed
State v. Plemmons Case below: 149 N.C. App. 974	No. 223P02	1. Def's NOA Based Upon a Constitutional Question (COA01-323) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss PDR	1. Dismissed Ex Mero Motu 2. Denied 3. Dismissed as Moot
State v. Poindexter Case below: Randolph County Superior Court	No. 563A99-2	Def's Motion to Extend Time for Trial Court to Conduct Evidentiary Hearing on or Before 18 November 2003	Allowed **07/07/03**
State v. Pyle Case below: 156 N.C. App. 699	No. 327P03	Def's Motion for Appropriate Relief (COA02-495)	Denied
State v. Sartori Case below: 155 N.C. App. 776	No. 323P98-2	1. Def's PWC to Review the Decision of the COA (COA02-476) (Filed as NOA Based on Constitutional Question) 2. Def's PWC to Review the Decision of the COA (Filed as PDR)	1. Dismissed ex mero motu 2. Denied
State v. Sines Case below: 158 N.C. App. 79	No. 322P03	Def's PWC to Review the Decision of the COA (COA02-741)	Denied

State v. Squires Case below: Pitt County Superior Court	No. 428A00	1. Def's Motion to File Supplemental Brief 2. AG's Conditional Motion to File Supplemental Brief 3. Def's Motion to File Second Supplemental Brief	1. Denied **07/16/03** 2. Denied **07/16/03** 3. Denied **07/16/03**
State v. Stillwell Case below: 158 N.C. App. 314	No. 314P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-847)	Denied
State v. Tart Case below: 157 N.C. App. 366	No. 228P03	1. Def's NOA Based Upon a Constitutional Question (COA02-675) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. — 2. Allowed 3. Denied
State v. Thompson Case below: 157 N.C. App. 638	No. 317P03	1. Def's Petition for Writ of Supersedeas (COA02-1220) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion for Temporary Stay 4. Def's Petition for Writ of Supersedeas	1. Denied 2. Denied 3. Denied **06/24/03** 4. Denied
State v. Vassey Case below: 154 N.C. App. 384	No. 054P03	Def's PWC to Review the Decision of the COA (COA02-229)	Denied
State v. Wall Case below: 157 N.C. App. 143	No. 241P03	Def's PDR under N.C.G.S. § 7A-31 (COA02-115)	Denied
State v. Williams Case below: 157 N.C. App. 576	No. 333P03	1. Def's NOA Based Upon a Constitutional Question (COA02-1334) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
State v. Wilson Case below: 158 N.C. App. 315	No. 360A03	1. Def's NOA Based Upon a Constitutional Question (COA02-1106) 2. AG's Motion to Dismiss Appeal	1. — 2. Allowed

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State v. Woods Case below: Forsyth County Superior Court	No. 228A95-2	Def's PWC to Review the Order of the Superior Court	Allowed for special purpose of remand to trial court for hearing on IAC. All other issues denied
Suttles v. Southeastern Health Facil. Case below: 157 N.C. App. 143	No. 221P03	1. Plt's PWC to Review the Decision of the COA (COA02-940) 2. Plt's Motion to Supplement PWC to Review the Decision of the COA	1. Denied 2. Allowed
Taylor v. K-Mart Corp. Case below: 154 N.C. App. 522	No. 640P02-2	Plt's PWC to Review the Decision of the COA (COA02-329)	Denied
Teague v. Isenhower Case below: 157 N.C. App. 333	No. 259P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-788)	Denied
Telley v. McClinton Case below: 157 N.C. App. 718	No. 284A03	Def's NOA Based Upon a Constitutional Question (COA02-1074)	Dismissed ex mero motu
Wilson v. Ventriglia Case below: 156 N.C. App. 700	No. 200P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-216)	Denied
Woodburn v. N.C. State Univ. Case below: 156 N.C. App. 549	No. 215P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-262)	Denied **08/13/03**

PETITIONS TO REHEAR

Gilbert v. N.C. Farm Bureau Mut. Ins. Cos. Case below: 357 N.C. 244	No. 059A03	Plt's Petition for Rehearing	Denied
Stephenson v. Bartlett Case below: 357 N.C. 301	No. 094PA02-2	Defs' Petition for Rehearing	Denied **Orr, J. and Martin, J., recused**

APRIL SHIPMAN v. CASEY SHIPMAN

No. 71A03

(Filed 2 October 2003)

1. Child, Support, Custody, and Visitation— custody—change of circumstances—findings

The evidence in a child custody proceeding supported ten findings concerning substantial changes in circumstances affecting the welfare of the child. The findings involved the mother moving frequently; moving herself and the child in with her boyfriend; working deceitfully to deprive defendant of visitation; allowing the child to stay in her mother's home, where she had been molested; and initiating a spiteful criminal action against defendant's mother. Although a judge in the Court of Appeals thought that the trial court failed to make findings of fact as to how the change of circumstances affected the welfare of the child, those effects are self-evident in this case.

2. Child Support, Custody, and Visitation— custody—change of circumstances—conclusion supported by findings

A trial court's conclusion in a child custody order that a substantial change in circumstances affected the welfare of the child supported the findings. The trial court was satisfied that the child's welfare had been adversely affected by defendant's failure to pay adequate child support, plaintiff's failure to provide a stable home environment, plaintiff's failure to ensure that defendant was accorded visitation, and plaintiff's failure to institute or sustain contact with defendant's family. Defendant's new employment, new house, and impending marriage were properly considered as changes likely to have a beneficial effect.

3. Child Support, Custody, and Visitation— custody—change of circumstances—best interest of child

The trial court did not err by deciding that a change of circumstances warranted a modification of a child custody order. The court considered the significance of the changes and the effects of those changes and concluded that the best interests of the child would be promoted by a change in custody. Trial courts are encouraged to pay particular attention in their findings to explaining whether any change in circumstances can be deemed substantial, whether that change affected the welfare

of the minor child, and why modification is in the child's best interests.

Justice ORR dissenting.

Justice PARKER joins in the dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 155 N.C. App. 523, 573 S.E.2d 755 (2002), affirming an order entered 5 October 2001 by Judge Laura J. Bridges in District Court, Henderson County. Heard in the Supreme Court 6 May 2003.

Wade Hall for plaintiff-appellant.

Edwin R. Groce; and Bazzle & Carr, P.A., by Eugene M. Carr III, for defendant-appellee.

BRADY, Justice.

The dispositive issue before this Court is whether the trial court's findings of fact were adequate to support its conclusion of law that a substantial change in circumstances warranted a modification of the custody arrangement regarding the parties' minor child. A divided panel of the Court of Appeals concluded that the trial court's findings of fact supported its conclusion of law. For the reasons stated below, we affirm the decision of the Court of Appeals.

On 5 October 1999, April Shipman (plaintiff) and Casey Shipman (defendant) entered into a post-separation consent order, in which the parties agreed to the joint custody of their only child, Spencer. The order also granted plaintiff primary care, physical custody, and control of the parties' minor child, and established visitation for defendant. In addition, defendant was required to pay $110.00 per week in child support.

In May 2001, defendant moved for sole custody of Spencer, alleging that "a material change" in circumstances had occurred and that such a change had affected the child's welfare. Defendant also admitted that his child support obligation was in arrearage and requested that the trial court vacate his support obligations if he agreed to pay the arrearage. In support of his motion seeking sole custody, defendant alleged that plaintiff's relationship with her boyfriend, Christopher Vaughn, created abusive and neglectful living conditions that were not in Spencer's best interests. Defendant also alleged that

plaintiff had denied defendant any visitation with the child in violation of the 5 October 1999 consent order. Plaintiff denied defendant's allegations and requested that the trial court hold defendant in contempt for his failure to pay child support in accordance with the consent order.

After a hearing on the matter, the trial court concluded that a substantial change of circumstances affecting Spencer's welfare had occurred during the nineteen-month period between the date of the original consent order and defendant's motion for sole custody. Consequently, the trial court ordered that defendant, rather than plaintiff, be granted primary care, physical custody, and control of the minor child. The trial court also established a visitation schedule for plaintiff and ordered her to pay child support based on her earnings. Plaintiff was additionally awarded a child support credit of $5,853.22, the amount of defendant's child support arrearage at the time of the hearing.

Plaintiff's arguments to this Court can be summarized as follows: The Court of Appeals erred in concluding that (1) the trial court's findings of fact were supported by competent evidence; (2) the trial court's findings of fact were adequate to support its conclusion that a material change in circumstances affecting Spencer's welfare had been established; and (3) the trial court did not abuse its discretion in ordering that defendant be given primary care, physical custody, and control of the minor child. Plaintiff additionally argues that the Court of Appeals erred in determining that trial court's decision to modify the parties' child support obligations was premised on substantial supporting evidence.

It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a " 'substantial change of circumstances affecting the welfare of the child' " warrants a change in custody. *Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998) (quoting *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974)); *see also* N.C.G.S. § 50-13.7(a) (2001) (establishing that custody orders "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party"). The party seeking to modify a custody order need not allege that the change in circumstances had an adverse effect on the child. *Pulliam*, 348 N.C. at 619, 501 S.E.2d at 899. While allegations concerning adversity are "acceptable factor[s]" for the trial court to consider and will support modification, "a show-

ing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody." *Id.* at 620, 501 S.E.2d at 900.

As in most child custody proceedings, a trial court's principal objective is to measure whether a change in custody will serve to promote the child's best interests. *In re Custody of Peal*, 305 N.C. 640, 645-46, 290 S.E.2d 664, 667-68 (1982); *see also In re Lewis*, 88 N.C. 31, 34 (1883) (noting that "the welfare of the infants themselves is the polar star by which the discretion of the courts is to be guided"). Therefore, if the trial court does indeed determine that a substantial change in circumstances affects the welfare of the child, it may only modify the existing custody order if it further concludes that a change in custody is in the child's best interests. *Pulliam*, 348 N.C. at 629-30, 501 S.E.2d at 905-06 (Orr, J., concurring).

The trial court's examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. If the trial court concludes either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered. If, however, the trial court determines that there has been a substantial change in circumstances and that the change affected the welfare of the child, the court must then examine whether a change in custody is in the child's best interests. If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order.

When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. *Pulliam*, 348 N.C. at 625, 501 S.E.2d at 903. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

Our trial courts are vested with broad discretion in child custody matters. *Pulliam*, 348 N.C. at 624, 501 S.E.2d at 902. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to " 'detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges,' "

Surles v. Surles, 113 N.C. App. 32, 37, 437 S.E.2d 661, 663 (1993) (quoting *Newsome v. Newsome*, 42 N.C. App. 416, 426, 256 S.E.2d 849, 855 (1979)), *quoted in Pulliam*, 348 N.C. at 625, 501 S.E.2d at 903. Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence " 'might sustain findings to the contrary.' " *Pulliam*, 348 N.C. at 625, 501 S.E.2d at 903 (quoting *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975)).

In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law. *Id.* at 628, 501 S.E.2d at 904. With regard to the trial court's conclusions of law, our case law indicates that the trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of custody was in the child's best interests. If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement. *Id.*

[1] In the child custody order in the instant case, the trial court set out ten findings of fact in support of its conclusion that defendant had demonstrated that "a substantial change in circumstance[s] affecting the welfare of the minor child" had occurred. An examination of the trial court's summary of the evidence and enumerated findings of fact indicates that certain evidence played a crucial role in its determination that a substantial change in circumstances had occurred between the time of the original consent order and the date that defendant moved for sole custody.

A brief summary of the pivotal circumstances set out in the trial court evidentiary summary and findings of fact, as they relate to our analysis, follows. Regarding plaintiff, the trial court noted that although she had been a good mother and had provided good day-to-day care for the minor child, plaintiff: (1) moved frequently since the time of the original custody order; (2) had no home of her own at the time of the hearing; (3) demonstrated "instability" by moving often and not maintaining a home of her own; (4) violated the original cus-

tody order by moving in with her boyfriend, Vaughn, with her minor child present; (5) further violated the original consent order by actively working to prevent defendant from visiting with the minor child, which included a failure to inform defendant of her address and telephone number; (6) used "deceit" in her efforts to deprive defendant of visitation; (7) allowed the minor child to stay in the home of plaintiff's mother, where plaintiff had previously been molested; and (8) initiated a "spiteful" criminal prosecution against Shelia Bishop, defendant's mother and the minor child's paternal grandmother.

The trial court found only one adverse circumstance regarding defendant—that defendant had violated the consent order by failing to pay child support. The trial court found that defendant had a good relationship with the minor child, that the minor child loved defendant, and that the child looked forward to visiting with defendant. The factual findings further revealed that defendant resided in a three-bedroom home, that he was to marry the day after the hearing, and that he could provide for the minor child. The trial court also found that defendant's fiancée, Kelly Squirer, had a child near the age of Spencer and could provide defendant with assistance in caring for the child.

Our review of the record discloses that substantial evidence supported each of the trial court's relevant findings of fact. It was undisputed that plaintiff moved numerous times and often stayed in others' homes since the time of the original custody order. In addition, plaintiff did not deny she had left Spencer in the care of her mother, once for a period of up to ten days, in a location where she had been molested. The above-noted evidence unequivocally supports the trial court's characterization of plaintiff's living arrangements as unstable.

Furthermore, it was undisputed that plaintiff moved in with her boyfriend, Vaughn. Vaughn testified that the two lived together for a four-month period. Although testimony varied as to the precise dates and conditions of the living arrangement between plaintiff and Vaughn, the evidence showed that Spencer lived with the couple during the four-month period and even shared a bedroom with them for a time.

Moreover, evidence in the record supports the trial court's findings as to plaintiff's "deceit" in hiding her whereabouts from defendant as a means of preventing him from visiting with the child. At the hearing, plaintiff was elusive when questioned about her failure to

provide timely notice of address and telephone changes. The evidence tended to show that plaintiff had employed a variety of strategies aimed at concealing her and Spencer's whereabouts from defendant.

The trial court's finding as to plaintiff's deceit was also supported by another finding, that plaintiff filed a "spiteful" criminal action against defendant's mother. Evidence in the record established that plaintiff failed to appear in court to prosecute the action. Additional evidence indicated that plaintiff had previously sought a domestic violence protective order against defendant, which was later dismissed when plaintiff failed to appear in court. Hearing testimony suggested that the protective order may have been filed, not to protect plaintiff from defendant or his threats, but rather as another means to distance herself and her child from defendant. Admittedly, the trial court did not include a reference to plaintiff's filing a domestic violence protective order against defendant in its findings of fact. Nevertheless, the fact that plaintiff sought a protective order against defendant under questionable circumstances was further evidence to support the trial court's characterization of the warrant filed against defendant's mother as "spiteful."

We conclude that adequate evidence supports the trial court's finding that defendant had failed to abide by his child support obligations. Defendant did not dispute the fact that he was in arrears at the time of the hearing or that his arrearage totaled $5,853.22. We acknowledge that the trial court did not include a finding that defendant also lived with his girlfriend during the period in question. However, defendant's testimony revealed that the minor child did not spend the night in defendant's home under such conditions. It would appear that the trial court did not consider defendant's living arrangements a violation of the original consent order, which forbade either party from having "non-familial overnight guests of the opposite sex in the presence of the minor child." Because defendant's cohabitation did not violate the original order and, more important, because defendant's cohabitation could not have affected the minor child, we presume that the trial court did not consider the cohabitation a substantial change in circumstances affecting the minor child. *See Browning v. Helff*, 136 N.C. App. 420, 524 S.E.2d 95 (2000) (concluding that a parent's cohabitation alone does not constitute a substantial change in circumstances affecting the minor child).

The judge dissenting in the Court of Appeals was of the opinion that the trial court's order was incomplete in that the trial court failed

to make findings of fact as to how the change of circumstances affected the welfare of the minor child. *Shipman v. Shipman*, 155 N.C. App. 523, 531, 573 S.E.2d 755, 760 (2002) (Walker, J., dissenting). As our appellate case law has previously indicated, before a child custody order may be modified, the evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child, and flowing from that prerequisite is the requirement that the trial court make findings of fact regarding that connection. *See Carlton v. Carlton*, 145 N.C. App. 252, 262, 549 S.E.2d 916, 923 (Tyson, J., dissenting) (emphasizing the importance of a trial court's factual findings as to any effect that a change in circumstances might have on the minor child), *rev'd per curiam per dissent*, 354 N.C. 561, 557 S.E.2d 529 (2001), *cert. denied*, 536 U.S. 944, 153 L. Ed. 2d 811 (2002); *see also* 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 13.103 (5th rev. ed. 2002) [hereinafter *Lee's Family Law*] (noting that the moving party must prove what the treatise author refers to as a "nexus" between the changed circumstances and the welfare of the child). In situations where the substantial change involves a discrete set of circumstances such as a move on the part of a parent, *Carlton*, 145 N.C. App. 252, 549 S.E.2d 916; a parent's cohabitation, *Browning*, 136 N.C. App. 420, 524 S.E.2d 95; or a change in a parent's sexual orientation, *Pulliam*, 348 N.C. 616, 501 S.E.2d 898, the effects of the change on the welfare of the child are not self-evident and therefore necessitate a showing of evidence *directly* linking the change to the welfare of the child. *See generally Lee's Family Law* § 13.103 (discussing cases in which our appellate courts have required a showing of specific evidence linking the change in circumstances to the welfare of the child). Other such situations may include a remarriage by a parent or a parent's improved financial status. Evidence linking these and other circumstances to the child's welfare might consist of assessments of the minor child's mental well-being by a qualified mental health professional, school records, or testimony from the child or the parent. *See, e.g., Carlton*, 145 N.C. App. at 262, 549 S.E.2d at 923 (Tyson, J., dissenting) (noting that the trial court relied upon a psychiatric assessment of the child, the child's record of school absentees, and the child's poor school performance to assess the effects of a parent's move on the welfare of the child); *MacLagan v. Klein*, 123 N.C. App. 557, 562, 473 S.E.2d 778, 782-83 (1996) (affirming modification where the child's therapist testified that the child was experiencing emotional and physical difficulties as a result of moving with custodial parent to a new community where the child was being taught

religious beliefs that conflicted with the beliefs the child learned prior to the move), *disc. rev. denied*, 345 N.C. 343, 483 S.E.2d 170 (1997), *and overruled on other grounds by Pulliam*, 348 N.C. 616, 501 S.E.2d 898.

While, admittedly, the trial court's findings of fact do not present a level of desired specificity, the court's factual findings were sufficient for our review, given the circumstances in the instant case. Unlike the facts presented by the cases noted *supra*, the effects of the substantial changes in circumstances on the minor child in the present case are self-evident, given the nature and cumulative effect of those changes as characterized by the trial court in its findings of fact. Most notable is the effect of plaintiff's deceitful denial of visitation to defendant. We recognize that our appellate courts have previously stated that, generally, interference *alone* by the custodial parent with the noncustodial parent's visitation rights does not justify a modification of a child custody order. *See, e.g., Woncik v. Woncik*, 82 N.C. App. 244, 248, 346 S.E.2d 277, 279 (1986). In the instant case, however, the trial court's findings of fact reflected far more than the mere interference with defendant's visitation rights, warranting the court's intervention. As noted *supra*, the trial court characterized the child's relationship with defendant, his father, as a good relationship and further found that the child looked forward to seeing defendant. The trial court's findings indicate that the denial of defendant's visitation was deceitful and more than simply an interference or frustration with his rights, as it encompassed a considerable period. *See id.* (holding that where "interference [with visitation] becomes so pervasive as to harm the child's close relationship with the noncustodial parent, there can be a conclusion drawn that the actions of the custodial parent show a disregard for the best interests of the child, warranting a change of custody"). Furthermore, denying the minor child visitation with a loving father was coupled with an unequivocally unstable home life created by plaintiff's often transient living arrangements. Given our review of the trial court's factual findings, we cannot agree with the dissenting Court of Appeals' judge that the findings failed to establish that the change in circumstances had any effect on the minor child.

In sum, we conclude that there was substantial underlying evidence to support each of the trial court's ten findings of fact pertaining to whether there had been a substantial change in circumstances affecting the welfare of the minor child. As a result, we hold that the trial court's findings are conclusive on appeal.

[2] We must next determine whether the trial court's factual findings adequately support its conclusion of law that "a substantial change in circumstance[s] affecting the welfare of the minor child has occurred since the entry of the October 5, 1999 Order in this cause." The trial court's conclusion indicates its satisfaction that the minor child's welfare had been adversely affected by the following substantial changes in circumstances: (1) defendant's failure to pay adequate child support, which obviously resulted in denying the minor child the benefits that attach to such financial resources; (2) plaintiff's failure to provide a stable home environment, which resulted in denying the minor child the benefits of the security that attaches to a dependable and consistent home life; (3) plaintiff's failure to ensure that defendant was accorded his visitation opportunities, which resulted in denying the minor child the benefits of maintaining regular contact with his father; and (4) plaintiff's failure to initiate or sustain contact with defendant's family, including Spencer's paternal grandmother, which resulted in denying the minor child the benefits of access and contact with other members of his extended family. In our view, such findings provide adequate support for the trial court's initial conclusion that defendant had shown that "a substantial change in circumstance[s]" had occurred during the period following the original custody decree and that the change had affected the welfare of the minor child.

In addition to noting that a substantial change in circumstances had *adversely* affected the welfare of the minor child, the order also includes language indicating that the trial court considered changes in circumstances that could positively affect the circumstances of the minor child. *See Pulliam*, 348 N.C. at 620, 501 S.E.2d at 900 (holding that "a showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody"). In finding of fact number nine (finding 9), the trial court stated that "[d]efendant and Kelly Squirer have a three bedroom home, can provide for the child, Kelly Squirer has a four year old son and can help with the child." The evidence and testimony at the hearing showed that finding 9 was the culmination of a series of developments that occurred after the original custody decree. Defendant secured new employment, he began a relationship with Squirer, and the two bought a house together. Other testimony indicated that the two planned to marry immediately following the modification hearing and that both were employed. Thus, there is ample evidence to support the trial court's factual finding, and we conclude that the court properly considered finding 9 as an additional showing of a substantial

change in circumstances that would likely have a beneficial effect on the welfare of the minor child.

[3] We next examine whether the trial court erred by deciding that such a change of circumstances warranted a modification of the original custody order. Upon determining that a substantial change in circumstances affecting the welfare of the minor child occurred, a trial court must then determine whether modification would serve to promote the child's best interests. *Peal*, 305 N.C. at 645-46, 290 S.E.2d at 667-68. In the case at bar, the trial court considered the significance of the changes in circumstances and the effects of those changes on Spencer, and expressly concluded that "the best interest[s] of the minor child would be materially and essentially promoted" by a change in custody. Consequently, the trial court ordered a modification of the original custody agreement, granting defendant "[p]rimary care, custody[,] and control of the child."

We note that although the content of the trial court's order in the instant case is adequate for our review, the lack of specificity in the order, particularly concerning the findings of fact as to the effect of the changes in circumstances on the child's welfare, has made our review far more difficult. Given different factual circumstances, a slightly more pervasive lack of specificity could necessitate our reversal of a modification order. To avoid further confusion, we would encourage trial courts, when memorializing their findings of fact, to pay particular attention in explaining whether any change in circumstances can be deemed substantial, whether that change affected the welfare of the minor child, and, finally, why modification is in the child's best interests.

The trial court's findings of facts are supported by substantial evidence, and these findings are adequate to support the trial court's conclusions of law. Those conclusions, in turn, justify the modification of the original child custody order, including those provisions relating to defendant's child support obligations. Therefore, this Court affirms the holding of the Court of Appeals and concludes, for the reasons stated in this opinion, that the trial court's decision to modify the original custody order complied with the applicable substantive and procedural law.

AFFIRMED.

Justice ORR dissenting.

I respectfully dissent from the majority opinion.

The majority acknowledges "the trial court's findings of fact do not present a level of desired specificity." Unfortunately, the majority then proceeds to draw its own factual determinations from the recitation of the evidence found in the trial court's order. While I acknowledge that there is evidence in the record to support a determination that circumstances have changed over the course of the approximate eighteen months between the original custody determination and the modification hearing, the trial court's findings do not show that the changes were substantial *and* that they affected the welfare of the child.

The majority acknowledges a series of eight "findings." None of these findings, however, directly address the effect of the changes on the minor child; it is only assumed by the majority that the change in circumstances affected the child.

As the majority notes, where "the effects of the change on the welfare of the child are not self-evident" it necessitates "a showing of evidence *directly* linking the change to the welfare of the child. *See generally Lee's Family Law* § 13.103 (discussing cases in which our appellate courts have required a showing of specific evidence linking the change in circumstances to the welfare of the child)."

Unfortunately, it is the majority that makes the requisite linkage between the substantial change in circumstances and the purported effect on the child, not the District Court Judge. Since whatever effects there may be—if any—are not "self-evident," this case should be reversed and remanded for additional findings of fact.

Justice PARKER joins in this dissenting opinion.

KAREN McKINNEY, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF MICHAEL EDWARD McKINNEY v. JAMES EVERETT RICHITELLI

No. 203PA02

(Filed 2 October 2003)

1. Intestate Succession— bar to parents abandoning children—applies after child reaches majority

The statute barring the intestate succession rights of parents who wilfully abandon their children, N.C.G.S. § 31A-2, applies to any abandoned child dying intestate regardless of the child's age at death. A holding that the statute does not apply after the child reaches majority would effectively forgive the abandoning parent's dereliction and frustrate the statute's purpose, which was to discourage parents from shirking their responsibility of support to their children and to prevent an abandoning parent from reaping an undeserved bonanza.

2. Intestate Succession— bar to parents abandoning children—abandonment—definition and evidence

A father abandoned his child within the meaning of N.C.G.S. § 31A-2 (which bars intestate succession by parents who abandon their children) where the father did not make support payments from the time his son was four until he was eighteen; defendant states that he was unemployed or in prison for a significant part of that time but he did not attempt to modify the support order; defendant did not see his son once in fifteen years; and he had no communication with his son, even though he was allowed to write letters from prison.

3. Intestate Succession— bar to parents abandoning children—exception—resuming care and support

A defendant who had abandoned his child and who did not reestablish contact until his son was almost twenty years old could not benefit from N.C.G.S. § 31A-2(1), which contains an exception to the intestate succession bar for parents who resume care and maintenance of an abandoned child for a year before the child's death. While care pertains to love and concern for the child, maintenance refers to the financial support of a child during minority and must be renewed at least one year before the child reaches eighteen.

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. 973, 563 S.E.2d 100 (2002), reversing summary judgment entered by Judge Narley Cashwell, on 14 March 2001 in Superior Court, Wake County. Heard in the Supreme Court 3 December 2002.

Pipkin, Knott, Clark & Berger, L.L.P., by Ashmead P. Pipkin, for plaintiff-appellant.

Huggard, Obiol & Blake, P.L.L.C., by John P. Huggard, for defendant-appellee.

EDMUNDS, Justice.

Plaintiff Karen McKinney, acting individually and as the personal representative of the estate of her deceased son, Michael Edward McKinney[1] (Michael), brought this declaratory action against Michael's father, James Everett Richitelli (defendant), to determine the rights of the parties with respect to any proceeds of Michael's estate and to any proceeds of a wrongful death action brought on Michael's behalf. The Court of Appeals reversed the trial court's entry of summary judgment in favor of plaintiff. For the reasons discussed herein, we reverse the decision of the Court of Appeals.

Taken in the light most favorable to defendant, the evidence shows that plaintiff and defendant were married in 1976 and that their son, Michael, was born on 30 July 1977. Plaintiff and defendant were divorced in 1981. The district court entered a custody order awarding primary custody of Michael to plaintiff, while providing defendant visitation rights. Although the custody order required defendant to pay child support of $240.00 per month beginning on 1 October 1980, he failed to make any payments from 1 January 1981 through Michael's eighteenth birthday, 30 July 1995. Defendant admits that he had no contact or communication with Michael during this period, but explains that for most of these years, he was either incarcerated for theft and robbery convictions or suffering from drug and alcohol abuse.

Defendant's first contact with Michael after 1981 came when he wrote Michael in March 1997. At this time, Michael was nineteen years old, had been diagnosed with cancer, and would later file a medical malpractice action in which he alleged that a radiologist

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1. Michael's name was originally Michael Edward Richitelli. He later changed his name to Michael Edward McKinney.

caused his illness. By defendant's accounts, after their initial contact, he and Michael visited with each other on at least three occasions and spoke regularly by telephone before Michael's death. Between October 1997 and December 1998, defendant sent Michael six checks totaling $3,150.

Michael's medical malpractice suit was filed on 13 May 1998, and he died intestate on 21 February 1999. After plaintiff was appointed as the personal representative of Michael's estate on 19 March 1999, she amended Michael's suit to include a wrongful death claim. While the wrongful death claim was pending, plaintiff on 6 July 2000 filed a declaratory judgment complaint against defendant, seeking a judicial determination of defendant's rights to any potential award resulting from the wrongful death suit. Defendant answered and moved to dismiss the declaratory judgment action pursuant to N.C. R. Civ. P. 12(b)(6). Following discovery, plaintiff filed a motion for summary judgment claiming she was entitled to judgment as a matter of law because defendant's behavior "during the period of 1981 through July 30, 1995 constituted a willful abandonment resulting in the loss of his right to intestate succession in any part of [Michael's] estate including wrongful death proceeds."

The motions were heard in the Superior Court, Wake County, on 31 January 2001. The key issue was the interpretation of N.C.G.S. § 31A-2, "Acts barring rights of parents," which provides as follows:

> Any parent who has wil[l]fully abandoned the care and maintenance of his or her child shall lose all right to intestate succession in any part of the child's estate and all right to administer the estate of the child, except—
>
> (1) Where the abandoning parent resumed its care and maintenance at least one year prior to the death of the child and continued the same until its death; or
>
> (2) Where a parent has been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child.

N.C.G.S. § 31A-2 (2001). On 14 March 2001, the trial court denied defendant's motion to dismiss and granted plaintiff's motion for summary judgment by an order declaring "that pursuant to N.C.G.S.

§ 31A-2 defendant . . . has lost all right to intestate succession in any part of [Michael's] estate, including, but not limited to, the proceeds of any wrongful death claim because of his willful abandonment of the care and maintenance of [Michael] during his minority."

Defendant appealed, and in an unpublished opinion, the Court of Appeals reversed the trial court's judgment. *McKinney v. Richitelli*, 149 N.C. App. 973, 563 S.E.2d 100 (2002). The Court of Appeals noted that "our case law remains unclear whether a parent can resume a relationship with a child after the child reaches the age of majority and therefore fall within the first exception to N.C.G.S. § 31A-2," but concluded that a genuine issue of material fact existed as to whether defendant had resumed a relationship with Michael sufficient to invoke the exception set out in N.C.G.S. § 31A-2(1). The Court of Appeals' opinion and the briefs to this Court relied heavily on our order vacating *In re Estate of Lunsford*, 143 N.C. App. 646, 547 S.E.2d 483 (2001), a case similar to the one at issue, and remanding the case only for additional findings of fact by the trial court. *In re Estate of Lunsford*, 354 N.C. 571, 556 S.E.2d 292 (2001). However, in that order, we made no determinations as to questions of law. Because the record in the case at bar is sufficiently developed to allow us to reach the underlying issues, we do not consider arguments based on our order in *Lunsford* to be applicable.

Summary judgment may be granted in a declaratory judgment action "where '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.' " *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 178, 581 S.E.2d 415, 422 (2003) (quoting N.C.G.S. § 1A-1, Rule 56(c) (2001)). Plaintiff argues that the Court of Appeals erred in determining that a genuine issue of material fact existed as to whether defendant had resumed statutorily adequate care and maintenance of Michael.

In deciding whether summary judgment was proper in this case, we must undertake a three-fold inquiry. First, we must determine whether N.C.G.S. § 31A-2 applies after a child has reached his or her majority to prevent an abandoning parent from recovering through an offspring that was abandoned while a minor.[2] If so, we must next

2. Logically, N.C.G.S. § 31A-2 must apply to an abandonment that initially occurs while the child is a minor. After all, a parent cannot abandon an emancipated or adult child when the parent has no further responsibility for the child.

consider whether defendant abandoned Michael such that N.C.G.S. § 31A-2 precludes defendant from taking under intestate succession. Finally, if we find that defendant abandoned Michael, we must determine whether a parent who has abandoned his or her minor child may thereafter resume a parent-child relationship with the now-adult child and, by so doing, come under the exception set out in N.C.G.S. § 31A-2(1). *See* Heyward D. Armstrong, *In re Estate of Lunsford and Statutory Ambiguity: Trying to Reconcile Child Abandonment and the Intestate Succession Act*, 81 N.C. L. Rev. 1149 (2003).

[1] We observe at the outset that N.C.G.S § 31A-2 is ambiguous because nowhere in chapter 31A of the General Statutes is the term "child" defined, nor is the meaning of the term clear from its context. Thus "child" here could reasonably mean either a minor offspring or an offspring of any age. Although defendant contends that the word "child" as used in the body of the statute logically refers to a "minor child," he argues that the word "child" as used in the exception set out in N.C.G.S. § 31A-2(1) refers to a child regardless of age. Under defendant's interpretation, a parent may reconcile with his or her offspring after the child has reached majority and thereafter take if the adult child dies intestate. In contrast, plaintiff argues that under N.C.G.S. § 31A-2 the continuous abandonment of a minor child by a parent permanently terminates that parent's right to participate in the intestate share when the child reaches his or her majority. Under plaintiff's interpretation, the exception set out in N.C.G.S. § 31A-2(1) can take effect only if the reconciliation occurs while the child is still a minor.

In interpreting such a statutory ambiguity, we adhere to the following rules of construction:

> Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning. *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 232 S.E.2d 184 (1977). But where a statute is ambiguous, judicial construction must be used to ascertain the legislative will. *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E.2d 797 (1948). The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent. *Buck v. Guaranty Co.*, 265 N.C. 285, 144 S.E.2d 34 (1965). This intent "must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought

> to be remedied." *Milk Commission v. Food Stores*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967).

Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990).

Our analysis begins with *Avery v. Brantley*, 191 N.C. 396, 131 S.E. 721 (1926). In *Avery*, the father abandoned his daughter, and the issue before us was the father's ability to recover in the negligence suit brought when his intestate daughter was killed in an accident. We considered two statutes then in effect. One statute, 1 N.C. Cons. Stat. § 189 (1920), terminated the rights of a natural parent to the care, custody, and services of a child once the parent gave up the child for adoption. The other statute, 1 N.C. Cons. Stat. 137(6) (Supp. 1924), provided that a parent would inherit if a child died intestate. This second statute did not contain a provision limiting its operation when a parent had abandoned the child. Because the child in *Avery* had not been adopted, we held that the statutes could not be interpreted *in pari materia* and that the statute allowing the parents to inherit from their intestate daughter controlled. *Id.* at 400, 131 S.E. at 722. Accordingly, we concluded that the mother and father shared in the proceeds of the child's estate, even though the father had abandoned the child. *Id.* Thereafter, the General Assembly amended 137(6) to provide,

> [i]f, in the lifetime of its father and mother, a child dies intestate, without leaving husband, wife or child, or the issue of a child, its estate shall be equally divided between the father and mother. If one of the parents is dead at the time of the death of the child, the surviving parent shall be entitled to the whole of the estate. . . . Provided, that a parent, or parents, who has willfully abandoned the care, custody, nurture and maintenance of such child to its kindred, relatives or other person, shall forfeit all and every right to participate in any part of said child's estate under the provisions of this section.

Act of Mar. 9, 1927, ch. 231, 1927 N.C. Sess. Laws 591 (amending 1 N.C. Cons. Stat. § 137(6), later recodified as N.C.G.S. § 28-149(6) (1943).

With the adoption in 1960 of a new Intestate Succession Act, N.C.G.S. ch. 29, N.C.G.S. § 28-149(6) was abolished. The General Statutes Commission, "cognizant of the inadequate statutory law relating to the inheritance of property by unworthy heirs," thereupon

created a special committee to draft new legislation addressing the topic. Report of Drafting Committee to the General Statutes Commission, Special Report of the General Statutes Commission on an Act to Be Entitled "Acts Barring Property Rights," at 1 (Feb. 8, 1961). The committee responded by drafting a bill (enacted by the General Assembly and now codified as N.C.G.S. § 31A-2) that, among other provisions, prohibited abandoning parents from recovering through their intestate children. The committee stated that the purpose of this section was to "revise, broaden, and reintroduce" abolished N.C.G.S. § 28-149(6). *Id.* at 4. The committee reasoned that "[i]t seems very inequitable to allow a parent who has abandoned his child to inherit from such child when the child dies intestate." *Id.* However, the committee also provided two exceptions that allowed an abandoning parent to share in the intestate's estate. *Id.* The first of these exceptions encouraged an abandoning parent to resume his or her duties of care and maintenance of the child in an effort to renew the parent-child relationship. *See* N.C.G.S. § 31A-2(1).

It is apparent from this history that the legislative intent behind N.C.G.S. § 31A-2 was both to discourage parents from shirking their responsibility of support to their children and to prevent an abandoning parent from reaping an undeserved bonanza. Were we to hold that section 31A-2 has no application once a child reaches majority, a parent who has abandoned his or her child would nevertheless automatically inherit if the still-abandoned child died intestate after reaching the age of eighteen. Such an interpretation would frustrate the statute's purpose and effectively forgive the abandoning parent's dereliction. Therefore, we hold that N.C.G.S. § 31A-2 applies to any abandoned child dying intestate regardless of the child's age at death.

[2] We next consider whether defendant abandoned Michael. While we have observed the difficulty of formulating a uniform definition of the term, we have explained "abandonment" of a child as "wil[l]ful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962); *see also In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997).

> Abandonment has also been defined as wil[l]ful neglect and refusal to perform the natural and legal obligations of parental care and support. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial

> affection, and wil[l]fully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.

Pratt v. Bishop, 257 N.C. at 501, 126 S.E.2d at 608; *see also Lessard v. Lessard*, 77 N.C. App. 97, 100-01, 334 S.E.2d 475, 477 (1985) (utilizing the *Pratt* definitions of abandonment in the context of N.C.G.S. § 31A-2), *aff'd per curiam*, 316 N.C. 546, 342 S.E.2d 522 (1986). "Maintenance" or support refers to a parent's financial obligation to provide support during the child's minority. *See generally Wells v. Wells*, 227 N.C. 614, 44 S.E.2d 31 (1947).

Applying these precepts to this case, the evidence, even viewed in the light most favorable to defendant, demonstrates that defendant abandoned Michael. From the time Michael was four until after his eighteenth birthday, defendant violated the court's order by failing to make any child support payments. Both in her brief and at oral argument, plaintiff claimed defendant owed approximately $42,000 in arrearages accrued during Michael's minority. Although defendant states that for a significant amount of that time he was either unemployed or in prison, at no point during this period did defendant attempt to modify the child support order. Even though defendant was entitled under the support order to visit Michael on alternate weekends, holidays, and two weeks in the summer, he did not see his son even once in fifteen years. Defendant admits that he had no communication with Michael at all during this period even though he was allowed to write letters from prison during his periods of incarceration. These findings demonstrate "wil[l]ful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child." *Pratt v. Bishop*, 257 N.C. at 501, 126 S.E.2d at 608. Thus, we hold that defendant abandoned Michael as contemplated by N.C.G.S. § 31A-2.

[3] Finally, we must determine whether defendant is entitled to the benefit of the exception provided in N.C.G.S. § 31A-2(1). Defendant argues that this exception applies to any abandoned child, whether or not that child has reached majority. He reasons that although the duty of maintenance or financial support ends at majority, the duty of care applies to a child of any age. Because he provided sufficient evidence to establish that he resumed the care and maintenance of Michael at least one year before Michael's death, defendant argues that his conduct in the final two years of Michael's life restored defendant's right to inheritance. We find defendant's arguments unpersuasive.

The critical inquiry as to N.C.G.S. § 31A-2(1) is not whether a parent can resume a relationship with a child, but whether a parent "resumed its care and maintenance at least one year prior to the death of the child and continued the same until its death." N.C.G.S. § 31A-2(1). The exception requires that the parent resume both the "care *and* maintenance" of the child. *Id.* (emphasis added). These requirements may not be read in the disjunctive. As stated above, while "care" pertains to love and concern for the child, "maintenance" refers to the financial support of a child during minority. *See generally Wells v. Wells*, 227 N.C. 614, 44 S.E.2d 31. Our jurisprudence establishes that "[t]he authority of the court to require support for a normal child ceases when the legal obligation to support no longer exists. The parents' duty to support . . . cease[s] upon emancipation." *Shoaf v. Shoaf*, 282 N.C. 287, 290, 192 S.E.2d 299, 302 (1972). "The age of emancipation is precisely fixed—eighteen." *Id.* at 291, 192 S.E.2d at 303. Although a parent may have a duty of support of an older child who is still in school, N.C.G.S. § 50-13.4(c)(2) (2001), there is no evidence to indicate this provision applies here. In the case at bar, defendant did not reestablish contact with Michael until he was almost twenty years old. Even assuming that defendant presented sufficient evidence that he resumed the care of Michael, defendant cannot resume the maintenance of Michael because his legal obligation to do so ceased at eighteen.

We held above that N.C.G.S. § 31A-2 pertains to the estate of a child of any age. Under the logic of that analysis—that a parent who abandons a child should benefit from the death of the child only if the parent has resumed a parental relationship with the child—an abandoning parent who seeks to come under the exception in N.C.G.S. § 31A-2(1) must renew both the care and the maintenance of the child during the child's minority, when care and maintenance are most valuable. *See Williford v. Williford*, 288 N.C. 506, 510, 219 S.E.2d 220, 223 (1975) (although issue not squarely presented, we held that "the plaintiff father, having abandoned the deceased *when the latter was a minor child*, may not now share in the proceeds of the settlement of the claim for wrongful death now in the hands of the administratrix") (emphasis added). Under the terms of the statute, the care and maintenance must continue for a year before the child's death. Therefore, we hold that, in order to benefit from this provision, a parent must renew such care and maintenance at least one year before the child reaches the age of eighteen.

This holding not only follows from the preceding historical and textual analysis, it is also consistent with our understanding of the General Assembly's overall intent. When an adult or emancipated child discerns that a parent who had previously abandoned him or her now sincerely seeks reconciliation, the child is free to execute a will making provisions for the no-longer-wayward parent. Although we acknowledge that this argument is of limited application to the facts before us because any recovery for Michael's wrongful death would pass under the laws of intestate succession even if he had written a will, *see* N.C.G.S. § 28A-18-2(a) (2001), the larger principle that the abandoned child has the power to prevent a reconciled parent from being excluded from the child's estate informs our analysis. We believe that the General Assembly has adequately demonstrated an unwillingness to allow an abandoning parent to take from an abandoned adult child as the result of a mechanical application of the rules of intestate succession.

We hold that summary judgment in favor of plaintiff was proper in this case. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

JOSEPH PATRICK SUMMEY v. RONALD BARKER, FORSYTH COUNTY SHERIFF; AND HARTFORD INSURANCE COMPANY, SURETY; MICHAEL SCHWEITZER, CHIEF JAILER OF FORSYTH COUNTY, IN THEIR OFFICIAL CAPACITIES; LINDA SIDES; JOE MADDUX, CORRECTIONAL MEDICAL SERVICES, INC. D/B/A CORRECTIONAL MEDICAL SYSTEMS A/K/A CORRECTIONAL MEDICAL SERVICES

No. 632A02

(Filed 2 October 2003)

1. Appeal and Error— Supreme Court review of Court of Appeals—flawed Court of Appeals analysis

A Court of Appeals analysis of the exclusion of experts from a medical negligence case was fundamentally flawed because it reviewed the lower court order as a sanction for failure to comply with a discovery order, but defendants had moved for summary judgment rather than for sanctions. However, the appeal was considered in the interests of justice.

2. Discovery— deadline—extension after expiration—excusable neglect required

A judge may allow enlargement of time after the expiration of a court-ordered deadline only upon a showing of excusable neglect. Plaintiff's motion to extend the time for filing a discovery document related that a new attorney in the firm had taken over the case but cited neither rule nor statute and was properly denied.

3. Medical Malpractice— expert testimony excluded—summary judgment

Summary judgment was properly granted in a medical negligence and medical malpractice action where plaintiff's expert testimony was excluded.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 154 N.C. App. 448, 573 S.E.2d 534 (2002), affirming an order for summary judgment signed 24 September 2001 by Judge Clarence W. Carter in Superior Court, Forsyth County. Heard in the Supreme Court 5 May 2003.

Parrish, Smith & Ramsey, LLP, by Steven D. Smith, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by Allan R. Gitter and Alison R. Bost, for defendant-appellees Ronald Barker, Hartford Insurance Company, and Michael Schweitzer.

Smith Moore LLP, by Alan W. Duncan and Lisa Frye Garrison, for defendant-appellees Correctional Medical Services, Inc., and Linda Sides.

EDMUNDS, Justice.

This case is before us on appeal of right from the North Carolina Court of Appeals. On 22 October 1996, Joseph Patrick Summey (plaintiff), who had been charged with removing his daughter across state lines, was transported to the Forsyth County detention center, then held at the Forsyth County jail by officials of the State of North Carolina. Plaintiff, a hemophiliac, alleged that while in jail between 22 October 1996 and 24 October 1996 he suffered bouts of bleeding. He was twice taken to North Carolina Baptist Hospital in Winston-Salem and ultimately underwent treatment there for twelve days.

On 8 October 1999, plaintiff filed an action against Forsyth County Sheriff Ronald Barker and Forsyth County Chief Jailer Michael Schweitzer, each in his official capacity. Plaintiff also named as defendants the sheriff's surety, Hartford Insurance Company, and Linda Sides and Joe Maddux of Correctional Medical Services, Inc. The suit in part appears to contain allegations of both medical malpractice and medical negligence, and the certification required by Rule 9(j) in an action for medical malpractice is included in the complaint. *See* N.C.G.S. § 1A-1, Rule 9(j)(2001). Plaintiff also alleges affirmative wrongdoing by defendants. Plaintiff based his claims upon alleged violations of the North Carolina Constitution and of various statutory and fiduciary duties.

Although pertinent documentation has not been included in the record on appeal, plaintiff's brief asserts that law enforcement defendants Barker, Schweitzer, and Hartford Insurance Company pled the affirmative defenses of governmental immunity, public official's immunity, contributory negligence, and qualified immunity. They also moved pursuant to North Carolina Rule of Civil Procedure 12(b)(6) to dismiss plaintiff's claims. After conducting a hearing, on 14 December 1999 Judge Catherine C. Eagles denied the motion as to plaintiff's claim for medical malpractice and medical negligence, but allowed the motion as to plaintiff's claim under the North Carolina Constitution. These defendants appealed to the Court of Appeals.

On or about 7 March 2000, while the appeal of the motion to dismiss was pending in the Court of Appeals, the parties entered into a "Consent Discovery Scheduling Order" (Consent Order). *See* N.C.G.S. § 1A-1, Rule 26(f1) (2001). The Consent Order set out the time during which various discovery proceedings would take place. Specifically, plaintiff was to designate his expert witnesses within thirty days of "the expiration of all deadlines within which any party may file any appeal or response to any appeal or to any decision of the appellate courts in this case." On 3 April 2001, the Court of Appeals affirmed the trial court's order regarding the motions to dismiss. *Summey v. Barker*, 142 N.C. App. 688, 544 S.E.2d 262 (2001). Plaintiff did not thereafter designate his experts within the time allowed.

On or about 10 May 2001, the law enforcement defendants moved for summary judgment. *See* N.C.G.S. § 1A-1, Rule 56 (2001). On or about 27 July 2001, defendants Sides and Correctional Medical Services, Inc., sent plaintiff's counsel a letter notifying him that plaintiff had not timely submitted the names of his expert witnesses. That same day these defendants moved for summary judgment because of

plaintiff's failure to comply with the Consent Order. On 28 August 2001, the law enforcement officials amended their motion for summary judgment to include as a ground plaintiff's failure to comply with the Consent Order.

On 5 September 2001, plaintiff filed a "Motion to Extend Time to File and Designate Expert Witnesses Pursuant to the Consent Order Dated March 9, 2000." In a separate letter sent to defendants that day, plaintiff designated his expert witnesses, pointing out that the experts were the same individuals who had been designated in an earlier (but dismissed) lawsuit of this matter. On or about 24 September 2001, Judge Clarence W. Carter entered an "Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion for Extension of Time to Designate Experts." In this order, Judge Carter found that there were no genuine issues of material fact and ordered that the summary judgment motions of the defendants be allowed. In addition, he denied plaintiff's motion for an extension of time to designate experts.

Plaintiff appealed to the Court of Appeals, which affirmed the trial court. *Summey v. Barker*, 154 N.C. App. 448, 573 S.E.2d 534 (2002). The majority determined that exclusion of plaintiff's experts was an allowable sanction for plaintiff's failure to comply with the Consent Order and affirmed the grant of summary judgment as to all defendants. In dissent, Judge Greene argued that the trial court had erred by failing to consider lesser sanctions. Judge Greene also observed that while the majority affirmed the grant of summary judgment as to all defendants, only some of the defendants had been named in the portions of the suit dealing with medical malpractice or medical negligence. Although Judge Greene argued that the majority should consider as a separate matter whether summary judgment was appropriate as to the defendants who were not named in the medical malpractice portions of plaintiff's suit, he ultimately concluded that summary judgment was proper as to them. Accordingly, our review is limited to plaintiff's claims relating to defendants Sides and Correctional Medical Services, Inc. *See Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 463, 323 S.E.2d 23, 25 (1984).

[1] The Court of Appeals' analysis of the trial court's order for summary judgment is fundamentally flawed because its premise, that Judge Carter's order should be reviewed as a sanction for plaintiff's failure of discovery, is incorrect. Rule 26(f1) of the North Carolina Rules of Civil Procedure requires that the trial court conduct a scheduling conference in a medical malpractice action. N.C.G.S. § 1A-1,

Rule 26(f1). The rule concludes by stating that "[i]f a party fails to identify an expert witness as ordered, the court shall, upon motion by the moving party, impose an appropriate sanction, which may include dismissal of the action, entry of default against the defendant, or exclusion of the testimony of the expert witness at trial." *Id.* However, defendants did not move for sanctions pursuant to Rule 26(f1); instead, they moved for summary judgment pursuant to Rule 56. Nevertheless, in the interests of justice and to avoid additional delay, we will review plaintiff's appeal pursuant to our authority under Rule 2 of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 2.

[2] First we must determine whether Judge Carter properly denied plaintiff's motion to extend time. The motion cited neither a rule nor a statute to support the request for an extension, though it did relate that a new attorney in the firm had taken over plaintiff's case in January 2001. A judge may allow enlargement of time after the expiration of a court-ordered deadline only upon a showing of excusable neglect. N.C.G.S. § 1A-1, Rule 6(b) (2001). Plaintiff made no such showing. Accordingly, the motion for extension of time was properly denied.

[3] As a result, plaintiff's forecast of evidence could not include any expert testimony. In their summary judgment motion, defendants Sides and Correctional Medical Services, Inc. contended that because plaintiff had no experts to support his claims, defendants were entitled to summary judgment. Defendants Barker, Schweitzer, and Hartford Insurance Company reiterated that argument in their amended motion for summary judgment, in addition to their original claim that defendants' evidence demonstrated that there was no genuine issue of material fact.

Summary judgment is appropriate "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 [a] party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). On appeal of a trial court's allowance of a motion for summary judgment, we consider whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. Evidence presented by the parties is viewed in the light most favorable to the non-movant. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000).

We have reviewed the materials submitted by the parties and considered by the trial court prior to its allowing the Rule 56 motions for summary judgment. We conclude that the trial court properly allowed defendants' motions.

For the reasons stated herein, the opinion of the Court of Appeals is affirmed as modified.

MODIFIED AND AFFIRMED.

RICHARD ALLEN OVERTON v. WILLIAM ROBERT PURVIS

No. 45A03

(Filed 2 October 2003)

Negligence— last clear chance—hunter struck while standing in roadway

The decision of the Court of Appeals that the trial court erred by instructing on last clear chance in an action to recover for injuries sustained by plaintiff when he was struck by defendant's vehicle while standing in the roadway in an attempt to protect hunting dogs crossing the roadway is reversed for the reasons stated in the dissenting opinion that plaintiff had a reasonable expectation that defendant, in maintaining a proper lookout, would see him, slow down and prepare to stop; that plaintiff was in a helpless peril from which he could not escape by the exercise of reasonable care immediately prior to being struck by defendant's vehicle; and that the evidence supports a reasonable inference that defendant had the time and means to avoid the accident by the exercise of reasonable care after he discovered, or should have discovered, plaintiff's helpless peril.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 154 N.C. App. 543, 573 S.E.2d 219 (2002), reversing and remanding an amended judgment entered 18 June 2001 by Judge Quentin T. Sumner in Superior Court, Pitt County. Heard in the Supreme Court 9 September 2003.

The Blount Law Firm, PA, by Marvin K. Blount III, for plaintiff-appellant.

Walker, Clark, Allen, Grice & Ammons, LLP, by Jerry A. Allen and Gay P. Stanley, for defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals addressing only defendant's assignment of error as to the last clear chance doctrine. The result in the Court of Appeals did not require it to reach other issues properly preserved by defendant and raised on appeal. These remaining issues relate not only to the amended judgment reversed and remanded by the Court of Appeals, but also to three additional orders entered 6 June 2001 and appealed by defendant in his notice of appeal to the Court of Appeals. Because we now reverse the Court of Appeals' decision as to the only issue it addressed, on remand, that court should also consider defendant's remaining issues.

REVERSED.

STATE OF NORTH CAROLINA v. ALVINO RAE WILSON, JR.

No. 605A02

(Filed 2 October 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 154 N.C. App. 127, 571 S.E.2d 631 (2002), remanding for resentencing of the defendant, a judgment entered 14 September 2001 by Judge Melzer A. Morgan, Jr., in Superior Court, Rockingham County. Heard in the Supreme Court 10 September 2003.

Roy Cooper, Attorney General, by Daniel P. O'Brien, Assistant Attorney General, for the State-appellant.

Staples Hughes, Appellate Defender, by Barbara S. Blackman, Assistant Appellate Defender, for defendant-appellee.

PER CURIAM.

AFFIRMED.

THE NORTH CAROLINA BAPTIST HOSPITALS, INC. v. JAMES W. CROWSON

No. 102A03

(Filed 2 October 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 155 N.C. App. 746, 573 S.E.2d 922 (2003), affirming an order for summary judgment entered 4 September 2001 by Judge Chester Davis in District Court, Forsyth County. Heard in the Supreme Court 9 September 2003.

Ott Cone & Redpath, P.A., by Melanie M. Hamilton, Laurie S. Truesdell, and Wendell H. Ott, for plaintiff-appellant.

Crowson & Nagle, L.L.P., by James W. Crowson, pro se, for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. MARCUS LAMONT CARMON

No. 153A03

(Filed 2 October 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 156 N.C. App. 235, 576 S.E.2d 730 (2003), finding no prejudicial error in orders entered 10 December 2001 and judgments entered 12 December 2001 by Judge William C. Griffin, Jr. in Superior Court, Pitt County. Heard in the Supreme Court 10 September 2003.

Roy Cooper, Attorney General, by William R. Miller, Assistant Attorney General, for the State.

Geoffrey W. Hosford for defendant-appellant.

Patterson, Harkavy & Lawrence, L.L.P., by Ann Groninger; and Seth Jaffe, on behalf of the American Civil Liberties Union of North Carolina Legal Foundation, Inc., amicus curiae.

PER CURIAM.

AFFIRMED.

EASTERN OUTDOOR, INC., PETITIONER v. BOARD OF ADJUSTMENT OF JOHNSTON COUNTY, RESPONDENT

No. 353A02

(Filed 2 October 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. 516, 564 S.E.2d 78 (2002), affirming an order entered 27 December 2000 by Judge Knox V. Jenkins in Superior Court, Johnston County. Heard in the Supreme Court 8 September 2003.

Waller, Stroud, Stewart & Araneda, LLP, by Betty Strother Waller, for petitioner-appellant.

J. Mark Payne, Johnston County Attorney, for respondent-appellee.

PER CURIAM.

AFFIRMED.

THE NORTH CAROLINA STATE BAR v. WILLIE D. GILBERT, ATTORNEY

No. 434A02

(Filed 2 October 2003)

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. 299, 566 S.E.2d 685 (2002), affirming an order of discipline filed 1 November 2000 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Supreme Court 10 September 2003.

Carolin Bakewell for plaintiff-appellee.

Michaux & Michaux, P.A., by Eric C. Michaux; and Willie D. Gilbert, II, pro se, for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. ALBERT RAY WILLIAMS

No. 4A03

(Filed 2 October 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 154 N.C. App. 466, 572 S.E.2d 213 (2002), finding no error in a judgment entered 29 May 2001 by Judge Frank Brown in Superior Court, Hertford County. Heard in the Supreme Court 8 September 2003.

Roy Cooper, Attorney General, by Douglas W. Corkhill, Assistant Attorney General, for the State.

Anne M. Gomez for defendant-appellant.

PER CURIAM.

AFFIRMED.

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

Board of Drainage Comm'rs of Pitt Cty. v. Dixon Case below: 158 N.C. App. 509	No. 381P03	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA02-834) 2. Defs' Conditional PDR as to Additional Issues	1. Allowed 2. Allowed
Butler v. City Council of Clinton Case below: 160 N.C. App. 68	No. 467P03	Plts' PDR Under N.C.G.S. § 7A-31 (COA02-1268)	Denied
Capital Outdoor, Inc. v. Tolson Case below: 159 N.C. App. 55	No. 446P03	Petitioners' (Horizon Outdoor Advertising, Inc., Adams Outdoor Advertising of Charlotte, and the Lamar Company, LLC) PDR Under N.C.G.S. § 7A-31 (COA02-94)	Denied
Carter v. Cook Case below: 158 N.C. App. 743	No. 458P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-1215)	Denied
Chrysler Fin. Co., LLC v. S.C. Ins. Co. Case below: 158 N.C. App. 513	No. 427P03	Def's (S.C. Insurance Company) PDR Under N.C.G.S. § 7A-31 (COA02-1079)	Denied
Crowder v. Crowder Case below: 159 N.C. App. 228	No. 440P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1128)	Denied **Edmunds, J., recused**
Dalenko v. Wake Cty. Dep't of Human Servs. Case below: 157 N.C. App. 49	No. 240P03	Plt's (Carol Bennett) Motion for Meaningful Reconsideration of petitions (Rules 2 and 37, N.C. Rules of Appellate Procedure) (COA02-377)	Dismissed
Department of Transp. v. Airlie Park, Inc. Case below: 156 N.C. App. 63	No. 143PA03	Joint Motion by Plaintiff and Defendant (Airlie Park, Inc.) to Dismiss Appeal (COA02-766)	Allowed **09/08/03**

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Case	No.	Petition	Disposition
Department of Transp. v. Roymac P'ship Case below: 158 N.C. App. 403	No. 375PA03	1. Def's (Roymac Partnership) PDR Under N.C.G.S. § 7A-31 (COA02-441) 2. Plt's (DOT) PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
Hargrove v. Batts Temporary Serv. Labor Works Case below: 159 N.C. App. 466	No. 480P03	1. Plt's NOA Based Upon a Constitutional Question (COA02-1397) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed ex mero motu 2. Denied
Howerton v. Arai Helmet, Ltd. Case below: 158 N.C. App. 316	No. 383PA03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-612)	Allowed **08/21/03**
Hunt v. N.C. State Univ. Case below: 159 N.C. App. 111	No. 430A03	1. Plt's NOA Based Upon a Dissent in the COA (COA02-842) 2. Plt's PDR as to Additional Issues (COA02-842)	1. — 2. Denied
In re Appeal of Church of Yahshua the Christ at Wilmington Case below: 160 N.C. App. 236	No. 525P03	1. Petitioner's (Church's) NOA Based Upon a Constitutional Question (COA02-1005) 2. Petitioner's (Church's) PDR Pursuant to N.C.G.S. § 7A-31 3. Petitioner's (Church's) Motion for Temporary Stay	1. Dismissed ex mero motu **09/19/03** 2. Denied **09/19/03** 3. Denied **09/19/03**
In re Clayton Case below: 159 N.C. App. 228	No. 416P03	Respondent's (Imogene Clayton) PDR Under N.C.G.S. § 7A-31 (COA02-732)	Denied
In re Hutchins Case below: 159 N.C. App. 228	No. 437P03	Respondent's (Philip Allen Hutchins) PDR Under N.C.G.S. § 7A-31 (COA02-1322)	Denied
In re Lint Case below: 158 N.C. App. 542	No. 376P03	Respondent's (Arminda Shaefer Ferguson) PDR Under N.C.G.S. § 7A-31 (COA02-1109)	Denied

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In re Smith Case below: 158 N.C. App. 743	No. 386P03	Respondent's (Roy Bartley Smith) PDR Pursuant to N.C.G.S. § 7A-31 (COA02-1689)	Denied
In re Stratton Case below: 159 N.C. App. 461	No. 490P03	1. Respondent's (Jack Stratton) NOA Based Upon a Constitutional Question (COA02-745) 2. Respondent's (Jack Stratton) PDR Under N.C.G.S. § 7A-31 3. Petitioner's (DSS) Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
In re Testamentary Tr. of Charnock Case below: 158 N.C. App. 35	No. 326A03	1. Petitioner's NOA Based upon a Dissent 2. Petitioner's PWC as to Additional Issues (COA02-820)	1. — 2. Denied
In re Will of Smith Case below: 158 N.C. App. 722	No. 397P03	Propounder's (Carrie A. Allison) PDR Under N.C.G.S. § 7A-31 (COA02-1323)	Denied
Jeffrey R. Kennedy, D.D.S., P.A. v. Kennedy Case below: 160 N.C. App. 1	No. 500A03	Def's Motion for Temporary Stay (COA02-1198)	Denied **09/11/03** **Orr, J. recused**
Lee v. Fantasy Lake, Inc. Case below: 159 N.C. App. 466	No. 450P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-966)	Denied
Monin v. Peerless Ins. Co. Case below: 159 N.C. App. 334	No. 503P03	Plt's PDR Pursuant to N.C.G.S. § 7A-31 (COA02-1105)	Denied
Palmer v. Jackson Case below: 157 N.C. App. 625	No. 336PA03	Defs' PDR Under N.C.G.S. § 7A-31 (COA02-1)	Allowed

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People Unlimited Consulting, Inc. v. B&A Indus., LLC Case below: 158 N.C. App. 744	No. 411P03	1. Defs' (Scott and Kathy Shoff Russell) PDR Under N.C.G.S. § 7A-31 (COA02-815) 2. Defs' (Scott and Kathy Shoff Russell) PWC to Review the Decision of the COA	1. Denied 2. Denied
Piedmont Inst. of Pain Mgmt. v. Staton Found. Case below: 157 N.C. App. 577	No. 340P03	Plts' PDR Under N.C.G.S. § 7A-31 (COA02-147)	Denied
Pintacuda v. Zuckeberg Case below: 159 N.C. App. 617	No. 509A03	1. Def's NOA Based Upon a Dissent 2. Def's PDR as to Additional Issues (COA02-905)	1. — 2. Allowed
Ridgefield Properties, L.L.C. v. City of Asheville Case below: 159 N.C. App. 376	No. 484A03	1. Respondent's NOA Based Upon a Dissent (COA02-1110) 2. Respondent's PDR as to Additional Issues	1. — 2. Denied
Smith v. First Choice Servs. Case below: 158 N.C. App. 244	No. 357P03	Joint Motion to Withdraw PDR (COA02-814)	Dismissed as moot **08/29/03**
Smith v. Hamrick Case below: 159 N.C. App. 696	No. 449P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-1004)	Denied
Smith v. State Farm Mut. Auto. Ins. Co. Case below: 157 N.C. App. 596	No. 318A03	1. Def's NOA Based Upon a Dissent (COA02-544) 2. Plt's PDR as to Additional Issues (COA02-544)	1. — 2. Denied
State v. Allison Case below: 159 N.C. App. 467	No. 378P00-3	1. Def's NOA Based Upon a Constitutional Question (COA02-1043) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed

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

State v. Bates Case below: Yadkin County Superior Court	No. 145A91-5	1. Def's Motion for Emergency Stay of Execution 2. Def's PWC to Review the Order of the Superior Court 3. Def's Motion to Allow Opportunity to Amend Motion for Appropriate Relief 4. Def's Motion for Additional Time to Amend Motion for Appropriate Relief	1. Denied **09/24/03** 2. Denied **09/24/03** 3. Denied **09/24/03** 4. Denied **09/24/03**
State v. Burgess Case below: 149 N.C. App. 976	No. 400P03	Def's PWC to Review the Decision of the COA (COA00-1391)	Denied
State v. Castor Case below: 150 N.C. App. 17	No. 464P03	1. Def's PWC to Review the Decision of the COA (COA01-479) (Filed as Motion for Belated Appeal) 2. Def's Motion for Belated Appeal	1. Denied 2. Dismissed ex mero motu
State v. Chambers Case below: 159 N.C. App. 467	No. 506P03	Def's PWC to Review the Decision of the COA (COA02-1472)	Denied
State v. Deal Case below: 157 N.C. App. 574	No. 300A03	1. Def's NOA Based Upon a Constitutional Question (C0A02-811) 2. AG's Motion to Dismiss Appeal	1. --- 2. Allowed
State v. Fredrick Case below: 158 N.C. App. 313	No. 363P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-237)	Denied
State v. Gillis Case below: 158 N.C. App. 48	No. 320P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-638)	Denied
State v. Givens Case below: 158 N.C. App. 745	No. 412P03	1. Def's NOA Based Upon a Constitutional Question (COA02-876) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed

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State v. Green Case below: 157 N.C. App. 717	No. 332P03	Def's PDR Under N.C.G.S. § 7A-31 (C0A02-1184)	Denied
State v. Harper Case below: 158 N.C. App. 595	No. 388P03	1. Def's NOA Based Upon a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 (COA02-764) 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
State v. Hartman Case below: Northampton County Superior Court	No. 531A94-3	1. Def's Motion for Stay of Execution 2. Def's Petition for Writ of Certiorari	1. Denied **09/25/03** 2. Denied **09/25/03**
State v. Hartman Case below: Northampton County Superior Court	No. 531A94-4	1. Def's PWC to Review the Order of the Superior Court 2. Def's Motion to Stay Execution 3. Def's Motion to Vacate Death Sentence 4. Def's Motion to Remand for Entry of a Life Sentence	1. Denied 2. Denied 3. Denied 4. Denied
State v. Keel Case below: Edgecomb County Superior Court	No. 134A93-11	AG's Motion to Lift Stay of Execution	Allowed **09/11/03**
State v. Kelly Case below: 159 N.C. App. 229	No. 434P03	1. Def's NOA Based Upon a Constitutional Question (COA02-541) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
State v. King Case below: 158 N.C. App. 60	No. 328P03	1. Def's NOA Based Upon a Constitutional Question (COA02-830) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
State v. Latham Case below: 157 N.C. App. 480	No. 304P03	1. Def's NOA Based Upon a Constitutional Question (COA02-595) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed

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

State v. Littlejohn Case below: 158 N.C. App. 628	No. 403P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-575)	Denied
State v. Mangum Case below: 158 N.C. App. 187	No. 351P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-988)	Denied
State v. Mays Case below: 158 N.C. App. 563	No. 413P03	AG's PDR Under N.C.G.S. § 7A-31 (COA01-1387)	Denied
State v. McNeil Case below: 158 N.C. App. 96	No. 420P03	1. Def's PDR Under N.C.G.S. § 7A-31 (COA02-1401) 2. State's Response to Def's PDR 3. AG's Motion for State's Response to Def's PDR to be Deemed Timely Filed	1. Denied 2. Dismissed as moot 3. Allowed
State v. Morris Case below: 156 N.C. App. 335	No. 344P03	Def's PWC to Review the Decision of the COA (COA02-438)	Denied
State v. Moses Forsyth County Superior Court	No. 574A97-3	Def's PWC to Review the Order of the Superior Court	Denied
State v. Norfleet Case below: 159 N.C. App. 230	No. 433P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-256)	Denied
State v. Outlaw Case below: 159 N.C. App. 423	No. 425P03	1. AG's Petition for Writ of Supersedeas 2. AG's PDR Under N.C.G.S. § 7A-31 (COA02-584)	1. Denied 2. Denied
State v. Parker Case below: 148 N.C. App. 217	No. 444P03	Def's PWC to Review the Decision of the COA (COA01-413)	Denied
State v. Perry Case below: 159 N.C. App. 30	No. 432P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1356)	Denied

State v. Shaw Case below: 159 N.C. App. 230	No. 435P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-537)	Denied
State v. Spruill Case below: 157 N.C. App. 365	No. 387P03	Def's PWC to Review the Decision of the COA (COA02-702)	Denied
State v. Thomas Case below: 159 N.C. App. 468	No. 489P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1276)	Denied
State v. Torres Case below: 159 N.C. App. 230	No. 447P03	1. Def's PDR Under N.C.G.S. § 7A-31 (COA02-1726) 2. AG's Motion to Dismiss Appeal	1. Denied 2. Dismissed
State v. Wiggins (aka Rae Carruth) Case below: 159 N.C. App. 252	No. 520P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-959)	Denied
Sullivan v. Mebane Packaging Grp., Inc. Case below: 158 N.C. App. 19	No. 370P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-762)	Denied
Zumkehr v. Hidden Lakes Prop. Owners Ass'n Case below: 158 N.C. App. 747	No. 408P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-547)	Denied

PETITION TO REHEAR

Dawes v. Nash Cty. Case below: 357 N.C. 442	No. 117A02	Def's Petition for Rehearing	Denied **09/09/03**

STATE OF NORTH CAROLINA v. RONALD O'NEAL VALENTINE

No. 398A00

(Filed 7 November 2003)

1. Evidence— hearsay—state of mind exception—unavailable declarant exception—residual exception

The trial court did not err in a first-degree murder and discharging a firearm into occupied property case by allowing the victim's hearsay statements into evidence under N.C.G.S. § 8C-1, Rules 803(3), 803(24), and 804(b)(5), because: (1) the statements which were made orally to witnesses explained the victim's upset and concerned state of mind; (2) the victim's account of the events established the basis for the victim's fear or concern, and his belief that defendant's actions were so life-threatening that the victim needed to retrieve his gun to protect himself from defendant and defendant's brother; (3) although the trial court failed to make the required findings of fact and conclusions of law regarding the trustworthiness of the hearsay statements, the Supreme Court reviewed the record and concluded that the evidence established that the statements possessed equivalent guarantees of trustworthiness; (4) the victim's statements to two witnesses were more probative in establishing the victim's state of mind shortly after the altercation with defendant than any other evidence the State could have procured by reasonable means; and (5) contrary to defendant's assertion, the statements did not violate his constitutional right to confrontation when the statements fell within a firmly rooted hearsay exception.

2. Evidence— hearsay—coconspirator exception

The trial court did not err in a first-degree murder and discharging a firearm into occupied property case by admitting into evidence hearsay statements made by defendant's brother to a witness under the coconspirator exception of N.C.G.S. § 8C-1, Rule 801(d)(E), because: (1) the evidence viewed in a light most favorable to the State was sufficient to meet the State's burden of establishing that a conspiracy between defendant and his brother existed; (2) the actions of both defendant and his brother established that they both intended to harm the victim and that they were acting in unison; (3) the statements were made in furtherance of the conspiracy and were not merely narratives; and (4) even if the statements were not admissible under the coconspir-

ator exception, the statements were not hearsay and thus it was not necessary for the statements to fall within a hearsay exception.

3. **Appeal and Error— preservation of issues—failure to raise constitutional issue at trial**

Although defendant contends the trial court committed plain error in a first-degree murder and discharging a firearm into occupied property case by allowing the State to present evidence that defendant, upon being informed of his constitutional rights under Miranda, chose not to make a statement and requested an attorney, this assignment of error is dismissed because defendant waived this issue by failing to raise his constitutional concerns at trial.

4. **Homicide— first-degree murder—short-form indictment—failure to allege aggravating circumstances**

The trial court did not err in a first-degree murder and discharging a firearm into occupied property case by entering judgment even though the State failed to allege in the short-form indictment the aggravating circumstances supporting the death penalty.

5. **Sentencing— aggravating circumstances—felony involving use or threat of violence to person—right to rebut evidence**

The trial court erred during the sentencing phase of a first-degree murder and discharging a firearm into occupied property case by limiting defendant's right to cross-examine the witness whose testimony supported 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, and defendant is entitled to a new capital sentencing proceeding, because the error violated defendant's right to rebut evidence the State submitted.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Thomas D. Haigwood on 1 February 2000 in Superior Court, Hertford County, upon a jury verdict finding defendant guilty of first-degree murder. On 22 November 2000, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of an additional judgment. On 30 August 2002, upon motion by defendant, the

Supreme Court ordered the parties to submit supplemental briefs addressing the issues set out in *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556 (2002). Heard in the Supreme Court 10 September 2002.

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

Ann B. Petersen for defendant-appellant.

LAKE, Chief Justice.

Defendant was indicted on 12 January 1998 for one count of first-degree murder and one count of discharging a firearm into occupied property. The cases came on for trial at the 3 January 2000 session of Superior Court, Hertford County.

On 20 January 2000, the jury returned verdicts of guilty on both counts and, following a capital sentencing proceeding, recommended a sentence of death on the conviction for first-degree murder. Defendant was sentenced to death and further received a sentence of thirty-four to fifty months' imprisonment on the conviction for discharging a firearm into occupied property.

The State's evidence at trial tended to show the following: Around 9:00 a.m. on the morning of 29 November 1997, defendant called his former girlfriend, Stephanie Lassiter, and informed her that he planned to come to her home in Ahoskie, North Carolina. Defendant was angry because Steve Hannah, the victim, was staying at Lassiter's home. Defendant told Lassiter to "get that nigger out of [your] house." Lassiter told defendant to leave her alone and hung up the phone. Shortly thereafter, defendant called Lassiter a second time and informed her again that he was coming to her home.

Less than thirty minutes after defendant's second call to Lassiter, defendant arrived at her home. Defendant banged on the door, yelled obscenities at her and demanded that she open the door. When Lassiter opened the door, defendant and his brother, Carl Valentine, barged into the home. Defendant went straight to the bedroom where Hannah was located. After knocking the bedroom door open, defendant went to the kitchen, where he pulled a steak knife out of the kitchen sink. Hannah then went to his car, got a gun and pointed it at defendant. At this point, defendant decided to leave Lassiter's home, but before doing so, he threatened the victim by saying, "You pulled a gun on me, I'll be back."

After Hannah left Lassiter's home, he told his friend Emmanuel Parker about the altercation with defendant. Parker informed the victim that he knew defendant and assured Hannah that he would try to help resolve the situation. Parker suggested that Hannah hide out at a friend's house until the situation with defendant was resolved.

After talking with Hannah, Parker spoke with both defendant and defendant's brother, Carl. Defendant was adamant that the argument with the victim was not over. During their conversation, Parker noticed that defendant had a baseball bat and a gun in the car with him.

Shortly after the incident at Lassiter's home, defendant and Carl returned to Lassiter's apartment complex. With a baseball bat in his hand, defendant stood in the parking lot yelling, "Tell the nigger I came back."

Around 11:00 a.m. on November 29, two hours after the incident between defendant and the victim, defendant and his brother saw the victim in his car at the home of Wardell and Ryoko Moody. Defendant jumped out of his car, ran towards the victim and shot into the victim's car six times. Four of the six shots hit the victim: two in the right leg, one in the left leg, and one in the chest. The chest wound was fatal.

[1] In his first assignment of error, defendant contends the trial court erred by allowing the victim's hearsay statements into evidence. Emmanuel Parker and Wardell Moody testified regarding statements made by the victim to each of them. The trial court conducted several *voir dire* proceedings to determine the admissibility of these statements and concluded that the statements were admissible under Rules 803(3), 803(24) and 804(b)(5) of the North Carolina Rules of Evidence.

Defendant first argues that the victim's statements were not properly admissible under 803(3) because the victim's statements did not contain any evidence of his then-existing emotions or state of mind.

As a general rule, hearsay evidence is not admissible, *State v. Rivera*, 350 N.C. 285, 288, 514 S.E.2d 720, 722 (1999); however, Rule 803(3) of the North Carolina Rules of Evidence allows for the admission of what is otherwise hearsay testimony when it tends to show the declarant's then-existing state of mind, N.C.G.S. § 8C-1, Rule 803(3) (2001).

This issue was also addressed in *State v. Gary*, 348 N.C. 510, 501 S.E.2d 57 (1998), where the defendant argued that the trial court erred in allowing into evidence the hearsay testimony of the victim's mother regarding threats made by the defendant to the victim. The victim's mother testified, "[The victim] said, '[The defendant] told me he'd kill me if I left him.' " *Id.* at 519, 501 S.E.2d at 64. The defendant argued that the testimony of the victim's mother was not properly admissible to establish the victim's fearful state of mind. *Id.* at 518, 501 S.E.2d at 63. This Court concluded that the victim's factual statements fell within the purview of Rule 803(3) because the facts served "to demonstrate the basis for [the victim's] fear." *Id.* at 522, 501 S.E.2d at 65.

Mere recitations of fact, totally devoid of emotion, are inadmissible under Rule 803(3). *State v. Hardy*, 339 N.C. 207, 229, 451 S.E.2d 600, 612 (1994). In *Hardy*, the trial court admitted excerpts from the victim's diary as hearsay statements under Rule 803(3). 339 N.C. at 227, 451 S.E.2d at 611. This Court concluded that the diary entries were inadmissible because they were "merely a recitation of facts which describe various events." *Id.* at 228, 451 S.E.2d at 612. When referring specifically to one of the diary entries, this Court noted that the entry expressed no emotion and seemed to have been written in a calm and detached manner. As a result, this Court concluded that the diary entry did not establish the victim's state of mind. *Id.* at 229-30, 451 S.E.2d at 613.

In the first set of hearsay statements in the instant case, Emmanuel Parker testified that the victim appeared "upset about something" and that the victim inquired as to whether Parker knew any "O'Neal Valentino or Valentine." The victim also told Parker about the confrontation which took place earlier that morning at Lassiter's home. The victim told Parker how defendant had pulled a knife on him and why the victim felt he had to get his gun so that he "could keep them off him" and so that he could "get out."

In the second set of hearsay statements, Wardell Moody testified that the victim asked him if he knew anyone by the name of "Valentino or Valentine." The victim told Moody that "[the victim] was at this girl's house and that two brothers came in on them. One of them had a knife and [the victim] pulled his gun on them and he backed them off." Moody also testified that the victim acted "concerned."

Unlike *Hardy*, the statements in the case *sub judice* were made orally by the victim to two witnesses rather than being merely recorded on paper in a calm, detached manner. The factual circumstances in the statements made to both Parker and Moody explained the victim's "upset" and "concern[ed]" state of mind. Because the statements made by the victim to both Parker and Moody related directly to the victim's fear of defendant, the statements were admissible to establish the victim's then-existing state of mind.

Defendant further contends that the hearsay statements admitted through the testimony of Parker and Moody were factually inconsistent with Lassiter's testimony and that the State chose to admit the victim's hearsay statements because they provided a more preferential presentation of the facts than that provided by Lassiter's testimony. Specifically, defendant asserts that Lassiter's version of the events revealed that the victim did not get his gun from the car in order to get away from defendant and that defendant never threatened the victim with a knife and never made any statement to the victim until after the victim threatened defendant with a gun.

The victim's statements to Parker and Moody establish that the victim *interpreted* defendant's actions as "pull[ing] a knife out on him" and that the victim felt he needed to get his gun in an effort to "back[] them off." The victim's account of the events is important because it establishes the basis for the victim's "fear" or "concern": his belief that defendant's actions were so life-threatening that he needed to retrieve the gun to protect himself from defendant and defendant's brother.

Other than admission under Rule 803(3), the trial court's alternative bases for admission of the victim's hearsay statements to Parker and Moody were the "residual exceptions," Rules 803(24) and 804(b)(5). Defendant asserts that these bases for admission were also error because the trial court did not make or include findings of fact or conclusions of law in the record.

Once a trial court establishes that a declarant is unavailable pursuant to Rule 804(a) of the North Carolina Rules of Evidence, there is a six-part inquiry to determine the admissibility of the hearsay evidence proffered under Rule 804(b)(5). *State v. Fowler*, 353 N.C. 599, 608-09, 548 S.E.2d 684, 696 (2001), *cert. denied*, 535 U.S. 939, 152 L. Ed. 2d 230 (2002); *State v. Triplett*, 316 N.C. 1, 8-9, 340 S.E.2d 736, 741 (1986). Rule 803(24) of the North Carolina Rules of Evidence is essentially identical to Rule 804(b)(5), but it does not require that the

declarant be unavailable. *Triplett*, 316 N.C. at 7, 340 S.E.2d at 740. Under either of the two residual exceptions to the hearsay rule, the trial court must determine the following: (1) whether proper notice has been given, (2) whether the hearsay is not specifically covered elsewhere, (3) whether the statement is trustworthy, (4) whether the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and (6) whether the interests of justice will be best served by admission. *State v. Smith*, 315 N.C. 76, 91-98, 337 S.E.2d 833, 844-48 (1985); *accord* N.C.G.S. § 8C-1, Rule 804(b)(5) (2001); *see also Triplett*, 316 N.C. at 8-10, 340 S.E.2d at 740-41.

Defendant argues that the third step of the analysis—determining the equivalent circumstantial guarantees of trustworthiness of the hearsay statements—was not established. When determining the trustworthiness, the following considerations are at issue: (1) whether the declarant had personal knowledge of the underlying events, (2) whether the declarant is motivated to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) whether the declarant is available at trial for meaningful cross-examination. *State v. King*, 353 N.C. 457, 479, 546 S.E.2d 575, 592 (2001), *cert. denied*, 534 U.S. 1147, 151 L. Ed. 2d 1002 (2002); *State v. Tyler*, 346 N.C. 187, 195, 485 S.E.2d 599, 603, *cert. denied*, 522 U.S. 1001, 139 L. Ed. 2d 411 (1997); *State v. Nichols*, 321 N.C. 616, 624, 365 S.E.2d 561, 566 (1988).

The trial court is required to make findings of fact and conclusions of law when determining the trustworthiness of a hearsay statement. *State v. Swindler*, 339 N.C. 469, 474, 450 S.E.2d 907, 910-11 (1994); *State v. Deanes*, 323 N.C. 508, 515, 374 S.E.2d 249, 255 (1988), *cert. denied*, 490 U.S. 1101, 104 L. Ed. 2d 1009 (1989). The State concedes that the trial court "erroneously failed to make the required findings of fact and conclusions of law." Because the trial court failed to determine whether the victim's statements to Parker and Moody contained "equivalent circumstantial guarantees of trustworthiness" necessary for admission under the exceptions to the hearsay rule, we will review the record and make our own determination.

This Court has previously addressed cases where the trial court failed to make the findings necessary to establish the trustworthiness of a hearsay statement. In *State v. Daughtry*, 340 N.C. 488, 459 S.E.2d 747 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996), the trial court concluded that the hearsay statement at issue possessed the requisite trustworthiness but failed to make findings of fact in

support of its conclusion of law. *Id.* at 514, 459 S.E.2d at 760. Although the trial court's failure to make findings of fact was erroneous, this Court reviewed the record and concluded that the record supported the trial court's conclusion. *Id.* In addition, this Court noted the overwhelming evidence in support of the defendant's guilt and concluded that any error in the admission of the hearsay statement was harmless beyond a reasonable doubt. *Id.*

In *Swindler*, the trial court also failed to make any particularized findings of fact or conclusions of law regarding whether the hearsay statement at issue possessed "equivalent circumstantial guarantees of trustworthiness." 339 N.C. at 474, 450 S.E.2d at 911. The trial court summarily concluded, "I think that there are some indications that this is a truthful statement." *Id.* This bare assertion was inadequate to establish the trustworthiness of the hearsay statement; however, this Court performed its own analysis on the trustworthiness of the statement using the four considerations addressed in *King. Id.* at 474-75, 450 S.E.2d at 911.

In applying the *King* considerations to establish the trustworthiness in the case *sub judice*, we note that the hearsay statements at issue were made by the victim to Parker and Moody on 29 November 1997. First, the victim had personal knowledge of the events described in the statements, and the statements were made within two hours after the initial altercation between defendant and the victim. Second, the victim had no reason to lie to Parker and Moody, and there is no indication he would have benefitted from altering the story. Third, the victim never recanted the statements he made to Parker and Moody, and the victim died shortly after the statements were made. Fourth and finally, the victim was unavailable to testify, having died from gunshot wounds shortly after the statements were made. In sum, the evidence in the record establishes that the statements possessed "equivalent circumstantial guarantees of trustworthiness."

Having established the "trustworthiness" prong under Rule 804(b)(5), we turn now to the rest of the test. The State provided defendant with timely notice of its intent to introduce the victim's hearsay statements, and defendant did not allege that he failed to receive notice of the State's intent to use the hearsay statements. Without the victim's statements, the jurors would not have learned how the victim felt about the altercation that occurred at Lassiter's home or hear the victim's interpretation of the facts which supported his then-existing state of mind. This information was "material" to the

case in that the circumstances of the relationship between defendant and the victim are relevant to establish defendant's motive for killing the victim.

The testimonies of Parker and Moody provided insight into how the victim felt following the altercation with defendant. Further, the victim's rendition of the altercation provided jurors with an understanding of how the victim perceived the events that had occurred at Lassiter's home shortly before the murder. The victim's statements to Parker and Moody were more probative in establishing the victim's state of mind shortly after the altercation with defendant than any other evidence the State could have procured by reasonable means.

The North Carolina Rules of Evidence provide that the rules "shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." N.C.G.S. § 8C-1, Rule 102(a) (2001). By permitting the victim's statements to be admitted into evidence, the trial court served the "interests of justice" by providing jurors with the necessary tools to ascertain the truth.

Defendant further alleges that the admission of the hearsay statements violated his constitutional right to confrontation. Specifically, he asserts that because the hearsay statements were not admissible under a "firmly rooted" exception, the statements were not sufficiently reliable to satisfy the Sixth Amendment's Confrontation Clause requirements for admissibility. Evidence which falls within a "firmly rooted" hearsay exception is sufficiently reliable to prevent violation of a defendant's right to confrontation. *State v. Jackson*, 348 N.C. 644, 651, 503 S.E.2d 101, 106 (1998); *accord State v. Gainey*, 343 N.C. 79, 86, 468 S.E.2d 227, 231-32 (1996). As noted above, the statements at issue fall within a firmly rooted hearsay exception; therefore, this contention is without merit.

Based on the foregoing, we conclude that the victim's statements were admissible under Rule 803(3) and under the exceptions to the hearsay rule, Rule 803(24) and Rule 804(b)(5).

[2] In his next assignment of error, defendant asserts that the trial court erred by admitting into evidence statements made by defendant's brother, Carl. Following a *voir dire*, the trial court concluded that the statements were admissible pursuant to the co-conspirator

exception. N.C.G.S. § 8C-1, Rule 801(d)(E) (2001). Defendant contends the State did not establish the existence of a conspiracy between defendant and Carl. Assuming first, *arguendo*, that the statements were hearsay, we consider whether these statements fall within the co-conspirator exception.

"A statement by one conspirator made during the course and in furtherance of the conspiracy is admissible against his co-conspirators." *State v. Mahaley*, 332 N.C. 583, 593, 423 S.E.2d 58, 64 (1992), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 649 (1995). Admission of a conspirator's statement into evidence against a co-conspirator requires the State to establish that: "(1) a conspiracy existed; (2) the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) while it was active, that is, after it was formed and before it ended." *State v. Lee*, 277 N.C. 205, 213, 176 S.E.2d 765, 769-70 (1970), *quoted in Mahaley*, 332 N.C. at 593-94, 423 S.E.2d at 64. Proponents of a hearsay statement under the co-conspirator exception must establish a *prima facie* case of conspiracy, without reliance on the statement at issue. *State v. Williams*, 345 N.C. 137, 141, 478 S.E.2d 782, 784 (1996); *State v. Tilley*, 292 N.C. 132, 138, 232 S.E.2d 433, 438 (1977). In establishing the *prima facie* case, the State is granted wide latitude, and the evidence is viewed in a light most favorable to the State. *State v. Bonnett*, 348 N.C. 417, 438, 502 S.E.2d 563, 577 (1998), *cert. denied*, 525 U.S. 1124, 142 L. Ed. 2d 907 (1999); *see also Williams*, 345 N.C. at 143, 478 S.E.2d at 785.

In the present case, Emmanuel Parker testified about statements made to him by Carl, defendant's brother, at two different times on the day of 29 November 1997. The first statements were made to Parker shortly after Parker spoke with the victim about the events which had transpired at Lassiter's home. According to Parker, Carl told him, "[Y]ou know where we are from and if somebody pulls a knife or a gun out [on] you, you are supposed to get smoked." Parker also testified that when he tried to reason with Carl by telling him that the situation was not worth killing anybody over, Carl agreed with Parker and told him, "I'm through," and "it's over with," but "you need to talk to [defendant]."

As to the second series of statements made by Carl later that morning, Parker testified that he again tried to persuade Carl that the altercation with the victim did not justify a murder. Carl again agreed with Parker and said, "I should just take the baseball bat and f--- [the victim] up."

Defendant argues that the evidence was insufficient to establish a *prima facie* case of conspiracy and that even if the State had proven the existence of a conspiracy, the statements attributed to Carl were not made in the furtherance of the conspiracy. Specifically, defendant contends that Carl's statements were merely "narratives of things to be done" and were therefore inadmissible as statements in furtherance of the conspiracy.

"A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means." *State v. Lamb*, 342 N.C. 151, 155, 463 S.E.2d 189, 191 (1995); *see also State v. Barnes*, 345 N.C. 184, 216, 481 S.E.2d 44, 61, *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). This Court has recognized the "inherent difficulty" in establishing a criminal conspiracy. *Mahaley*, 332 N.C. at 594, 423 S.E.2d at 65; *accord Tilley*, 292 N.C. at 139, 232 S.E.2d at 438. However, in establishing a criminal conspiracy, direct proof is not required. *State v. Gibbs*, 335 N.C. 1, 48, 436 S.E.2d 321, 348 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994). "It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933), *quoted in Gibbs*, 335 N.C. at 48, 436 S.E.2d at 348. In finding the existence of a criminal conspiracy, jurors are allowed to make the logical inference that "one who conspires to bring about a result intends the accomplishment of that result, or of *anything which naturally flows from its attempted accomplishment*." *State v. Small*, 301 N.C. 407, 419, 272 S.E.2d 128, 136 (1980) (emphasis added).

As a general rule, the acts and declarations of a conspirator are not admissible when they come in the form of narratives or descriptions. *State v. Wells*, 219 N.C. 354, 356, 13 S.E.2d 613, 614 (1941); *see also State v. Potter*, 252 N.C. 312, 314, 113 S.E.2d 573, 575 (1960) (holding that testimony was erroneously admitted against the defendant because it was merely a narrative regarding what the defendant had previously said and done). Narrative declarations are admissible only when admitted against the defendant who made them or in whose presence the statements were made. *Wells*, 219 N.C. at 356, 13 S.E.2d at 614.

The following evidence was presented at trial and tended to establish a conspiracy: Carl accompanied defendant to Lassiter's home after Lassiter told defendant she did not want defendant to

come to her home and after defendant had made threats regarding the victim. After defendant barged into Lassiter's home, Carl also entered the home. Further, Carl was present when defendant made his way to Lassiter's bedroom, knocked open the bedroom door, saw the victim and went to the kitchen where defendant retrieved a steak knife. Carl drove the car as he and defendant left Lassiter's home following defendant's threat to the victim, "I'll be back."

Carl drove defendant back to Lassiter's home shortly after the altercation. During this second visit, defendant displayed a baseball bat and made threatening statements about the victim. When defendant left Lassiter's home the second time, Carl continued to drive, with defendant riding as a passenger. When defendant and Carl talked with Parker, defendant expressed his plans to get even with the victim and showed Parker the gun he was carrying.

Just prior to the murder, defendant was seen exiting the passenger side of a black car. The same black car was seen leaving the site of the shooting which resulted in the victim's death. This evidence, when viewed in a light most favorable to the State, is sufficient to meet the State's burden of establishing that a conspiracy between defendant and Carl existed.

The actions of both Carl and defendant clearly establish that they both intended to harm the victim and that they were acting in unison. Carl was aware that defendant intended to kill the victim, as defendant stated many times in Carl's presence that he planned to kill the victim. Also, defendant was armed with a gun and a baseball bat as he rode around town with Carl. The evidence further shows that Carl intended to harm the victim, as Carl accompanied defendant to Lassiter's home after defendant had made threats towards the victim on the telephone. Carl is responsible for driving himself and defendant to and from the scene where the victim was killed. In sum, the evidence shows that both Carl and defendant intended and collaborated to harm the victim in a way likely to lead to the death of the victim.

We further conclude that the statements at issue were made in furtherance of the conspiracy and were not merely narratives. The State submitted substantial evidence that Carl and defendant had entered into an agreement and a collaborative effort to harm the victim. Carl's statements to Parker that he should just "f--- [the victim] up" and Carl's statement that the victim's actions resulted in the need,

according to custom, to "smoke" him were statements made in furtherance of the objective to harm the victim. We conclude that this evidence tended to show an implicit agreement and collaborative effort between Carl and defendant to commit the murder.

Accordingly, we conclude that Carl's statements were properly admissible under Rule 801(d)(E) as statements of a co-conspirator. Even if the statements were not properly admissible under the co-conspirator exception, we conclude that the statements were not hearsay; therefore, it was not necessary for the statements to fall within a hearsay exception.

The probative value of a nonhearsay statement "does not depend, in whole or in part, upon the competency and credibility of any person other than the witness." *State v. Dilliard*, 223 N.C. 446, 447, 27 S.E.2d 85, 86 (1943); *see also State v. Holder*, 331 N.C. 462, 484, 418 S.E.2d 197, 209 (1992) (witness' statements about the defendant's conduct were not hearsay, as they were not probative of the truth and were admitted to establish that the victim made the statements). Further, a nonhearsay statement does not put the truth or falsity of the statement at issue. *Dilliard*, 223 N.C. at 447, 27 S.E.2d at 86-87.

Specifically, Carl's initial statement that "where we are from" pulling a knife or gun on someone results in getting "smoked" was not offered to establish the truth of this statement: that this was in fact the custom in the area where defendant and Carl were raised. Rather, the statement was offered to show that defendant intended to shoot the victim. Likewise, Carl's statement made during the same conversation to Parker that "I'm through," but "you need to talk to [defendant]" was offered to establish that at that time defendant had a plan to kill the victim. Offered in connection with one another, the statements serve to demonstrate that the brothers had a common plan to harm the victim.

Similarly, Carl's second statement that defendant and Carl should just assault the victim with a baseball bat instead of kill the victim was not admitted to establish the truth of this statement: that in fact Carl thought a better alternative was to assault the victim with a baseball bat. Rather, the statement was admitted to further demonstrate a common plan between defendant and Carl. With both sets of Carl's statements, the truth or falsity thereof was not at issue. The weight that jurors chose to give these statements in deciding the issue of defendant's guilt or innocence depended upon the credibility of wit-

ness Parker in relating the statements. The statements at issue were nonhearsay. The trial court did not err in allowing the admission of these statements.

[3] In his final guilt-innocence phase issue, defendant argues that the trial court committed plain error by allowing the State to present evidence that defendant, upon being informed of his constitutional rights under *Miranda*, chose not to make a statement and requested an attorney. At two points during the trial, the chief investigating officer, Detective Scott Outlaw, was asked whether defendant made any response after being advised of his *Miranda* rights. When Detective Outlaw was questioned the first time, defendant objected, and the trial court sustained the objection. The second time Detective Outlaw was asked about defendant's failure to make any statement, defendant made no objection. Detective Outlaw testified that after he read defendant his *Miranda* rights, he asked if defendant wanted to "obtain the services of an attorney." Defendant, according to Detective Outlaw, replied that he wanted to speak to an attorney. Detective Outlaw then testified that defendant did not make any other statements.

"[A]dmission of evidence without objection waives *prior* or subsequent objection to the admission of evidence of a similar character." *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979) (emphasis added); *see also State v. Alford*, 339 N.C. 562, 569-70, 453 S.E.2d 512, 516 (1995) (holding that the defendant waived his objection by failing to object to the admission of the same evidence at other points in the trial); *State v. Maccia*, 311 N.C. 222, 229, 316 S.E.2d 241, 245 (1984) (holding that the defendant waived his original objection by failing to object when the prosecution later returned to the same subject material).

Defendant's argument is based upon his Fifth Amendment right to silence and his Sixth Amendment right to counsel. However, defendant did not raise these constitutional concerns before reaching this Court. The failure to raise a constitutional issue before the trial court bars appellate review. N.C. R. App. P. 10(b)(1); *State v. Wiley*, 355 N.C. 592, 624, 565 S.E.2d 22, 44-45 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003); *State v. Golphin*, 352 N.C. 364, 411, 533 S.E.2d 168, 202 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Based upon our long-established law, defendant has waived this issue, and he is barred from raising it on appellate review before this Court. This assignment of error is dismissed.

[4] In a further issue arising subsequent to defendant's trial, as a result of the United States Supreme Court's recent ruling in *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556, defendant asserts that the State's failure to allege in the indictment the aggravating circumstances supporting the death penalty left the trial court without jurisdiction to enter judgment on the capital crime. Specifically, he argues that *Ring* held that aggravating circumstances are "elements" of the crime of capital murder and must be alleged in the indictment because aggravating circumstances can increase the maximum penalty. Defendant further argues that the failure of the short-form murder indictment to allege any aggravating circumstance was a jurisdictional defect requiring that his death sentence be vacated and a sentence of life imprisonment without parole be imposed. We considered and rejected this argument recently in *State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593, *cert. denied*, — U.S. —, — L. Ed. 2d —, 72 U.S.L.W. 3234 (2003). Accordingly, this assignment of error is overruled.

For the foregoing reasons, upon our full consideration of the record on appeal and arguments of counsel on all issues appropriately presented, we conclude that defendant received a fair trial, free from prejudicial error. We therefore uphold the guilty verdicts.

[5] As to the assignment of error arising from the sentencing phase, defendant argues that the trial court erred by limiting his right to cross-examine the witness whose testimony supported submission of the (e)(3) aggravating circumstance. Defendant asserts that this error entitles him to a new trial.

The sole aggravator submitted to the jury was 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). To prove the existence of the (e)(3) aggravator, three distinct prongs must be established: (1) the defendant has been convicted of a felony, (2) the felony for which he was convicted involved the "use or threat of violence to the person," and (3) the conduct supporting the conviction occurred prior to the events giving rise to the capital felony charge. *State v. Goodman*, 298 N.C. 1, 22, 257 S.E.2d 569, 583 (1979); *see also State v. Hamlette*, 302 N.C. 490, 503-04, 276 S.E.2d 338, 347 (1981).

Although a certified judgment is sufficient to establish the existence of all three prongs of the test, the State is "entitled to present witnesses in the penalty phase of the trial to prove the cir-

cumstances 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); *see also State v. Blakeney*, 352 N.C. 287, 316, 531 S.E.2d 799, 819 (2000), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001). Conversely, a defendant may present evidence which mitigates his involvement in the previous felony supporting the (e)(3) aggravating circumstance. *Hamlette*, 302 N.C. at 504, 276 S.E.2d at 347; *see also State v. Taylor*, 304 N.C. 249, 279, 283 S.E.2d 761, 780 (1981) (holding that the "better rule here is to allow both sides to introduce evidence in support of aggravating and mitigating circumstances which have been admitted into evidence by stipulation"), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983).

The State presented evidence that on 11 March 1998, defendant was convicted of assault with a deadly weapon inflicting serious injury. The victim, Thomas Futrell, testified about the assault. During cross-examination of Futrell, defendant tried to question him regarding defendant's Exhibit Number 32. Exhibit Number 32 was a hand-printed statement, titled "Affidavit," which contained Futrell's signature on the initial line of written material. At the bottom of the document was what appeared to be a notary's seal with the signature, "Patrina Brown." The substance of Exhibit Number 32 stated that defendant was not involved in the beating of Futrell. When questioned by defendant, Futrell repeatedly contended that he signed only a piece of *blank* paper when defendant pointed out that Exhibit Number 32 was a signed statement that defendant did not assault Futrell. The State objected to this line of questioning, and the trial court conducted *voir dire* to determine whether defendant's questioning of Futrell was proper.

During *voir dire*, defendant argued that the State was allowed to bolster the evidence regarding the assault conviction with the testimony of the alleged victim and that he should have the same right to present evidence which would contradict or mitigate the State's evidence. Futrell testified during *voir dire* that his signature on Exhibit Number 32 was his "drunken" signature, that the document was signed when it was only a blank sheet of paper, and that the paper was not signed in the presence of the notary. The trial court ruled that defendant would be allowed to ask Futrell only to identify Exhibit Number 32 and generally to ask Futrell whether he had ever stated that defendant did not take part in assaulting him. The trial court further ruled that defendant would not be allowed to refer to

the content of Exhibit Number 32 if Futrell denied having made a statement that defendant was not involved in his assault. Defendant contends that these limitations on his right to cross-examine Futrell were error.

We agree and conclude that this error violated defendant's right to rebut the evidence the State submitted in support of the (e)(3) aggravating circumstance. However, we disagree with defendant's contention that he is entitled to a new trial. The error occurred during the sentencing phase, and any impact from this error is limited to the sentencing proceeding. Accordingly, we hold that defendant is entitled to a new capital sentencing proceeding.

PRESERVATION ISSUES

Defendant raises four additional issues which he concedes have been previously decided contrary to his position by this Court: (1) the trial court erred in allowing the State to try defendant for first-degree murder when the short-form indictment failed to provide him with notice of the charge of first-degree, capital murder; (2) the trial court erred in instructing the jury on Issue Four that it must "unanimously" find that the aggravating circumstance was sufficiently substantial for imposition of the death penalty when compared with the mitigating circumstances; (3) the trial court erred in instructing the jury that it had a "duty" to recommend a sentence of death if it found that the mitigating circumstances were insufficient to outweigh the aggravating circumstance; and (4) the jury instructions defining mitigating circumstances unconstitutionally limited the jury's consideration.

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

For the reasoning set forth above regarding the (e)(3) aggravating circumstance, we must vacate defendant's sentence of death and remand to the Superior Court, Hertford County, for a new capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000.

NO. 97CRS4688, FIRST-DEGREE MURDER: GUILT-INNOCENCE PHASE—NO ERROR; SENTENCING PHASE—REMANDED FOR NEW CAPITAL SENTENCING PROCEEDING.

NO. 98CRS208, DISCHARGING FIREARM INTO OCCUPIED PROPERTY: NO ERROR.

STATE OF NORTH CAROLINA v. MARK LORENZO SQUIRES

No. 428A00

(Filed 7 November 2003)

1. Homicide— felony murder—sale of cocaine—motion to dismiss—sufficiency of evidence

The trial court did not err in a double first-degree murder case by denying defendant's motions to dismiss related to the sale of cocaine as an underlying felony to support the felony murder of one of the victims, because: (1) the evidence was sufficient for a reasonable juror to find attempted sale of cocaine which is a lesser-included offense of sale of cocaine; (2) actions to which defendant has admitted, including possession of the drugs and scales while attempting to effectuate the sale, are sufficient to establish both intent and an act in preparation of an actual transfer of cocaine; (3) defendant's contention that the language "sale of cocaine" on the verdict sheet required the jury to find that a completed sale occurred is without merit when the trial court instructed the jury that either a completed sale or an attempted sale of cocaine sufficed to support a conviction for felony murder; and (4) although defendant contends some jurors may have found a completed sale while others found an attempted sale, any member of the jury who found the elements constituting a sale of cocaine must necessarily have found the elements of attempted sale of cocaine.

2. Homicide— first-degree murder—short-form indictment—notice

The short-form indictment used to charge defendant with first-degree murder was constitutional because it gave defendant sufficient notice of the nature and cause of the charges against him.

3. Homicide— first-degree murder—sufficiency of indictment

The trial court did not err by entering judgment upon defendant's convictions for first-degree murder based on indictments

purportedly alleging only second-degree murder because the indictments were sufficient to charge first-degree murder, the crime for which defendant was convicted.

4. Sentencing— aggravating circumstances—murder part of course of conduct

The trial court did not err in a capital sentencing proceeding following defendant's conviction of one of two first-degree murders solely on the basis of the felony murder rule by submitting the N.C.G.S. § 15A-2000(e)(11) aggravating circumstance that the murder was part of a course of conduct including crimes of violence against others based on defendant's murder of a second victim, because: (1) where the evidence supports a finding of more than one underlying felony, the (e)(11) aggravating circumstance may be submitted since only one of the underlying felonies merges as an element of the first-degree murder conviction; and (2) the murder of another victim could properly be used to support submission of the (e)(11) circumstance for one of the victims when the evidence supported a finding of the felony murder based on attempted sale of cocaine.

5. Homicide— first-degree murder—short-form indictment—failure to allege aggravating circumstances

The short-form murder indictment is both statutorily and constitutionally sufficient without the inclusion of the N.C.G.S. § 15A-2000(e) aggravating circumstances.

6. Homicide— first-degree murder—short-form indictment—failure to allege elements

Although defendant contends his rights under the Eighth and Fourteenth Amendments were violated by the trial court's entry of a death sentence under an indictment failing to allege all of the elements of capital murder, our Supreme Court has already concluded that the crime of first-degree murder and the accompanying maximum penalty of death are encompassed within the language of the short-form murder indictment.

7. Sentencing— aggravating circumstances—felony involving use or threat of violence

The trial court did not err in a double first-degree murder case by submitting 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, because there is no requirement that the conviction for the prior felony precede the occurrence of the capital murder itself.

8. Sentencing— nonstatutory mitigating circumstance—defendant's prison sentence for another crime

The trial court did not err in a double first-degree murder case by failing to submit the nonstatutory mitigating circumstance that defendant had been sentenced to 105 years' imprisonment in the state of Georgia for his convictions of crimes that he committed there, because defendant's prison sentence for another crime is not relevant as a mitigating circumstance.

9. Sentencing— death penalty—proportionality

The trial court did not err in a double first-degree murder case by sentencing defendant to the death penalty for one of the murders because: (1) the jury's finding of three distinct aggravating circumstances submitted were supported by the evidence, and our Supreme Court has deemed the N.C.G.S. § 15A-2000(e)(3) and (e)(11) aggravating circumstances standing alone to be sufficient to sustain a death sentence; (2) nothing in the record suggested that defendant's death sentence was imposed under the influence of passion, prejudice, or other arbitrary factor; and (3) defendant was convicted of two first-degree murders, one on the basis of premeditation and deliberation and under the felony murder rule, and the other solely under the felony murder rule.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Jerry R. Tillett on 15 May 2000 in Superior Court, Pitt County, upon a jury verdict finding defendant guilty of first-degree murder. On 17 September 2002, 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 6 May 2003.

Roy Cooper, Attorney General, by William P. Hart, Special Deputy Attorney General, and Amy C. Kunstling, Assistant Attorney General, for the State.

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

PARKER, Justice.

On 27 July 1998 defendant Mark Lorenzo Squires was indicted on two counts of first-degree murder in connection with the deaths of Randy House and Erick Keech. Defendant was tried capitally and was found guilty on both counts of first-degree murder. For the murder of House, defendant's conviction was based on premeditation and deliberation and felony murder with the sale of cocaine as the underlying felony. For the murder of Keech, defendant's conviction was based solely on felony murder with both the sale of cocaine and House's murder as the underlying felonies. Following a capital sentencing proceeding, the jury recommended that defendant be sentenced to life imprisonment without parole for House's murder and to death for Keech's murder.

The State's evidence tended to show that on 4 July 1998, House, a drug dealer, was planning to make a $4,500 purchase of crack cocaine from defendant. The crack cocaine was being purchased from defendant for both House and Keech. Keech was known to drive a 1981 burgundy Oldsmobile.

On 5 July 1998 police responded to a call that led to an abandoned 1981 burgundy Oldsmobile on Contentnea Street in Greenville, North Carolina. The police found the windows of the car rolled down on both the front and back driver's side. The police also found a large quantity of blood on the back floorboards and elsewhere in the car and a small bullet hole in the top of the front driver's side door.

On 15 July 1998 men doing yard work on Atlantic Avenue in Greenville found two bodies behind a shed. The decomposition of the bodies suggested that they had been there for some time. Police identified the bodies as Keech and House.

Defendant, identifying himself as William Ferrell, voluntarily went to the Greenville Police Department on 20 July 1998 to speak with the police. Defendant told the police that he had known House for approximately six months and had bought drugs from him in the past. Additionally, defendant told police that he wanted to buy "some smoke" from House on the night of 4 July 1998 but that House failed to appear for the exchange.

On 23 July 1998 the New Bern police received a call from Ellis Tripp, a local resident. Tripp told police that defendant was at his home, that defendant was driving a tan Mazda multi-purpose van with bloodstains on the seats, that defendant had said the bloodstains

were the result of a homicide in Greenville in which defendant and someone else had murdered two men and disposed of the bodies, and that defendant was taking the van to Cape Carteret the next day to have the van reupholstered and wanted Tripp to follow him as a shield. The following day, 24 July 1998, Tripp cooperated with the police, who subsequently arrested defendant.

After he was arrested, defendant again reported to police officers that his name was "William Ferrell"; but defendant later told them his real name. Defendant told police that he met House and Keech at the Player's Club Apartments on the night of the shootings to collect a $5,000 debt from a past drug transaction. Defendant said that he thought House and Keech were going to rob and shoot him and that he shot the two victims, dumped their bodies on Atlantic Avenue, and abandoned the car near the river. When asked if anyone was with him during the shooting, defendant responded that he did not tell on others.

Defendant testified on his own behalf at trial. His testimony tended to show that he regularly sold cocaine and marijuana to House. Defendant did not carry a gun, but Lucius Gaston a/k/a Puppet, who accompanied him on drug transactions, carried a weapon. On 4 July 1998 House called to arrange a drug buy which was to take place at Players Club Apartments. Defendant and Puppet drove to the apartments in the Mazda van. Defendant had with him the drugs and digital scales to weigh the cocaine. House arrived in Keech's car with Keech driving and House sitting in the passenger seat. Puppet got into the car behind Keech, and defendant got into the car behind House. Defendant asked House for the money twice. House "drew down" on Puppet. Puppet grabbed House's gun, a nine-millimeter pistol, and then shot House with his own gun, a .38-caliber "police special." Keech tried to grab Puppet, the two of them struggled, and defendant heard three shots. Defendant drove Keech's car to the shed on Atlantic Avenue where he and Puppet dumped the bodies. Defendant wrapped Puppet's .38-caliber and House's nine-millimeter weapons in a sock and plastic bag and disposed of them behind a Pantry convenience store.

Defendant later told his cellmate that he had shot the victims. Defendant did not mention Puppet. The police recovered the nine-millimeter pistol behind the Pantry, but the .38 was not found.

The pathologist who performed the autopsy on the bodies of House and Keech determined that the men had probably been

dead for ten days when their bodies were found. The body of House had two gunshot wounds. One was to the left side of the back of his head and the other was to the left side of the back of his neck. Keech's body had a gunshot wound to the right side of his face. The pathologist determined that the cause of death for both House and Keech was the fatal gunshot wounds to each of their heads.

GUILT-INNOCENCE PHASE

[1] Defendant first contends that the trial court erred by denying defendant's motions to dismiss related to the sale of cocaine as an underlying felony to support the felony murder of Keech and in instructing the jury to consider sale of cocaine as an underlying felony to support the felony murder of Keech. The basis for this contention is that the evidence was insufficient to show that defendant completed the sale of cocaine. We disagree.

The jury convicted defendant of Keech's murder solely on the theory of felony murder. The verdict sheet listed two predicate felonies to support a finding of felony murder: (1) "other murder" (that is, the murder of Randy House), and (2) "sale of cocaine." The trial judge instructed the jury on sale of cocaine as follows:

> If you find from the evidence beyond a reasonable doubt that on or about the date that's been alleged, the defendant . . . *committed or attempted to commit* sale of cocaine with the use or possession of a deadly weapon, then it would be your duty to return a verdict of first-degree murder under the felony murder rule as to this alleged felony.

(Emphasis added.) The jury found defendant had committed both underlying felonies submitted to support a conviction of felony murder for Keech's death.

Defendant argues that the State presented insufficient evidence to prove a completed sale of cocaine in that the State failed to prove that a transfer of cocaine took place on the night in question. Defendant further argues that the words "sale of cocaine" on the verdict sheet suggested to the jurors that they were required to find a completed sale rather than an attempted sale of cocaine. Thus, according to defendant, the verdict form improperly provided an opportunity for jurors to find a predicate felony that was unsupported by the evidence.

In determining the sufficiency of the evidence to withstand a motion to dismiss and to be submitted to the jury, the trial court must determine "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." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Substantial evidence is such relevant evidence as is 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). The trial court must review the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993).

Viewed under this standard, the evidence in this case was sufficient for a reasonable juror to find attempted sale of cocaine, a lesser-included offense of sale of cocaine. The elements of attempt are an intent to commit the substantive offense and an overt act which goes beyond mere preparation but falls short of the completed offense. *State v. Robinson*, 355 N.C. 320, 338, 561 S.E.2d 245, 257, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002). In *State v. Moore*, 327 N.C. 378, 395 S.E.2d 124 (1990), this Court defined the sale of cocaine as the " 'transfer of [cocaine] for a specified price payable in money.' " *Id.* at 382, 395 S.E.2d at 127 (quoting *State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985)). Thus, to have sale of cocaine submitted to the jury as an underlying felony, the State was required to produce evidence that defendant intended to sell cocaine and committed an overt act beyond mere preparation towards the transfer of cocaine for a monetary price.

As defendant concedes, the evidence, viewed in the light most favorable to the State, was sufficient to prove an attempted sale of cocaine. Defendant testified that he had a business relationship with House involving several drug transactions over a six-month period of time and that House had contacted him on 4 July 1998 to plan an exchange of drugs for money that night at the Player's Club Apartments. Defendant and Puppet went to the prearranged meeting place. Defendant brought to the meeting both the cocaine and digital scales with which to weigh the cocaine. When House and Keech arrived, defendant entered Keech's car in order to effect the sale. According to defendant, he asked House twice for the money, after which House and Keech attempted to rob defendant and Puppet; and both victims were then shot as an act of self-defense. The actions to

which defendant has admitted—possession of the drugs and scales while attempting to effectuate the sale—are sufficient to establish both intent and an act in preparation of an actual transfer of cocaine. This evidence is sufficient to satisfy the elements of attempted sale of cocaine.

Defendant's contention that the language "sale of cocaine" on the verdict sheet required the jury to find that a completed sale occurred is without merit. The trial court clearly instructed the jury that either a completed sale or an attempted sale of cocaine sufficed to support a conviction for felony murder. "We presume 'that jurors . . . attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.' *Francis v. Franklin*, 471 U.S. 307, 324 n.9, 85 L. Ed. 2d 344, 360 n.9 (1985)." *State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208, *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). Accordingly, we can assume in this case that the jury understood the notation on the verdict sheet to be inclusive of both potential predicate felonies, namely, a completed sale of cocaine or an attempted sale of cocaine.

Defendant argues that some jurors may have found a completed sale while others found an attempted sale. Even if some jurors found a completed sale of cocaine rather than an attempted sale, this discrepancy would not change the result. When a jury finds the facts necessary to constitute one offense, it also inescapably finds the facts necessary to constitute all lesser-included offenses of that offense. *See State v. Vance*, 328 N.C. 613, 623, 403 S.E.2d 495, 502 (1991); *State v. Jolly*, 297 N.C. 121, 130, 254 S.E.2d 1, 7 (1979). Attempted sale of cocaine is a lesser-included offense of the sale of cocaine. Therefore, any member of the jury who found the elements constituting a sale of cocaine must necessarily have found the elements of attempted sale of cocaine. Since the evidence at trial was sufficient to prove attempted sale of cocaine and since all jurors necessarily found an attempted sale, a determination of whether the evidence supported a completed sale of cocaine is not necessary to resolve this issue. We hold that the trial court's submission to the jury of "sale of cocaine" as a predicate felony to support defendant's felony murder conviction for Keech's death was not error.

[2] Defendant next argues that his rights under the United States and North Carolina Constitutions were violated when he was tried for first-degree murder based on the short-form murder indictments in

that the indictments allege only the elements of second-degree murder. The United States Supreme Court has consistently declined to impose a requirement mandating states to prosecute only upon indictments which include all elements of an offense. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 477 n.3, 147 L. Ed. 2d 435, 447 n.3 (2000); *Alexander v. Louisiana*, 405 U.S. 625, 633, 31 L. Ed. 2d 536, 543-44 (1972). The Court has, however, held the Sixth Amendment due process requirements to apply to the states. *In re Oliver*, 333 U.S. 257, 92 L. Ed. 682 (1948). Under the Sixth Amendment defendants have the right "to be informed of the nature and cause of the accusation[s]" against them. U.S. Const. amend. VI. This Court has consistently held that the short-form first-degree murder indictment serves to give a defendant sufficient notice of the nature and cause of the charges against him or her. *See, e.g.*, *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). Additionally, this Court held in *State v. Avery*, 315 N.C. 1, 14, 337 S.E.2d 786, 793 (1985), which involved an indictment identical in substance to the one in this case, that "[t]he indictment in question complies with the short-form indictment authorized by [N.C.]G.S. [§] 15-144 and is therefore sufficient to charge first[-]degree murder without specifically alleging premeditation and deliberation or felony murder." *Id.*; *see also State v. Kilpatrick*, 343 N.C. 466, 472, 471 S.E.2d 624, 628 (1996). We find no compelling reason to depart from our prior holdings and conclude that the trial court did not err by trying defendant under the bills of indictment issued in this case.

[3] Next, defendant asserts that the trial court erred by entering judgment upon defendant's convictions for first-degree murder based on indictments purportedly alleging only second-degree murder. Defendant argues that this deficiency created a fatal variance between the verdicts and the indictments and violated his Fourteenth and Fifth Amendment rights.

Defendant is correct that our case law requires conformity between a charge and a judgment. *State v. Hare*, 243 N.C. 262, 264, 90 S.E.2d 550, 552 (1955). Nevertheless, in this case no variance exists between the charges in the indictments and the judgments entered. As noted above, the indictments were sufficient to charge first-degree murder, the crime for which defendant was convicted. Accordingly, defendant's assignment of error is overruled.

SENTENCING PROCEEDING

[4] Defendant next contends that the trial court erred in submitting the (e)(11) aggravating circumstance, that the murder was part of a course of conduct including crimes of violence against others. *See* N.C.G.S. § 15A-2000(e)(11) (2001). Defendant relies on the theory espoused in his first assignment of error, that the sale of cocaine was improperly submitted as an underlying felony. Assuming *arguendo* that defendant's argument was correct, defendant's conviction for the felony murder of Keech would rest solely on the murder of House. In *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981), *overruled on other grounds by State v. Sanderson*, 346 N.C. 669, 488 S.E.2d 133 (1997), this Court held that "[w]hen a criminal defendant is convicted of first[-]degree murder upon a theory of felony murder, it is error to submit the underlying felony to the jury at the punishment phase of trial as one of the aggravating circumstances." *Id.* at 262, 275 S.E.2d at 478; *see also State v. Millsaps*, 356 N.C. 556, 560, 572 S.E.2d 767, 770 (2002); *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). Thus, if the murder of House were the only predicate felony supporting the felony murder conviction for Keech's murder, the State in this case would have been barred from having the (e)(11) aggravator submitted. However, where the evidence supports a finding of more than one underlying felony, the (e)(11) aggravating circumstance may be submitted since only one of the underlying felonies merges as an element of the first-degree murder conviction. *Cherry*, 298 N.C. at 113, 257 S.E.2d at 567-68.

As noted above, the jury in this case properly found defendant guilty of felony murder for the death of Keech based on attempted sale of cocaine. Accordingly, the murder of House could properly be used to support submission of the (e)(11) circumstance, and the trial court did not err by submitting it.

[5] Defendant next argues that this Court should reconsider its prior holdings that the short-form murder indictment, taken from N.C.G.S. § 15-144, is sufficient to give the trial court jurisdiction over a capital defendant. Specifically, defendant contests this Court's holding that aggravating circumstances found at the sentencing proceeding in a capital trial are used only as sentencing factors and not as elements of a greater offense. *See, e.g., State v. Golphin*, 352 N.C. 364, 395-97, 533 S.E.2d 168, 193-94 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Defendant contends that the United States Supreme Court in *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556 (2002), held that

aggravating circumstances are elements of capital murder, a greater crime than first-degree murder; thus, to comport with Article I, Section 22 of the North Carolina Constitution, aggravating circumstances must be included in an indictment in order to give a trial court jurisdiction over a capital murder.

This Court addressed this issue in the recent case of *State v. Hunt*, 357 N.C. 257, 277-78, 582 S.E.2d 593, 606 (2003), holding that, even after *Ring*, the short-form murder indictment is both statutorily and constitutionally sufficient without the inclusion of the N.C.G.S. § 15A-2000(e) aggravating circumstances. As noted therein, the United States Supreme Court's ruling in *Ring* contains nothing requiring reconsideration of our earlier holdings that the short-form murder indictment was an appropriate charging document. *See, e.g.*, *Braxton*, 352 N.C. at 173-75, 531 S.E.2d 436-38; *Wallace*, 351 N.C. at 503-08, 528 S.E.2d at 341-43. This assignment of error is overruled.

[6] In his next assignment of error, defendant contends that his rights under the Eighth and Fourteenth Amendments to the United States Constitution were violated by the trial court's entry of a death sentence under an indictment failing to allege all of the elements of capital murder. Defendant acknowledges that the Court in *Ring* stopped short of deciding whether the Fourteenth Amendment required aggravating circumstances to be alleged in a criminal indictment. 536 U.S. at 597 n.4, 153 L. Ed. 2d at 569 n.4. Nonetheless, he argues that this Court should revisit its decision in *Braxton*, 352 N.C. 158, 531 S.E.2d 428, under the logic employed in *Ring*. We decline to do so.

As defendant concedes, this Court has previously considered this argument in *Braxton* and determined that "[t]he crime of first-degree murder and the accompanying maximum penalty of death . . . are encompassed within the language of the short-form murder indictment." 352 N.C. at 175, 531 S.E.2d at 437-38; *see also Wallace*, 351 N.C. at 504-08, 528 S.E.2d at 341-43. The United States Supreme Court in *Ring*, as pointed out by defendant, explicitly declined to consider the issue of the defendant's indictment. 536 U.S. at 597 n.4, 153 L. Ed. 2d at 569 n.4. This assignment of error is overruled.

[7] Defendant's next assignment of error pertains to the trial court's submission of the (e)(3) aggravating circumstance, that "defendant had been previously convicted of a felony involving the use or threat of violence to the person." N.C.G.S. § 15A-2000(e)(3). Defendant contends that this Court's interpretation of that aggravator in *State v.*

Burke, 343 N.C. 129, 469 S.E.2d 901, *cert. denied*, 519 U.S. 1013, 136 L. Ed. 2d 409 (1996), and in *State v. Lyons*, 343 N.C. 1, 468 S.E.2d 204, *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996), was incorrect under the plain language of the statute. In short, defendant contends that for the (e)(3) aggravator to apply a defendant must have been convicted of the violent felony before the commission of the act for which he is currently on trial.

Assuming without deciding that defendant effectively preserved this issue for appellate review, we do not agree that the (e)(3) aggravating circumstance was improperly submitted. In *Burke*, the defendant shot a man he believed testified against him in a previous murder trial. 343 N.C. at 138, 469 S.E.2d at 904. The prior felony for which (e)(3) was submitted in that case was assault with a deadly weapon inflicting serious injury. *Id.* at 157, 469 S.E.2d at 915. As in this case the conviction for the prior felony occurred after the murder for which the defendant was being sentenced but before the defendant's conviction for the murder. *Id.* The Court in *Burke* held as follows:

> [T]here is no requirement that the conviction occur prior to the capital murder so long as the conduct giving rise to the conviction occurred prior to the events out of which the capital murder arose. The "previously convicted" language used by the legislature in N.C.G.S. § 15A-2000(e)(3) simply establishes a more reliable means of assuring that the defendant is guilty of the violent felony.

Id. at 159, 469 S.E.2d at 916.

In this case defendant was convicted of six qualifying violent felonies on 12 August 1999. Defendant's trial for the capital murders of House and Keech took place after that date. We decline to impose a requirement that the conviction for the prior felony precede the occurrence of the capital murder itself. Thus, under this Court's precedent, the trial court's submission of the (e)(3) aggravating circumstance was not error.

[8] Defendant next contends that the trial court improperly declined to submit to the jury as a nonstatutory mitigating circumstance that defendant had been sentenced to 105 years' imprisonment in the state of Georgia for his convictions of crimes that he had committed there. More specifically, defendant argues that fairness dictates that he be permitted to use the convictions as mitigation, just as the State is permitted to use them as aggravation to support a death sentence. We disagree.

This Court has held that a defendant's prison sentence for another crime is not relevant as a mitigating circumstance. *State v. Price*, 331 N.C. 620, 634-35, 418 S.E.2d 169, 177 (1992), *sentence vacated on other grounds*, 506 U.S. 1043, 122 L. Ed. 2d 113 (1993). In *Price*, this Court stated: "That [a] defendant is currently serving a life sentence for another unrelated crime is not a circumstance which tends to justify a sentence less than death for the capital crime for which defendant is being sentenced." *Id.* In keeping with this precedent, we hold that the trial court correctly denied defendant's request to submit the prior sentences as a mitigating circumstance. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises six additional issues that he concedes have previously been decided contrary to his position by this Court: (i) whether the trial court properly denied defendant's request for allocution; (ii) whether the trial court used the proper burden of persuasion for mitigating circumstances by instructing the jury that defendant had the burden to prove mitigating circumstances to the satisfaction of the jurors; (iii) whether the trial court erred by instructing jurors that they were permitted to reject mitigators on the basis that they did not have mitigating value; (iv) whether the trial court erred by instructing jurors they "may" consider mitigating circumstances; (v) whether the trial court properly instructed the jury that the death penalty may be imposed if the mitigating circumstances have equivalent weight to the aggravating circumstances; and (vi) whether the North Carolina death penalty statute is vague, overbroad, and unconstitutional in that the death sentence is a cruel and unusual punishment imposed in an arbitrary and discriminatory manner.

Defendant raises these issues for purposes of urging this Court to reexamine its prior holdings. We have considered defendant's arguments on these issues and conclude that defendant has demonstrated no compelling reason for us to depart from our prior holdings. We thus overrule these assignments of error.

PROPORTIONALITY

[9] Finally, this Court exclusively has the statutory duty in capital cases, pursuant to N.C.G.S. § 15A-2000(d)(2), to review the record and determine: (i) whether the record supports the jury's findings of the aggravating circumstances upon which the court based its death

sentence; (ii) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (iii) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *State v. McCollum*, 334 N.C. 208, 239, 433 S.E.2d 144, 161 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

After a thorough review of the transcript, record on appeal, briefs, and oral arguments of counsel, we conclude that the jury's findings of the three distinct aggravating circumstances submitted were supported by the evidence. We also conclude that nothing in the record suggests that defendant's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Finally, we must consider whether the imposition of the death penalty in defendant's case is proportionate to other cases in which the death penalty has been affirmed, considering both the crime and the defendant. *State v. Robinson*, 336 N.C. 78, 133, 443 S.E.2d 306, 334 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995). The purpose of proportionality review is "to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Proportionality review also acts "[a]s a check against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). Our consideration is limited to those cases that are roughly similar as to the crime and the defendant, but we are not bound to cite every case used for comparison. *State v. Syriani*, 333 N.C. 350, 400, 428 S.E.2d 118, 146, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

In the case at bar, defendant was convicted of two first-degree murders—one on the basis of premeditation and deliberation and under the felony murder rule, for which he did not receive the death penalty, and one solely under the felony murder rule, for which he did receive the death penalty. As to the Keech murder, for which defendant received a sentence of death, the jury found all of the aggravating circumstances submitted: (i) that defendant had been previously convicted of six felonies involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3); (ii) that the capital felony was

committed for the purpose of avoiding or preventing a lawful arrest, N.C.G.S. § 15A-2000(e)(4); and (iii) 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).

The trial court submitted one statutory mitigating circumstance for the jury's consideration, the catchall mitigating circumstance that there existed any other circumstance arising from the evidence which the jury deemed to have mitigating value, N.C.G.S. § 15A-2000(f)(9). The jury did not find that mitigating circumstance to exist. The trial court also submitted four nonstatutory mitigating circumstances; the jury found one of these circumstances to exist and to have mitigating value.

In our proportionality analysis we compare this case to those cases in which this Court has determined the sentence of death to be disproportionate. This Court has determined the death sentence to be disproportionate on eight occasions. *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). This case is not substantially similar to any of the cases in which this Court has found that the death sentence was disproportionate.

We also consider cases in which this Court has found the death penalty to be proportionate. Defendant in this case murdered House during a drug deal and then shot Keech in the head and chest. Defendant also has a history that includes prior convictions for shootings and violent crimes. Furthermore, this Court has deemed the (e)(3) and (e)(11) aggravating circumstances, standing alone, to be sufficient to sustain a sentence of death. *State v. Bacon*, 337 N.C. 66, 110 n.8, 446 S.E.2d 542, 566 n.8 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995). Viewed in this light, the present case is more analogous to cases in which we have found the sentence of death proportionate than to those cases in which we have found the sentence disproportionate or to those cases in which juries have consistently returned recommendations of life imprisonment.

Defendant received a fair trial and capital sentencing proceeding, free from prejudicial error; and the death sentence in this case is not disproportionate. Accordingly, the judgments of the trial court are left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. VAUGHN WOOLRIDGE A/K/A PAUL REED

No. 41PA02

(Filed 7 November 2003)

Judges— superior court judge reconsidering order by another superior court judge—motion to suppress heroin

The trial court erred in a maintaining a dwelling for keeping or selling controlled substances, trafficking in heroin by possession, trafficking in heroin by manufacturing, and conspiracy to traffic heroin by possession case when one superior court judge reconsidered an order by another superior court judge that originally granted defendant's motion to suppress the heroin and upon reconsideration denied defendant's motion to suppress, because: (1) an order of one superior court judge may be reconsidered by another only if the party seeking to alter the original order makes a sufficient showing of a substantial change in circumstances during the interim which presently warrants a different or new disposition of the matter; and (2) in this case the State did not present evidence of a substantial change of circumstances warranting reconsideration of the order, but instead presented the same or similar evidence based upon the new legal theory of inevitable discovery doctrine that the State could have presented to the first judge.

On discretionary review pursuant to N.C.G.S. § 7A-31 from a unanimous decision of the Court of Appeals, 147 N.C. App. 685, 557 S.E.2d 158 (2001), finding no error after appeal of judgments entered 5 May 2000 by Judge Orlando F. Hudson in Superior Court, Wake County. Heard in the Supreme Court 9 April 2003.

Roy Cooper, Attorney General, by Joyce Rutledge, Assistant Attorney General, for the State.

The Law Offices of James D. Williams, Jr., P.A., by James D. Williams, Jr., and Deria Phillips Hayes, for defendant-appellant.

BRADY, Justice.

The sole issue presented for our review is whether one superior court judge may reconsider an order entered by another superior court judge. Based upon well-established case law, we conclude that one superior court judge may not reconsider an order entered by another; accordingly, we reverse the decision of the Court of Appeals.

On 6 April 1998, Vaughn Woolridge, a/k/a Paul Reed, (defendant) was indicted for maintaining a dwelling for keeping or selling controlled substances, trafficking in heroin by possession, trafficking in heroin by manufacturing, and conspiracy to traffic heroin by possession. Defendant moved to suppress evidence of twenty grams of heroin seized at his residence prior to the issuance of a search warrant for that location. Pursuant to defendant's motion to suppress, a hearing was held before Wake County Superior Court Judge Abraham Penn Jones in September 1999.

Evidence presented by the State at this suppression hearing tended to show that defendant resided in an apartment located on Tapers Drive in Raleigh, North Carolina. On 18 December 1997 at approximately 1:00 p.m., the Raleigh Police Department began an initial surveillance of defendant's residence. The surveillance was initiated based upon information obtained from a confidential source that both heroin and guns were being sold from, stored in, and distributed out of the residence.

Raleigh Police Sergeant A.J. Wisniewski testified that he began his surveillance of the apartment in the early evening hours of 18 December. At some point during Wisniewski's surveillance, Sergeant Michael Glendy informed Wisniewski that he had just placed defendant in police custody for a parole violation on a second-degree murder conviction. Glendy further informed Wisniewski that defendant was known to possess guns and drugs. Wisniewski was aware that Glendy and other officers were attempting to secure a search warrant for defendant's residence.

Shortly after Wisniewski began his surveillance, he observed a man walk up the stairway leading to the apartment, examine two chairs that were located on the porch outside of the apartment's entrance, and attempt to drag those chairs off the porch and down the adjoining stairway. Wisniewski approached the man and noticed that the man had a gun. The man identified himself as a bondsman and informed Wisniewski that someone had called and asked him to remove the chairs from the porch. Following a brief exchange between the bondsman and Wisniewski, the bondsman departed.

After the bondsman retreated, Wisniewski looked under both chairs. Wisniewski found nothing under the first chair; however, when he tipped the second chair over on its side, he observed a package approximately one and one-half or two-inches long in the lining of the chair. The officer retrieved the package and, recognizing its contents as heroin, placed it in his vehicle. Wisniewski estimated that he secured the heroin between 5:20 and 5:30 p.m.

Glendy obtained the search warrant at 7:20 p.m. and arrived at the residence to execute the warrant at approximately 7:40 p.m. According to Wisniewski, law enforcement officers conducted a search of the apartment's porch and other locations that could be reached from the apartment's door in addition to searching inside the apartment. Specifically, Wisniewski confirmed that the search would have encompassed the area where the chairs were located.

Following testimony from Wisniewski and Glendy, the State argued that defendant's motion to suppress should be denied because Wisniewski's seizure of the heroin was justified by the exigent circumstances exception to the search warrant requirement. The State contended that Wisniewski believed he was in danger, based upon his prior knowledge that defendant's residence was used to store weapons and drugs.

Judge Jones disagreed with the State and granted defendant's motion to suppress the twenty grams of heroin. Judge Jones signed a detailed order seven months later on 28 April 2000, in which he memorialized his findings of fact and conclusions of law. As reflected in his order, Judge Jones concluded that at the time Wisniewski looked under the chair, no warrant had been issued, and there were no exigent circumstances to justify Wisniewski's search.

On or about 1 October 1999, the State appealed the order suppressing the heroin to the Court of Appeals. The State subsequently

moved for additional time in which to serve the proposed record on appeal. The superior court granted the State's motion and instructed the State to file the proposed record by 3 February 2000. On 4 February 2000, defendant filed a motion to dismiss the State's appeal, arguing that the State had failed to file the record by the 3 February 2000 deadline and had further failed to deliver the trial transcripts by the appropriate deadline. It appears from the record that the State never served the proposed record or responded to defendant's motion to dismiss the appeal.

On or about 20 March 2000, defendant filed a motion to dismiss the indictments pending against him or to determine the admissibility of other evidence seized as a result of the execution of the search warrant. Defendant argued that there was no admissible evidence of drugs to support the charges against him. In support of his argument, defendant referenced Judge Jones' order suppressing the twenty grams of heroin.

On or about 28 April 2000, the State filed a separate document captioned "Motion." The State's "Motion" does not appear to be in response to defendant's filings. In its "Motion," the State requested that the trial court reexamine the evidence discovered and seized in the warrantless search, this time under the inevitable discovery exception to the search warrant requirement. The State noted that Judge Jones had previously concluded that the search was unlawful and that the heroin seized pursuant to that search should be suppressed. Nevertheless, the State argued that the issue of whether the heroin was admissible under the inevitable discovery exception was not before Judge Jones and therefore needed to be resolved.

Defendant subsequently filed a motion to suppress all evidence, including that which was found after the search warrant had been obtained. In support of his motion, defendant contended that evidence found pursuant to the search warrant was tainted by the illegal seizure of the heroin prior to the issuance and execution of the warrant.

In May 2000, Superior Court Judge Orlando F. Hudson held a hearing to resolve the pending motions of both defendant and the State. In support of its "Motion" to reexamine the evidence, the State argued that it was simply requesting that Judge Hudson now address an issue not considered by Judge Jones, that is, whether the heroin would have been inevitably discovered in the search conducted pursuant to the search warrant.

Defendant objected to the State's "Motion." Judge Hudson then inquired of the State whether it was permitted to raise the issue of inevitable discovery. In response, the State argued that, at the time of the hearing before Judge Jones, it believed the search was legal and that at the second hearing, it would be presenting new evidence showing that the heroin could have been inevitably discovered.

Judge Hudson overruled defendant's objection and allowed the State to present evidence in support of its motion. Judge Hudson noted: (1) that Judge Jones had, in fact, found that an illegal search had occurred but never addressed whether inevitable discovery applied; (2) that the State had not waived its right to raise the issue of inevitable discovery and that there was no prejudice to defendant in allowing the State to do so; and (3) that he was allowing the State's motion to reexamine the evidence in the interest of justice.

The State presented virtually the same evidence that it had presented at the first hearing before Judge Jones, with the addition of certain testimony tending to show that the heroin seized by Wisniewski would have been inevitably discovered in the subsequent search of defendant's apartment. Briefly, the evidence included testimony from Glendy that prior to Wisniewski's surveillance of the residence defendant was observed sitting in one of the chairs outside the apartment, that the chairs outside defendant's residence matched others found inside the residence, and that law enforcement officers had indeed searched the apartment's porch area during execution of the search warrant. Additionally, Wisniewski testified that if he had not searched for and seized the heroin prior to the issuance of the search warrant, he would have done so while the search warrant was being executed.

Following the State's presentation of evidence, Judge Hudson granted the State's motion, ruling as follows:

> [A]fter listening to the evidence and arguments of counsel, that although Judge Jones' order suppressed the 20 plus grams of heroin because the search by the law enforcement officer preceded the acquisition of the search warrant, the [trial court] finds that Judge Jones did not consider, nor did the State argue[,] the applicability of the inevitable discovery exception.
>
> This [c]ourt in its discretion has allowed the State's motion to now consider this exception as it applies to the facts. The [c]ourt

> finds that the State has carried its burden for proving that, although the heroin was illegally seized, it would have been inevitably legally discovered and seized pursuant to a legal search of the building.

Judge Hudson denied defendant's second motion to suppress and motion to dismiss the indictments. Thereafter, defendant's case proceeded to trial. Trial testimony revealed that law enforcement officers discovered $3,900 in cash, scales, a strainer, a cutting agent, and other items normally associated with drug trafficking inside defendant's apartment. Defendant testified at trial that he was not aware of any heroin in his residence and that he did not place heroin under one of the chairs found on the apartment's landing. At the close of all evidence, the trial court instructed the jury on the law, the jury deliberated, and the jury reached a verdict finding defendant guilty of all charges. The trial court consolidated three of the convictions for sentencing and, on 5 May 2000, sentenced defendant to two consecutive terms of 90 to 117 months' imprisonment.

Defendant appealed to the Court of Appeals, which, in a unanimous decision, found no error. On 19 December 2002, this Court allowed defendant's petition for discretionary review of the decision of the Court of Appeals as to one issue. We must therefore determine whether Judge Hudson erred in reconsidering Judge Jones' decision to grant defendant's motion to suppress the heroin.

"The power of one judge of the superior court is equal to and coordinate with that of another." *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 670, 151 S.E.2d 579, 580 (1966). Accordingly, it is well established in our jurisprudence

> that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.

Calloway v. Ford Motor Co., 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). When the above-noted situation arises, the second judge may reconsider the order of the first judge "only in the limited situation where the party seeking to alter that prior ruling makes a sufficient showing of a substantial change in circumstances during the interim which presently warrants a different

or new disposition of the matter." *State v. Duvall*, 304 N.C. 557, 562, 284 S.E.2d 495, 499 (1981).

The reason one superior court judge is prohibited from reconsidering the decision of another has remained consistent for over one-hundred years. When one party "wait[s] for another [j]udge to come around and [takes its] chances with him," and the second judge overrules the first, an " 'unseemly conflict' " is created. *Henry v. Hilliard*, 120 N.C. 479, 487-88, 27 S.E. 130, 132 (1897) (quoting *Roulhac v. Brown*, 87 N.C. 1, 4 (1882)). Given this Court's intolerance for the impropriety referred to as "judge shopping" and its promotion of collegiality between judges of concurrent jurisdiction, this " 'unseemly conflict' . . . will not be tolerated." *Id. at* 488, 27 S.E. at 132 (quoting *Roulhac*, 87 N.C. at 4).

The orders at issue in the present case, initially granting defendant's motion to suppress and, upon reconsideration by a different judge, denying the motion to suppress, appear to violate the well-established rule announced by this Court in *Calloway*. The State contends that in seeking reconsideration of Judge Jones' order, it acted in good faith and that Judge Hudson did not err in reconsidering Judge Jones' suppression order because at the second suppression hearing it presented new evidence justifying reconsideration. According to the State, the "new" evidence consisted of testimony that the heroin would have inevitably been discovered after the search warrant had been issued. We find the State's argument unpersuasive.

As noted above, an order of one superior court judge may be reconsidered by another only if the party seeking to alter the original order "makes a sufficient showing of a substantial change in circumstances during the interim which presently warrants a different or new disposition of the matter." *Duvall*, 304 N.C. at 562, 284 S.E.2d at 499. The so-called "new" evidence presented by the State to Judge Hudson did not transpire, nor was it newly discovered, in between the time of Judge Jones' order granting defendant's motion to suppress and the State's motion seeking reconsideration of that order by Judge Hudson. Rather, that evidence was known to the State at the time of the first suppression hearing, and in fact, the State presented similar evidence at that first hearing. Clearly, the State did not present to Judge Hudson evidence of a substantial change in circumstances warranting reconsideration of Judge Jones' order, but simply presented the same or similar evidence based upon a new legal theory, the inevitable discovery doctrine.

In fact, the State concedes in its arguments to this Court that it was presenting a new legal theory. The State contends that it was proper to seek a ruling from Judge Hudson because it did not ask Judge Hudson to reconsider or reverse Judge Jones' decision that the seizure of the heroin was illegal. Rather, the State maintains that it was simply asking Judge Hudson to consider, regardless of the illegality of the seizure, whether the heroin could have been inevitably discovered—a theory that the State could have, but did not, present to Judge Jones.

For the above-noted reasons, we conclude that circumstances did not exist to warrant reconsideration of Judge Jones' order. In the case *sub judice*, it appears that the prosecutor did what this Court does not tolerate: He "waited for another [j]udge to come around and took [his] chances with him." *Henry*, 120 N.C. at 487, 27 S.E. at 132.

In sum, we conclude that Judge Jones' order suppressing the heroin was not subject to reconsideration. Litigants and superior court judges must remain mindful that "[t]he power of one judge of the superior court is equal to and coordinate with that of another," *Michigan Nat'l Bank*, 268 N.C. at 670, 151 S.E.2d at 580, and when unseemly behavior such as "judge shopping" or a lack of collegiality between judges arises, we cannot condone such action.

For the foregoing reasons, Judge Hudson's suppression order, and the verdicts and judgments entered against defendant are vacated. We reverse the decision of the Court of Appeals and remand this case to that court for further remand to the Superior Court, Wake County, for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

DONALD EARL WHITAKER AND THOMAS LEE WHITAKER, JR., CO-ADMINISTRATORS OF THE ESTATE OF CARLTON WHITAKER, DECEASED v. TOWN OF SCOTLAND NECK, C.T. HASTY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SAFETY DIRECTOR FOR THE TOWN OF SCOTLAND NECK, AND DOUGLAS BRADDY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS PUBLIC WORKS SUPERINTENDENT FOR THE TOWN OF SCOTLAND NECK

No. 49PA03

(Filed 7 November 2003)

Employer and Employee; Workers' Compensation— *Woodson* exception—intentional misconduct

The trial court did not err in a negligence case arising out of an employee maintenance worker's death while collecting garbage by granting summary judgment in favor of defendants based on the fact that plaintiffs failed to raise a genuine issue of material fact as to defendants' civil liability under the *Woodson* exception to the general exclusivity provisions of the North Carolina Workers' Compensation Act, because: (1) the six-factor test created by the Court of Appeals in *Wiggins*, 132 N.C. App. 752 (1999), misapprehends the narrowness of the substantial certainty standard set forth in *Woodson*, 329 N.C. 330 (1991), and is therefore explicitly rejected; (2) the *Woodson* exception applies only in the most egregious cases of employer misconduct where there is uncontroverted evidence of the employer's intentional misconduct and where such misconduct is substantially certain to lead to the employee's serious injury or death; (3) there was insufficient evidence in the present case to reasonably support plaintiffs' contention that defendants intentionally engaged in misconduct knowing that it was substantially certain to cause serious injury or death to decedent; (4) simply having knowledge of some possibility, or even probability, of injury or death is not the same as knowledge of a substantial certainty of injury or death; and (5) the facts of this case involve defective equipment and human error that amount to an accident rather than intentional misconduct.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 154 N.C. App. 660, 572 S.E.2d 812 (2002), reversing and remanding an order for summary judgment entered by Judge Dwight L. Cranford on 15 August 2001, in Superior Court, Halifax County. Heard in the Supreme Court 9 September 2003.

Joynes & Gaidies Law Group, P.A., by Frank D. Lawrence, III, for plaintiff-appellees.

Cranfill, Sumner & Hartzog, L.L.P., by Patrick H. Flanagan, Donna R. Rascoe, Edward C. LeCarpentier, III, and David H. Batten for defendant-appellants.

WAINWRIGHT, Justice.

The issue raised in the present appeal is whether plaintiffs presented sufficient evidence to trigger the narrowly defined *Woodson* exception to the general exclusivity provisions of the North Carolina Workers' Compensation Act (Act). *See Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991); *see also* N.C.G.S. § 97-10.1 (2001) (excluding all rights and remedies against employers other than those specifically set forth in the Workers' Compensation Act). For the reasons set forth below, we hold that plaintiffs did not meet this burden and that the trial court properly granted summary judgment in favor of defendants.

The evidence presented to the trial court shows the following: The Town of Scotland Neck (Town) is a North Carolina municipality that provides general governmental services including, among other things, garbage collection. Decedent Carlton Whitaker was employed by the Town as a general maintenance worker assigned to assist in the operation of a garbage truck.

On 30 July 1997, decedent and two other maintenance workers were emptying a dumpster at a private school. The garbage truck backed up to the dumpster, with decedent positioned at the rear of the truck. Decedent's job was to attach the dumpster to the truck's lifting equipment so that the dumpster could be emptied. In order to secure the dumpster for lifting, decedent and his co-worker attached a trunnion bar on the front of the dumpster to latching mechanisms located at the rear of the truck. Decedent hooked the truck's cable winch to the rear of the dumpster. Coupled to the truck in this fashion, the winch hoisted the dumpster into the air, pivoting the dumpster on its trunnion bar, and allowing its contents to fall into the truck's rear compactor.

As the dumpster was being hoisted, the latching mechanism on decedent's side of the garbage truck gave way, releasing the trunnion bar and allowing the raised container to swing free of its restraints. The dumpster swung around to decedent's side of the truck, striking

decedent and pinning him against the truck. Decedent's co-workers rushed to his aid, manually pushing the dumpster aside and lowering decedent to the ground. Following the accident, decedent was conscious and could talk.

Rescue personnel responded and transported decedent to the hospital. Twenty-eight days after the accident, decedent died as a consequence of a crush injury to his chest.

On the day of the accident, Scotland Neck Safety Director C.T. Hasty began his investigation. He found that the dumpster latching mechanism on the truck could not, in fact, be latched by hand and that the dumpster was bent. He interviewed a number of decedent's co-workers, several of whom reported that both the dumpster and the truck's latching mechanism had been broken for at least two months and that such defects had been reported to their supervisor. The supervisor, however, denied any prior knowledge of defects in the truck or dumpster. Based upon his investigation, Hasty concluded that the broken latch and the bent dumpster were the direct cause of the accident.

In August 1997, the North Carolina Department of Labor's Division of Occupational Safety and Health (OSHANC) also investigated the accident and similarly concluded that "defective equipment was the proximate cause of the accident" and that "the accident . . . was a result of employment conditions that were not in compliance with the safety standards of OSHA." More specifically, the OSHANC investigator found five "serious" violations of state labor law. These violations included: failure to train employees in the safe operation of garbage truck equipment, failure to properly supervise employees in the operation of garbage truck equipment, failure to implement a program for inspection of garbage truck equipment, operation of defective garbage truck equipment, and unsafe operation of garbage truck equipment. As a result of these OSHANC violations, the Town was assessed penalties totaling $10,500.

On 20 August 1999, plaintiffs Donald Whitaker and Thomas Whitaker, Jr., as co-administrators of the estate of decedent, filed a civil action against the Town; Scotland Neck Safety Director C.T. Hasty, in his individual and official capacity; and Scotland Neck Public Works Superintendent Douglas Braddy, in his individual and official capacity. Plaintiffs alleged "willful, wanton, reckless, careless and gross negligence" and demanded compensatory and punitive damages.

Defendants denied all negligence. As an additional defense, defendants responded that plaintiffs' civil action was barred by the North Carolina Workers' Compensation Act, which limits remedies for work-related injuries to those expressly provided by the Act.

The trial court agreed that plaintiffs' claim was barred by the Workers' Compensation Act and granted defendants' motion for summary judgment on 15 August 2001. Plaintiffs thereafter appealed to the Court of Appeals, which reversed the trial court, concluding that plaintiffs had raised a genuine issue of material fact under *Woodson* as to whether defendants' actions were substantially certain to cause decedent's death. *Whitaker v. Town of Scotland Neck*, 154 N.C. App. 660, 572 S.E.2d 812 (2002).

The Court of Appeals based its decision in the present case on a multifactor test that it set out in *Wiggins v. Pelikan, Inc.*, 132 N.C. App. 752, 513 S.E.2d 829 (1999). *Whitaker*, 154 N.C. App. at 663-64, 572 S.E.2d at 814. In *Wiggins*, the Court of Appeals applied the following six factors in deciding whether the defendant-employer intentionally engaged in misconduct substantially certain to cause the injury or death of an employee: "(1) Whether the risk that caused the harm existed for a long period of time without causing injury"; "(2) Whether the risk was created by a defective instrumentality with a high probability of causing the harm at issue"; "(3) Whether there was evidence the employer, prior to the accident, attempted to remedy the risk that caused the harm"; "(4) Whether the employer's conduct which created the risk violated state or federal work safety regulations"; "(5) Whether the defendant-employer created a risk by failing to adhere to an industry practice, even though there was no violation of a state or federal safety regulation"; and "(6) Whether the defendant-employer offered training in the safe behavior appropriate in the context of the risk causing the harm." *Wiggins*, 132 N.C. App. at 756-58, 513 S.E.2d at 832-33.

Relying on this test, the Court of Appeals in the present case concluded that summary judgment in favor of defendants was inappropriate because plaintiffs had offered proof of the existence of most of the *Wiggins* factors. *Whitaker*, 154 N.C. App. at 664-65, 572 S.E.2d at 815.

After our thorough review of the facts in the present case, we conclude that the trial court properly granted defendants' motion for summary judgment. Moreover, we conclude that the six-factor test created by the Court of Appeals in *Wiggins* misapprehends the nar-

rowness of the substantial certainty standard set forth in *Woodson v. Rowland*. Accordingly, we explicitly reject the *Wiggins* test and rely solely on the standard originally set out by this Court in *Woodson v. Rowland*.

As this Court has often discussed, the North Carolina Workers' Compensation Act was created to ensure that injured employees receive sure and certain recovery for their work-related injuries without having to prove negligence on the part of the employer or defend against charges of contributory negligence. *See, e.g.*, *Pleasant v. Johnson*, 312 N.C. 710, 712, 325 S.E.2d 244, 246-47 (1985). In exchange for these "limited but assured benefits," the employee is generally barred from suing the employer for potentially larger damages in civil negligence actions and is instead limited exclusively to those remedies set forth in the Act. *Id.*; *Woodson*, 329 N.C. at 338, 407 S.E.2d at 227.

This Court, however, recognizes an important exception to the general exclusivity provisions of the Workers' Compensation Act where an employee is injured or killed as a result of the intentional misconduct of the employer. *See Pleasant*, 312 N.C. at 713, 325 S.E.2d at 247. In *Woodson*, this Court slightly expanded this exception to include cases in which a defendant employer engaged in conduct that, while not categorized as an intentional tort, was nonetheless substantially certain to cause serious injury or death to the employee. 329 N.C. at 337-44, 407 S.E.2d at 226-30. In such cases, the injured employee may proceed outside the exclusivity provisions of the Act and maintain a common law tort action against the employer. *Id.* at 348, 407 S.E.2d at 233.

In *Woodson v. Rowland*, the defendant-employer was a construction company that specialized in trench excavation. *Id.* at 334, 407 S.E.2d at 225. An employee of the defendant-employer was killed when a fourteen-foot-deep trench in which he was working collapsed. *Id.* at 336, 407 S.E.2d at 225. The factual circumstances surrounding the employee's death in *Woodson* were particularly offensive to this Court. In flagrant disregard of safety regulations and industry-wide standards, the defendant-employer's president had knowingly directed his employees to work in a deep trench with sheer, unstable walls that lacked proper shoring. *Id.* at 345-46, 407 S.E.2d at 231. The hazard of a cave-in was so obvious that the foreman of another construction crew working on the project had emphatically refused to send his men into the trench until it was properly shored. *Id.* at 335, 407 S.E.2d at 225. Moreover, the defendant-employer had been cited

at least four times in the preceding six and a half years for multiple violations of trenching-safety regulations. *Id.* at 345, 407 S.E.2d at 231. Thus, there was sufficient evidence from which "a reasonable juror could determine that upon placing a man in this trench serious injury or death as a result of a cave-in was a substantial certainty rather than an unforeseeable event, mere possibility, or even substantial probability." *Id.*

Based on these specific facts, this Court in *Woodson* defined a narrow exception to the general exclusivity provisions of the North Carolina Workers' Compensation Act. We specifically held that

> when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act.

Id. at 340-41, 407 S.E.2d at 228.

The *Woodson* exception represents a narrow holding in a fact-specific case, and its guidelines stand by themselves. This exception applies only in the most egregious cases of employer misconduct. Such circumstances exist where there is uncontroverted evidence of the employer's intentional misconduct and where such misconduct is substantially certain to lead to the employee's serious injury or death.

In the present case, there is insufficient evidence to reasonably support plaintiffs' contention that defendants intentionally engaged in misconduct knowing that it was substantially certain to cause serious injury or death to decedent. Indeed, the facts of the present case are readily distinguishable from those that gave rise to our holding in *Woodson.*

In *Woodson*, the defendant-employer's president was on the job site and observed first-hand the obvious hazards of the deep trench in which he directed the decedent-employee to work. *Id.* at 335, 407 S.E.2d at 225. Knowing that safety regulations and common trade practice mandated the use of precautionary shoring, the defendant-employer's president nonetheless disregarded all safety measures and intentionally placed his employee into a hazardous situation in

which experts concluded that only one outcome was substantially certain to follow: an injurious, if not fatal, cave-in of the trench. *Id.* at 345-46, 407 S.E.2d at 231-32.

In the present case, there is no similar evidence that defendants were manifestly indifferent to the health and safety of their employees. The Town has a long history of garbage collection, yet there is no evidence of record that the Town had been previously cited for multiple, significant violations of safety regulations, as in *Woodson.* On the day of the accident, none of the Town's supervisors were on-site to monitor or oversee the workers' activities. Decedent was not expressly instructed to proceed into an obviously hazardous situation as in *Woodson.* There is no evidence that defendants knew that the latching mechanism on the truck was substantially certain to fail or that if such failure did occur, serious injury or death would be substantially certain to follow. As discussed in *Woodson,* simply having knowledge of some possibility, or even probability, of injury or death is not the same as knowledge of a substantial certainty of injury or death.

In *Woodson,* evidence was presented from which a jury could reasonably conclude that the defendant-employer's president recognized the immediate hazards of his operation and consciously elected to forgo critical safety precautions. *Id.* at 345, 407 S.E.2d at 231. Here, there is no such evidence. Moreover, in *Woodson,* the employee worked in a deep, narrow trench in which it was impossible for him to escape or avoid injury once the soil around him began to cave in. Here, however, decedent was not so helpless. In sum, the forecast of evidence in the present case fails to establish that defendants intentionally engaged in misconduct knowing that it was substantially certain to cause serious injury or death to decedent. The facts of this case involve defective equipment and human error that amount to an accident rather than intentional misconduct.

We therefore conclude that plaintiffs failed to raise a genuine issue of material fact as to defendants' civil liability under the *Woodson* exception to the general exclusivity provisions of the North Carolina Workers' Compensation Act. Accordingly, we reverse the ruling of the Court of Appeals and instruct that court to reinstate the original order of the Superior Court, Halifax County, granting summary judgment in favor of defendants.

REVERSED.

IN RE: INQUIRY CONCERNING A JUDGE, NOS. 270 & 280 EVELYN W. HILL, RESPONDENT

No. 316A03

(Filed 7 November 2003)

Judges— censure of superior court judge

A superior court judge is censured by the Supreme Court for conduct prejudicial to the administration of justice that brings the judicial office into disrepute based upon the following actions: (1) making unwarranted critical remarks to an attorney, during the attorney's argument in support of a motion, accusing the attorney of being insensitive and heartless and suggesting that she was an incompetent attorney; and (2) assaulting a deputy sheriff by reaching for his genitals after directing him to get out of the way as the judge entered a clerk of court's office and making improper remarks to the deputy.

This matter is before the Court upon a recommendation by the Judicial Standards Commission, entered 29 May 2003, that respondent, Judge Evelyn W. Hill, a judge of the General Court of Justice, Superior Court Division, Tenth 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(3) of the North Carolina Code of Judicial Conduct. Considered in the Supreme Court 16 October 2003.

No counsel for Judicial Standards Commission or respondent.

ORDER OF CENSURE

In letters dated 26 July 2001 and 11 March 2002, the Judicial Standards Commission (Commission) notified Judge Evelyn W. Hill (respondent) that it had ordered a preliminary investigation to determine whether formal proceedings under Commission Rule 9 should be instituted against her. The subject matter of the investigation included allegations that: 1) on 10 May 2001, respondent engaged in *ex parte* communications with and displayed excessive personal familiarity toward Eric Scheiner, the plaintiff in a case in which respondent was hearing a motion that day; 2) that respondent made unwarranted critical and demeaning remarks to attorney Kerry E. Larsen on 7 May 2001, during her argument in support of a motion before respondent; and 3) that respondent assaulted Franklin County

Deputy Sheriff Brian Bowers on 13 February 2002, by reaching for his genitals after directing him to get out of her way as she entered the Franklin County Clerk of Superior Court's offices.

On 21 August 2002, special counsel for the Commission filed a complaint alleging in pertinent part:

> 3. The respondent has subjected an attorney and a deputy sheriff to verbal statements or physical acts or both that were unbecoming to her and demeaning to the dignity, integrity, and honor of the judicial office on the following occasions:
>
> a. The respondent presided over the May 7, 2001, civil session of Durham County Superior Court and heard a motion in *McGeorge v. Ponsell, Broyles, et al.*, Durham County file number 01 CVS 826. Attorney Kerry E. Larsen appeared and argued the motion on behalf of the defendants. During attorney Larsen's argument in support of the motion, the respondent interrupted and demanded her personal opinion about a legal issue. When attorney [Larsen] declined to express such an opinion, the respondent engaged in unwarranted, unprovoked personal and professional criticism of attorney Larsen, accusing her of being insensitive and heartless and suggesting she was an incompetent attorney.
>
> b. The respondent was assigned to hold court in Franklin County during the week of February 11-15, 2002. As the respondent was entering the offices of the Franklin County Clerk of Superior Court around lunchtime on February 13, 2002, Franklin County deputy sheriff Brian W. Bowers was exiting those offices. The respondent and deputy Bowers met in the doorway area, and the respondent directed deputy Bowers to "Get the hell out of my way." When deputy Bowers hesitated, the respondent extended her open right hand toward him in a manner that appeared to those present that she intended to grab his genitals. Deputy Bowers deflected the respondent's hand with his and applied pressure to her fingers to stop the assault. Deputy Bowers released the respondent's hand as soon as she identified herself as a judge. Both the respondent and deputy Bowers exited the Clerk's offices at that time along with two (2) other deputy sheriffs who had been waiting for deputy Bowers. Whereupon, the respondent stated in the presence of the three (3) deputy sheriffs words to the effect that either "It's been a while since I've

shoved a male's balls down his throat" or "It's been a while since I shoved a man's balls through his nose holes."

4. The actions of the respondent on both of the occasions described in paragraphs 3a and 3b above constitute 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 5 September 2002, respondent answered the complaint, in pertinent part, as follows:

3. Denied.

3a. It is admitted that Judge Hill conducted a motion hearing in the case set out in paragraph 3a of the Complaint, and that attorney Kerry E. Larsen appeared and argued the motion on behalf of the defendants. The full transcript of this hearing reflects what was said at the hearing. Judge Hill's comments and questions were in no way intended to be demeaning or a "personal attack," but rather reflected Judge Hill's concern for the victim in the case and for ensuring that a fair and legal result occurred. Except as herein admitted, the allegations of paragraph 3a are denied.

3b. It is admitted that Judge Hill held court in Franklin County during the week of February 11, 2002. It is further admitted that on or about February 13, 2002, outside of a back office of the clerk of court, Investigator Winstead and Detective Philbeck of the Franklin County Sheriff's Department were talking with Judge Hill. Inside of this office were Deputy Bowers of the Franklin County Sheriff's Department, and Amy Leonard and Barbara Dickerson, both employees of the Franklin County Clerk's Office. No member of the public was present inside or outside the office. Winstead, Philbeck, and Judge Hill stood outside the doorway to the office for some time, talking and joking. Winstead then stuck his head inside the doorway and said "Brian, let's go" to Deputy Bowers, who stood and started to walk out the doorway. As this was occurring, Judge Hill entered the doorway. Judge Hill told Bowers to get out of her way, and jokingly made a gesture with her hand toward the area of [Bowers'] midsection. Bowers grabbed Judge Hill's hand, at which time Judge Hill laughed and said, "Wait, I am a judge." Bowers released Judge Hill's hand, and Judge Hill laughed and made a joking comment

to the three deputy sheriffs involving the male anatomy (upon information and belief, neither of the clerk's office personnel have stated that they heard this comment). Bowers immediately believed that this was a joke that Winstead and Philbeck had gotten Judge Hill to engage in with him. The three deputy sheriffs and Judge Hill all moved to the hallway, where they laughed among themselves about the episode. During these events, Bowers was dressed in a grey sweatshirt with the letters "F.C.S.D." and had his firearm holstered on his side—obviously dressed as law enforcement. Deputy Bowers has stated that he was in no way offended or assaulted during the events, that he does not wish to complain against Judge Hill in any way, and that he views this as joking horseplay among courthouse personnel. Except as herein admitted, the allegations of paragraph 3b are denied.

4. Denied.

On 27 February 2003, the Commission served respondent with a notice of formal hearing concerning the charges alleged. The Commission conducted the hearing on 1 May 2003, at which time special counsel for the Commission presented evidence supporting the allegations in the complaint. The Commission found, *inter alia*, the following:

7. The respondent presided over a civil session of Durham County Superior Court on May 7, 2001, and heard a motion in *McGeorge v. Ponsell, Broyles, et al.*, Durham County file number 01 CVS 826. Attorney Kerry E. Larsen appeared and argued the motion on behalf of the defendant Duke University. During Larsen's argument in support of the motion, the respondent interrupted and demanded that Larsen give her personal opinion about what Larsen in her "heart of hearts" thought the plaintiff knew. When attorney [Larsen] declined to express such an opinion, the respondent became annoyed with [Larsen]. Respondent then assumed what she described as a "D.A. mode" in which she intensely questioned [Larsen]. During the said "D.A. mode" of questioning, Respondent told [Larsen], "I think it's important to focus on the human side, and I haven't heard anything you've said so far to suggest you even have a heart." During respondent's subsequent questioning, [Larsen] was unable to answer a question involving a date. Upon [Larsen's] admission that she did not know the answer, respondent asked Larsen, "Pretty incompetent, isn't

it?" At all times during the hearing of the motion, [Larsen] remained composed and professional. At no time prior to or during the hearing did [Larsen] act in such a manner that would provoke [or] justify the personal and professional criticism leveled against her by the respondent.

8. The respondent was assigned to hold court in Franklin County during the week of February 11-15, 2002. As the respondent was entering one of the offices of the Franklin County Clerk of Superior Court around lunchtime on February 13, 2002, Franklin County deputy sheriff Brian W. Bowers was exiting the office, after talking with employees in the Clerk's Office, Amy Leonard and Barbara Dickerson. The respondent and Bowers simultaneously entered into the doorway area from opposite directions, at which time the following exchange took place:

Respondent: "Get out of my way."

Bowers: "Excuse me."

Respondent: "Get the hell out of my way."

Respondent then extended her hand toward Bowers in a manner that appeared, to Leonard, Dickerson and Bowers, that she intended to grab his genitals. Bowers, in an attempt to prevent an assault upon himself, caught the respondent's hand with his hand and bent her fingers backward to stop her action. Bowers, who did not know the respondent's identity or that the respondent was a judge, released the respondent's hand as soon as the respondent was identified to Bowers as a judge. Both the respondent and deputy Bowers exited the Clerk's office and were joined in the hallway by deputy sheriffs Travis Philbeck and Kent Winstead, who had been behind the respondent outside the doorway. Whereupon the following exchange took place:

Respondent: "Are you scared?"

Bowers: "Yes."

Respondent: "It's been a while since I shoved a male's balls through his nose holes."

9. Respondent admitted making the statement attributed to her in paragraphs 7. and 8. above, and stated that she was "horrified" at her statements.

After hearing all of the evidence, the Commission concluded on the basis of clear and convincing evidence that respondent's conduct constituted:

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).

The Commission recommended that this Court censure respondent.

In reviewing the Commission's recommendations pursuant to N.C.G.S. §§ 7A-376 and 7A-377, this Court acts as a court of original jurisdiction, rather than in its usual capacity as an appellate court. *See In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). Moreover, the Commission's recommendations are not binding upon this Court. *In re Nowell*, 293 N.C. 235, 244, 237 S.E.2d 246, 252 (1977). We consider the evidence and then exercise independent judgment as to whether to censure, to remove, or to decline to do either. *Id.*

The quantum of proof in proceedings before the Commission is proof by clear and convincing evidence. *See id.* at 247, 237 S.E.2d at 254. Such proceedings are not meant "to punish the individual but to maintain the honor and dignity of the judiciary and the proper administration of justice." *Id.* at 241, 237 S.E.2d at 250. After thoroughly examining the evidence presented to the Commission, we conclude the Commission's findings of fact are supported by clear and convincing evidence and adopt them as our own. *See In re Harrell*, 331 N.C. 105, 110, 414 S.E.2d 36, 38 (1992).

We note that the findings of fact contained in paragraph number 7 above would not, in and of themselves, likely be viewed as conduct prejudicial to the administration of justice. However, respondent's conduct, based on the totality of the events cited, does rise to a level of conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In light of the foregoing, we conclude that respondent's actions constitute conduct in violation of Canons 2A and 3A(3) 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, Judge Evelyn W. Hill, be and she is hereby, censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

By order of the Court in Conference, this the 6th day of November, 2003.

Brady, J.
For the Court

PHIL S. TAYLOR, EMPLOYEE v. BRIDGESTONE/FIRESTONE, EMPLOYER, GALLAGHER BASSETT SERVICES, CARRIER

No. 280A03

(Filed 7 November 2003)

Workers' Compensation— future medical treatment—initial burden of proof

The decision of the Court of Appeals in a workers' compensation case is reversed for the reason stated in the dissenting opinion in the Court of Appeals that there was competent evidence in the record to support the Industrial Commission's finding that plaintiff failed to meet his initial burden of proving that there was a substantial risk of future medical treatments.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 157 N.C. App. 453, 579 S.E.2d 413 (2003), vacating an opinion and award of the North Carolina Industrial Commission filed 18 January 2002 and remanding for rehearing and findings of fact. Heard in the Supreme Court 14 October 2003.

Edwards & Ricci, P.A., by Brian M. Ricci, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by David A. Rhoades and Jaye E. Bingham, for defendant-appellants.

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion.

REVERSED.

PETER BREVORKA AND WIFE CAROLE BREVORKA v. WOLFE CONSTRUCTION, INC.

No. 76A03

(Filed 7 November 2003)

Vendor and Purchaser; Warranties— warranty of habitability— limited warranty agreement—civil action not barred

The decision of the Court of Appeals in this case is reversed for the reason stated in the dissenting opinion in the Court of Appeals that the language of a limited warranty agreement for a house purchased by plaintiffs did not bar plaintiffs from maintaining an action for breach of the implied warranty of habitability or workmanlike quality against the builder-vendor.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 155 N.C. App. 353, 573 S.E.2d 656 (2002), reversing an order entered 3 October 2001 by Judge Catherine C. Eagles in Superior Court, Guilford County, and remanding for entry of a stay of plaintiffs' action pending arbitration. Heard in the Supreme Court 13 October 2003.

Alexander Ralston, Speckhard & Speckhard, L.L.P., by Stanley E. Speckhard, for plaintiff-appellants.

Tuggle Duggins & Meschan, P.A., by Kenneth J. Gumbiner, for defendant-appellee.

Roy Cooper, Attorney General, by Gary R. Govert, Special Deputy Attorney General, on behalf of the Consumer Protection Division of the North Carolina Department of Justice, amicus curiae.

Lewis & Roberts, PLLC, by Gary W. Jackson and Kurt F. Hausler, on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals.

REVERSED.

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

OLIVER WRIGHT LEARY v. N.C. FOREST PRODUCTS, INC., CANAL WOOD CORPORATION, MOSES LASITTER, JOSEPH WETHERINGTON, CHRISTOPHER L. WETHERINGTON, TAMMY WETHERINGTON, MAMIE E. LEARY, T. BARBARA LEARY, MAMIE RUTH LEARY CLAGGETT, ELMER LEE LEARY, SR., PATTIE LEARY, LINWOOD RICHARD LEARY, SR., SANDRA LEARY GRISSOM, LAURA M. LEARY ELLIOTT, ALLEN R. ELLIOTT, SHIRLEY LEARY STATEN, HAROLD J.R. LEARY, RICHARD SMITH, ELMER LEE LEARY, JR., PATRICK L. LEARY, KENNETH LEARY, ARLENE P. SMITH, AND THE LAW FIRM OF LEE, HANCOCK, LASITTER & KING

No. 277A03

(Filed 7 November 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 157 N.C. App. 396, 580 S.E.2d 1 (2003), affirming an order entered 30 July 2001 by Judge W. Russell Duke, Jr. in Superior Court, Pitt County. Heard in the Supreme Court 15 October 2003.

Loflin & Loflin, by Thomas F. Loflin, and Oliver Wright Leary, pro se, for plaintiff-appellant.

Lee, Hancock & Lasitter, P.A., by Moses D. Lasitter, for defendant-appellees N.C. Forest Products, Inc., Moses Lasitter, Joseph Wetherington, Christopher L. Wetherington, Tammy Wetherington, and The Law Firm of Lee, Hancock, Lasitter & King.

Dees, Smith, Powell, Jarrett, Dees & Jones, by Tommy W. Jarrett, for defendant-appellee Canal Wood Corporation.

David C. Sutton, for defendant-appellees Mamie E. Leary, T. Barbara Leary, Mamie Ruth Leary Claggett, Elmer Lee Leary, Sr., Pattie Leary, Linwood Richard Leary, Sr., Sandra Leary Grissom, Laura M. Leary Elliott, Allen R. Elliott, Shirley Leary Staten, Harold J.R. Leary, Richard Smith, Elmer Lee Leary, Jr., Patrick L. Leary, Kenneth Leary, and Arlene P. Smith.

PER CURIAM.

AFFIRMED.

IN RE YOCUM

[357 N.C. 568 (2003)]

IN THE MATTER OF: NICOLE HOPE YOCUM, A JUVENILE

No. 313A03

(Filed 7 November 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 158 N.C. App. —, 580 S.E.2d 399 (2003), affirming an order terminating parental rights entered 17 October 2001 by Judge Charles Brown in District Court, Rowan County. Heard in the Supreme Court 14 October 2003.

Charles W. Porter for petitioner-appellee Brenda Lee Yocum.

Sofie W. Hosford for respondent-appellant Adam Jermaine Austin.

PER CURIAM.

AFFIRMED.

IN THE MATTER OF THE WILL OF CHARLES RICHARD JOHNSTON, DECEASED

No. 242A03

(Filed 7 November 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 157 N.C. App. 258, 578 S.E.2d 635 (2003), dismissing as interlocutory an appeal of an order entered 22 January 2002 by Judge Paul L. Jones in Superior Court, New Hanover County. Heard in the Supreme Court 14 October 2003.

Shipman & Associates, L.L.P., by Gary K. Shipman and William G. Wright, for propounder-appellee Constance Sophia Johnston.

Hogue Hill Jones Nash & Lynch, LLP, by David A. Nash, for caveator-appellants Charles Richard Johnston, Jr.; Jennifer J. Mangan; and Lorie J. McCabe.

PER CURIAM.

AFFIRMED.

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

SUSAN F. JOHNSON v. BOARD OF TRUSTEES OF DURHAM TECHNICAL COMMUNITY COLLEGE

No. 236PA03

(Filed 7 November 2003)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 157 N.C. App. 38, 577 S.E.2d 670 (2003), reversing and remanding a memorandum of decision and judgment entered by Judge Howard E. Manning, Jr., on 12 September 2001 in Superior Court, Durham County. Heard in the Supreme Court 14 October 2003.

Glenn, Mills & Fisher, P.A., by Stewart W. Fisher, for plaintiff-appellee.

Haywood, Denny & Miller, L.L.P., by George W. Miller, III, and George W. Miller, Jr., for defendant-appellant.

North Carolina Academy of Trial Lawyers and the American Civil Liberties Union of North Carolina Legal Foundation, Inc., by Lynn Fontana, Counsel; and American Civil Liberties Union of North Carolina Legal Foundation, Inc., by Seth H. Jaffe, Counsel, amici curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

CAROLYN AVERITT LANCASTER, CHARLES S. FOX, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF CORNELIA AVERITT FOX, DECEASED, JANE GREGG DERBY, SABRA GREGG CAMPBELL AND MARY MAC GREGG WILKINSON v. MAPLE STREET HOMEOWNERS ASSOCIATION, INC., A NONPROFIT NORTH CAROLINA CORPORATION

No. 206A03

(Filed 7 November 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 156 N.C. App. 429, 577 S.E.2d 365 (2003), ordering a new trial after appeal of judgment entered 14 August 2001 by Judge Dexter Brooks in Superior Court, Columbus County. Heard in the Supreme Court 16 October 2003.

Mitchell, Brewer, Richardson, Adams, Burge & Boughman, by Ronnie M. Mitchell and Coy E. Brewer, Jr., for plaintiffs-appellants.

Michael W. Willis; and Ward and Smith, P.A., by Kenneth R. Wooten and Hugh R. Overholt, for defendant-appellee.

PER CURIAM.

AFFIRMED.

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

STATE OF NORTH CAROLINA v. STEVEN LAMAR PARTRIDGE

No. 269PA03

(Filed 7 November 2003)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 157 N.C. App. 568, 579 S.E.2d 398 (2003), vacating a judgment entered 12 June 2002 by Judge Robert P. Johnston, in Superior Court, Mecklenburg County, and remanding for imposition of a new judgment and sentencing. Heard in the Supreme Court 16 October 2003.

Roy Cooper, Attorney General, by William P. Hart, Special Deputy Attorney General, for the State-appellant.

William B. Gibson for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

NELLIE H. MELTON v. FAMILY FIRST MORTGAGE CORPORATION, FLAGSTAR BANK, FSB, UNION PLANTERS BANK NA, T. DAN WOMBLE AS TRUSTEE ON A DEED OF TRUST MADE BY THE PLAINTIFF, AND LORI MELTON FRYE

No. 164A03

(Filed 7 November 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 156 N.C. App. 129, 576 S.E.2d 365 (2003), affirming an order for summary judgment signed 6 November 2001 by Judge Beverly T. Beal in Superior Court, Forsyth County. Heard in the Supreme Court 14 October 2003.

S. Mark Rabil for plaintiff-appellant.

Allman Spry Leggett & Crumpler, P.A., by W. Rickert Hinnant, for defendant-appellee Family First Mortgage Corporation.

PER CURIAM.

AFFIRMED.

DIANE WILSON BOWEN, EXECUTRIX OF THE ESTATE OF BRUCE PICKETT WILSON v. PAMELA Y. MABRY, EXECUTRIX OF THE ESTATE OF JOSEPHINE DOWNER WILSON

No. 47PA03

(Filed 7 November 2003)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 154 N.C. App. 734, 572 S.E.2d 809 (2002), reversing and remanding an order entered 16 November 2001 by Judge Jimmy L. Myers in District Court, Davidson County. Heard in the Supreme Court 15 October 2003.

Biesecker, Tripp, Sink & Fritts, by Max R. Rodden, for plaintiff-appellee.

Michelle D. Reingold for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

MARY TATE LEE, EMPLOYEE v. BRIAN CENTER, EMPLOYER AND SELF-INSURED/KEY RISK MANAGEMENT SERVICES, SERVICING AGENT

No. 651PA02

(Filed 7 November 2003)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of an unpublished decision of the Court of Appeals, 153 N.C. App. 200, 569 S.E.2d 32 (2002), reversing an opinion and award entered by the North Carolina Industrial Commission on 11 December 2000 and remanding to the full Commission to enter findings of fact and conclusions of law. Heard in the Supreme Court 15 October 2003.

Waymon L. Morris for plaintiff-appellee.

Young Moore and Henderson P.A., by J.D. Prather and Michael W. Ballance, for defendant-appellant.

PER CURIAM.

WRIT OF CERTIORARI IMPROVIDENTLY ALLOWED.

MICHELLE BATTLE PHILLIPS v. A TRIANGLE WOMEN'S HEALTH CLINIC, INC. AND STUART L. SCHNIDER, M.D.

No. 81A03

(Filed 7 November 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 155 N.C. App. 372, 573 S.E.2d 600 (2002), affirming in part and reversing in part orders entered 26 October 2000 and 6 August 2001 by Judge Abraham Penn Jones, and orders entered 19 March 2001 and 6 August 2001 by Judge Donald W. Stephens, in Superior Court, Wake County. On 12 June 2003, the Supreme Court granted discretionary review of additional issues. Heard in the Supreme Court 16 October 2003.

Burford & Lewis, PLLC, by Robert J. Burford and James W. Vaughan, for plaintiff-appellant and -appellee.

Yates, McLamb & Weyher, L.L.P., by John W. Minier, for defendant-appellant and -appellee Stuart L. Schnider, M.D.

PER CURIAM.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

Adams, Kleemeier, Hagan, Hannah & Fouts, PLLC v. Jacobs Case below: 158 N.C. App. 376	No. 378A03	Defs' (David Queller and Ira Born) Motion for Appropriate Sanctions Pursuant to Rules 14(c) and 25(b) of the North Carolina Rules of Appellate Procedure (COA02-789)	Denied **10/23/03**
Ashton v. City of Concord Case below: 160 N.C. App. 250	No. 529A03	1. Plt's NOA Based Upon a Constitutional Question (COA02-1257) 2. Def's Motion to Dismiss appeal	1. — 2. Allowed
Blum v. Rhodes Case below: 158 N.C. App. 743	No. 459P03	Intervenors' (Shelley Blum and Deborah Blum) PWC to Review the Decision of the COA (COA02-1091)	Denied
Calloway v. Onderdonk Case below: 158 N.C. App. 743	No. 410P03	1. Def's NOA (Constitutional Question) 2. Def's PDR Under N.C.G.S. § 7A-31 (COA02-1076)	1. Dismissed 2. Denied
Carter v. Cook Case below: 158 N.C. App. 743 357 N.C. 504	No. 458P03	Plt's Petition for Rehearing of PDR (COA02-1215)	Dismissed
Conseco Fin. Servicing Corp. v. Home City, Ltd. Case below: 159 N.C. App. 465	No. 491P03	Defendant-Appellants' PDR Under N.C.G.S. § 7A-31 (COA02-913)	Denied **10/06/03**
Downs v. State Case below: 159 N.C. App. 220	No. 395PA03	Plts' PDR Under N.C.G.S. § 7A-31 (COA02-969)	Allowed
Dukes v. Bergman Case below: 159 N.C. App. 465	No. 501P03	Defs' PDR Under N.C.G.S. § 7A-31 (COA02-1179)	Denied

Dye v. Dye Case below: 357 N.C. 458	No. 180P03	1. Def's Motion to Reconsider Notice of Writ of Habeas Corpus and to Dismiss Fraudulent Child Support Charges and Case in its Entirety Due to Extortion and Blackmail (COA98-1324) 2. Def's Motion to Reconsider Notice for PWC for Discretionary Review 3. Def's Motion to Remove Judges William L. Daisy and Joseph E. Turner, Jr. 4. Def's Motion for Judges Daisy and Turner to Pay Restitution	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed
Evans v. Anderson Case below: 159 N.C. App. 465	No. 487P03	Plts' PDR Under N.C.G.S. § 7A-31 (COA02-1107)	Denied
Farm Bureau Ins. Co. of N.C., Inc. v. Blong Case below: 159 N.C. App. 365	No. 445P03	Defs' PDR Under N.C.G.S. § 7A-31 (COA02-651)	Denied
Haizlip v. MFI of S.C., Inc. Case below: 159 N.C. App. 466	No. 513P03	Def's (Stephen K. Miller) PDR Under N.C.G.S. § 7A-31 (COA02-1027)	Denied
Hodgin v. Hodgin Case below: 159 N.C. App. 635	No. 474P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-1007)	Denied
Hunt v. N.C. State Univ. Case below: 159 N.C. App. 111	No. 430A03	Plt's and Def's Motion to Dismiss Appeal (COA02-842)	Allowed
Jeffrey R. Kennedy, D.D.S., P.A. v. Kennedy Case below: 160 N.C. App. 1	No. 500A03	Plt's Motion for Temporary Stay of Appellate Proceedings (COA02-1198)	Allowed for fifteen days

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

Martin v. Martin Bros. Grading Case below: 158 N.C. App. 503	No. 396P03	Defs' PWC to Review the Decision of the COA (COA02-381)	Denied
N.C. State Bar v. Rudisill Case below: 159 N.C. App. 704	No. 451P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-1159)	Denied
National Alliance for the Mentally Ill v. County of Cumberland Case below: 159 N.C. App. 466	No. 470PA03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1182)	Allowed **10/20/03**
Petho v. Wakeman Case below: 159 N.C. App. 467	No. 492P03	Def's (Shawnee Wakeman) PDR Under N.C.G.S. § 7A-31 (COA02-1338)	Denied
State v. Barton Case below: 159 N.C. App. 467	No. 511P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1675)	Denied **Orr, J., recused**
State v. Bellamy Case below: 159 N.C. App. 143	No. 452P03	Def's PWC to Review the Decision of the COA (COA02-1313)	Denied
State v. Call Case below: Wilkes County Superior Court	No. 341A96-3	Def's PWC to Review the Order of the Superior Court	Denied
State v. Clark Case below: 160 N.C. App. 250	No. 502P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1699)	Denied
State v. Dammons Case below: 159 N.C. App. 284	No. 494P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-625)	Denied **Orr, J., recused**

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

State v. Donevan Case below: 160 N.C. App. 252	No. 546P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-899)	Denied
State v. Fowler Case below: 159 N.C. App. 504	No. 523P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-730)	Denied
State v. Glasco Case below: 160 N.C. App. 150	No. 547P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-602)	Denied
State v. Haskins Case below: 160 N.C. App. 349	No. 566P03	1. Def's NOA Based on a Constitutional Question (COA02-1225) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
State v. Holbrooks Case below: 159 N.C. App. 467	No. 479P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1661)	Denied
State v. Holden Case below: 160 N.C. App. 503	No. 574PA03	AG's Motion for Temporary Stay (COA02-1478)	Allowed pending determination of the State's PDR **10/24/03**
State v. Jones Case below: Duplin County Superior Court	No. 497A93-5	1. Def's PWC to Review the Superior Court Order 2. Def's Motion for a Hearing Concerning Appropriate Relief 3. Def's Motion for $1.12 Billion Settlement for Injustice	1. Denied 2. Denied 3. Denied
State v. Keel Case below: Edgecombe County Superior Court	No. 134A93-12	AG's Motion to Bypass the COA on Defendant's Application for Writ of Habeas Corpus as to Involuntary Manslaughter Conviction	Dismissed as moot **10/31/03**
State v. Keel Case below: Edgecombe County Superior Court	No. 134A93-13	Def's Motion to Stay Execution	Denied

State v. McKisson Case below: 159 N.C. App. 229	No. 436P03	1. Def's NOA Based Upon a Constitutional Question (COA02-955) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's (Alternative) PDR Under N.C.G.S. § 7A-31 4. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Denied 4. Allowed
State v. Medlin Case below: 158 N.C. App. 314	No. 524P03	Def's PWC to Review the Decision of the COA (COA02-1522)	Denied
State v. Miles Case below: 159 N.C. App. 468	No. 488P03	1. Def's NOA Based Upon a Constitutional Question (COA02-893) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
State v. Nevills Case below: 158 N.C. App. 733	No. 418P03	1. Def's NOA Based Upon a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 (COA02-774) 3. AG's Motion to Dismiss	1. — 2. Denied 3. Allowed
State v. Rasmussen Case below: 158 N.C. App. 544	No. 414P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-849)	Denied
State v. Richardson Case below: 159 N.C. App. 468	No. 475P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1082)	Denied
State v. Scercy Case below: 159 N.C. App. 344	No. 495P03	1. Def's NOA Based Upon a Constitutional Question (COA02-772) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
State v. Shelman Case below: 159 N.C. App. 300	No. 466P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1261)	Denied
State v. Torres Case below: 160 N.C. App. 251	No. 530P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1589)	Denied

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

State v. Wright Case below: 160 N.C. App. 251	No. 476P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-744)	Denied
State Auto Prop. & Cas. Ins. Co. v. Rankin Case below: 159 N.C. App. 467	No. 521P03	Plt's PWC to Review the Decision of the COA (COA02-1202)	Denied
Warnock v. CSX Transp., Inc. Case below: 159 N.C. App. 215	No. 462P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-568)	Denied
Widener v. Widener Case below: 159 N.C. App. 469	No. 469P03	1. Def's PDR Under N.C.G.S. § 7A-31 (COA02-1242) 2. Def's PWC to Review the Decision of the COA	1. Denied 2. Denied

PETITION TO REHEAR

Wise v. Harrington Grove Cmty. Ass'n Case below: 357 N.C. 396	No. 428A02	Defs' Petition for Rehearing	Denied **10/31/03**

STATE OF NORTH CAROLINA v. CLIFFORD RAY MILLER

No. 84A02

(Filed 5 December 2003)

1. Criminal Law— prosecutor's argument—defendant's versions of facts not in evidence—not comment on failure to testify

The trial court did not err during a capital sentencing proceeding by failing to intervene ex mero motu during the prosecutor's closing argument that defendant's version of the facts is not in evidence, because: (1) the prosecutor's statement was aimed at demonstrating a weakness in defendant's theory of the case and was not an improper comment on defendant's failure to testify; and (2) the statement properly demonstrated that the evidence did not confirm defendant's version of the facts.

2. Criminal Law— prosecutor's argument—defendant brought electric tape and racquetball to crime scene

The trial court did not err during a capital sentencing proceeding by failing to intervene ex mero motu when the prosecutor stated during his cross-examination of defendant's expert that defendant brought a knapsack containing electric tape and a racquetball to the robbery, because the facts give rise to a reasonable inference that defendant brought these items to the scene of the crime.

3. Discovery— motion for protective order—psychological test data

The trial court did not err during a capital sentencing proceeding by denying defendant's motion for a protective order requiring raw psychological test data pertaining to defendant to be released only to qualified professionals retained by the State, because the trial court's order did nothing more than employ the provisions of N.C.G.S. § 15A-905(b) which requires this data to be disclosed to the State during discovery.

4. Evidence— psychological test data—discovery—cross-examination

The trial court did not commit plain error during a capital sentencing proceeding by failing to intervene ex mero motu to prevent alleged misuse of raw psychological test data pertaining to defendant during the State's cross-examination of defendant's

expert, because: (1) an expert may be required to disclose the underlying facts or data on cross-examination; and (2) if an expert obtained any information from a psychological test administered to a defendant which related to the expert's testimony, then the test is both discoverable and within the proper scope of cross-examination.

5. Sentencing— capital—aggravating circumstances—murder committed in commission of kidnapping—pecuniary gain—not double counting

The trial court in a capital sentencing proceeding did not allow double counting of elements and evidence between two statutory aggravating circumstances and thus did not commit plain or harmless error by instructing on the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the murder was committed in commission of a kidnapping and the N.C.G.S. § 15A-2000(e)(6) aggravating circumstance that the murder was committed for pecuniary gain, because: (1) the circumstance of committing the murder while in commission of a kidnapping directs the jury's attention to the factual circumstances of defendant's crimes while the circumstance of committing the murder for pecuniary gain requires the jury to consider not defendant's actions but his motive for killing the victim; and (2) both circumstances were supported by sufficient, independent evidence apart from that which overlapped.

6. Sentencing— capital—aggravating circumstances—murder committed in commission of kidnapping—especially heinous, atrocious, or cruel

The trial court in a capital sentencing proceeding did not allow double counting of elements and evidence between two statutory aggravating circumstances and thus did not commit plain or harmless error by instructing on the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the murder was committed in commission of a kidnapping and the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the capital felony was especially heinous, atrocious, or cruel, because: (1) evidence exists separate from the kidnapping showing the murder was especially heinous, atrocious, or cruel, including that defendant made the victim take off his clothes, put a ball into the victim's mouth, put electrical tape around the victim's head to secure the ball which cut off the victim's oxygen supply, and defendant stabbed the victim ten to thirty times while the victim was alive;

and (2) the trial court instructed the jury not to use the same evidence as a basis for finding more than one aggravating circumstance, and it is presumed that the jury follows the trial court's instructions.

7. Sentencing— capital—prosecutor's argument—aggravating circumstances—especially heinous, atrocious, or cruel

The trial court did not err during a capital first-degree sentencing phase by allegedly permitting the prosecutor's N.C.G.S. § 15A-2000(e)(9) especially heinous, atrocious, or cruel aggravating circumstance argument to go beyond the victim's murder experience to include what the victim was thinking during the kidnapping offense as well, because: (1) defendant did not object to the prosecutor's request that the jury imagine defendant's feelings during the kidnapping; and (2) the prosecutor's argument was not a request for the jury to consider the same evidence to find aggravating circumstances (e)(5) and (e)(9).

8. Constitutional Law— effective assistance of counsel—objective standard of reasonableness

A defendant in a capital first-degree murder trial was not denied effective assistance of counsel based on his counsel's alleged failure to object or preserve error, failure to provide prior evaluations to the defense expert, failure to provide a prior witness statement to the defense expert, and failure to elicit a favorable element of diagnosis from the defense expert, because: (1) defendant failed to show that counsel's performance was deficient; (2) defense counsel's conduct did not fall below an objective standard of reasonableness; and (3) defendant failed to show counsel made errors so serious that counsel was not functioning as the counsel guaranteed defendant by the Sixth Amendment.

9. Sentencing— death penalty—proportionate

The trial court did not err in a first-degree murder trial by sentencing defendant to the death penalty, because: (1) defendant was found guilty on the basis of premeditation and deliberation and under the felony murder rule; (2) the jury found three aggravating circumstances under N.C.G.S. § 15A-2000(e)(5) that the murder was committed in commission of a kidnapping, under N.C.G.S. § 15A-2000(e)(9) that the murder was especially heinous, atrocious, or cruel, and under N.C.G.S. § 15A-2000(e)(6) that the murder was committed for pecuniary gain; and (3)

defendant presented no evidence showing that he exhibited concern for the victim after stabbing the victim numerous times.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Russell J. Lanier, Jr. on 25 October 2001 in Superior Court, Onslow County, upon a jury verdict finding defendant guilty of first-degree murder. On 13 February 2002, 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 5 May 2003.

Roy Cooper, Attorney General, by Robert C. Montgomery and Amy C. Kunstling, Assistant Attorneys General, for the State.

Paul M. Green for defendant-appellant.

ORR, Justice.

On 16 October 2001, defendant Clifford Ray Miller was convicted of robbery with a dangerous weapon, felonious conspiracy to commit robbery with a dangerous weapon, first-degree kidnapping, felonious larceny, and first-degree murder. The jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. Following a capital sentencing hearing, the jury recommended a sentence of death for the murder and the trial court imposed consecutive sentences totaling 168 to 230 months imprisonment for the remaining felonies.

Defendant presented no evidence at trial, but the State's evidence tended to show the following: On 13 August 2000, David William Brandt was employed as the assistant manager of Aladdin's Castle, an arcade located in the Jacksonville Mall. As assistant manager, Brandt was responsible for depositing the arcade's earnings in a nearby bank every day or every other day. When Brandt left the mall on 13 August 2000, he was carrying three bank deposit bags containing a total of $2,688.25. As he was leaving, defendant and his friend Angelito Reyes Maniego approached Brandt and asked him for a ride. Brandt had given Maniego rides home on several prior occasions, so Maniego was aware that Brandt often dropped off the arcade's bank deposits after work.

Brandt agreed to give defendant and Maniego a ride. Once inside Brandt's truck, defendant held a knife to Brandt's throat and told him that he would not hurt Brandt if Brandt cooperated. Defendant

instructed Brandt to drive to Wal-Mart, but Maniego told Brandt to keep driving. Brandt drove to an apartment complex where Maniego took over the driving. After driving for about two hours, defendant told Maniego to find the nearest woods, which Maniego did. They pulled to the side of the road and exited the truck. Defendant told Brandt to remove his shirt, and then walked Brandt into the woods, with Maniego following. Next, defendant took a pair of handcuffs from his backpack and handcuffed Brandt to the largest tree he could find. When the handcuffs broke, defendant claimed Brandt fell unconscious. At some point after he handcuffed Brandt, defendant placed a racquetball in Brandt's mouth and wrapped electrical tape around his head to secure the ball. Maniego said, "Now just off him," and handed defendant a knife Maniego had brought from home. Defendant handed the knife back to Maniego, and they argued for several minutes about who should kill Brandt. Ultimately, defendant took the knife and stabbed Brandt approximately 31 times.

Defendant and Maniego then drove Brandt's truck back to Jacksonville. Once there, they cleaned out the truck and left it in a Wal-Mart parking lot. They disposed of Brandt's clothes and divided the money from the deposit bags.

Detectives Condry and Fifield investigated Brandt's disappearance as a missing person case. On 15 August 2000 at 4:00 p.m., the detectives went to defendant's residence to talk with him because he was one of the last people seen with Brandt. Defendant agreed to go with the detectives to the Jacksonville Police Department. At approximately 4:20 p.m., defendant gave a written statement, in which he said Brandt drove defendant and Maniego home.

Detective Condry told defendant his statement was inconsistent with what Maniego told the police. Defendant then made a second statement to the police telling them that a few hours after Brandt left defendant at defendant's home, Maniego returned and took defendant down to the waterfront. At the waterfront Maniego showed defendant the bags of money Brandt had been carrying, and offered defendant half the money in exchange for defendant's silence. Defendant stated that he took half the money and stashed it under a sofa cushion in his home. Based on this statement, the detectives asked defendant if they could search his home for the money. Defendant accompanied the detectives to his home and showed them where he had hidden bundles of cash totaling $892.00 under a sofa cushion. The police then took defendant into custody at which

time defendant made a third statement. In this statement, defendant confessed to murdering Brandt.

After defendant's arrest, defendant and Maniego tried unsuccessfully to help police locate Brandt's body. Ultimately, police officers used bloodhounds to find Brandt's body in a swampy, wooded area of Duplin County.

Defendant assigned no errors to the guilt phase of his trial. Therefore, we only review the sentencing phase of his trial for possible error.

Defendant first contends that the trial court erred by failing to intervene *ex mero motu* to prevent and correct the effects of improper cross-examination and closing argument by the State during the sentencing phase. Defendant argues the State improperly commented on defendant's failure to testify; the State misstated evidence; the trial court improperly denied defendant a protective order; and the trial court failed to prevent misuse of raw psychological data. In determining whether the trial court should have intervened, we "must determine whether the argument[s] in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002).

[1] Defendant argues the following statement made by the prosecutor during closing argument constituted improper comment on defendant's failure to testify:

> Who is leading who in this case? Who's leading whom? This defendant would have you believe that in fact he is simply a sheep or pawn of Maniego. Well, ladies and gentlemen, this defendant's version of the facts, ladies and gentlemen, that is not in evidence.

Defendant contends that the prosecutor's statement that "defendant's version of the facts . . . is not in evidence" is a clear and definite request for the jury to draw an adverse inference from defendant's failure to testify.

Because defendant did not object to this portion of the closing argument at trial, he carries the burden on appeal of showing the

prosecutor's argument was so grossly improper that the trial court should have intervened *ex mero motu*. *State v. Call*, 349 N.C. 382, 419-20, 508 S.E.2d 496, 519 (1998). "[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979). In evaluating whether the prosecutor improperly commented on defendant's failure to testify, we must consider the prosecutor's comments "in the context in which they were made and in light of the overall factual circumstances to which they referred." *Call*, 349 N.C. at 420, 508 S.E.2d at 519.

It is well-established that it is improper for a prosecutor to comment in closing argument on a defendant's failure to testify. *State v. Ward*, 354 N.C. 231, 250-51, 555 S.E.2d 251, 264-65 (2001); *State v. Mitchell*, 353 N.C. 309, 326, 543 S.E.2d 830, 840, *cert. denied*, 534 U.S. 1000, 151 L. Ed. 2d 389 (2001); *State v. Parker*, 350 N.C. 411, 430-31, 516 S.E.2d 106, 120 (1999), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000). However, a prosecutor does not violate this prohibition unless " 'the language used [was] manifestly intended to be, or was . . . of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.' " *State v. Rouse*, 339 N.C. 59, 95-96, 451 S.E.2d 543, 563 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995), quoting *United States v. Anderson*, 481 F.2d 685, 701 (4th Cir. 1973) *aff'd*, 417 U.S. 211, 41 L. Ed. 2d 20 (1974).

When the prosecutor's statement in the case *sub judice* is considered in its proper context, it is apparent that the prosecutor did not comment on defendant's failure to testify. Rather, the prosecutor's statement was aimed at demonstrating a weakness in defendant's theory of the case. In opening arguments, defendant's counsel emphasized the forthcoming testimony of Dr. Hilkey, a psychologist who was expected to testify that, but for Maniego's strong influence over defendant, defendant would not have killed Brandt. In response, the prosecutor began his closing argument by reminding the jury of the evidence which tended to show that defendant acted independently. The prosecutor pointed out that defendant held a knife to Brandt's throat, told Maniego where to drive and where to pull over, restrained Brandt with the handcuffs, gagged Brandt with a ball and electrical tape, and then stabbed him approximately 31 times. Only after this recitation of the evidence did the prosecutor make the

statement in question. After making the statement in question, the prosecutor said "[b]oth of these individuals are culpable in this killing." The prosecutor was arguing that, contrary to defendant's assertion, evidence showed both defendant and Maniego were responsible for Brandt's death, and that the evidence did not show Maniego's influence was the driving force in Brandt's murder. The prosecutor's statement properly demonstrated that the evidence did not confirm defendant's version of the facts; the statement was not an improper comment on defendant's decision not to testify.

Since the prosecutor's statement neither strayed from the bounds of propriety nor, in its proper context, "was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify," *Rouse*, 339 N.C. at 95-96, 451 S.E.2d at 563, quoting *Anderson*, 481 F.2d at 701, it was not so grossly improper that the trial court should have intervened *ex mero motu*. Therefore, defendant's argument is without merit.

[2] Defendant next argues that the prosecutor misstated the evidence during his cross-examination of Dr. Hilkey when he asked, "[d]id you ever ask this particular defendant why he took a knapsack to this robbery containing a pair of handcuffs, a roll of electric tape and a racquetball?" Later, during closing argument, the prosecutor made several similar statements, each assuming that defendant brought the ball and electrical tape:

> According to this particular defendant's statement he's the one who brought the ball to this horrible crime. He's the one who brought the tape. . . .
>
> What possesses a person to bring electric tape and a racquetball to a robbery?
>
> . . .
>
> Ladies and gentlemen of the [j]ury, he didn't just jump David Brandt out there in the parking lot of the Jacksonville Mall as he was walking out of the store and beat him. He didn't just let David drive a little ways and rob him. Ladies and gentlemen of the [j]ury, he had it thought out to the point he brought along handcuffs, he brought along tape, he brought along a rubber ball.

Despite the prosecutor's repeated statements to the contrary, the evidence does not show defendant told the police he brought the ball and electrical tape to the scene. While he revealed in his statement

that he brought the handcuffs, defendant only confessed to *using*, not bringing, the ball and electrical tape to silence Brandt.

This Court has held that "[c]ounsel may argue the facts in evidence *and all reasonable inferences that may be drawn therefrom* together with the relevant law in presenting the case." *State v. Anderson*, 322 N.C. 22, 37, 366 S.E.2d 459, 468 (emphasis added), *cert. denied*, 488 U.S. 975, 102 L. Ed. 2d 548 (1988). Certainly, the facts give rise to an inference that defendant brought the ball and tape to the scene of the crime. First, defendant admitted to bringing the handcuffs to the scene in a backpack he regularly carried. While defendant did not expressly admit to bringing the ball and tape, he confessed to the police that he used all three implements—the ball, the tape and the handcuffs—to restrain Brandt before stabbing him. Additionally, defendant pointed out in his statement that Maniego handed him the knife Maniego had brought to the scene and told defendant to kill Brandt. That defendant did not tell the police Maniego also brought the ball and tape to the scene gives rise to an inference that defendant brought them himself. Finally, Dr. Hilkey testified on cross-examination that he was aware the ball and tape were brought to the scene, but he could not remember whether defendant had disclosed this information to him or whether he had read it in one of Maniego's statements. While the inference is less direct here, counsel for the State could infer that Dr. Hilkey's response meant he was aware, either through his contact with defendant or his review of Maniego's statements, that defendant brought the ball and tape. Because the prosecutor's comments were "reasonable inferences" drawn from facts in evidence, *Anderson*, 322 N.C. at 37, 366 S.E.2d at 468, the prosecutor's remarks were not improper. Therefore, the prosecutor's remarks did not amount to gross impropriety warranting the trial court's intervention, and defendant's assignment of error is overruled.

[3] Defendant also claims the trial court erred by denying his motion for a protective order requiring raw psychological test data pertaining to the defendant to be released only to qualified professionals retained by the State. Defendant argues that releasing the data directly to prosecutors was error, and that the trial court erred by failing to intervene in order to prevent the subsequent misuse of the raw data during the State's cross-examination of Dr. Hilkey at the sentencing hearing.

In the present case, the State requested that the trial court order the defense to disclose the raw test data obtained from Dr. Hilkey's

psychological examination of defendant. Defendant's counsel explained that Dr. Hilkey had some ethical concerns about disclosing the data, but would agree to turn it over if the court ordered him to do so. On the trial court's order, the data was disclosed to the State, which later used it to cross-examine Dr. Hilkey.

We first address whether the trial court erred in denying defendant's motion for a protective order. N.C.G.S § 15A-905(b) requires defendants to produce to the State during discovery, among other things,

> 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.

N.C.G.S. § 15A-905(b) (2001). In addition, in applying N.C.G.S. § 15A-905(b), this Court has held that raw psychological data like the data at issue in the present case *must* be disclosed to the State during discovery. *See State v. Cummings*, 352 N.C. 600, 615, 536 S.E.2d 36, 48 (2000). Because the trial court's order did nothing more than employ the provisions of N.C.G.S. § 15A-905(b), we conclude that the trial court did not err in its denial of defendant's motion for a protective order and its subsequent order requiring defendant to turn over the data in question directly to the prosecutors.

[4] We next consider whether the trial court erred in failing to intervene *ex mero motu* to prevent alleged misuse of the raw psychological data during the State's cross-examination of Dr. Hilkey at the sentencing hearing. Because defendant did not object, we review the cross-examination for plain error. *See* N.C. R. App. P. 10(c)(4); and *State v. Barden*, 356 N.C. 316, 348, 572 S.E.2d 108, 130 (2002) (where defendant assigned error, but failed to object, to the prosecutor's cross-examination, and this Court applied plain error review), *cert. denied*, — U.S. —, 155 L. Ed. 2d 1074 (2003). Under plain error review, "reversal is justified when the claimed error is so basic, prejudicial, and lacking in its elements that justice was not done." *State v. Prevatte*, 356 N.C. 178, 258, 570 S.E.2d 440, 484 (2002), *cert. denied*, — U.S. —, 155 L. Ed. 2d 681 (2003).

We have already established that defense counsel was required by N.C.G.S. § 15A-905(b) to turn over the data in question during dis-

covery. While the Rules of Evidence do not apply during sentencing hearings, we are also guided in this instance by N.C.G.S. § 8C-1, Rule 705 (2001), which states in part that "[t]he expert may in any event be required to disclose the underlying facts or data on cross-examination." Additionally, this Court has held that if an expert obtained any information from a psychological test administered to a defendant which related to the expert's testimony, then the test is both discoverable and within the proper scope of cross-examination. *State v. McCarver*, 341 N.C. 364, 397-98, 462 S.E.2d 25, 44 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996). We therefore conclude that the cross-examination of Dr. Hilkey was proper, and that the trial court committed no error in failing to intervene *ex mero motu*. Defendant's assignment of error is overruled.

[5] Defendant next claims the trial court erred by providing jury instructions that allowed double-counting of evidence and elements between statutory aggravating circumstances. Defendant presents two arguments in support of his claim: aggravating factor (e)(6) was subsumed within factor (e)(5); and aggravating factor (e)(5) was subsumed within factor (e)(9).

The State claims plain error review applies because defendant failed to object to the alleged double counting of elements and evidence. However, defendant contends harmless error analysis applies because the trial court failed to record the charge conference as N.C.G.S. § 15A-1231(b) requires, and because *Stringer v. Black*, 503 U.S. 222, 231, 117 L. Ed. 2d 367, 379 (1992), states that plain error review is not constitutionally sufficient for invalid aggravating circumstances. We conclude that the aggravating circumstances were not duplicative. Therefore, the trial court committed neither plain nor harmless error regarding the double-counting of elements and evidence in its aggravating circumstances jury instructions, and we need not reach the issue of which standard of review applies.

Defendant first argues aggravating factor (e)(5) (the murder was committed in commission of a kidnapping) was subsumed within aggravating factor (e)(6) (the murder was committed for pecuniary gain). A jury may not consider two aggravating circumstances when one completely overlaps the other. *State v. Jennings*, 333 N.C. 579, 628, 430 S.E.2d 188, 214, *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). The trial court properly instructed the jury on the (e)(5) aggravating factor as follows:

> First-degree kidnapping is the unlawful confinement, restraint or removal of a person without the person's consent for the purpose of facilitating his commission of the felony of robbery with a dangerous weapon, when the confinement, restraint or removal was a separate complete act, independent of and apart from the robbery with the dangerous weapon and the person was not released by the defendant in a safe place or had been seriously injured.
>
> If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, the defendant unlawfully confined a person, restrained a person, removed a person from one place to another and that the person did not consent and that this was done for the purpose of facilitating the defendant's commission of robbery with a dangerous weapon and this confinement, restraint or removal was a separate complete act, independent of and apart from the robbery with a dangerous weapon and that the person confined, restrained or removed was not released by the defendant in a safe place or had been seriously injured, 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 Recommendations" form.

The trial court then instructed the jury on the (e)(6) aggravating factor as follows:

> A murder is committed for pecuniary gain if the defendant, when he commits it, 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 did so to obtain from the victim $2688 in U.S. money held by the victim for the victim's employer, 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.

"Double-counting occurs when two aggravating circumstances" based upon the same evidence are submitted to the jury. *State v. Barnes*, 345 N.C. 184, 238, 481 S.E.2d 44, 74, *cert. denied*, *Chambers*

v. North Carolina, 522 U.S. 876, 139 L. Ed. 2d 134 (1997), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). While a complete overlap is impermissible, some overlap in the evidence supporting each aggravating circumstance is permissible. *Id.* Defendant argues that the submission of both the (e)(5) and (e)(6) aggravating circumstances in this case constitutes impermissible double-counting. We disagree.

As we stated in *State v. Green*, 321 N.C. 594, 610, 365 S.E.2d 587, 596-97, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1998), " 'there is no error in submitting multiple aggravating circumstances provided that the inquiry prompted by their submission is directed at distinct aspects of the defendant's character or the crime for which he is to be punished.' " (quoting *State v. Hutchins*, 303 N.C. 321, 354, 279 S.E. 2d 788, 808 (1981), *cert. denied*, 464 U.S. 1065, 79 L. Ed. 2d 207 (1984)). Such is the case here. The circumstance of the committing the murder while in commission of a kidnapping "directs the jury's attention to the factual circumstances of defendant's crimes. The circumstance of [committing the murder for pecuniary gain] requires the jury to consider not defendant's actions but his motive" for killing the victim. *Green*, 321 N.C. at 610, 365 S.E.2d at 597. Therefore, we conclude the trial court did not err by submitting both the (e)(5) and the (e)(6) aggravating circumstances to the jury.

Furthermore, in *Call*, 349 N.C. 382, 508 S.E.2d 496, we considered nearly identical jury instructions and found no error. Our rationale in *Call* applies to this case.

> Even though the jury would necessarily have to consider evidence of the robbery to find each aggravating circumstance, it is clear from the record that the trial court did not allow the jury to find both aggravating circumstances using the exact same evidence. Further, both circumstances were supported by sufficient, independent evidence, apart from that which overlapped, upon which the jury could rely.

Id. at 427, 508 S.E.2d at 524. As in *Call*, we conclude that aggravating circumstance (e)(6) was not subsumed within aggravating circumstance (e)(5), and that the trial court did not commit error by instructing the jury on both circumstances.

[6] Next, we examine whether aggravating circumstance (e)(5) (the murder was committed while defendant was engaged in the commission of a kidnapping) was completely subsumed within aggravating

circumstance (e)(9) (the capital felony was especially heinous, atrocious, or cruel), and whether the trial court erred in failing to intervene to prevent improper argument regarding aggravating circumstance (e)(9).

The evidence showing the murder was committed during a kidnapping is, as the trial court stated in its instruction to the jury, that the defendant unlawfully confined a person, restrained a person, removed a person from one place to another and that the person did not consent and that this was done for the purpose of facilitating the defendant's commission of robbery with a dangerous weapon. Evidence exists separate from the kidnapping, showing the murder was especially heinous, atrocious, or cruel, including that defendant made the victim take off his clothes, put a ball into the victim's mouth, and put electrical tape around the victim's head to secure the ball. The electrical tape covered the victim's mouth and nose. The ball and tape completely cut off the victim's oxygen supply. Dr. Christopher Ingram, the medical examiner who performed the autopsy on the victim, testified that the victim would have lost consciousness within four minutes due to the ball and tape if defendant had not stabbed the victim. Defendant then stabbed the victim ten to 30 times while the victim was alive. Thus, separate evidence, apart from the kidnapping, shows the murder was especially heinous, atrocious, or cruel.

The trial court instructed the jury not to use the same evidence as a basis for finding more than one aggravating factor. Because separate evidence exists for each factor, and because we must presume the jury followed the trial court's instructions, *State v. Wiley*, 355 N.C. 592, 637, 565 S.E.2d 22, 52, *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003), we conclude that aggravating circumstance (e)(5) was not subsumed within aggravating circumstance (e)(9). Hence, we conclude the trial court did not err by instructing the jury on aggravating circumstances (e)(5) and (e)(9).

[7] Defendant also claims that the trial court erred by permitting the prosecutor's (e)(9) argument (that the murder was especially heinous, atrocious, or cruel) to go beyond the victim's murder experience to include the kidnapping offense as well. Defendant also argues that the prosecutor asked the jury to use the same evidence to find these two aggravating circumstances.

When the prosecutor first asked the jury to "image [sic] what [the victim] thought" during his closing arguments, defendant objected.

We assume defendant was objecting to the prosecutor's request that the jury imagine what the victim was thinking. However, we have consistently found such requests to be proper. *See State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001); *State v. Jones*, 346 N.C. 704, 714-15, 487 S.E.2d 714, 720-21 (1997). Moreover, defendant does not argue that the prosecutor's general request that the jury imagine what the victim was thinking was improper. Therefore, we decline to find the prosecutor's request improper in this case.

Furthermore, defendant did not object to the prosecutor's request that the jury imagine defendant's feelings during the kidnapping. Thus, we must determine whether the prosecutor's remarks were "so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *Barden*, 356 N.C. at 358, 572 S.E.2d at 135.

Although a complete overlap in the evidence supporting each aggravating factor is impermissible, some overlap in the evidence supporting each aggravating factor is permitted. *Barnes*, 345 N.C. at 238, 481 S.E.2d at 74. Here, although some of the evidence of aggravating circumstances (e)(5) and (e)(9) overlaps, separate and distinct evidence exists for each factor. We conclude that the prosecutor's request for the jury to consider the victim's thoughts during the kidnapping was proper. We also conclude that the prosecutor's argument was not a request for the jury to consider the exact same evidence to find aggravating circumstances (e)(5) and (e)(9). Therefore, we overrule defendant's assignment of error.

[8] Next, defendant contends he was denied effective assistance of counsel by counsel's failure to object or preserve error, counsel's failure to provide prior evaluations to Dr. Hilkey, counsel's failure to provide a prior witness statement to Dr. Hilkey, and counsel's failure to elicit a favorable element of diagnosis from Dr. Hilkey.

In *State v. Braswell*, this Court adopted the United States Supreme Court's language in *Strickland v. Washington*, and enunciated the following two-part test for determining whether a defendant received ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so

serious as to deprive the defendant of a fair trial, *a trial whose result is reliable.*

Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). We conclude that counsel's performance was not deficient; therefore, defendant did not receive ineffective assistance of counsel.

Defendant first claims he received ineffective assistance of counsel because his counsel failed to object or preserve error regarding the following: the prosecutor's improper comment on defendant's failure to testify; the prosecutor's misstatement of evidence; the double-counting of elements and evidence between statutory aggravating circumstances; and the prosecutor's improper argument regarding the especially heinous, atrocious, or cruel aggravating circumstance.

Defendant argues that his counsel failed to object to the prosecutor's comment on defendant's failure to testify. However, we have previously concluded that the prosecutor's statement was not an improper comment on defendant's failure to testify. Therefore, the prosecutor's statement was not improper, and defendant failed to show that counsel's performance was deficient, as the first part of the *Strickland* test requires.

Defendant next argues he received ineffective assistance of counsel because his counsel failed to object to the prosecutor's misstatement of the evidence during the prosecutor's cross-examination of Dr. Hilkey. However, the prosecutor did not misstate the evidence. Therefore because the prosecutor's statement was proper, defendant's counsel did not err by declining to object, and defendant failed to show his counsel was deficient as required by the first part of the *Strickland* test.

Defendant also argues he received ineffective assistance of counsel because his counsel failed to object to the double-counting of elements and evidence between statutory aggravating circumstances. However, we have already determined that the trial court properly instructed the jury on all three aggravating circumstances. Therefore, the prosecutor's statement was not improper, and defendant failed to meet the first prong of the *Strickland* test.

Additionally, defendant claims he received ineffective assistance of counsel because his counsel failed to object to the prosecutor's improper argument regarding the especially heinous, atrocious, or cruel aggravating circumstance. Having concluded that the prosecu-

tor's remarks were not improper, counsel was not deficient by choosing not to object, and defendant again has failed to meet the first part of the *Strickland* test.

Defendant next claims he received ineffective assistance of counsel because of his counsel's failure to provide defendant's prior psychiatric evaluations to Dr. Hilkey, the psychologist who testified on defendant's behalf. Defendant contends this failure made Dr. Hilkey look unprepared and undermined the psychologist's credibility. The transcript contains sufficient information to determine whether counsel's decision not to provide defendant's prior psychiatric evaluations to Dr. Hilkey prejudiced defendant. Therefore, we will review this issue on direct appeal.

We do not conclude defense counsel's conduct "fell[] below an objective standard of reasonableness," *State v. Fair*, 354 N.C. 131, 166-67, 557 S.E.2d 500, 525 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002), when defense counsel failed to provide Dr. Hilkey with defendant's prior psychological evaluations. Defendant argues that because Dr. Hilkey did not review these evaluations prior to testifying, he appeared unprepared during the State's cross-examination. However, Dr. Hilkey's credibility was not harmed. In fact, defense counsel used the cross-examination in his closing argument to bolster Dr. Hilkey's credibility. Therefore, because defendant failed to show "counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment," *Braswell*, 312 N.C. at 562, 324 S.E. 2d at 248, defendant did not meet the first prong of the *Strickland* test.

Defendant next claims he received ineffective assistance of counsel because defense counsel did not provide Dr. Hilkey with a witness statement. After Dr. Hilkey testified, the State presented rebuttal evidence consisting of Anthony Nathan's testimony that he heard defendant tell another jail inmate, "I can't change anything. I mean, I'm guilty. . . . I know I did it and I didn't feel anything." The transcript contains sufficient information to determine whether counsel's decision not to provide Dr. Hilkey with Nathan's statement prejudiced defendant. Therefore, we will review this issue on direct appeal.

Defense counsel's failure to inform Dr. Hilkey of this statement did not harm Dr. Hilkey's credibility. In defense counsel's closing argument at sentencing, counsel stated: "after the fourth stab wound and [defendant] went into a fog. . . .[that defendant said he] didn't feel anything is consistent with Dr. Hilkey's opinion." Because evidence

that defendant "didn't feel anything" when he killed the victim is not inconsistent with defendant feeling remorse at a later time, defense counsel did not err by failing to inform Dr. Hilkey of this statement. Thus, defendant failed to show "that counsel's performance was deficient," *Braswell*, 312 at 562, 324 S.E.2d at 248.

Next, defendant argues his trial counsel was ineffective by failing to elicit testimony from Dr. Hilkey concerning one element of dependent personality. Dr. Hilkey testified that defendant met six of eight criteria for a dependent personality, as defined by the Revised *Diagnostic and Statistical Manual of Mental Disorders* (Michael B. First ed. 4th ed. 2000). Dr. Hilkey described the fifth criterion as: "goes to excessive lengths to obtain nurturing and support of others." The Revised *Diagnostic and Statistical Manual of Mental Disorders* in fact defines the fifth criterion as: a person who "goes to excessive lengths to obtain nurturance and support from others, *to the point of volunteering to do things that are unpleasant.*" *Id.* at 725 (emphasis added). Defendant argues the italicized language, which defense counsel did not elicit from Dr. Hilkey, directly addresses how defendant's dependent personality related to his criminal actions.

The record indicates defense counsel did not fail to elicit defendant's dependent personality from Dr. Hilkey. Although Dr. Hilkey's description of the fifth criterion did not indicate Maniego influenced defendant to commit crimes, other portions of Dr. Hilkey's testimony indicate Maniego's influence. For example, Dr. Hilkey testified that defendant "would often times seek people who he would rely on who he would become dependent on and abandon his own . . . sense of . . . self." Dr. Hilkey also testified that defendant's "need to belong . . . took precedence over his own capacity to know right from wrong," and that defendant was "directly influenced by the behavior of [Maniego]." Thus, Dr. Hilkey did indicate that defendant's personality disorder influenced his commission of crimes.

Defendant's counsel did not err merely by failing to elicit evidence of Maniego's influence at the beginning of Dr. Hilkey's testimony. Therefore, defendant failed to show ineffective assistance of counsel because he did not show his "counsel's performance was deficient." *Braswell*, 312 N.C. at 562, 324 S.E.2d at 248.

PRESERVATION ISSUES

Defendant next argues that, because the murder indictment failed to allege all the elements of first-degree murder and all the

aggravating circumstances to be applied at the capital sentencing hearing, the murder indictment was in violation of his constitutional rights. But, as we stated in *State v. Hunt*, 357 N.C. 257, 278, 582 S.E.2d 593, 607, *cert. denied*, — U.S. —, 156 L. Ed. 2d 702 (2003), the failure to include all aggravating circumstances in an indictment "violates neither the North Carolina nor the United States Constitution." *Id.* Also, we stated in *State v. Wallace*, 351 N.C. 481, 508, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000), that the elements of first-degree murder need not be charged. Therefore, the murder indictment is proper, and defendant's assignment of error is overruled.

Defendant next contends this Court should strike the death penalty as unconstitutional. However, this Court has consistently held that the death penalty is constitutional. *See e.g. State v. Haselden*, 357 N.C. 1, 28, 577 S.E.2d 594, 611, *cert. denied*, — U.S. —, — L. Ed. 2d —, 72 U.S.L.W. 3308 (2003); *State v. McKoy*, 327 N.C. 31, 37-39, 394 S.E.2d 426, 429-30 (1990); *State v. Barfield*, 298 N.C. 306, 343-54, 259 S.E.2d 510, 537-44 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). We find no reason to depart from our prior holdings. Hence, we conclude that the death penalty is constitutional.

Finally, defendant claims aggravating circumstance N.C.G.S. § 15A-2000(e)(9), that the murder was especially heinous, atrocious, or cruel, is unconstitutionally vague and overbroad. We have repeatedly considered and rejected this argument. *Haselden*, 357 N.C. at 26, 577 S.E.2d at 610; *State v. Call*, 353 N.C. 400, 424, 545 S.E.2d 190, 205, *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548 (2001). We see no reason to depart from our prior rulings on this issue. Thus, we determine that aggravating circumstance (e)(9) is not overbroad.

PROPORTIONALITY REVIEW

[9] Having concluded that defendant's sentencing proceeding was free from prejudicial error, we must now determine: (1) whether the record supports the aggravating circumstances found by the jury and upon which the sentence of death was based; (2) whether the 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).

In the present case, the jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. The jury found the aggravating circumstances that defendant committed the murder while engaged in commission of first-degree kidnapping, N.C.G.S. § 15A-2000(e)(5); the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and defendant committed the murder for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). After reviewing the record, transcripts, briefs, and oral arguments we conclude that the evidence supports all three aggravating circumstances. Moreover, we conclude that the death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

Proportionality review is designed to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935. In conducting proportionality review, we determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983); *see* N.C.G.S. § 15A-2000(d)(2). Whether the death penalty is disproportionate "ultimately rest[s] upon the experienced judgments of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

This Court has determined that the death sentence was disproportionate in eight cases. *State v. Kemmerlin*, 356 N.C. 446, 489, 573 S.E.2d 870, 898-99 (2002); *State v. Benson*, 323 N.C. 318, 328, 372 S.E.2d 517, 522 (1988); *State v. Stokes*, 319 N.C. 1, 27, 352 S.E.2d 653, 668 (1987); *State v. Rogers*, 316 N.C. 203, 237, 341 S.E.2d 713, 733 (1986) (*overruled on other grounds by State v. Gaines*, 345 N.C. 647, 677, 483 S.E.2d 396, 414 (1997), and *by State v. Vandiver*, 321 N.C. 570, 573, 364 S.E.2d 373, 375); *State v. Young*, 312 N.C. 669, 691, 325 S.E.2d 181, 194 (1985); *State v. Hill*, 311 N.C. 465, 479, 319 S.E.2d 163, 172 (1984); *State v. Bondurant*, 309 N.C. 674, 693, 309 S.E.2d 170, 182 (1983); and *State v. Jackson*, 309 N.C. 26, 46, 305 S.E.2d 703, 719 (1983).

However, each of these eight cases is distinguishable from the present case. In *Kemmerlin*, 356 N.C. at 488, 573 S.E.2d at 898; *Benson*, 323 N.C. at 328, 372 S.E.2d at 522; *Stokes*, 319 N.C. at 10, 352 S.E.2d at 658; *Rogers*, 316 N.C. at 236, 341 S.E.2d at 732; *Hill*, 311 N.C.

at 469, 319 S.E.2d at 166; and *Jackson*, 309 N.C. at 44, 305 S.E.2d at 716, the jury only found one aggravating circumstance. Here, the jury found three aggravating circumstances.

In *Young*, 312 N.C. at 690, 325 S.E.2d at 194, where the jury found two aggravating circumstances, this Court noted that the jury failed to find the especially heinous, atrocious, or cruel aggravating circumstance. N.C.G.S. § 15A-2000(e)(9). Here, the jury found that aggravating circumstance.

In *Bondurant*, 309 N.C. at 694, 309 S.E.2d at 182, this Court determined that the death penalty was unconstitutional because immediately after the defendant shot the victim, the defendant exhibited concern for the victim and took the victim to the hospital. Here, defendant presented no evidence showing that he exhibited concern for Brandt after he stabbed Brandt. In fact, the evidence shows defendant left the victim's body in the woods, and did not attempt to find the body until several days after the murder. Even then, defendant only did so at a detective's request, and was unable to locate the body.

Additionally, in *Benson*, 323 N.C. at 328, 372 S.E.2d at 522, *Stokes*, 319 N.C. at 27, 352 S.E.2d at 668, and *Jackson*, 309 N.C. at 44, 305 S.E.2d at 716, the defendants were convicted of felony murder only. Here, defendant was convicted of both felony murder and murder with premeditation and deliberation. "The finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

After reviewing the cases, we conclude that the present case is more similar to certain cases in which we have found the death penalty proportionate (like *State v. Mann* 355 N.C. 294, 318, 560 S.E.2d 776, 791, *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002), where the jury found the same three aggravating circumstances as the jury found in the case at bar) than those cases in which we have found the death penalty disproportionate. Accordingly, we conclude defendant received a fair trial and capital sentencing proceeding, free from prejudicial error. Therefore, the sentence of death entered against defendant must be left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. WESLEY TOBY SMITH, JR.

No. 607A02

(Filed 5 December 2003)

1. Evidence— hearsay—state of mind exception

The trial court did not err in a capital first-degree murder prosecution by admitting a hearsay statement of the victim at trial regarding a blue van under the N.C.G.S. § 8C-1, Rule 803(3) state of mind exception, because: (1) the testimony regarding the blue van made four days prior to the victim's death served to support the victim's assertion that it was spooky at home alone during the day and tended to show her state of mind at the time of the conversation with her mother; (2) the statement about the blue van, along with an earlier statement that defendant gave the victim the creeps, supported the victim's intention to tell defendant to stay away and was relevant to show a potential confrontation; and (3) even assuming the testimony was inadmissible based on the fact that defendant drove a black and burgundy colored van and the only link ever made between defendant and the blue van was made by defendant's counsel, defendant has not shown that the error was prejudicial.

2. Evidence— nonexpert testimony—effects of Valium

The trial court did not err in a capital first-degree murder prosecution by allowing the testimony of a nurse regarding the effects of ten milligrams of Valium, because: (1) the testimony was admissible under N.C.G.S. § 8C-1, Rule 701 as a nonexpert's opinion based on reasonable perceptions while working as a nurse over a number of years; and (2) her testimony was admissible under Rule 701 since the testimony was helpful in the determination of a fact in issue concerning whether defendant was so impaired when he killed the victim that he could not have killed with premeditation and deliberation.

3. Evidence— testimony—defendant carried pocketknife

The trial court did not commit prejudicial error in a capital first-degree murder prosecution by admitting testimony that defendant sometimes carried a pocketknife, because: (1) defendant admitted to stabbing the victim with a knife, the murder weapon was not found, and evidence was presented that defendant carried different knives at different times; and (2) defendant

cannot establish that the outcome of his trial would have been any different had the testimony regarding the knife been excluded.

4. Criminal Law— prosecutor's argument—crime scene

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 closing argument regarding the crime scene, because: (1) prosecutors may create a scenario of the crime committed that is reasonably inferable from the evidence in the record, and the prosecutor's inferences from the evidence presented were not so tenuous that the trial court needed to intervene; and (2) the prosecutor informed the jury that his version was just one interpretation of the evidence presented at trial.

5. Homicide— first-degree murder—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree premeditated murder, because: (1) defendant confessed to killing the victim by stabbing her repeatedly; (2) although the victim's request to stay away was presumably the trigger for defendant's actions, telling a casual acquaintance to stay away is not sufficient provocation to compel a killing by stabbing or even a rage; (3) defendant told four different stories of how he injured his hands in an attempt to avoid being linked to the crime; (4) defendant first denied involvement and attempted to divert suspicion; and (5) the victim was stabbed and cut approximately sixty times, and defendant admitted that he repeatedly stabbed the victim even as she fell to the floor and tried to crawl away.

6. Criminal Law— capital sentencing—prosecutor's argument—defendant's failure to show remorse—not comment on failure to testify

The trial court did not err in a capital sentencing proceeding by failing to intervene ex mero motu during the State's closing argument allegedly commenting on defendant's failure to testify, because: (1) the prosecutor was commenting on defendant's demeanor, and the jury can consider the demeanor of defendant in making its sentencing decision; and (2) the prosecutor's statements were not of such a character that the jury would take the statements to be a reference to defendant's failure to testify.

7. Constitutional Law— right to testify—trial court inquiry

The trial court did not err by failing to inquire whether defendant wished to testify at his capital sentencing proceeding, because: (1) our Supreme Court has never required trial courts to inform a defendant of his right to testify or to make an inquiry on the record regarding his waiver of the right to testify; (2) absent a defendant's indication that he wished to testify, it cannot be said that the trial court denied defendant his right; and (3) after all evidence was presented at the guilt-innocence phase of the trial, defense counsel made it clear that defendant wished to waive the right to testify on his own behalf.

8. Homicide— first-degree murder—failure to allege aggravating circumstances in indictment

The trial court had jurisdiction to enter a death sentence against defendant for first-degree murder even though the indictment did not allege any aggravating circumstances.

9. Homicide— first-degree murder—short-form indictment—constitutionality

The short-form indictment used to charge defendant with first-degree murder was constitutional.

10. Constitutional Law— effective assistance of counsel—failure to move for dismissal of charges

A defendant in a first-degree murder case was not deprived of the effective assistance of counsel even though his counsel failed to move for dismissal of the charges based on lack of jurisdiction, because: (1) the indictment charging defendant was proper, and the trial court had jurisdiction to convict defendant of first-degree murder and to sentence him to death; and (2) defense counsel's failure to object to a legally sufficient indictment was not a deficiency in performance.

11. Sentencing— aggravating circumstances—murder especially heinous, atrocious, or cruel

The evidence in a capital first-degree murder case supported the jury's finding of the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel, because: (1) the victim was stabbed approximately sixty times in her own home; (2) defendant continued to stab the victim even as she fell to the ground and attempted to crawl away; and (3) it took approximately ten minutes for the victim to die.

12. 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) defendant was found guilty on the basis of premeditation and deliberation; (2) the victim was murdered in her own home, a factor which shocks the conscience; and (3) the jury found the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered 29 May 2002 by Judge Charles C. Lamm, Jr., in Superior Court, Rowan County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 8 September 2003.

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

Staples S. Hughes, Appellate Defender, by Barbara S. Blackman, Assistant Appellate Defender, for defendant-appellant.

LAKE, Chief Justice.

On 15 October 2001, defendant was indicted for first-degree murder for the stabbing death of Margaret Leighann Martin. He was tried capitally to a jury at the 6 May 2002 Criminal Session of Superior Court, Rowan County, the Honorable Charles C. Lamm, Jr. presiding. The jury found defendant guilty of first-degree murder, and, following a capital sentencing proceeding, recommended that defendant be sentenced to death. On 29 May 2002, Judge Lamm sentenced defendant accordingly. Defendant appeals his conviction for first-degree murder and his death sentence to this Court as of right.

The evidence at trial tended to show that defendant met the victim's boyfriend, Jason Wagner, while working as a painter at a construction site. Defendant became acquainted with the victim, Margaret Leighann Martin, during her visits to the construction site to see Wagner. Defendant visited the couple at their home several times, occasionally staying even when Wagner was not there.

On two separate occasions, Martin expressed her discomfort about being around defendant. In the summer of 2001, Martin told her mother that she had stopped visiting Wagner at work because defendant "gave her the creeps." On 8 September 2001, Martin told her

mother that she intended to tell defendant to stop visiting her home and to stop associating with Wagner.

On 11 September 2001, Wagner returned home early in the day to check on Martin. Defendant's van was parked in the driveway, and Wagner found defendant and Martin sitting at opposite ends of the couch watching television. Defendant asked Wagner if he had any work available. Wagner replied in the negative and defendant left shortly thereafter.

The following day, Wagner left for work at approximately eight o'clock in the morning. He returned home in the evening to find the front door open. Once inside, Wagner noticed a dining room chair was flipped over, the dishwasher door was open, and there was blood in the kitchen. Wagner ran to the bedroom, where he found Martin lying face down on the floor beside the bed. Wagner checked for a pulse and discovered that Martin was dead. She had been stabbed approximately sixty times in the back, head, and chest areas. Additionally, her throat and neck were cut in several places.

Defendant was first questioned by police on 17 September 2001. At that time, defendant denied any involvement in the victim's murder and consented to giving blood, hair, and fingernail samples. That same day, the police searched defendant's home and property, finding a pair of shoes that were later determined to match prints found in the victim's home. After searching defendant's property, the police asked defendant to return to the sheriff's department for further questioning. Defendant confessed to Martin's murder during his second interview with police and gave a written statement detailing the circumstances of the victim's death. The basic issue for the jury to determine at trial was whether defendant murdered the victim with premeditation and deliberation.

Defendant sets forth several assignments of error in the proceedings. He additionally argues that the sentence of death imposed upon him is disproportionate to the crime. For the reasons that follow, we conclude that defendant's trial and capital sentencing proceeding were free of prejudicial error and that defendant's sentence of death is not disproportionate.

[1] In his first assignment of error, defendant contends that the trial court erred in admitting a hearsay statement of the victim at trial. Martin's mother, Tonia Helms, testified as to a conversation she had with Martin shortly before her death. According to this testimony, the Saturday before Martin died, she told her mother that she intended to

tell defendant to stop coming by the house and to stop associating with Wagner. During the same conversation, Martin told her mother that it was "spooky" at home, alone, during the day, and that sometimes a blue van would come to the end of the road and hesitate before turning around to leave. Defendant objected to the testimony regarding the blue van, but the trial court admitted the testimony pursuant to N.C.G.S. § 8C-1, Rule 803(3).

Defendant contends that Helms' testimony regarding the blue van was not within the Rule 803(3) hearsay exception. Rule 803(3) allows for the admission of

> [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

N.C.G.S. § 8C-1, Rule 803(3) (2001). Statements that merely recount a factual event are not admissible under Rule 803(3) because such facts can be proven with better evidence, such as the in-court testimony of an eyewitness. *State v. Hardy*, 339 N.C. 207, 229, 451 S.E.2d 600, 612 (1994). However, where such statements "serve . . . to demonstrate the basis for the [victim's] emotions," the statements will be admitted under Rule 803(3). *State v. Gray*, 347 N.C. 143, 173, 491 S.E.2d 538, 550 (1997), *cert. denied*, 523 U.S. 1031, 140 L. Ed. 2d 486 (1998), *and overruled in part on other grounds by State v. Long*, 354 N.C. 534, 557 S.E.2d 89 (2001). Martin told her mother, just prior to relating the story of the blue van, that it was "spooky" at home alone during the day. Martin's statement that it was "spooky" at home alone indicated her general feeling of discomfort about being home alone and was a part of her expressed feeling regarding defendant. The activity of the blue van was a factor contributing to Martin's discomfort. We thus hold that the testimony regarding the blue van served to support Martin's assertion that it was "spooky" at home alone during the day and tended to show her state of mind at the time of the conversation. Ms. Helms' testimony of the statements Martin made four days prior to her death reflects Martin's state of mind and comes within the Rule 803(3) hearsay exception.

Defendant also contends that even if the testimony was admissible under Rule 803(3), the testimony should have been excluded as irrelevant because defendant's van was black and burgundy in color.

We disagree. "[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, 7 (1996). Here, Ms. Helms testified that Martin told her she intended to tell defendant to stop coming to the house. She followed up by stating that it was "spooky" there and that she had seen a blue van come down the road and hesitate before leaving. Martin's statements, along with an earlier statement that defendant gave her "the creeps," support her intent to tell defendant to stay away. The testimony was relevant because it related to Martin's intent to tell defendant to stop coming to the house, giving rise to a potential confrontation.

Even assuming *arguendo* that the testimony regarding the blue van was inadmissible, defendant has not shown that the error was prejudicial to his case. In order to prevail, defendant must show "that a reasonable possibility exists that a different result would have been reached absent the error." *State v. Weeks*, 322 N.C. 152, 170, 367 S.E.2d 895, 906 (1988). The prosecution did not attempt to connect defendant to the blue van or suggest that the driver of the blue van murdered the victim. Testimony from several witnesses established that defendant drove a black and burgundy colored van. The only link ever made between defendant and the blue van was made by defendant's counsel. Given that a relationship between defendant and the blue van was never established, defendant cannot show that a reasonable possibility exists that the outcome would have been different had the testimony been excluded. Therefore, even if the trial court did err in admitting the testimony regarding the blue van, such error was harmless to defendant beyond a reasonable doubt. This assignment of error is overruled.

[2] Defendant next assigns error to the trial court's decision to allow the nonexpert testimony of nurse Leslie Burgess regarding the effects of ten milligrams of Valium. Defendant, in an attempt to negate the *mens rea* required for first-degree murder, argued that he was under the influence of a combination of drugs at the time he murdered the victim and thus was not capable of premeditation and deliberation. In his statement to police, defendant stated that on the morning of the murder, he "took some pills, 2 Valium, ten milligrams, 3 Klonopins, ten milligrams, 2 Xanax, number 10's." Ms. Burgess testified for the State as to the effects of two, ten-milligram Valium on the body.

Ms. Burgess testified that she holds bachelor degrees in preveterinary medicine and in nursing. She has been a registered nurse

since 1995. She has worked in the Intensive Care, Pediatric Intensive Care, and Pediatric Open Heart units of various hospitals. At the time of her encounter with defendant, Ms. Burgess worked in the emergency room of Rowan Regional Medical Center. Ms. Burgess was a highly qualified nurse with years of experience, but she did not have sufficient specialized knowledge, training, or experience necessary to testify as an expert regarding the effects of ten milligrams of Valium. Even though Ms. Burgess could not testify as an expert as to the effects of ten milligrams of Valium and was not so tendered, her testimony was still admissible under N.C.G.S. § 8C-1, Rule 701 as a nonexpert's opinion, based on her reasonable perceptions.

North Carolina Rule of Evidence 701 states:

> If the witness is not testifying as an expert, [her] testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of [her] testimony or the determination of a fact in issue.

N.C.G.S. § 8C-1, Rule 701 (2001).

Ms. Burgess gave extensive testimony as to defendant's physical condition at the time she treated him at the hospital. She testified that his temperature, pulse rate, respiration, blood pressure, and oxygen saturation levels were all in the normal range for a man of his age and size. She additionally testified that his pupils reacted normally to light and he did not appear intoxicated or otherwise impaired. After questioning Ms. Burgess on defendant's condition as she observed him on 12 September 2001, the State went on to ask Ms. Burgess several questions about the effects of Valium on an individual. The following colloquy occurred during a *voir dire* of Ms. Burgess:

> Q. And just say where you worked, if you can recall, in this last twelve years.
>
> A. At Presbyterian Hospital in Charlotte, I worked in their Intensive Care Unit, and then I worked in the Pediatric Intensive Care Unit. I've worked at MUSC, Medical University of South Carolina in Charleston, South Carolina in the Pediatric Intensive Care Unit, Pediatric Open Heart Unit, and Pediatric Emergency Room, and at Northeast Medical Center in Concord in the Pediatric Intensive Care Unit and Rowan Regional Medical Center in the Emergency Department.

> Q. In the course of your duties, did you see the—did you see Valium prescribed?
>
> A. Yes. I also worked at Carolina Medical in the Emergency Department on a part-time basis.
>
> Q. You saw Valium prescribed for patients that were under your care?
>
> A. That's correct.
>
> Q. And did you personally observe the effects of Valium on—specifically, of taking two, ten milligram Valiums.
>
> A. Of two, ten? Rarely.
>
> Q. Okay.
>
> A. Because that was a high dose.
>
> Q. All right. What would be a typical dose of Valium?
>
> A. Ten—ten milligrams.
>
> Q. One, ten milligrams.
>
> A. That's correct.

Ms. Burgess was then allowed to testify before the jury as to the effects of taking two, ten-milligram Valium. She testified as follows:

> Q. Now, Ms. Burgess, I think I was asking you whether, in the course of your duties and training, that you're familiar with the effects of the drug known as Valium?
>
> A. Yes, I am.
>
> . . . .
>
> Q. All right. And, are you familiar with the effects of taking two, ten milligram Valium at the same time would be on a person?
>
> A. Yes, sir. It'd make them lethargic, somewhat disoriented, slow to respond, pupillary response would be sluggish . . . . Movements would be slow, the vital signs would be depressed, meaning the respirations would be low, the blood pressure would be low and the pulse would definitely be low.
>
> Q. Did you find any of these effects on Wesley [Toby] Smith, Jr. when you examined him at 12:15, on September 12th?
>
> A. No, sir.

Q. Do you have an opinion as to how long the effects of taking two, ten milligram Valium would remain—how long the effects would last on the individual that had taken them?

A. The maximum I would say would be six hours, maybe four hours.

Ms. Burgess' testimony regarding the effects of two, ten-milligram Valium was rationally based on her perceptions while working as a nurse over a number of years. She testified that she had seen the effects of Valium on patients in her care. Although Ms. Burgess did acknowledge during *voir dire* that she had rarely seen the effects of two, ten-milligram Valium, the trial court could reasonably infer from her response that she had seen the effects of such a dose at least once. Even if Ms. Burgess had not had personal experience with a patient taking two, ten-milligram Valium, her observations of the effects of a normal dose, along with her observations of the effects of medication in general, were sufficient for her to render a lay opinion as to the effects of two, ten-milligram Valium.

Ms. Burgess' testimony was further admissible as a nonexpert opinion under Rule 701 because the testimony was helpful in the determination of a fact in issue. Ms. Burgess' testimony was helpful to the jury in determining whether defendant was so impaired when he killed the victim that he could not have killed with premeditation and deliberation. Since Ms. Burgess' opinion as to the effects of two, ten-milligram Valium was rationally based on her perceptions while working as a nurse and her testimony was helpful to the jury in determining a fact in issue, the trial court did not err by allowing Ms. Burgess' testimony. This assignment of error is overruled.

[3] Defendant's third assignment of error is that the trial court committed prejudicial error by admitting testimony that defendant sometimes carried a pocketknife. Dr. Kenneth Snell, the pathologist who performed the victim's autopsy, concluded that the murder weapon was a knife with a blade no longer than three inches. The State introduced evidence that defendant had been known to occasionally carry a four-inch knife on his person. Defendant contends that because his pocketknife could not have been the weapon, the testimony that he sometimes carried it was irrelevant and prejudicial.

Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue. "In criminal cases, 'every circumstance that is calculated to throw any light upon the supposed crime is admissi-

ble. The weight of such evidence is for the jury.' " *State v. Lytch*, 142 N.C. App. 576, 580, 544 S.E.2d 570, 573 (2001) (quoting *State v. Hamilton*, 264 N.C. 277, 286-87, 141 S.E.2d 506, 513 (1965), *cert. denied*, 384 U.S. 1020, 16 L. Ed. 2d 1044 (1966)). Defendant admitted to stabbing the victim with a knife, yet the murder weapon was never found. The testimony to which defendant objects was relevant because it established that defendant sometimes carried a knife. The particular knife described had a four-inch blade, however, defendant may have carried different knives at different times. Because the weapon used to murder the victim was never found, evidence that defendant carried a knife with him at times had some relevance to the case.

Even assuming *arguendo* that the testimony was not relevant, defendant has the burden of establishing that the trial court's error in allowing the testimony was so prejudicial that a different result would have occurred had the testimony been excluded. *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987). Defendant has failed to meet his burden. Defendant argues that the testimony may have led the jury to infer that defendant was a violent man. However, defendant elicited testimony from his own witnesses regarding the various knives he owned and carried. In light of such testimony from his own witnesses, defendant cannot now say that the testimony may have caused the jury to speculate as to his tendencies towards violence. Additionally, it was not necessary for the State to prove that defendant carried a knife the day he murdered the victim. The jury could find defendant guilty based upon his picking up and using a knife found in the home, as defendant stated in his confession. Defendant cannot establish that the outcome of his trial would have been any different had the testimony regarding the knife been excluded. This assignment of error is overruled.

[4] Defendant's fourth assignment of error is that the State's closing argument was unsupported by the evidence and was grossly improper. Defendant failed to object to the prosecutor's closing argument at trial. Therefore, "review is limited to an examination of whether the argument was so grossly improper that the trial [court] abused [its] discretion in failing to intervene *ex mero motu*." *State v. Gladden*, 315 N.C. 398, 417, 340 S.E.2d 673, 685, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986).

In his closing argument, the prosecutor told the jury that the crime scene was "absolutely critical" in determining defendant's intent when he murdered the victim. The prosecutor then suggested

a scenario of the crime in which defendant first stabbed the victim in the back and in the head. Later, the prosecutor suggested to the jury that defendant may have been leaving at one point while the victim was still alive, but, instead of leaving, he returned to the victim and cut her throat before she died. Defendant contends that the prosecutor's scenario of what occurred the morning of 12 September 2001 was unsupported by the evidence and, given that the story the crime scene tells is "absolutely critical" in deciding defendant's guilt, the trial court erred by not intervening. We disagree.

During closing arguments, prosecutors may create a scenario of the crime committed that is reasonably inferable from the evidence in the record. *State v. Ingle*, 336 N.C. 617, 645, 445 S.E.2d 880, 895 (1994), *cert. denied*, 514 U.S. 1020, 131 L. Ed. 2d 222 (1995). Such arguments rest within the discretion of the trial court, and counsel will be granted wide latitude in hotly contested cases. *State v. Roseboro*, 344 N.C. 364, 376, 474 S.E.2d 314, 320 (1996). Here, the prosecutor's inferences from the evidence presented were not so tenuous that the trial court needed to intervene. There was evidence presented at trial regarding the wounds inflicted upon the victim, blood sample analysis from various places throughout the house, and footprint identifications that were all available and used to infer the scenario suggested by the prosecutor. Further, the prosecutor himself informed the jury that his was just one interpretation of the evidence presented at trial. Reviewing the prosecutor's closing argument in light of the evidence presented at trial, we hold that there was sufficient evidence to support the scenario presented by the prosecutor. In light of the evidence, we cannot say that the prosecutor's argument was improper, much less so grossly improper as to require intervention *ex mero motu* by the trial court. This assignment of error is overruled.

[5] Defendant's fifth assignment of error is that the trial court erred by denying defendant's motion to dismiss because the evidence was insufficient to support a conviction for first-degree premeditated murder. When ruling on a motion to dismiss, the trial court must determine whether the prosecution has presented "substantial evidence of each essential element of the crime." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998). "Substantial evidence is that amount of 'relevant evidence that a reasonable mind might accept as adequate to support a conclusion.' " *State v. Williams*, 355 N.C. 501, 579, 565 S.E.2d 609, 654 (2002) (quoting *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995)), *cert. denied*, 537 U.S. 1125, 154

L. Ed. 2d 808 (2003). In making its decision, the trial court must view the evidence in the light most favorable to the State. *State v. Hyatt*, 355 N.C. 642, 666, 566 S.E.2d 61, 77 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003). Here, the trial court correctly determined that the State presented substantial evidence of each element of the crime of first-degree murder.

Defendant confessed to killing the victim by stabbing her repeatedly. In his confession, defendant claimed that something just came over him and he "went into a rage." His defense at trial was that his "rage" was not premeditated and he lacked the requisite intent for first-degree murder. For the jury to find defendant guilty of first-degree murder, it had to find that the murder was committed with premeditation and deliberation. Premeditation and deliberation, both processes of the mind, must generally be proven by circumstantial evidence. *State v. Small*, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991). Circumstances which may be considered include: (1) lack of sufficient provocation by the victim; (2) defendant's conduct before and after the killing, including attempts to cover up involvement in the crime; and (3) evidence of the brutality of the crime, and the dealing of lethal blows after the victim has been rendered helpless. The State produced substantial evidence covering each of these circumstances.

First, the State presented evidence tending to show that the victim intended to tell defendant to stop coming to her home and to stop associating with Wagner. Defendant, by his own admission, establishes that the victim did tell him to stay away. Shortly thereafter, defendant "went into a rage" and began stabbing the victim. Although such request to stay away was presumably the trigger for defendant's actions, telling a casual acquaintance to stay away is definitely not sufficient provocation to compel a killing by stabbing or even "a rage."

Second, the State presented evidence that on the morning of the victim's murder, defendant lied to his wife about where he was going when he left their house. Defendant told his wife that he was going to the store when, in fact, he intended on going to see the victim. After the murder, defendant continued to lie to his wife and to others. Defendant cut his hands during the commission of the crime. He told his wife and a housemate that, while at the store, a man approached defendant and ordered him off of the pay phone. When defendant refused, the man pulled out a knife and cut defendant. Defendant went to the hospital for treatment, where he told a nurse he cut his

hands while stripping wires at work. He later told a police officer that he injured his hands during an altercation that occurred at his house. Then, when first questioned about the murder, defendant told police he injured his hands while stripping wires at home. Defendant told four different stories of how he injured his hands, in an attempt to avoid being linked to the crime. Additionally, when first questioned by police, defendant denied involvement and attempted to divert suspicion to Wagner by telling police that Wagner was abusive towards the victim.

Finally, the State's evidence shows that the victim was stabbed and cut approximately sixty times. Her skull was fractured and her throat was cut. Some of the stab wounds were so forceful that the knife handle left marks on the victim's body. Further, defendant admitted in his statement to police that he repeatedly stabbed the victim, even as she fell to the floor and tried to crawl away. The State presented substantial evidence of premeditation and deliberation. The trial court did not err in denying defendant's motion to dismiss because a reasonable jury could conclude from the evidence that defendant murdered the victim with premeditation and deliberation. This assignment of error is overruled.

[6] Defendant's sixth assignment of error is that the trial court erred by failing to intervene when the State, during its penalty phase closing argument, commented on defendant's failure to testify. N.C.G.S. § 8-54 provides that a defendant's failure to testify shall not create any presumption against him. To that end, prosecutors cannot directly refer to a defendant's failure to testify. *Griffin v. California*, 380 U.S. 609, 614, 14 L. Ed. 2d 106, 109 (1965). This is so because, "extended reference by the court or counsel concerning [defendant's failure to testify] would nullify the policy that the failure to testify should not create a presumption against the defendant." *State v. Randolph*, 312 N.C. 198, 206, 321 S.E.2d 864, 869 (1984). In determining whether a prosecutor's statement is, in fact, a direct reference to a defendant's failure to testify, the Court must consider whether " 'the language used [was] manifestly intended to be, or was . . . of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.' " *United States v. Anderson*, 481 F.2d 685, 701 (4th Cir. 1973) (quoting *U.S. ex rel. Leake v. Follette*, 418 F.2d 1266, 1269 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050, 25 L. Ed. 2d 665 (1970)), *aff'd*, 417 U.S. 211, 41 L. Ed. 2d 20 (1974). *See also State v. Rouse*, 339 N.C. 59, 95-96, 451 S.E.2d 543, 563 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995).

In the present case, the prosecutor made the following statements during his penalty phase closing argument.

> One of the things you're going to hear is whether [Toby] Smith has any remorse for this killing. You heard the tape of the telephone conversation that was played from jail, and you heard [Toby] Smith say to his wife, "I didn't mean to kill that girl." Well, I'd say to you you've sat here for two weeks of trial. Have you seen any expression of remorse or regret from Wesley [Toby] Smith, Jr., other than when it had to do with his present predicament? . . . . Did you see any reaction from him on the verdict from this jury? The only time Wesley [Toby] Smith has shown any remorse is remorse over his own condition.

Defendant contends that the jury could have only understood these statements to be a reference to defendant's failure to testify at trial and at the sentencing hearing. We disagree.

The prosecutor's statements, viewed as a whole, do not make reference to defendant's failure to testify. Rather, the prosecutor was commenting on defendant's demeanor. The jury may properly consider the demeanor of defendant in making its sentencing decision. The prosecutor, referring to the tape recorded telephone conversation between defendant and his wife, asked the jury if it had heard any remorse from defendant. The prosecutor also asked the jury if it had seen any remorse from defendant during the trial. Viewing the prosecutor's statements as a whole, it is clear that he did not intend to comment on defendant's failure to testify. Further, the prosecutor's statements were not of such a character that the jury would take the statements to be a reference to defendant's failure to testify. This assignment of error is without merit and is overrruled.

[7] Defendant's seventh assignment of error is that the trial court erred by failing to inquire whether defendant wished to testify at his sentencing proceeding. Defendant contends that he has a constitutional right to testify on his own behalf, and that this right was violated because the trial court did not inquire as to whether defendant wished to testify at the sentencing proceeding. This Court has never required trial courts to inform a defendant of his right to testify or to make an inquiry on the record regarding his waiver of the right to testify. *State v. Carroll*, 356 N.C. 526, 533, 573 S.E.2d 899, 905 (2002), *cert. denied*, — U.S. —, 156 L. Ed. 2d 640 (2003). While defendant does have a constitutional right to testify, this right was not violated in the instant case. In *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741

(1985), this Court held that absent a defendant's indication that he wished to testify, it cannot be said that the trial court denied defendant of his right. *Id.* at 474-75, 334 S.E.2d at 750.

After all evidence was presented at the guilt-innocence phase of the trial, defendant's attorney made it clear to the trial court that defendant wished to waive the right to testify on his own behalf. Defendant's attorney informed the trial court that defendant had been continuously consulted throughout the trial regarding his right to testify, and defendant was informed that it was solely his decision whether to testify on his own behalf. Defendant's attorney further informed the trial court that defendant had chosen not to testify in his own defense. At that point, defendant affirmed to the trial court that he had decided not to testify. Defendant presented testimony from nineteen witnesses at his sentencing proceeding, and he did not testify on his own behalf. Defendant's attorney was by his side at all times and available to counsel defendant regarding his right to testify. Given these circumstances, and because defendant never made a request to testify on his own behalf, we cannot say that defendant's rights were violated. This assignment of error is without merit and is overruled.

[8] Defendant's eighth assignment of error is that the trial court did not have the jurisdiction to enter a death sentence against defendant because the indictment did not allege any aggravating circumstances. This Court recently considered and rejected this argument in *State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593, *cert. denied*, — U.S. —, 156 L. Ed. 2d 702 (2003). This assignment of error is, therefore, overruled.

[9] Defendant's ninth assignment of error is that the trial court did not have the jurisdiction to convict defendant of first-degree murder because he was charged by a short-form indictment that did not specifically allege the elements necessary for first-degree murder. Defendant, recognizing that previous decisions by this Court have been contrary to his position in this argument, raises this issue for the purpose of preserving it for possible further judicial review of this case. We have considered defendant's arguments on this issue and find no reason to depart from our previous holdings. This assignment of error is overruled.

[10] Defendant's tenth assignment of error is that he was deprived of the effective assistance of counsel because his trial attorney failed to move for dismissal of the charges due to a lack of jurisdiction. To prevail in his argument, defendant must satisfy a two-part test, first set

out by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). Under *Strickland*, a defendant must establish (1) that his counsel's performance was deficient and (2) that the deficiencies prejudiced the defendant. *Id.* In order to prevail, a defendant must establish that his "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* The errors must have been "so serious as to deprive the defendant of a fair trial." *Id.* In the case *sub judice*, defendant has not met his burden in this regard. As discussed above, the indictment charging defendant was proper and the trial court had jurisdiction to convict defendant of first-degree murder and to sentence him to death. Since the indictment was legally sufficient, defendant's counsel's failure to object to it was not a deficiency in performance, and there was no prejudice to defendant. Defendant cannot meet the requirements for an ineffective assistance of counsel claim, and therefore, this assignment of error is overruled.

Having concluded that defendant's trial and capital sentencing proceeding were free of prejudicial error, we must now review the record and determine: (1) whether the evidence supports the aggravating circumstance found by the jury and upon which the sentencing court based its sentence of death; (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (2001).

[11] After a thorough review of the record on appeal, briefs, and oral arguments of counsel, we conclude that the evidence fully supports the aggravating circumstance found by the jury. The jury found, as an aggravating circumstance, that the murder of the victim was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9) (2001). The victim was stabbed approximately sixty times in her own home. Defendant continued to stab the victim even as she fell to the ground and attempted to crawl away. Evidence presented by the State tended to show that it took approximately ten minutes for the victim to die. The circumstances of the victim's death provide ample support for the jury's finding of the above aggravating circumstance. Further, we conclude there is no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We therefore turn to our final statutory duty of proportionality review.

[12] We conduct a proportionality review to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). In doing so, we must look at both the defendant and the crime. *State v. Watts*, 357 N.C. 366, 379, 584 S.E.2d 740, 750 (2003). In the present case, the jury found the existence of one aggravating circumstance: that the murder was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9).

The trial court submitted five statutory mitigating circumstances, including the "catchall" circumstance, of which the jury found none to exist. The trial court additionally submitted sixteen nonstatutory mitigating circumstances, of which the jury found only four to exist: (1) defendant had no history of violence or aggression toward others; (2) defendant's mother was tragically killed in a car accident when he was fifteen years old and this had a dramatic impact on him; (3) defendant loves and cares for his family, consisting of his father, two sisters, and three children; and (4) defendant admitted his guilt to police officers.

We begin our proportionality review by comparing this case to the eight cases where this Court has determined the sentence of death to be disproportionate. *See State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). After careful review, we conclude that this case is not substantially similar to any case in which this Court has previously found the death penalty disproportionate.

First, defendant was convicted of first-degree murder on the basis of premeditation and deliberation, the finding of which " 'indicates a more cold-blooded and calculated crime.' " *State v. Haselden*, 357 N.C. 1, 30, 577 S.E.2d 594, 612 (quoting *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)), *cert. denied*, — U.S. —, — L. Ed. 2d —, 72 U.S.L.W. 3308 (2003). Additionally, the

victim was murdered in her own home, a factor which "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. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). Further, the murder was found to be especially heinous, atrocious, or cruel under N.C.G.S. § 15A-2000(e)(9). These factors distinguish the present case from those in which this Court has found the sentence of death to be disproportionate.

In conducting a proportionality review, we must also compare this case with prior cases where this Court has found the death penalty to be proportionate. *Haselden*, 357 N.C. at 31, 577 S.E.2d at 613. Although this Court reviews all similar cases when engaging in our duty of proportionality review, "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.* at 31, 577 S.E.2d at 613 (quoting *State v. McCollum*, 334 N.C. 208, 244, 433 S.E.2d 144, 164 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994)). Upon comparison of the present case with those in which we have previously conducted a proportionality review, we conclude that this case is more similar to cases in which this Court has found the sentence of death proportionate than to those in which this Court has found the sentence of death disproportionate.

The similarities between this case and prior cases in which a sentence of death was found proportionate "merely serves as an initial point of inquiry." *State v. Daniels*, 337 N.C. 243, 287, 446 S.E.2d 298, 325 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995). The final decision of whether a death sentence is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). Therefore, having thoroughly reviewed the entire record in this matter, and based upon the characteristics of this defendant and the crime he committed, we cannot conclude as a matter of law that the sentence of death in this case is disproportionate or excessive.

Accordingly, we hold that defendant received a fair trial and capital sentencing proceeding, free of prejudicial error.

NO ERROR.

STEVE SINGLETON v. HAYWOOD ELECTRIC MEMBERSHIP CORPORATION

No. 403A02

(Filed 5 December 2003)

Trespass— real property—placement of electrical poles and power lines

The Court of Appeals did not err by affirming the trial court's entry of partial summary judgment in favor of plaintiff member in a trespass case arising out of defendant electric cooperative's placing of new electric poles and power lines on plaintiff's real property even though plaintiff asked defendant to enter the property to restring a downed transmission line, because: (1) a member only contracts to grant rights-of-ways and easements for the initial set up for the supply of electrical service for that individual member when he signs the parties' membership agreement; (2) the parties' "Conditions of Service" did not confer on defendant the unilateral right to utilize plaintiff's land to redesign an existing transmission line, add poles and lines, remove vegetative growth or cut down trees, and clear the path in order to restore power to other members; (3) defendant failed to obtain the necessary easements and rights-of-way before electing to redesign the downed transmission line; and (4) defendant did not have an express easement and has made no claim of a prescriptive easement.

Justice EDMUNDS dissenting.

Justice PARKER joining in dissenting opinion.

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. 197, 565 S.E.2d 234 (2002), affirming a judgment entered 19 October 2000 by Judge Loto G. Caviness in Superior Court, Haywood County. On 3 October 2002, the Supreme Court granted discretionary review of additional issues. Heard in the Supreme Court 7 April 2003.

Smathers & Norwood, by Patrick U. Smathers, for plaintiff-appellee.

Parker, Poe, Adams & Bernstein LLP, by Robert H. Tiller, Jack L. Cozort, and Irvin W. Hankins III, for defendant-appellant.

Smith Anderson Blount Dorsett Mitchell & Jernigan, LLP, by James D. Blount, Jr., Christopher G. Smith, and Kevin E. Pethick, on behalf of Progress Energy and Duke Power; Lawrence F. Mazer, Associate General Counsel, for Progress Energy; and Lara Simmons Nichols, Assistant General Counsel, for Duke Power, amici curiae.

Robert B. Schwentker for North Carolina Electric Membership Corporation; and Moore & Van Allen, PLLC, by Joseph W. Eason and Robert A. Meynardie, on behalf of the North Carolina Electric Membership Corporation, amicus curiae.

Orr, Justice.

The issue before the Court is whether the Court of Appeals properly affirmed the trial court's entry of partial summary judgment for the plaintiff. For the reasons discussed herein, we affirm the decision of the Court of Appeals.

Defendant, Haywood Electric Membership Corporation (HEMC), is a rural electric cooperative owned by its members. Plaintiff, Steve Singleton, first became a member of HEMC in August of 1966 when he signed a membership application for that one year. In November of 1976 Singleton signed another membership application in which he agreed to purchase and use electric power for any properties he owned serviced by HEMC for the duration of his ownership of those properties. Every member agrees to be bound by the rules and regulations governed by HEMC when the member signs his membership application.

In February of 1998, following an ice storm, Singleton telephoned HEMC to report a downed transmission power line on property he had owned since September of 1995. The property, a 14.319 acre tract bearing two rental homes, is located on U.S. Highway 276 in Haywood County, North Carolina. The evidence showed that there were no transmission power poles located on the property and that the transmission line at issue crossed over Singleton's property at an approximate height of 300 feet from one mountain ridge to another. Norman Sloan, HEMC's General Manager, stated in his affidavit that this transmission line "had been in existence for more than 50 years." Prior to the ice storm and HEMC's subsequent repair work, the only power pole on Singleton's property was a service pole that provided electricity to the two rental homes on the property and was not connected to the transmission line in question.

Singleton stated in his affidavit that the transmission line at issue "did not serve [his] property." Ronnie Allen, an HEMC employee, stated in his affidavit that the downed transmission line served "178 meters" and that before HEMC repaired the downed line "those customers were without power." Additionally, Singleton stated in his deposition that the rental homes on his property did not lose power during the ice storm when the transmission line fell. Finally, the record does not reflect that the downed transmission line was connected to the service pole that provided electricity to Singleton's rental homes.

Singleton first reported the downed line to HEMC because he was concerned that a "child or an animal" might be electrocuted by the downed line. Three days after Singleton reported the downed line, he noticed that it had not been repaired, so he called HEMC to report the downed line again. Gary Best, an HEMC employee, stopped by Singleton's business to advise him of the status of the downed line. Best informed Singleton that HEMC would have to replace the transmission pole at the top of the ridge adjacent to Singleton's property line. Singleton told Best that HEMC would have to replace it "by hand" because he did not "want any vehicles up there."

Subsequently, HEMC entered Singleton's property and replaced the pole at the top of the ridge, placed two new poles on Singleton's property and cleared a "thirty to forty" foot-wide swath approximately 550 feet down the mountain on Singleton's property. HEMC also replaced existing copper wire with approximately 550 feet of aluminum wire. The transmission line formerly spanned from ridge to ridge at a height of 300 feet, but HEMC lowered the lines to a thirty-foot height. The new aluminum lines were substantially bigger in size, and, as a result, more visible. In order to complete this task, HEMC cut several large oak trees, pruned an apple orchard and cleared the river bank of vegetative growth on Singleton's property that formerly acted as a buffer from the highway and neighboring campground.

Singleton filed a complaint against HEMC on 17 November 1999 alleging four causes of action:

> That the foregoing constitutes trespass to Plaintiff's real property, including ongoing trespass.
>
> That the foregoing constitutes an unlawful taking and inverse condemnation of Plaintiff's real property.

> That the foregoing constitutes a conversion of Plaintiff's real and personal property[.]
>
> That the Plaintiff will be irreparably harmed if the poles and power lines are not removed from Plaintiff's real property, and Plaintiff is entitled to a mandatory injunction ordering and directing Defendant to remove said poles and utility lines.

Singleton later voluntarily dismissed the claims of inverse condemnation and conversion. The trial court granted partial summary judgment in Singleton's favor based on the theory that HEMC did "not have an express or prescriptive easement for placing utility lines, poles, or other electrical transmission equipment upon [Singleton's] real property, and that the actions of [HEMC] constitute[] trespass and a continuing trespass."

The case proceeded to trial on 9 October 2000 on the single remaining issue of money damages. The jury awarded Singleton $700.00 per month for rental of the land. The trial court ordered HEMC to pay Singleton "the sum of $22,125.80 as rental from February 21, 1998 through October 10, 2000" for retroactive rent payment. The trial court further ordered that HEMC would "remain liable for rental sums to the Plaintiff from October 10, 2000 until all power lines, power poles, and other miscellaneous transmission equipment are removed from Plaintiff's real property . . . and any other damages which may result from Defendant's continuous trespass." The trial court ordered HEMC to pay Singleton interest in "the sum of $1,591.72" from the date of filing (17 November 1999) through the date of the judgment (10 October 2000).

HEMC appealed the trial court's grant of partial summary judgment to the Court of Appeals, which affirmed the trial court with Judge Walker dissenting. *Singleton v. Haywood Elec. Mbrshp. Corp.*, 151 N.C. App. 197, 565 S.E.2d 234 (2002). The trial court found, and the Court of Appeals agreed, that there was no express easement or a prescriptive easement and no genuine issue of material fact existed for Singleton's claim of continuing trespass. Thus, Singleton was entitled to judgment as a matter of law.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c)(2001). "[T]he movant must

meet the burden of proving an essential element of plaintiff's claim does not exist, cannot be proven at trial or would be barred by an affirmative defense." *Goodman v. Wenco Foods, Inc.*, 333 N.C. 1, 21, 423 S.E.2d 444, 454 (1992).

There are two issues before this Court. First, the dissent argued that a genuine issue of material fact exists as to whether HEMC exceeded the scope of the membership service agreement thus making the trial court's grant of partial summary judgment improper. Second, this Court granted HEMC's petition for discretionary review on whether the trial court should have granted summary judgment in HEMC's favor because consent to entry on the property is a complete defense to trespass.

First, we will address the issue raised by HEMC's petition for discretionary review. As to this issue, HEMC contends that no genuine issue of material fact exists but that HEMC was authorized to perform the work at issue both by contract (membership rules and regulations) and by Singleton's request to repair the downed line. Thus according to HEMC, it is entitled to judgment as a matter of law because there was no trespass as a matter of law.

We first turn to the law of civil trespass. It is elementary that "trespass is a wrongful invasion of the possession of another." *State ex rel. Bruton v. Flying "W" Enterprises, Inc.*, 273 N.C. 399, 415, 160 S.E.2d 482, 493 (1968). " 'Furthermore, a claim of trespass requires: (1) possession of the property by plaintiff when the alleged trespass was committed; (2) an unauthorized entry by defendant; and (3) damage to plaintiff.' " *Fordham v. Eason*, 351 N.C. 151, 153, 521 S.E.2d 701, 703 (1999) (quoting *Fordham v. Eason*, 131 N.C. App. 226, 229, 505 S.E.2d 895, 898 (1998)); *See also Matthews v. Forrest*, 235 N.C. 281, 283, 69 S.E.2d 553, 555 (1952). The courts of this State have defined continuing trespass as "wrongful trespass upon real property, caused by structures permanent in their nature." *Oakley v. Texas Co.*, 236 N.C. 751, 753, 73 S.E.2d 898, 898 (1953); *See also Bishop v. Reinhold*, 66 N.C. App. 379, 384, 311 S.E.2d 298, 301, *disc. rev. denied*, 310 N.C. 743, 315 S.E.2d 700 (1984); *Teeter v. Postal Tel. Co.*, 172 N.C. 783, 786, 90 S.E. 941, 941 (1916), and *Sample v. Roper Lumber Co.*, 150 N.C. 161, 166, 63 S.E. 731, 732 (1909).

Singleton is the record owner of the property at issue and alleges damages as a result of HEMC's placement of new electric poles and lines and the damage to his property necessitated by the new poles

and lines. There is no dispute that Singleton asked HEMC to enter the property to re-string the downed transmission line as it had been for the last fifty years. However, Singleton does not complain about HEMC's physical entrance onto the land; rather, Singleton complains that the placement of new poles and lines in order to re-design the existing transmission line constituted trespass because the new poles and lines were "unauthorized, and therefore an unlawful entry." *Matthews*, 235 N.C. at 283, 69 S.E.2d at 555. Singleton complained that the new poles and lines were "permanent in their nature" and therefore amount to a continuing trespass. *Oakley*, 236 N.C. at 753, 73 S.E.2d at 899. Furthermore, Singleton complained that he was damaged by HEMC's cutting of the trees and clearing of the land.

In a trespass action a defendant may assert that the entry was lawful or under legal right as an affirmative defense. *Hildebran v. Southern Bell Tel. & Tel. Co.*, 216 N.C. 235, 236, 4 S.E.2d 439, 439 (1939). Because Singleton consented to HEMC's entry upon the land, the crucial question for determination is whether HEMC had authorization or consent to repair and replace the lines in the manner that it did.

HEMC concedes that it had no express easement and does not argue that it had an easement by prescription. HEMC argues, however, that Singleton contractually authorized HEMC to maintain, repair, and replace HEMC's equipment when he agreed to be bound by the membership rules and regulations found in the service agreement. HEMC submits that the rules and regulations operated as consent for HEMC's actions because it expressly provides that members must grant "all necessary easements and rights-of-way." HEMC further submits that this operative agreement authorized it to re-design the existing transmission line, and that this service agreement prevented the new lines and poles from creating a continuing trespass.

Section V, titled "Conditions of Services," of the membership service agreement set out member responsibilities before electrical service will be supplied to the member. HEMC contends these "Conditions of Service" bind the member "to furnish without cost to the Cooperative all necessary easements and rights-of-way" and oblige the member to provide the "right of access to member's premises at all times for the purpose of . . . repairing, removing, maintaining or exchanging any or all equipment." Section V states in pertinent part:

A. General Conditions

The Cooperative will supply electrical service to the Member after all of the following conditions are met:

1. The Member is in compliance with all aspects of the Service Agreement and agrees to be bound by the Cooperative's Articles of Incorporation and Bylaws.
2. *The Member agrees to furnish* without cost to the Cooperative all necessary easements and rights-of-way.

. . . .

4. The Member agrees that the Cooperative will have the right of access to member's premises at all times for the purpose of reading meters, testing, *repairing, removing, maintaining or exchanging any or all equipment and facilities which are the property of the Cooperative,* or when on any other business between the Cooperative and the Member. In cases where it is reasonably necessary and cost effective, the Cooperative may use, without payment to the Member, the Member's premises for accessing neighboring property served by the Cooperative. However, *the Member will have the opportunity to locate a right-of-way that is beneficial to all parties.*

. . . .

8. The Member agrees to be responsible for any additional facilities, protective devices, or corrective equipment necessary to provide adequate service or prevent interference with service to the Cooperative's other members.

In interpreting contracts, we adhere to the following rules of construction:

> [T]he goal of construction is to arrive at the intent of the parties when the [contract] was issued. Where a [contract] defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the [contract] are to be harmoniously construed, and if possible, every word and every provision is to be given effect.

Gaston County Dyeing Machine Co. v. Northfield Ins. Co., 351 N.C. 293, 299-300, 524 S.E.2d 558, 563 (2000) *(quoting Woods v.*

Nationwide Mut. Ins. Co., 295 N.C. 500, 505-06, 246 S.E.2d 773, 777 (1978)); see also *C.D. Spangler Constr. Co. v. Industrial Crankshaft & Engineering Co.*, 326 N.C. 133, 142, 388 S.E.2d 557, 563 (1990).

The scope of the "Conditions of Service" is expressly limited to "supply of electrical service to the Member." The rules and regulations define "Member" as "the person . . . that has the legal responsibility for payment of the bill for service." The express language of the "Conditions of Service" requires that these conditions be met before the service will be supplied: "The Cooperative will supply electrical service to the Member *after all of the following conditions are met.*" (Emphasis added.) Read in light of the scope and time limitations, a member only contracts to grant rights-of-ways and easements for the initial set up for the supply of electrical service for that individual member.

The evidence showed that the downed transmission line did not provide electrical service to Singleton because unlike the other 178 HEMC members, his rental homes never lost power during the ice storm. Therefore, the "Conditions of Service" did not confer on HEMC the unilateral right to utilize Singleton's land to re-design an existing transmission line, add poles and lines, remove vegetative growth or cut down trees, and clear the path in order to restore power to other HEMC members.

Next, HEMC relies on Section V, subsection D, titled "Right-of-Way Maintenance" as its authority to maintain the transmission line in the manner that it did. Section V, subsection D, states in full:

> *The Member will grant to the Cooperative*, and the Cooperative *will maintain right-of-way* according to its specifications with the right to cut, trim, and control the growth of trees and shrubbery located within the right-of-way or *that may interfere with or threaten to endanger the operation or maintenance of the Cooperative's line or system.* When trimming the right-of-way, the Cooperative will remove debris at its expense from "clean and maintained" areas; that is, an area which is regularly maintained free of logs and brush, but not the removal of stumps. In other areas, right-of-way debris will be left in the right-of-way limit.

(Emphasis added.)

The plain language of this section assumes that HEMC obtained the necessary easements and rights-of-ways prior to entering the

property to "cut, trim, and control the growth of trees and shrubbery." This section is in the future tense, stating: "the member *will* grant . . . and the Cooperative *will* maintain." This language, along with the language in the preceding "Conditions of Service" assumes that prior to HEMC servicing its members with electricity, it will obtain all necessary easements and rights-of-way to maintain, repair and replace its equipment utilized in the furnishing of electricity to the member. HEMC failed to obtain those necessary easements and rights-of-way before electing to re-design the downed transmission line.

Interpreting the rules and regulations in the way that HEMC desires would result in far reaching powers for HEMC over the lands of consumers it services. For example, if HEMC had unlimited access for "repairing, removing, maintaining or exchanging" its equipment over and above that which provides electricity to the member, then the power company could arguably place a transformer or substation on any member's property without the landowner's consent or compensation for the taking. This is simply not the case under North Carolina real property law. Prior to re-designing the existing line, HEMC could have negotiated for an easement or used its power of eminent domain under N.C.G.S. § 40A-3(a)(1).

The rules and regulations, read as a whole, did not confer on HEMC the unilateral right to increase its presence and use of Singleton's land above and beyond the original use. As previously noted, HEMC did not have an express easement and has made no claim of a prescriptive easement. Because HEMC failed to obtain an easement or right-of-way before redesigning the existing transmission line by erecting two poles, lowering the line from a height of 300 feet to a thirty-foot height, removing vegetation and trees in a thirty to forty foot swath, its actions were "unauthorized, and therefore an unlawful entry" and thus constituted continuing trespass as a matter of law. *Matthews*, 235 N.C. at 283, 69 S.E.2d at 555. Therefore, summary judgment should not have been granted in HEMC's favor and the trial court properly denied HEMC's motion for summary judgment.

Next, the dissent raised the issue that summary judgment should not have been granted in Singleton's favor because a genuine issue of material fact still existed regarding whether HEMC "committed an act in excess of the authority granted under the service rules and regulations." *Singleton*, 151 N.C. App. at 207, 565 S.E.2d at 241. This issue is subsumed by the issue of whether the service rules and reg-

ulations operated as a defense against the trespass action. As previously discussed, we conclude that HEMC's acts were "unauthorized, and therefore an unlawful entry," and that Singleton did not consent by signing the rules and regulations. *Matthews*, 235 N.C. at 283, 69 S.E.2d at 555. Thus, since there is no genuine issue of material fact and no right under the membership agreement to perform the work complained of, the Court of Appeals correctly affirmed the trial court in granting partial summary judgment in Singleton's favor.

Finally, the Court of Appeals properly dismissed HEMC's estoppel argument because HEMC did not properly assign error on this basis because it failed to "state plainly, concisely and without argumentation the legal basis upon which error is assigned" in violation of the Rules of Appellate Procedure. N.C. R. App. P. 10(c)(1) (2001).

For the reasons stated herein, the opinion of the Court of Appeals is affirmed.

AFFIRMED.

Justice EDMUNDS dissenting.

I fear that the majority's restrictive reading of the Haywood Electric Membership Corporation Service Rules and Regulations may have unfortunate consequences. The wire that fell during the February 1998 ice storm had been in place for at least fifty years. Defendant initially entered plaintiff's property pursuant both to plaintiff's express invitation and to Section V(A)(4) of the Service Rules and Regulations, which gives defendant the "right of access to [plaintiff's] premises at all times for the purpose of . . . repairing . . . any or all equipment and facilities which are the property of [defendant]." The issue now before us is whether the actions defendant took thereafter, replacing the wire with one that was heavier and hung substantially lower, erecting new poles, cutting vegetation along the wire's right-of-way, and so on, resulted in a continuing trespass. The majority's holding, that summary judgment for plaintiff was properly granted, fails to recognize that the evidence in this case presents a genuine issue of material fact.

It is apparent from the discussion in the majority opinion that the fallen power line was, at best, obsolescent. Defendant used the opportunity presented by the ice storm to erect modern equipment in its place. Section V of the Service Rules and Regulations permits defendant to enter plaintiff's land for the purposes of "maintaining or

exchanging . . . equipment and facilities" and of "maintain[ing the] right-of-way." It is inconceivable that defendant would have signed this agreement if it understood that, by so doing, it would not be permitted at its discretion to update or replace antiquated equipment that was on or crossed over property belonging to plaintiff and others. A fifty-year-old infrastructure would be inefficient, unprofitable, and probably unsafe, benefitting neither plaintiff nor defendant. Nevertheless, under the majority's holding, a utility provider such as defendant may be discouraged from making improvements to its equipment. On the other hand, it also seems unlikely that, when plaintiff called on defendant to repair the line, he had any expectation that wholesale and intrusive changes would follow. Accordingly, I believe that a genuine issue of material fact exists as to whether defendant's actions on plaintiff's property fall within the meaning of "repairing . . . maintaining or exchanging any or all equipment or facilities" as those terms are used in the Service Rules and Regulations. This case should be tried. I respectfully dissent.

Justice PARKER joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. RODNEY JAY TUCKER

No. 113PA03

(Filed 5 December 2003)

Sentencing— aggravating factor—abused position of trust or confidence—consolidation of convictions for multiple offenses

The trial court did not err by aggravating defendant's sentence in two judgments that consolidated convictions for multiple offenses of statutory sexual offense of a person 13, 14, or 15, indecent liberties, and sexual offense by a person in a parental role based on defendant's abuse of his position of trust or confidence, because: (1) the trial judge is required by the Structured Sentencing Act to enter judgment on a sentence for the most serious offense in a consolidated judgment, and aggravating factors applied to the sentence for a consolidated judgment will apply only to the most serious offense in that judgment; (2) statutory sexual offense of a person aged 13, 14 or 15 is the most serious

offense in each of the judgments; and (3) the aggravating factor of abusing a position of trust or confidence thus did not apply to the crime of sexual offense by a person in a parental role but applied only to the most serious crime of sexual offense of a person aged 13, 14, or 15. N.C.G.S. § 15A-1340.15(b).

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 156 N.C. App. 53, 575 S.E.2d 770 (2003), arresting in part, remanding for resentencing in part, and finding no error in part judgments entered 24 July 2001 by Judge Henry E. Frye, Jr., in Superior Court, Forsyth County. Heard in the Supreme Court 10 September 2003.

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

Brian Michael Aus for defendant-appellee.

PARKER, Justice.

The issue before this Court is whether the Court of Appeals erred in holding that the trial court improperly aggravated defendant's sentence in two of three judgments that consolidated convictions for multiple offenses.

Defendant Rodney J. Tucker was arrested pursuant to a warrant issued on 15 September 2000. Defendant was indicted on fourteen counts of statutory sexual offense of a person aged 13, 14, or 15; seven counts of indecent liberties with a child; and seven counts of sexual offense by a person in a parental role, all arising from the accusations of defendant's stepdaughter concerning two years of sexual molestation and abuse by defendant. According to the parties' briefs, defendant was also indicted on one count of attempted first-degree statutory rape. Defendant's case came on for trial at the 16 July 2001 criminal session of Forsyth County Superior Court. At the close of the State's evidence, defendant successfully moved for dismissal of the charge of attempted first-degree statutory rape.

After the jury returned a unanimous verdict, the trial court entered judgment on 24 July 2001 for fourteen counts of statutory sexual offense of a person aged 13, 14 or 15; seven counts of indecent liberties with a child; and seven counts of sexual offense by a person in a parental role. The court found one aggravating factor, that defendant abused a position of trust or confidence. N.C.G.S. § 15A-1340.16(d)(15) (2001). The court also found two mitigating fac-

tors, that defendant has a support system in the community and that defendant has a positive employment history or is gainfully employed. N.C.G.S. § 15A-1340.16(e)(18), (19). The court decided that the factors in aggravation outweighed the factors in mitigation. The court then consolidated the offenses into three distinct judgments. The first judgment is labeled 00CRS054807 and consists of cases 00CRS054807, 54808, 54809, 54810, and 54811. This first judgment includes five counts of statutory sexual offense of a person aged 13, 14, or 15 and five counts of indecent liberties with a child. The second judgment is labeled 00CRS054812 and consists of cases 00CRS054812, 54813, and 54814. This judgment includes three counts of statutory sexual offense of a person aged 13, 14, or 15, one count of indecent liberties with a child, and two counts of sexual offense by a person in a parental role. The third judgment is labeled 00CRS054815 and consists of cases 00CRS054815, 54817, 54820, 54822, 54823, and 54825. This judgment includes six counts of statutory sexual offense of a person aged 13, 14, or 15, one count of indecent liberties with a child, and five counts of sexual offense by a person in a parental role. After calculating defendant's criminal history to be at record level II, the court sentenced defendant to three consecutive terms of imprisonment of a minimum term of 334 months to a maximum term of 410 months.

A unanimous panel of the Court of Appeals found no error with respect to two evidentiary issues raised by defendant, arrested judgment for one conviction for sexual offense by a person in a parental role, and remanded for resentencing with respect to two of the three consolidated judgments. *State v. Tucker*, 156 N.C. App. 53, 575 S.E.2d 770 (2003). The State did not appeal the arrested judgment for the one conviction for sexual offense by a person in a parental role. The State did, however, petition for discretionary review of the portion of the Court of Appeals' opinion remanding judgments 00CRS54812 and 54815 for resentencing, and this Court allowed the petition.

Respecting the pertinent issue on appeal, the Court of Appeals found error with the trial court's application of aggravating factors in sentencing. *Id.* at 62, 575 S.E.2d at 776. Specifically, the court held that the two judgments including convictions of sexual offense by a person in a parental role, 00CRS54812 and 54815, were improperly increased by use of the aggravating factor that defendant took advantage of a position of trust or confidence, N.C.G.S. § 15A-1340.16(d)(15). *Id.* The Court of Appeals determined that evidence establishing the parent-child relationship was required

to prove both the crime of sexual offense by a person in a parental role as well as the aggravating factor that defendant took advantage of a position of trust. *Id.* at 61-62, 575 S.E.2d at 775-76. According to the court's reasoning, such use of this evidence twice within the same judgment violated N.C.G.S. § 15A-1340.16(d) which reads, "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation . . . ." *Id.*

Before this Court the State contends that the Court of Appeals erred in remanding the second and third of the three consolidated judgments, 00CRS054812 and 54815, for resentencing. We agree.

We note at the outset that the same evidence cannot be used to prove an element of a crime and to prove an aggravating factor on the same conviction. N.C.G.S. § 15A-1340.16(d). Applying this statute, this Court has held that "[a] sentence may not be aggravated by evidence supporting an element of the same offense." *State v. Wilson*, 354 N.C. 493, 522, 556 S.E.2d 272, 291 (2001), *overruled on other grounds by State v. Millsaps*, 356 N.C. 556, 572 S.E.2d 767 (2002). *See also State v. Mickey*, 347 N.C. 508, 514, 495 S.E.2d 669, 673 (1998) (citing *State v. Hayes*, 323 N.C. 306, 312, 372 S.E.2d 704, 707-08 (1988)). In *State v. Raines*, 319 N.C. 258, 354 S.E.2d 486 (1987), the defendant was convicted for the crime of engaging in vaginal intercourse with a person over whom defendant's employer had assumed custody. *Id.* at 261, 354 S.E.2d at 488. This Court determined that "a relationship of trust and confidence was needed to prove the custodial element of the offense" and, therefore, held that the finding of the aggravating factor abuse of a position of trust or confidence violated the statutory scheme. *Id.* at 266, 354 S.E.2d at 491.[1] Thus, defendant is correct that a single conviction cannot be aggravated by evidence used to prove an element of that offense.

However, in situations where a defendant is convicted of two or more offenses, the General Assembly has given the trial court discretion to consolidate the offenses into a single judgment. N.C.G.S. § 15A-1340.15(b) (2001). The Structured Sentencing Act states that:

> The judgment shall contain a sentence disposition specified for the class of offense and prior record level of the most serious offense, and its minimum sentence of imprisonment shall be

1. The Court in *Raines* applied the Fair Sentencing Act, predecessor to the Structured Sentencing Act, the pertinent substance of which is identical. N.C.G.S. § 1340.4 (a)(1) (1983) (position of trust aggravating factor).

> within the ranges specified for that class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment.

Id. Thus, when separate offenses of different class levels are consolidated for judgment, the trial judge is required to enter judgment containing a sentence for the conviction at the highest class. Accordingly, the trial judge is limited to the statutory sentencing guidelines, set out at N.C.G.S. § 1340.17(c), for the class level of the most serious offense, rather than any of the lesser offenses in that same consolidated judgment. The trial court may, however, depart from the appropriate sentencing guidelines for the most serious offense upon finding that aggravating or mitigating factors exist. N.C.G.S. § 15A-1340.16(b).

Determination of the convictions to which the sentencing guidelines apply becomes important for the application of aggravating factors. While "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation," N.C.G.S. § 15A-1340.16(d), where consolidated judgments are concerned, the analysis must go further. Any aggravating factors that are applied to the sentence will necessarily only apply to the offense in the judgment which provides the basis for the sentencing guidelines. Since the trial judge is required by the Structured Sentencing Act to enter judgment on a sentence for the most serious offense in a consolidated judgment, aggravating factors applied to the sentence for a consolidated judgment will only apply to the most serious offense in that judgment. *See State v. Miller*, 316 N.C. 273, 284, 341 S.E.2d 531, 538 (1986) ("[W]hen cases are consolidated for judgment, and the judge makes findings of aggravating and mitigating factors for the most serious offense for which defendant is being sentenced, the judge's failure to make findings of such factors for the lesser offenses consolidated will not constitute reversible error." (italics omitted)).

This Court has had occasion in previous opinions to address the application of aggravating factors to consolidated judgments. In *State v. Farlow*, 336 N.C. 534, 444 S.E.2d 913 (1994), this Court considered a case in which the defendant was convicted of second-degree sexual offense and taking indecent liberties with a child. The Court in *Farlow* considered two consolidated judgments, each consisting of several counts of second-degree sexual offense and several counts of taking indecent liberties with a child. *Id.* at 536, 444 S.E.2d at 914-15.

In that case, applying substantially similar language in the Fair Sentencing Act as the statute at issue here, the trial court aggravated the defendant's sentence for second-degree sexual offense by the fact of the victim's young age. *Id.* at 536, 444 S.E.2d at 915. This Court stated that the sentence could be aggravated by the young age of the victim because age is not an element of second-degree sexual offense, even though it is an element of the joined offense of taking indecent liberties with a child. *Id.* at 541, 444 S.E.2d at 918. "[T]he rule barring use of joinable convictions as an aggravating factor does not apply to use of a fact needed to prove an element of a contemporaneous conviction." *Id.* at 541, 444 S.E.2d at 917-18 (citing *State v. Wright*, 319 N.C. 209, 214, 353 S.E.2d 214, 218 (1987)). Although in *Farlow* the Court also determined that age could be used to aggravate the offense of taking indecent liberties with a child based on a different rationale, the Court specifically decided that use of a fact to aggravate a sentence where that same fact was needed to prove an element of a joined offense was not improper. *Id.*

Likewise, in *State v. Wright*, 319 N.C. 209, 353 S.E.2d 214 (1987), this Court upheld an aggravating factor that was based on evidence necessary to prove a separate offense. In that case, the defendant's second-degree murder conviction was aggravated by evidence "that the victim was handcuffed with her hands behind her back when she was stabbed." *Id.* at 212, 353 S.E.2d at 216. The defendant argued that this evidence was necessary to prove an element of first-degree kidnapping, for which the defendant was also convicted. *Id.* at 213, 353 S.E.2d at 217. This Court disagreed with the defendant on this point, but noted that even if the evidence were necessary to prove first-degree kidnapping, there would still be no error. *Id.* at 213, 353 S.E.2d at 217-18. Although the convictions in *Wright* were not consolidated for judgment, this Court noted that:

> we believe that the rule in *Westmoreland* and *Lattimore* would control in the instant case only if the prohibition . . . against using the same evidence to prove both an element of the offense and a factor in aggravation, also extends to using evidence necessary to prove an element of a joined or joinable offense for which defendant was convicted. We have already decided that question in the negative.

Id. at 214, 353 S.E.2d at 218. Thus, this Court recognized that where two or more offenses were joined for judgment, one offense could be properly aggravated by evidence needed to prove a separate joined offense.

In this case, the trial court consolidated twenty-eight convictions into three judgments. To begin our analysis we note that the first judgment is not implicated in this appeal because it does not contain the conviction that defendant contends was improperly aggravated, namely, sexual offense by a person in a parental role. The two judgments at issue in this case each consisted of three separate offenses. Statutory sexual offense of a person aged 13, 14, or 15, a class B1 felony, is the most serious offense in each of the judgments. N.C.G.S. § 14-27.7A(a) (2001). The offense of taking indecent liberties with a child is punishable as a class F felony and sexual offense by a person in a parental role is punishable as a class E felony. N.C.G.S. §§ 14-202.1(b), -27.7(a) (2001). Thus, under the Structured Sentencing Act, the judge was required to and did enter judgment containing a sentence at the level of the class B1 felony rather than for the lesser offenses. *See* N.C.G.S. § 15A-1340.15(b). This also means that the judge was bound by the class B1 sentencing guidelines, and not the class E or class F sentencing guidelines. *See* N.C.G.S. § 15A-1340.17(c).

In finding factors of aggravation and mitigation, the court found that defendant abused a position of trust to commit these crimes. N.C.G.S. § 15A-1340.16(d)(15). The only evidence in the record to support the position of trust aggravator is evidence of a parent-child relationship. Defendant contends that this evidence was also needed to prove an element of sexual offense by a person in a parental role and that applying the aggravator of abusing a position of trust to a judgment containing the conviction for sexual offense by a person in a parental role violates N.C.G.S. § 15A-1340.16(d).

To be guilty of sexual offense by a person in a parental role, the defendant must have "assumed the position of a parent in the home of a minor victim." N.C.G.S. § 14-27.7(a). Evidence of a parent-child relationship therefore was necessary to prove that defendant stood in a parental role with regard to the victim. A parent-child relationship is also indicative of a position of trust and such evidence supports the aggravating factor of abusing a position of trust. *State v. Daniel*, 319 N.C. 308, 311, 354 S.E.2d 216, 218 (1987). However, sexual offense by a person in a parental role was not the most serious offense in the consolidated judgment and was not the offense from which defendant's sentence was derived. Thus the aggravating factor of abusing a position of trust did not apply to the crime of sexual offense by a person in a parental role. Rather, the aggravator applied to the most serious offense in each of the two consolidated judgments, which was the statutory sexual offense of a person aged 13, 14, or 15.

Although defendant argues that the trial court cannot aggravate a sentence for a consolidated judgment using an element of a lesser included offense, defendant concedes that the trial court could have structured the judgments in a different manner in order to use the aggravator. The trial court had the discretion to consolidate the convictions for sexual offense by a person in a parental role into a fourth, separate judgment. In that situation, even by defendant's reasoning, the remaining three consolidated judgments could have been aggravated by abuse of a position of trust, leaving defendant with a longer prison sentence than he actually received because of the additional judgment. As this Court noted in *State v. Miller*, 316 N.C. 273, 341 S.E.2d 531, consolidation of offenses "works to the benefit of the defendant by limiting the maximum sentence that he can receive for all of the convictions so consolidated." *Id.* at 284, 341 S.E.2d at 538. Accordingly, we fail to see how defendant would benefit if N.C.G.S. § 15A-1340.16(d) precluded the aggravation of the most serious offense in a consolidated judgment.

For the foregoing reasons we hold that the trial court did not err in applying the aggravating factor of abusing a position of trust to consolidated judgments 00CRS054812 and 54815. The decision of the Court of Appeals is reversed and the cases remanded to that court for remand to Superior Court, Forsyth County, for reinstatement of the judgments in cases 54812 and 54815.

REVERSED AND REMANDED.

NORTH CAROLINA FORESTRY ASSOCIATION, PETITIONER v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WATER QUALITY, AND THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION AND ITS NPDES COMMITTEE, RESPONDENTS; AND THE SIERRA CLUB AND DOGWOOD ALLIANCE

No. 653A02

(Filed 5 December 2003)

Environmental Law— contested case—standing—person aggrieved—stormwater general permit—wood chip industry

The trial court did not err by holding that the N.C. Forestry Association (NCFA) was a person aggrieved under the North Carolina Administrative Procedure Act and therefore had stand-

ing to commence a contested case proceeding to challenge respondent EMC's denial of a stormwater general permit for the wood chip industry, because: (1) the NCFA and its members are adversely affected by the exclusion of new and expanding wood chip mills from the pertinent general permit when the result is that those mills will be forced to undergo the lengthy and detailed process of seeking individual permits instead of the prior minimal administrative process; and (2) the present case involves licensing of wood chip mills to operate in our state, and the North Carolina Administrative Procedure Act states that any action involving licensing is by definition a contested case.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 154 N.C. App. 18, 571 S.E.2d 602 (2002), reversing an order entered 27 March 2001 by Judge Howard E. Manning, Jr., in Superior Court, Wake County. Heard in the Supreme Court 15 October 2003.

Hunton & Williams, by Charles D. Case, Craig A. Bromby, Jeff F. Cherry, and Julie Beddingfield, for petitioner-appellant.

Roy Cooper, Attorney General, by Jill B. Hickey, Special Deputy Attorney General, for respondent-appellees.

Southern Environmental Law Center, by Donnell Van Noppen III, and Sierra Weaver, for intervenor-appellees.

WAINWRIGHT, Justice.

Petitioner-appellant North Carolina Forestry Association (NCFA) is a non-profit trade association whose members engage in forest management and timber products industries, including wood chip mills. Wood chip mills take cut logs and other large pieces of wood and process them into smaller chips that are used in the production of paper and plywood products.

Respondent-appellees are state agencies responsible for regulating water quality in North Carolina. These agencies have authority to issue permits pursuant to the National Pollutant Discharge Elimination System (NPDES) required by the federal Clean Water Act. 33 U.S.C. § 1342 (2000). The Clean Water Act, along with Chapter 143 of our General Statutes, and the rules of the North Carolina Environmental Management Commission, require facilities to obtain NPDES permits for stormwater discharges associated with their

industrial activities. *See* 33 U.S.C. § 1342 (2000); N.C.G.S. § 143-215.1 (2001); 15A NCAC 2B, 2H (2003).

The present case arises from the decision of the North Carolina Department of Environment and Natural Resources, Division of Water Quality (DWQ), to exclude new and expanding wood chip mills from a generally available stormwater permitting system and to instead subject the wood chip industry to a more rigorous individual permitting process.

In 1992, DWQ issued thirteen NPDES stormwater general permits. One of these permits, NPDES Stormwater General Permit No. NCG040000 (NCG04), authorized the discharge of stormwater runoff associated with the industrial activities of certain segments of the timber products industry, including wood chip mills. The NCG04 general permit expired on 31 August 1997.

On 1 April 1998, DWQ issued NPDES Stormwater General Permit No. NCG210000 (NCG21). Unlike NCG04, the NCG21 permit excluded wood chip mills. As a result, DWQ began requiring new and expanding wood chip mills to obtain more detailed and time-consuming individual NPDES stormwater permits.

In June 1998, NCFA, acting on behalf of its timber industry members, challenged DWQ's exclusion of wood chip mills from the NCG21 general permit. NCFA petitioned for a contested case hearing for administrative review under the North Carolina Administrative Procedure Act. NCFA argued that:

> NCFA and its members are "persons aggrieved" as defined in N.C.G.S. § 150B-2(6) because NCFA and its members are persons directly and indirectly affected substantially in the persons and property by the administrative decision to exclude wood chip mills from coverage under the General Permit. NCFA's members who decide to locate and permit new chip mills in North Carolina will be subject to, among other things, burdensome application procedures and additional monitoring and reporting requirements.

On 19 March 1999, an administrative law judge filed a recommended decision in the case, concluding, among other things, that the NCG21 general permit should be reissued without the exclusion of wood chip mills. The administrative law judge also found that NCFA was a "person aggrieved" and thus had standing to bring the

claim at issue. The administrative law judge further noted that the final agency decision in this case would be rendered by the Environmental Management Commission of the Department of Environment and Natural Resources.

On 5 November 1999, the Environmental Management Commission issued its Final Agency Decision, rejecting the administrative law judge's recommendation and instead concluding that NCFA lacked standing to challenge the issuance of NCG21. NCFA thereafter sought judicial review of the agency decision.

On 14 March 2001, the Wake County Superior Court heard NCFA's Petition for Judicial Review. The superior court concluded, among other things, that NCFA had standing to bring the contested case as a "person aggrieved."

NCFA appealed to the Court of Appeals and respondent state agencies cross-assigned error as to the trial court's conclusion that NCFA had standing. On 19 November 2002, a divided panel of the Court of Appeals reversed the trial court, holding that NCFA was not a "person aggrieved" and thus lacked standing. *North Carolina Forestry Ass'n v. Dep't of Env't and Natural Res.*, 154 N.C. App. 18, 24, 571 S.E.2d 602, 606 (2002). The dissent, however, concluded that NCFA had standing on two independent grounds: (1) because NCFA was a "person aggrieved," and (2) because the relevant action involved a "licensing" as defined in N.C.G.S. § 150B-2. *Id.* at 25-28, 571 S.E.2d at 606-08; *see also* N.C.G.S. § 150B-2(2) (2001) (defining "contested case" to include disputes over "licensing"); N.C.G.S. § 150B-2(3) (defining "license" as "any certificate, *permit* or other evidence, by whatever name called, of a right or privilege to engage in any activity" (emphasis added)).

On 27 December 2002, NCFA filed a Notice of Appeal and Petition for Discretionary Review in this Court. On 12 June 2003, this Court denied NCFA's Petition for Discretionary Review. Accordingly, our review is focused solely on the issue that formed the basis of the dissent: whether NCFA is a "person aggrieved" under the North Carolina Administrative Procedure Act and therefore has standing to commence a contested case proceeding to challenge DWQ's denial of a stormwater general permit for the wood chip industry. Having thoroughly reviewed the applicable statutory authorities and this Court's precedents, we conclude NCFA is a "person aggrieved" and therefore has standing to bring the contested case.

In general, individuals "adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground." *FEC v. Akins*, 524 U.S. 11, 25, 141 L. Ed. 2d 10, 23 (1998). In North Carolina, disputes between a state government agency and another person may be formally resolved with the filing of an administrative proceeding referred to as a "contested case." N.C.G.S. § 150B-22 (2001). A contested case is intended "to determine the person's rights, duties, or privileges." *Id.* "Any person aggrieved may commence a contested case [proceeding]." N.C.G.S. § 150B-23(a); *see also Empire Power Co. v. North Carolina Dep't of Env't, Health and Nat. Resources*, 337 N.C. 569, 588, 447 S.E.2d 768, 779 (1994).

A "person aggrieved" is "any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision." N.C.G.S. § 150B-2(6) (2001); *Empire Power*, 337 N.C. at 588, 447 S.E.2d at 779. This Court has stated that whether a party is a "person aggrieved" must be determined based on the circumstances of each individual case. *Empire Power*, 337 N.C. at 588, 447 S.E.2d at 779.

In the present case, NCFA is adversely affected by the exclusion of new and expanding wood chip mills from the NCG21 general permit. Prior to this exclusion, the operation of a new or expanding wood chip mill was a generally permitted activity that required minimal administrative process. As a result of their present exclusion from the NCG21 permit, new and expanding wood chip mills are forced to undergo the lengthy and detailed process of seeking individual permits. Accordingly, because the issuance of the NCG21 general permit adversely affected NCFA and its members, we conclude NCFA is a "person aggrieved" under the facts of the present case and thus has standing to bring a contested case hearing.

Additionally, the present case clearly involves the "licensing" of wood chip mills to operate in our state. The North Carolina Administrative Procedure Act states that any action involving "licensing" is by definition a contested case. N.C.G.S. § 150B-2(2). The North Carolina Administrative Procedure Act defines a "license" as "any certificate, *permit* or other evidence, by whatever name called, of a right or privilege to engage in any activity." N.C.G.S. § 150B-2(3) (emphasis added). Because we conclude that the NCG21 permit fits within this definition, we further conclude that the present case involves a licensing. This provides a distinct basis to conclude that NCFA has standing.

In sum, we hold that NCFA has standing to bring a contested case hearing and the Court of Appeals' decision was thus in error. As to any and all issues not herein addressed, we expressly decline to make any conclusions. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for further proceedings not inconsistent with this opinion.

REVERSED.

KATHERINE T. LANGE v. DAVID R. LANGE

No. 270A03

(Filed 5 December 2003)

Appeal and Error; Judges— mootness—recusal of judge who subsequently retired

An order entered by one district court judge that required the recusal of a trial judge and ordered a new hearing in a custody modification proceeding was not rendered moot by the recused judge's retirement and the case is remanded to the Court of Appeals for a determination of the appeal on the merits and in accordance with this opinion, because a decision on the merits will have a practical effect on the controversy because (1) the trial judge's retirement after he announced his decision but before he signed the final order triggered the "substituted judge" provisions of N.C.G.S. § 1A-1, Rule 63; and (2) a Court of Appeals decision reversing the recusal order will give the substituted judge the discretion either to enter the retired judge's order or to hold a new custody modification order, while a Court of Appeals decision affirming the recusal order will require the substituted judge to hold a new hearing and enter a new order.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 157 N.C. App. 310, 578 S.E.2d 677 (2003), dismissing as moot an appeal from an order entered 4 October 2001 by Judge William A. Christian in District Court, Mecklenburg County. Heard in the Supreme Court 17 November 2003.

Reid, Lewis, Deese, Nance & Person, L.L.P., by Renny W. Deese, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr., Katherine S. Holliday, and Preston O. Odom, III, for defendant-appellant.

LAKE, Chief Justice.

This appeal arises from an order entered by Judge William A. Christian requiring the recusal of Judge William G. Jones and ordering a new hearing in a custody modification proceeding involving the parties. The Court of Appeals dismissed as moot defendant's appeal of the recusal order, over Judge Calabria's dissent, because Judge Jones retired subsequent to entry of the recusal order but before the appeal was heard. For the reasons stated herein, we hold that the appeal was not rendered moot by Judge Jones' retirement. We therefore remand this case to the Court of Appeals for a determination of the appeal on the merits and in accordance with this opinion.

On 16 November 1998, in District Court, Mecklenburg County, Judge William G. Jones entered an order settling issues regarding child custody, visitation, and child support. Pursuant to the order, the parties were to share legal custody of their two children. Plaintiff, Katherine Lange, was given primary physical custody, and a visitation schedule was established for defendant, David Lange.

On 23 March 2000, plaintiff filed a motion to modify the custody arrangement because she planned to move to another city with the children. Defendant filed a response seeking primary physical custody in the event plaintiff moved to another city. A custody modification hearing was held before Judge Jones, the same judge that entered the original custody order.

On 30 June 2000, Judge Jones sent a letter to the parties which announced his decision in favor of defendant and requested defendant's attorney, Katherine Holliday, to prepare the order. The attorneys for both parties consulted several times regarding the exact wording of the order. Just prior to Judge Jones' signing the final order, plaintiff's attorney informed Judge Jones and Katherine Holliday that he planned to file a motion to recuse Judge Jones on the basis that Judge Jones and Katherine Holliday jointly owned, with others, vacation property in the mountains of North Carolina. Judge Jones delayed signing the custody modification order pending the outcome of the recusal hearing.

Plaintiff filed a recusal motion, and a hearing was held before Judge William A. Christian. On 4 October 2001, Judge Christian entered an order in which he concluded that Judge Jones had not violated any provision of the North Carolina Code of Judicial Conduct. Judge Christian also concluded that no evidence existed of any bias or partiality by Judge Jones towards either party in the case. Despite these conclusions of law, Judge Christian ordered that Judge Jones be recused because the relationship between Judge Jones and Katherine Holliday was such that it "would cause a reasonable person to question whether the Honorable William G. Jones could rule impartially" in the matter. Finally, Judge Christian ordered that plaintiff was entitled to a new hearing on her motion for custody modification. Defendant filed a timely notice of appeal from Judge Christian's order. Plaintiff cross-appealed from Judge Christian's conclusion that Judge Jones did not violate the North Carolina Code of Judicial Conduct.

Judge Jones retired prior to the Court of Appeals hearing this matter on appeal. As a result of his retirement, the Court of Appeals' majority dismissed the case as moot. The Court of Appeals held that because Judge Jones could no longer preside over any further hearing or sign the custody modification order, a new judge would have to consider the matter anew, thus making moot all issues on appeal.

A case is considered moot when "a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996). Courts will not entertain such cases because it is not the responsibility of courts to decide "abstract propositions of law." *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). Conversely, when a court's determination can have a practical effect on a controversy, the court may not dismiss the case as moot. Given the circumstances of this case, a decision on the merits of the parties' appeal will have a practical effect on the controversy. Therefore, the Court of Appeals erred by dismissing the appeal as moot.

Putting the issue of Judge Jones' recusal aside for a moment, his retirement triggers Rule 63 of the North Carolina Rules of Civil Procedure. Rule 63 provides:

> If by reason of death, sickness or other disability, resignation, retirement, expiration of term, removal from office, or other reason, a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules after a verdict is returned or a trial or hearing is otherwise concluded, then those duties, including entry of judgment, may be performed:
>
> . . . .
>
> (2) In actions in the district court, by the chief judge of the district, or if the chief judge is disabled, by any judge of the district court designated by the Director of the Administrative Office of the Courts.
>
> If the substituted judge is satisfied that he or she cannot perform those duties because the judge did not preside at the trial or hearing or for any other reason, the judge may, in the judge's discretion, grant a new trial or hearing.

N.C.G.S. § 1A-1, Rule 63 (2001). In general, the application of Rule 63 presents the "substituted judge" with two options in how to proceed. The judge could choose to honor Judge Jones' decision in the matter, and enter Judge Jones' order as written. In the alternative, the judge could choose to grant a new trial or hearing for the parties. Thus, application of Rule 63 gives the "substituted judge" discretion in determining how to proceed.

If the Court of Appeals determines that Judge Christian erred in entering his order recusing Judge Jones from the parties' case, the matter will be remanded to the trial court for further proceedings in accordance with Rule 63. In such circumstance, the newly assigned judge will have the discretion either to enter Judge Jones' order or to hold a new custody modification hearing.

However, if Judge Christian's recusal order is affirmed on appeal, Rule 63 has no application in that Judge Jones was properly recused before he retired. In such case, the newly assigned judge will have no discretion in how to proceed in that a new hearing will be held and a new order entered. Therefore, affirming Judge Christian's recusal order will have the effect of eliminating any discretion a judge may have to enter Judge Jones' custody modification order.

Given these options, a decision by the Court of Appeals on the merits of the parties' appeal will indeed have a practical effect on the

existing controversy. Therefore, the issue is not moot, and the Court of Appeals erred in dismissing the parties' appeal.

Because the Court of Appeals will be reviewing the merits of the parties' appeal regarding Judge Christian's recusal order, we deem it appropriate to reiterate the standard for recusal. This Court has previously held that " 'the burden is upon the party moving for disqualification to demonstrate objectively that grounds for disqualification actually exist. Such a showing must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially.' " *State v. Scott*, 343 N.C. 313, 325, 471 S.E.2d 605, 612 (1996) (quoting *State v. Fie*, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987)). Thus, the standard is whether "grounds for disqualification actually exist."

In this case, Judge Christian made specific findings of fact and conclusions of law that Judge Jones did not violate the Code of Judicial Conduct by his actions in this case and that there was no evidence of any bias by Judge Jones. Nevertheless, Judge Christian then went on to conclude that Judge Jones should be recused because a reasonable person could question his ability to rule impartially. Judge Christian's ruling was based on inferred perception and not the facts as they were found to exist. On remand, the Court of Appeals should apply the standard as it has been previously set out by this Court. If the Court of Appeals determines that Judge Christian's findings were supported by the evidence and that, in fact, Judge Jones did not violate the Code of Judicial Conduct, it should conclude that Judge Christian erred by ordering Judge Jones' recusal. However, if the Court of Appeals determines that Judge Christian's conclusion that Judge Jones did not violate the Code of Judicial Conduct is not supported by the evidence, then the Court of Appeals should remand for further proceedings in accordance with its holding.

The opinion of the Court of Appeals dismissing as moot defendant's appeal of the recusal order is, therefore, vacated and this case is remanded to that court for determination of the appeal on the merits and in accordance with this opinion.

VACATED AND REMANDED.

THOMAS WILLIAM HILL v. BOBBY MEDFORD, INDIVIDUALLY AND AS SHERIFF OF BUNCOMBE COUNTY; AND WESTERN SURETY COMPANY

No. 389A03

(Filed 5 December 2003)

Employer and Employee— termination of deputy sheriff—at-will employee—public policy violation—breach of contract

The decision of the Court of Appeals in this case is reversed for the reason stated in the dissenting opinion that an at-will employee (a deputy sheriff) who alleges wrongful discharge by his employer (the sheriff) for reasons that violate public policy does not have a claim for breach of contract against the employer on that basis. The deputy sheriff may only maintain a tort claim against the sheriff limited to the amount of the sheriff's bond.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 158 N.C. App. —, 582 S.E.2d 325 (2003), affirming an order entered 8 May 2002 by Judge James Baker, Jr., in Superior Court, Buncombe County. Heard in the Supreme Court 18 November 2003.

Long, Parker, Warren & Jones, P.A., by Robert B. Long, Jr., and W. Scott Jones, for defendant-appellants.

Carter & Kropelnicki, P.A., by Steven Kropelnicki, Jr., for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Mark A. Davis, for amicus curiae North Carolina Association of County Commissioners.

PER CURIAM.

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

REVERSED.

ADAMS KLEEMEIER HAGAN HANNAH & FOUTS, PLLC v. ROBERT JACOBS AND ELLIOT JACOBS AND DAVID QUELLER AND IRA BORN

No. 378A03

(Filed 5 December 2003)

Jurisdiction— personal—minimum contacts

The decision of the Court of Appeals that the nonresident defendants had insufficient contacts with this state to give the courts of this state personal jurisdiction over them in an action by plaintiff law firm to recover for legal services purportedly performed for them is reversed for the reason stated in the dissenting opinion that defendants had sufficient contacts by their business activities, including retaining two other law firms in this state to represent them on the underlying matters giving rise to this action.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 158 N.C. App. —, 581 S.E.2d 798 (2003), affirming an order entered 20 March 2002 by Judge L. Todd Burke in Superior Court, Guilford County. Heard in the Supreme Court 19 November 2003.

Adams Kleemeier Hagan Hannah & Fouts, PLLC, by J. Alexander S. Barrett and J. Scott Hale, for plaintiff-appellant.

Davis & Harwell, PA, by Fred R. Harwell, Jr. and Loretta C. Biggs, for defendant-appellees Queller and Born.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals.

REVERSED.

Justices ORR and EDMUNDS did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. DAVID VERNON SIMPSON

No. 431A03

(Filed 5 December 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 159 N.C. App. —, 583 S.E.2d 714 (2003), finding no error in a judgment entered 20 May 2002 by Judge Loto G. Caviness, in Superior Court, Henderson County. Heard in the Supreme Court 19 November 2003.

Roy A. Cooper, Attorney General, by Kimberly Elizabeth Gunter, Associate Attorney General, for the State.

Smith Moore, L.L.P., by James G. Exum, Jr.; and Mary Exum Schaefer for defendant-appellant.

PER CURIAM.

AFFIRMED.

RONALD M. HUGHES, JEFFREY LANE CLEMMONS, CLARENCE Y. SYKES, OLIVER J. & SHIRLEY W. FOWLER, BARRY STEELE, DONNA K. ATKINS, SOUTHPORT ELECTRICAL SERVICE, INC., KEITH R. & HOLLEY G. ROGERS, DONALD B. & ANN T. STEPHENSON, JULIUS & MARTHA G. CARTERET, CARMICHAEL CONSTRUCTION CO., INC., GREGORY A. & VICKIE M. POTTER, MARVIN CARROLL & JULIE J. MARTIN, PETITIONERS v. TOWN OF OAK ISLAND, RESPONDENT

No. 361A03

(Filed 5 December 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 158 N.C. App. —, 580 S.E.2d 704 (2003), affirming a judgment entered 29 May 2001 by Judge James F. Ammons, Jr. in Superior Court, Brunswick County. Heard in the Supreme Court 18 November 2003.

C. Wes Hodges, II, P.L.L.C., by C. Wes Hodges, II, for petitioner-appellees.

Roger Lee Edwards, P.A., by Roger Lee Edwards, for respondent-appellant.

Andrew L. Romanet, Jr., General Counsel, and Gregg F. Schwitzgebel, III, Senior Assistant General Counsel, on behalf of the North Carolina League of Municipalities, amicus curiae.

PER CURIAM.

AFFIRMED.

LEON KEA, PETITIONER v. DEPARTMENT OF HEALTH AND HUMAN SERVICES, O'BERRY CENTER, RESPONDENT

No. 603A02

(Filed 5 December 2003)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 153 N.C. App. 595, 570 S.E.2d 919 (2002), reversing and remanding an order entered 2 April 2001 by Judge Narley C. Cashwell in Superior Court, Wake County. Heard without oral argument pursuant to Rule 30(d) of the Rules of Appellate Procedure in the Supreme Court 18 November 2003.

Allen & Pinnix, P.A., by Angela Long Carter and M. Jackson Nichols, for petitioner-appellant.

Roy Cooper, Attorney General, by Lisa Granberry Corbett, Assistant Attorney General, for respondent-appellee.

PER CURIAM.

AFFIRMED.

BOYCE & ISLEY, PLLC, EUGENE BOYCE, R. DANIEL BOYCE, PHILIP R. ISLEY, AND LAURA B. ISLEY	)	
v.	)	From Wake County
ROY A. COOPER, III, THE COOPER COMMITTEE, JULIA WHITE, STEPHEN BRYANT, AND KRISTI HYMAN	)	

No. 598P02

SUPPLEMENTAL ORDER

Defendants filed motion for temporary stay, petition for writ of supersedeas, notice of appeal, petition for discretionary review of additional issues, and alternative petition for discretionary review of constitutional issues. Chief Justice LAKE, Justice PARKER, and Justice ORR recused. None of the remaining justices had conflicts as defined by the North Carolina Code of Judicial Conduct.

The term "quorum" means "[t]he minimum number of members (usu. a majority) who must be present for a body to transact business or take a vote." BLACK'S LAW DICTIONARY, at 1263 (7th ed. 1999). North Carolina law requires a minimum of four justices to constitute a "quorum for the transaction of the business of the court." N.C. Gen. Stat. § 7A-10 (2002). Upon the recusal of three justices, the remaining four justices constituted the minimum quorum necessary to address a matter before the court. Under these circumstances, the court in conference expressly invoked the Rule of Necessity in order to fulfill its duty under Article IV of the Constitution of North Carolina to resolve a matter properly presented to the court. *See United States v. Will*, 449 U.S. 200, 214, 66 L. Ed. 2d 392, 405-06 (1980) ("It is well established that actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated."); *see also Bacon v. Lee*, 353 N.C. 696, 717-18, 549 S.E.2d 840, 854-55 (2001) (Governor of North Carolina permitted to consider death row clemency petition despite his prior tenure as Attorney General); *Long v. Watts*, 183 N.C. 99, 102, 110 S.E. 765, 767 (1922) (Court must hear case challenging application of statewide income

tax to judicial salaries, despite the potential impact of decision on members of the Court).

By order of the Court in Conference, this 28th day of October, 2003.

Edmunds, J.
For the Court

Chief Justice LAKE, Justice PARKER, and Justice ORR recused.

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

Briggs v. City of Asheville Case below: 159 N.C. App. 558	No. 486P03	1. Respondent's PDR Under N.C.G.S. § 7A-31 (COA02-1296) 2. Petitioners' conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
Camp v. Kimberly-Clark Corp. Case below: 160 N.C. App. 595	No. 586P03	Def's Motion for Temporary Stay (COA01-68)	Denied **11/13/03**
Freeman v. Triangle Grading & Paving, Inc. Case below: 160 N.C. App. 415	No. 540P03	Defs' PDR Under N.C.G.S. § 7A-31 (COA02-1269)	Denied **11/17/03**
Garrett v. Galloway Case below: 160 N.C. App. 250	No. 559P03	1. Def's PWC to review the Decision of the COA (COA02-1185) 2. Def's PWC to Review the Order of the COA	1. Denied 2. Denied
Hutton v. Glosson Freightways, Inc. Case below: 160 N.C. App. 250	No. 531P03	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA02-390) 2. Def's Conditional PDR as to Additional Issues	1. Denied 2. Dismissed as moot
In re Estate of Moore Case below: 160 N.C. App. 85	No. 534PA03	Respondent's (Robert E. Monroe) PDR Under N.C.G.S. § 7A-31 (COA02-1248)	Allowed **12/02/03**
In re Martin Case below: 159 N.C. App. 466	No. 519P03	Petitioner's (Scott Farmer) PDR under N.C.G.S. § 7A-31 (COA02-1081)	Denied
In re O'Neal Case below: 160 N.C. App. 409	No. 551P03	Respondent's (Chadwick O'Neal) PDR Under N.C.G.S. § 7A-31 (COA02-906)	Denied
In re Will of Smith Case below: 159 N.C. App. 651	No. 481P03	Caveators' (Betty Smith Poole and Peggy Smith Scarboro) PDR Under N.C.G.S. § 7A-31 (COA02-607)	Denied

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

Jefferson Pilot Fin. Ins. Co. v. Marsh USA, Inc. Case below: 159 N.C. App. 43	No. 532P03	1. Def's (Hartford) PDR Under N.C.G.S. § 7A-31 (COA02-1386, COA02-1484) 2. Def's (Marsh USA) Conditional PDR	1. Denied 2. Dismissed as moot
Jeffrey R. Kennedy, D.D.S., P.A. v. Kennedy Case below: 160 N.C. App. 1	No. 500A03	1. Defs' NOA Based Upon a Dissent (COA02-1198) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR as to Additional Issues 4. Defs' Motion to Amend Petition for Writ of Supersedeas 5. Plt's Motion for Temporary Stay of Appellate Proceedings 6. Joint Motion of Plt and Defs for Dismissal	1. — 2. Dismissed 3. Dismissed 4. Dismissed 5. Allowed for 15 days **10/24/03** 6. Allowed
Lambert v. Cartwright Case below: 160 N.C. App. 73	No. 533P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-961	Denied
McHam v. N.C. Mut. Life Ins. Co. Case below: 141 N.C. App. 350	No. 597P03	Plt's PWC to Review the Decision of the COA (COA99-1458)	Denied **11/19/03** **Edmunds, J., recused**
Morris Communications Corp. v. Board of Adjust. for the City of Gastonia Case below: 159 N.C. App. 598	No. 483A03	Respondent-Appellee's Motion to Dismiss Appeal (COA02-1233)	Allowed
Northwestern Nat'l Bank v. Western & S. Life Ins.Co. Case below: 158 N.C. App. 312	No. 350P03	1. Def's (Western and Southern Life Ins. Co.) NOA Based Upon a Constitutional Question (COA02-760) 2. Def's (Western and Southern Life Ins. Co.) PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied

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

Slavin v. Town of Oak Island Case below: 160 N.C. App. 57	No. 535P03	1. Plts' NOA Based Upon a Constitutional Question (COA02-671) 2. Plts' PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
State v. Adams Case below: 159 N.C. App. 676	No. 485A03	1. Def's NOA (Constitutional Question) (COA02-1023) 2. AG's Motion to Dismiss Appeal for Lack of Substantial Constitutional Question	1. — 2. Allowed
State v. Barton Case below: 159 N.C. App. 467	No. 511P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1675)	Denied
State v. Cole Case below: 160 N.C. App. 415	No. 557P03	1. Def's NOA Based Upon a Constitutional Question (COA02-850) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
State v. Crooks Case below: 151 N.C. App. 297	No. 577P03	1. Def's PWC to Review the Decision of the COA (COA01-1061) 2. Def's Motion to Amend Petition	1. Denied 2. Allowed
State v. Daniels Case below: Mecklenburg County Superior Court	No. 506A90-4	1. Def's Motion for Temporary Stay of Execution 2. Def's Petition for Writ of Supersedeas 3. Def's PWC to Review the Order of the Superior Court	1. Denied **11/13/03** 2. Denied **11/13/03** 3. Denied **11/13/03**
State v. Davis Case below: 159 N.C. App. 229	No. 454P03	1. Def's PWC to Review the Decision of the COA (COA02-1537) (Filed as PDR) 2. Def's PWC to Review the Decision of the COA (Filed as NOA Based Upon a Constitutional Question) 3. AG's Motion to Dismiss Appeal (Appeal Docketed as PWC-D)	1. Denied 2. — 3. Allowed
State v. Diaz Case below: 155 N.C. App. 307	No. 581P03	Def's (Lopez) PWC to Review the Decision of the COA (COA02-145)	Denied

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

State v. Fogg Case below: 159 N.C. App. 467	No. 510P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1421)	Denied
State v. Harper Case below: 160 N.C. App. 595	No. 585P03	1. Def's NOA Based Upon a Constitutional Question (COA02-1573) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss	1. — 2. Denied 3. Allowed
State v. Hudson Case below: 160 N.C. App. 251	No. 536P03	Def's PWC to Review the Decision of the COA (COA02-1214)	Denied
State v. Jones Case below: 161 N.C. App. 60	No. 591PA03	1. AG's Motion for Temporary Stay (COA02-1404) 2. AG's Petition for Writ of Supersedeas 3. AG's Petition for Discretionary Review Under N.C.G.S. §7A-31	1. Allowed **11/13/03** 2. Allowed **11/24/03** 3. Allowed **11/24/03**
State v. Keel Case below: Edgecomb County Superior Court	No. 134A93-13	Motion by defendant for Stay of Execution	Denied
State v. Lassiter Case below: 160 N.C. App. 443	No. 580P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1279)	Denied
State v. Loza-Rivera Case below: 159 N.C. App. 468	No. 439P03	1. AG's Motion for Temporary Stay (COA02-951) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. **Stay Dissolved 12/04/03** 2. Denied 3. Denied
State v. Marcoplos Case below: 159 N.C. App. 707	No. 048A03-2	1. Defs' NOA Based Upon a Constitutional Question (COA01-1518-2) 2. AG's Motion to Dismiss Appeal	1. — 2. Allowed

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

State v. McCree Case below: 160 N.C. App. 19	No. 522P03	1. Def's NOA Based Upon a Constitutional Question (COA02-796) 2. Def's PDR	1. Dismissed *ex mero motu* 2. Denied
State v. Peak Case below: 156 N.C. App. 699	No. 443P03	Def's PWC to Review the Decision of the COA (COA02-801)	Denied
State v. Pittman Case below: 153 N.C. App. 525	No. 544P03	1. Def's PWC to Review the Decision of the COA (COA02-384) 2. Def's Motion to Appoint Counsel	1. Denied 2. Denied
State v. Poag Case below: 159 N.C. App. 312	No. 496P03	1. Def's NOA Based Upon a Constitutional Question (COA02-773) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
State v. Smith Case below: 158 N.C. App. 747	No. 407P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1089)	Denied
State v. Sneed Case below: 161 N.C. App. 331	No. 601PA03	1. AG's Motion for Temporary Stay (COA02-1746) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/25/03** 2. Allowed **11/25/03** 3. Allowed **11/25/03**
State v. Terrell Case below: 160 N.C. App. 710	No. 582P03	Def's PDR Under N.C.G.S. § 7A-31 (COA03-89)	Denied
State v. Whittington Case below: 159 N.C. App. 468	No. 512P03	1. Def's NOA Based Upon a Constitutional Question (COA02-818) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss	1. — 2. Denied 3. Allowed
State v. Williams Case below: 159 N.C. App. 468	No. 493P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-761)	Denied **Orr, J., recused**

PETITION TO REHEAR

N.C. State Bar v. Gilbert Case below: 357 N.C. 502	No. 434A02	Def's Petition for Rehearing (COA01-769)	Denied **11/18/03**

APPENDIXES

AMENDED ORDER ADOPTING
AMENDMENTS TO THE
NORTH CAROLINA RULES
OF APPELLATE PROCEDURE

ORDER ADOPTING AMENDMENTS
TO THE GENERAL RULES
OF PRACTICE FOR THE SUPERIOR
AND DISTRICT COURTS

ORDER ADOPTING AMENDMENTS
TO THE NORTH CAROLINA
CODE OF JUDICIAL CONDUCT

THE CHIEF JUSTICE'S COMMISSION
ON THE FUTURE OF THE
NORTH CAROLINA BUSINESS COURT

AMENDMENT TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING THE
COMPOSITION OF THE
GRIEVANCE COMMITTEE

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING APPOINTMENT OF COUNSEL FOR INDIGNENT DEFENDANTS IN CRIMINAL CASES

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE AUTHORIZED PRACTICE COMMITTEE

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PLAN OF LEGAL SPECIALIZATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CERTIFICATION OF PARALEGALS

AMENDMENT TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR BOARD OF LAW EXAMINERS

IN THE SUPREME COURT OF NORTH CAROLINA

Amended Order Adopting Amendments to the North Carolina Rules of Appellate Procedure

Rules 3, 4, 12, 13, 14, 26, and Appendix A of the North Carolina Rules of Appellate Procedure are hereby amended as described below:

Rule 3(b) is amended to update statutory references as follows:

(b) *Special Provisions.* Appeals in the following types of cases shall be taken in the time and manner set out in the General Statutes section noted:

(1) Termination of parental rights, G.S. ~~7A-289.34~~ 7B-1113.

(2) Juvenile matters, G.S. ~~7A-666~~ 7B-1001.

Rule 4(a)(2) is amended by the addition of a sentence as follows:

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within 14 days after entry of the judgment or order or within 14 days after a ruling on a motion for appropriate relief made during the 14-day period following entry of the judgment or order. Appeals from district court to superior court are governed by G.S. 15A-1431 and -1432.

Rule 12(c) is amended by deleting the second paragraph as follows:

(c) *Copies of Record on Appeal.* The appellant need file but a single copy of the record on appeal. Upon filing, the appellant may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the costs of reproducing copies of the record on appeal. The clerk will reproduce and distribute copies as directed by the court.

~~In civil appeals in forma pauperis the appellant need not pay a deposit for reproducing copies, but at the time of filing the original record on appeal shall also deliver to the clerk two legible copies thereof.~~

Rule 13(a)(1) is amended by deleting the second sentence as follows:

(1) *Cases Other Than Death Penalty Cases.* Within 30 days after the clerk of the appellate court has mailed the printed record to the parties, the appellant shall file his brief in the office of the clerk of the appellate court, and serve copies thereof upon all other parties separately represented. ~~In civil appeals in forma pauperis, no printed record is created; accordingly, appellant's 30 days for filing and serving the brief shall run from the date of docketing the record on appeal in the appellate court.~~ Within 30 days after appellant's brief has been served on an appellee, the appellee shall similarly file and serve copies of his brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief within 14 days after service of the brief of the appellee.

Rule 13(b) is amended by deleting the second paragraph as follows:

(b) *Copies Reproduced by Clerk.* A party need file but a single copy of his brief. At the time of filing the party may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the cost of reproducing copies of the brief. The clerk will reproduce and distribute copies of briefs as directed by the court.

~~In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original brief shall also deliver to the clerk two legible photocopies thereof.~~

Rule 14(c)(2) is amended by deleting the last sentence as follows:

(2) *Transmission; Docketing; Copies.* Upon the filing of a notice of appeal, the Clerk of the Court of Appeals will forthwith transmit the original record on appeal to the Clerk of the Supreme Court, who shall thereupon file the record and docket the appeal. The Clerk of the Supreme Court will procure or reproduce copies of the record on appeal for distribution as directed by the Court, and may require a deposit from appellant to cover the cost of reproduction. ~~In appeals in forma pauperis, the Clerk of the Court of Appeals will transmit with the original record on appeal the copies filed by the appellant in that Court under Rule 12(c).~~

Rule 14(d)(1) is amended by deleting the third paragraph as follows:

(1) *Filing and Service; Copies.* Within 30 days after filing notice of appeal in the Supreme Court, the appellant shall file with the Clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those questions upon which review by the Supreme Court is sought; provided, however, that when the appeal is based upon the existence of a substantial constitutional question or when the appellant has filed a petition for discretionary review for issues in addition to those set out as the basis of a dissent in the Court of Appeals, the appellant shall file and serve a new brief within 30 days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist or allows or denies the petition for discretionary review in an appeal based upon a dissent. Within 30 days after service of the appellant's brief upon him, the appellee shall similarly file and serve copies of a new brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief within 14 days after service of the brief of the appellee.

The parties need file but single copies of their respective briefs. At the time of filing a brief, the party may be required to pay to the Clerk a deposit fixed by the Clerk to cover the cost of reproducing copies of the brief. The Clerk will reproduce and distribute copies as directed by the Court.

~~In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the Clerk two legible copies thereof.~~

Rule 26(a)(1) is amended 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, record on appeal, and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service.

Appendix A is amended as follows:

Filing appellant's brief (or mailing brief under Rule 26(a))	30	Clerk's mailing of printed record ~~or from docketing record in civil appeals in forma pauperis~~ (60 days in Death Cases)	13(a)

These amendments to the North Carolina Rules of Appellate Procedure shall be effective upon adoption by the Supreme Court.

Adopted by the Court in Conference this the 1st day of May, 2003. 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 Amendments to 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 shall be followed:

(1) All appointments of defense counsel shall be in accordance with G.S. 7A-451(c), (d), and (e) and rules adopted by the Office of Indigent Defense Services ~~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 appointment of experts~~, *ex parte* matters, interim attorney fee awards, and similar matters arising~~ made prior to the filing of a motion for appropriate relief and subsequent to a denial by the Director of Indigent Defense Services shall ~~should~~ be ruled on by the senior resident superior court judge or the senior resident superior court judge's designee in accordance with rules adopted by the Office of Indigent Defense Services;

(3) All requests for other *ex parte* and similar matters arising prior to the filing of a motion for appropriate relief shall be ruled on by the senior resident superior court judge or the senior resident superior court judge's designee in accordance with rules adopted by the Office of Indigent Defense Services;

(4~~3~~) All motions for appropriate relief, when filed, shall ~~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~~

(5~~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 nonjurisdictional 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 nonjurisdictional 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; and.

(6) All requests for and awards of attorney fees and other expenses of representation shall be made in accordance with rules adopted by the Office of Indigent Defense Services.

These amendments to the General Rules of Practice for the Superior and District Courts shall be effective upon adoption by the Supreme Court.

Adopted by the Court in Conference this the 1st day of May, 2003. 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 practicable on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

Brady, J.
For the Court

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendments to the North Carolina Code of Judicial Conduct

The North Carolina Code of Judicial Conduct is hereby amended to read as follows:

Preamble

An independent and honorable judiciary is indispensable to justice in our society, and to this end and in furtherance thereof, this Code of Judicial Conduct is hereby established. A violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or willful misconduct in office, or otherwise as grounds for disciplinary proceedings pursuant to Article 30 of Chapter 7A of the General Statutes of North Carolina. No other code or proposed code of judicial conduct shall be relied upon in the interpretation and application of this Code of Judicial Conduct.

Canon 1

A judge should uphold the integrity and independence of the judiciary.

A judge should participate in establishing, maintaining, and enforcing, and should himself observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved.

Canon 2

A judge should avoid impropriety in all his activities.

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interest of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. A judge may, based on personal knowledge, serve as a personal reference or provide a letter of recommendation. He should not testify voluntarily as a character witness.

C. A judge should not hold membership in any organization that practices unlawful discrimination on the basis of race, gender, religion or national origin.

Canon 3

A judge should perform the duties of his office impartially and diligently.

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply.

A. Adjudicative responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials and others subject to his direction and control.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should abstain from public comment about the merits of a pending proceeding in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina law and should encourage similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties; from explaining for public information the proceedings of the Court; from addressing or discussing previously issued judicial decisions when serving as faculty or otherwise par-

ticipating in educational courses or programs; or from addressing educational, religious, charitable, fraternal, political, or civic organizations.

(7) A judge should exercise discretion with regard to permitting broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during civil or criminal sessions of court or recesses between sessions, pursuant to the provisions of Rule 15 of the General Rules of Practice for the Superior and District Courts.

B. Administrative responsibilities.

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

(4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.

C. Disqualification.

(1) On motion of any party, a judge should disqualify himself in a proceeding in which his impartiality may reasonably be questioned, including but not limited to instances where:

(a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;

(b) He served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or

any other interest that could be substantially affected by the outcome of the proceeding;

(d) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(3) For the purposes of this section:

(a) The degree of relationship is calculated according to the civil law system;

(b) "Fiduciary" includes such relationships as executor, administrator, trustee and guardian;

(c) "Financial interest" means ownership of a substantial legal or equitable interest (*i.e.*, an interest that would be significantly affected in value by the outcome of the subject legal proceeding), or a relationship as director or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, cultural, historical, religious, charitable, fraternal or civic organization is not a "financial interest" in securities held by the organization.

D. Remittal of disqualification.

Nothing in this Canon shall preclude a judge from disqualifying himself from participating in any proceeding upon his own initiative. Also, a judge potentially disqualified by the terms of Canon 3C may, instead of withdrawing from the proceeding, disclose on the record the basis of his potential disqualification. If, based on such disclo-

sure, the parties and lawyers, on behalf of their clients and independently of the judge's participation, all agree in writing that the judge's basis for potential disqualification is immaterial or insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all lawyers, shall be incorporated in the record of the proceeding. For purposes of this section, *pro se* parties shall be considered lawyers.

Canon 4

A judge may participate in cultural or historical activities or engage in activities concerning the legal, economic, educational, or governmental system, or the administration of justice.

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast substantial doubt on his capacity to decide impartially any issue that may come before him:

A. He may speak, write, lecture, teach, participate in cultural or historical activities, or otherwise engage in activities concerning the economic, educational, legal, or governmental system, or the administration of justice.

B. He may appear at a public hearing before an executive or legislative body or official with respect to activities permitted under Canon 4A or other provision of this Code, and he may otherwise consult with an executive or legislative body or official.

C. He may serve as a member, officer or director of an organization or governmental agency concerning the activities described in Canon 4A, and may participate in its management and investment decisions. He may not actively assist such an organization in raising funds but may be listed as a contributor on a fund-raising invitation. He may make recommendations to public and private fund-granting agencies regarding activities or projects undertaken by such an organization.

Canon 5

A judge should regulate his extra-judicial activities to ensure that they do not prevent him from carrying out his judicial duties.

A. Avocational activities. A judge may write, lecture, teach, and speak on legal or non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avoca-

tional activities do not substantially interfere with the performance of his judicial duties.

B. Civic and charitable activities. A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal or civic organization subject to the following limitations.

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him.

(2) A judge may be listed as an officer, director or trustee of any cultural, educational, historical, religious, charitable, fraternal or civic organization. He may not actively assist such an organization in raising funds but may be listed as a contributor on a fund-raising invitation.

(3) A judge may serve on the board of directors or board of trustees of such an organization even though the board has the responsibility for approving investment decisions.

C. Financial activities.

(1) A judge should refrain from financial and business dealings that reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

(2) Subject to the requirements of subsection (1), a judge may hold and manage his own personal investments or those of his spouse, children, or parents, including real estate investments, and may engage in other remunerative activity not otherwise inconsistent with the provisions of this Code but should not serve as an officer, director or manager of any business.

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified.

(4) Neither a judge nor a member of his family residing in his household should accept a gift from anyone except as follows:

(a) A judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official or academic use; or an invitation to the judge and his spouse to attend a bar-related function, a cultural or historical activity, or an

event related to the economic, educational, legal, or governmental system, or the administration of justice;

(b) A judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, favor or loan from a friend or relative; a wedding, engagement or other special occasion gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) Other than as permitted under subsection C.(4)(b) of this Canon, a judge or a member of his family residing in his household may accept any other gift only if the donor is not a party presently before him and, if its value exceeds $500, the judge reports it in the same manner as he reports compensation in Canon 6C.

(5) For the purposes of this section "member of his family residing in his household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his family, who resides in his household.

(6) A judge is not required by this Code to disclose his income, debts or investments, except as provided in this Canon and Canons 3 and 6.

(7) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.

D. Fiduciary activities. A judge should not serve as the executor, administrator, trustee, guardian or other fiduciary, except for the estate, trust or person of a member of his family, and then only if such service will not interfere with the proper performance of his judicial duties. "Member of his family" includes a spouse, child, grandchild, parent, grandparent or any other relative of the judge by blood or marriage. As a family fiduciary a judge is subject to the following restrictions:

(1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate, trust or ward becomes involved in adversarial proceedings in the court on which he serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.

E. Arbitration. A judge should not act as an arbitrator or mediator. However, an emergency justice or judge of the Appellate Division designated as such pursuant to Article 6 of Chapter 7A of the General Statutes of North Carolina, and an Emergency Judge of the District Court or Superior Court commissioned as such pursuant to Article 8 of Chapter 7A of the General Statutes of North Carolina may serve as an arbitrator or mediator when such service does not conflict with or interfere with the justice's or judge's judicial service in emergency status. A judge of the Appellate Division may participate in any dispute resolution program conducted at the Court of Appeals and authorized by the Supreme Court.

F. Practice of law. A judge should not practice law.

G. Extra-judicial appointments. A judge should not accept appointment to a committee, commission, or other body concerned with issues of fact or policy on matters other than those relating to cultural or historical matters, the economic, educational, legal or governmental system, or the administration of justice. A judge may represent his country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

Canon 6

A judge should regularly file reports of compensation received for quasi-judicial and extra-judicial activities.

A judge may receive compensation, honoraria and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, subject to the following restrictions:

A. Compensation and honoraria. Compensation and honoraria should not exceed a reasonable amount.

B. Expense reimbursement. Expense reimbursement should be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

C. Public reports. A judge shall report the name and nature of any source or activity from which he received more than $2,000 in income during the calendar year for which the report is filed. Any required report shall be made annually and filed as a public document as follows: The members of the Supreme Court shall file such reports with the Clerk of the Supreme Court; the members of the Court of Appeals shall file such reports with the Clerk of the Court of Appeals; and each Superior Court Judge, regular, special, and emergency, and each District Court Judge, shall file such report with the

Clerk of the Superior Court of the county in which he resides. For each calendar year, such report shall be filed, absent good cause shown, not later than May 15th of the following year.

Canon 7

A judge may engage in political activity consistent with his status as a public official.

The provisions of Canon 7 are designed to strike a balance between two important but competing considerations: (1) the need for an impartial and independent judiciary and (2) in light of the continued requirement that judicial candidates run in public elections as mandated by the Constitution and laws of North Carolina, the right of judicial candidates to engage in constitutionally protected political activity. To promote clarity and to avoid potentially unfair application of the provisions of this Code, subsection B of Canon 7 establishes a safe harbor of permissible political conduct.

A. Terminology. For the purposes of this Canon only, the following definitions apply.

(1) A "candidate" is a person actively and publicly seeking election to judicial office. A person becomes a candidate for judicial office as soon as he makes a public declaration of candidacy, declares or files as a candidate with the appropriate election authority, authorizes solicitation or acceptance of contributions or public support, or sends a letter of intent to the chair of the Judicial Standards Commission. The term "candidate" has the same meaning when applied to a judge seeking election to a non-judicial office.

(2) To "solicit" means to directly, knowingly and intentionally make a request, appeal or announcement, public or private, oral or written, whether in person or through the press, radio, television, telephone, Internet, billboard, or distribution and circulation of printed materials, that expressly requests other persons to contribute, give, loan or pledge any money, goods, labor, services or real property interest to a specific individual's efforts to be elected to public office.

(3) To "endorse" means to knowingly and expressly request, appeal or announce publicly, orally or in writing, whether in person or through the press, radio, television, telephone, Internet, billboard or distribution and circulation of printed materials, that other persons should support a specific individual in his efforts to be elected to public office.

B. Permissible political conduct. A judge or a candidate may:

(1) attend, preside over, and speak at any political party gathering, meeting or other convocation, including a fund-raising function for himself, another individual or group of individuals seeking election to office and the judge or candidate may be listed or noted within any publicity relating to such an event, so long as he does not expressly endorse a candidate (other than himself) for a specific office or expressly solicit funds from the audience during the event;

(2) if he is a candidate, endorse any individual seeking election to any office or conduct a joint campaign with and endorse other individuals seeking election to judicial office, including the solicitation of funds for a joint judicial campaign;

(3) identify himself as a member of a political party and make financial contributions to a political party or organization; provided, however, that he may not personally make financial contributions or loans to any individual seeking election to office (other than himself) except as part of a joint judicial campaign as permitted in subsection B(2);

(4) personally solicit campaign funds and request public support from anyone for his own campaign or, alternatively, and in addition thereto, authorize or establish committees of responsible persons to secure and manage the solicitation and expenditure of campaign funds;

(5) become a candidate either in a primary or in a general election for a judicial office provided that he should resign his judicial office prior to becoming a candidate either in a party primary or in a general election for a non-judicial office;

(6) engage in any other constitutionally protected political activity.

C. Prohibited political conduct. A judge or a candidate should not:

(1) solicit funds on behalf of a political party, organization, or an individual (other than himself) seeking election to office, by specifically asking for such contributions in person, by telephone, by electronic media, or by signing a letter, except as permitted under subsection B of this Canon or otherwise within this Code;

(2) endorse a candidate for public office except as permitted under subsection B of this Canon or otherwise within this Code;

(3) intentionally and knowingly misrepresent his identity or qualifications.

D. Political conduct of family members. The spouse or other family member of a judge or a candidate is permitted to engage in political activity.

Limitation of Proceedings

Disciplinary proceedings to redress alleged violations of Canon 7 of this Code must be commenced within three months of the act or omission allegedly giving rise to the violation. Disciplinary proceedings to redress alleged violations of all other provisions of this Code must be commenced within three years of the act or omission allegedly giving rise to the violation; provided, however, that disciplinary proceedings may be instituted at any time against a judge convicted of a felony during his tenure in judicial office.

Scope and Effective Date of Compliance

The provisions of Canon 7 of this Code shall apply to judges and candidates for judicial office. The other provisions of this Code shall become effective as to a judge upon the administration of the judge's oath to the office of judge; provided, however, that it shall be permissible for a newly installed judge to facilitate or assist in the transfer of his prior duties as legal counsel but he may not be compensated therefor.

Adopted unanimously by the Court in Conference this the 2nd day of April 2003. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

Brady, J
For the Court

THE CHIEF JUSTICE'S COMMISSION ON THE FUTURE OF THE NORTH CAROLINA BUSINESS COURT

IN THE SUPREME COURT OF NORTH CAROLINA BY ORDER OF THE COURT

In recognition of the need to assess the future of the North Carolina Business Court, the Court hereby creates THE CHIEF JUSTICE'S COMMISSION ON THE FUTURE OF THE NORTH CAROLINA BUSINESS COURT.

SECTION 1: STRUCTURE AND COMPOSITION OF THE COMMISSION

The structure and composition of the Commission shall be as follows:

The Chair of the Commission shall be the Chief Justice or his or her designee. The Chair will appoint the Commission's other members. The Commission's members should reflect the Business Court's five main constituents: judges, court administrators, legislators, practicing lawyers, and the Commission on Business Laws and the Economy. The Chair will appoint the members of the Commission as follows:

1.1 Judges:

1.1.1 Supreme Court of North Carolina: one justice from the Supreme Court of North Carolina,

1.1.2 North Carolina Court of Appeals: one judge from the North Carolina Court of Appeals,

1.1.3 North Carolina Superior Court: six judges from the Superior Courts of North Carolina, giving due regard for diversity of geographical representation.

1.2 Court Administrators: two current administrative employees of the North Carolina Administrative Office of the Courts.

1.3 Legislators:

1.3.1 North Carolina Senate: three members of the North Carolina Senate, giving due regard for diversity of geographical representation, and

1.3.2 North Carolina House of Representatives: three members of the North Carolina House of Rep-

resentatives, giving due regard for diversity of geographical representation.

1.4 **Practicing Lawyers:** sixteen practicing lawyers, giving due regard for diversity of geographical representation.

1.5 **Commission on Business Laws and the Economy:** two members of the Commission on Business Laws and the Economy.

1.6 **At-Large Members:** Three members of the general public who are not attorneys-at-law.

SECTION 2: DURATION AND RESPONSIBILITIES OF THE COMMISSION

The duration and responsibilities of the Commission shall be as follows:

2.1 **Duration:** the members of the Commission shall serve for a term of three years.

2.2 **Responsibilities:** the Commission's major responsibilities shall include studying the functions and procedures of the North Carolina Business Court and the functions and procedures of other states' business courts, and providing recommendations regarding:

2.2.1 **Geographic Expansion:** geographic expansion and future locations of the North Carolina Business Court;

2.2.2 **Jurisdiction:** the scope of subject-matter jurisdiction of the Business Court, including, but not limited to, law and technology issues;

2.2.3 **Administrative Efficiency:** matters relating to administrative efficiency, including but not limited to, assignment and management of cases, funding requirements, judicial terms of office, administrative organization, and measurement of the effectiveness of the Business Court;

2.2.4 **Appellate Process:** the appellate process for Business Court cases;

2.2.5 **Arbitration:** the role of arbitration in Business Court cases;

2.2.6 **Continuing Judicial Education:** the appropriate subjects and amount of continuing judicial edu-

cation necessary for judges serving on the Business Court;

2.2.7 **Other Issues:** other issues relevant to the development of a sound business law jurisprudence in North Carolina.

The commission shall provide a report of its findings and recommendations to the Chief Justice and members of the North Carolina Judicial Council not later than 31 December 2004. Adopted by the Court in Conference this the 6th day of November, 2003. This Order shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This Order shall also be published as quickly as practicable on the North Carolina Judicial Branch of Government Internet Home Page. (http://www.nccourts.org)

s/Lake, C.J.
LAKE, C. J.
For the court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE COMPOSITION OF THE GRIEVANCE COMMITTEE

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 23, 2004.

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 composition of the Grievance Committee, as particularly set forth in 27 N.C.A.C. 1A, Section .0700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0700, Standing Committees of the Council

.0701 Standing Committees and Boards

. . . .

(3) Grievance Committee. It shall be the duty of the Grievance Committee to exercise the disciplinary and disability functions and responsibilities set forth in Section .0100 of Subchapter 1B of these rules . . . . The Grievance Committee shall sit in panels as assigned by the president. Each panel shall have at least ten members. Two members of each panel shall be non-lawyers, one member may be a lawyer who is not a member of the council, and the remaining members of each panel shall be councilors of the North Carolina State Bar . . . .

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 23, 2004.

Given over my hand and the Seal of the North Carolina State Bar, this the 12th day of August, 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 6th day of October, 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 6th day of October, 2004.

s/Brady, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CRIMINAL CASES

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 23, 2004.

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 appointment of counsel for indigent defendants in criminal cases, as particularly set forth in 27 N.C.A.C. 1A, Section .0700 and 27 N.C.A.C. 1D, Sections .0400 and .0500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0700, Standing Committees of the Council

.0701 Standing Committees and Boards

. . . .

(6) Justice System Committee. It shall be the duty of the Justice System Committee to assist the council in identifying and

advancing the appropriate role of the State Bar in connection with initiatives, programs, legislation and other actions intended to improve access to justice, simplify the law and judicial procedures, and enhance the justice system and the public's confidence in that system; ~~to assist the judicial district bars of the State Bar in establishing plans for the representation of indigents in criminal cases in accordance with the provisions of Sections .0400 and .0500 of Subchapter 1D of these rules; to provide assistance and advice concerning the operation of such plans;~~ to consider means and methods of enhancing the degree of professionalism exhibited in the practice and conduct of the lawyers of this State; and to perform such other duties and consider such other matters as the council or the president may designate.

27 N.C.A.C. 1D, Section .0400, ~~Rules and Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases~~

~~.0401 Authority~~

~~These rules and regulations are issued pursuant to the authority contained in G.S. 7A-459, Chapter 1013 of the Session Laws of 1969.~~

~~.0402 Determination of Indigency~~

~~(a) Prior to the appointment of counsel on grounds of indigency, the court shall require the defendant to complete and sign under oath an affidavit of indigency in a form approved by the director of the Administrative Office of the Courts.~~

~~(b) Prior to the call of the case for trial, the judge shall make reasonable inquiry of the defendant personally under oath to determine the truth of the statements made in the affidavit of indigency.~~

~~(c) The defendant's affidavit of indigency shall be filed in the records of the case.~~

~~(d) Upon the basis of the defendant's affidavit of indigency, his statements to the court on this subject, and such other information as may be brought to the attention of the court which shall be made a part of the record in the case, the court shall determine whether or not the defendant is in fact indigent.~~

~~.0403 Waiver of Counsel~~

~~(a) Any defendant desiring to waive the right to counsel as provided in G.S. 7A-457 shall complete and sign under oath a waiver of counsel in a form approved by the director of the Administra-~~

~~tive Office of the Courts. If such defendant waives the right to counsel but refuses to execute such waiver, the court shall so certify in a form approved by the director of the Administrative Office of the Courts.~~

~~(b) Prior to the call of the case for trial, the judge shall make reasonable inquiry of the defendant personally to determine that the defendant has understandingly waived his or her right to counsel.~~

~~(c) The judge, upon being so satisfied, shall accept the waiver of counsel executed by the defendant, sign the same, and cause it to be filed in the record of the case.~~

~~.0404 Appointment of Counsel~~

~~(a) The North Carolina State Bar shall adopt a model plan for the appointment of counsel for indigent persons charged with certain crimes or otherwise entitled to representation. Each judicial district bar shall adopt a plan or plans for the appointment of counsel by the public defender and/or the court to represent indigent persons which provides for the appointment of experienced counsel for persons charged with serious crimes, with respect to which the model plan may serve as a guide or example. A plan may be applicable to the entire district, or, at the election of the district bar, separate plans may be adopted by the district bar for use in each separate county within the district.~~

~~(b) Such plan or plans as adopted by the judicial district bar shall be certified to the council of the North Carolina State Bar for its approval, following which the plan or plans shall be certified to the clerk of superior court of each county to which each plan is applicable by the secretary of the North Carolina State Bar and shall constitute the method by which counsel shall be selected in said district for appointment to indigent defendants. Thereafter all appointments of counsel for indigent defendants in said district shall be made in conformity with such plan or plans, unless the trial judge or, where authorized, the public defender, in the exercise of his or her discretion deems it proper in furtherance of justice to appoint as counsel for an indigent defendant or defendants some lawyer or lawyers residing and practicing in the judicial district who is or are not on the plan or list certified to the clerk of superior court, and if so, the trial judge or, where authorized, the public defender, may appoint as counsel to represent an indigent defendant some lawyer or lawyers not on said plan or list residing and practicing in the judicial district.~~

~~(c) No attorney shall be appointed as counsel for an indigent defendant in a court of any district except the district in which he or she resides or maintains an office except by consent of counsel so appointed.~~

~~(d) No indigent defendant shall be entitled or permitted to select or specify the attorney who shall be assigned to defend him or her.~~

~~(e) The clerk of superior court of each county shall file or record in his or her office, maintain and keep current the plan for the assignment of counsel applicable to said county as certified to him by the secretary of the North Carolina State Bar.~~

~~(f) The clerk of superior court of each county shall keep a record of all counsel eligible for appointment under the plan applicable to said county as certified to him or her by the secretary of the North Carolina State Bar.~~

~~(g) Orders for the appointment of counsel shall be entered by the court in a form approved by the director of the Administrative Office of the Courts.~~

~~(h) Notwithstanding any other provision of this section or any plans or assigned counsel lists adopted by a district bar pursuant thereto, two counsel shall be appointed to represent an indigent defendant charged with murder where the state is seeking the death penalty.~~

~~(i) (1) Notwithstanding any other provisions of this section or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime~~

~~(A) who does not have a minimum of five years of experience in the general practice of law, provided that the court or, where authorized, the public defender, may in its or his or her discretion appoint as assistant counsel an attorney who has less experience;~~

~~(B) who has not been found by the court or, where authorized, the public defender, appointing him to have a demonstrated proficiency in the field of criminal trial practice.~~

~~(2) For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any district attorney's office.~~

~~(j) (1) Notwithstanding any other provision of this section or any plans or assigned counsel lists adopted by a district bar pursuant~~

thereto, no attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime

(A) who does not have a minimum of five years of experience in the general practice of law, provided, that the court or, where authorized, the public defender, may in its or his or her discretion appoint as assistant counsel an attorney who has less experience;

(B) who has not been found by the trial judge or, where authorized, the public defender, to have a demonstrated proficiency in the field of appellate practice.

(2) For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any district attorney's office.

(3) Unless good cause is shown, an attorney representing the indigent defendant at the trial level shall represent him or her at the appellate level if the attorney is otherwise qualified under the provisions of this section.

(k) In those cases in which a public defender has authority to appoint a member of a judicial district bar to represent an indigent person, the public defender shall make the appointment pursuant to the procedures set out herein.

(l) It is contemplated that in those districts with a public defender, additional outside counsel will be appointed in those instances in which the volume of work handled by the public defender necessitates additional counsel and in those instances where a conflict of interest exists as regards the public defender and multiple defendants. Provided, when a conflict of interest on the part of the public defender necessitates additional counsel, the court shall appoint outside counsel.

(m) Nothing in these regulations or in the model plan shall be construed to prohibit assignment of otherwise qualified counsel to represent indigent defendants pursuant to specialized programs, plans or contracts which may be implemented from time to time to improve efficiency and economy where such programs, plans or contracts are consistent with the ends of justice and are approved by the Council of the North Carolina State Bar.

.0405 Withdrawal by Counsel

(a) At any time during or pending the trial or retrial of a case, the trial judge, the appointing judge, or the resident judge of the dis-

~~trict, upon application of the attorney, and for good cause shown, may permit said attorney to withdraw from the defense of the case.~~

~~(b) At any time after the trial of a case and during the pendency of an appeal, the trial attorney, for good cause shown, may apply to the appellate court for permission to withdraw from the defense of the case upon the appeal.~~

~~(c) Applications for permission to withdraw as counsel shall be made only for good~~ cause where compelling reasons or actual hardship exists.

~~.0406 Procedure for Payment of Compensation~~

~~(a) Upon completion of the representation of an indigent defendant by appointed counsel in the trial court, the trial judge shall, upon application, enter an order allowing such compensation as is provided in G.S. 7A-458.~~

~~(b) Upon the completion of any appeal, the trial judge, the resident judge or the judge holding the courts of the district, shall, upon application, enter a supplemental order in the cause allowing the appointed attorney upon the appeal such additional compensation as may be appropriate. This rule does not prohibit payment of interim fees pending final determination of any appeal~~

~~(c) Orders for the payment of compensation to counsel for representation of indigent defendants shall be entered by the judge in a form approved by the director of the Administrative Office of the Courts.~~

~~(d) Two certified copies of the order for the payment of fees shall be forwarded by the clerk of the superior court to the Administrative Office of the Courts, Attention: Assistant Director, Raleigh, North Carolina, for payment.~~

~~(e) Upon the entry of the order for the payment of counsel fees, the court shall upon final conviction likewise enter a judgment against the defendant for whom counsel was assigned in the amount allowed as counsel fees, said judgment to be in the form approved by the director of the Administrative Office of the Courts.~~

~~(f) Counsel appointed for the representation of indigent defendants shall not accept any compensation other than that awarded by the court.~~

27 N.C.A.C. 1D, Section .0500, ~~Model Plan for Appointment of Counsel for Indigent Defendants in Certain Criminal Cases~~

~~.0501 Purpose~~

~~The purpose of these regulations is to provide for effective representation of indigent criminal defendants at all stages of trial and appellate proceedings.~~

~~.0502 Applicability~~

~~These regulations apply to any criminal case arising in the _________ Judicial District in which the court has determined that the defendant is entitled to the appointment of counsel. Reference to the singular shall, as appropriate, be construed to include the plural.~~

~~.0503 Lists of Attorneys~~

~~(a) Any attorney engaged in the private practice of law primarily in the judicial district who~~

~~(1) maintains an office in the judicial district;~~

~~(2) practices criminal law in the courts of the _____ Judicial District to an appreciable extent, or intends or desires to do so, may be placed on one of three lists governing the appointment of counsel in criminal cases involving indigent persons. No other attorneys will be placed on the lists.~~

~~(b) Attorneys included on the first list may only be appointed to represent defendants charged with misdemeanors or felonies classified as Class H or Class I.~~

~~(c) Attorneys on the second list may be appointed to represent defendants charged with misdemeanors or felonies other than capital crimes, provided that an attorney may request the Committee on Indigent Appointments that he or she not be subject to appointment to represent defendants charged only with misdemeanors. If the committee approves the request, the list shall reflect the limited availability of that attorney for appointments.~~

~~(d) Attorneys on the third list may be appointed to represent defendants charged with any crimes, provided that an attorney may request the Committee on Indigent Appointments that he or she not be subject to appointment to represent defendants charged only with misdemeanors. If the committee approves the request, the list shall reflect the limited availability of that attorney for appointments.~~

~~(e) The Committee on Indigent Appointments shall, prior to the effective date of these regulations, meet and develop three lists of attorneys of the types described herein from the roster of attorneys currently accepting appointments in indigent cases in the ______ Judicial District. The first list shall include all such attorneys who have been licensed less than two years or who have been admitted by comity. The second list shall include all such attorneys who have been licensed for two years or more. The third list shall include all such attorneys who have had not less than five years experience in the general practice of law and who have demonstrated proficiency in the field of criminal trial practice. With respect to these initial lists, any other requirement not otherwise met by any listed attorney is hereby waived unless the committee determines that it ought not to be waived.~~

~~(f) Subject to the exceptions contained in Rule .0503(e) above, requirements for inclusion on the three lists are as follows:~~

~~(1) an attorney licensed to practice law in North Carolina may be included on the first list if the Committee on Indigent Appointments finds that~~

~~(A) the attorney is competent to represent criminal defendants charged with misdemeanors and felonies;~~

~~(B) two attorneys who have engaged in the practice of law in the ______ Judicial District for not less than three years preceding the committee's consideration, at least one of whom included on one of the three lists, have stated in writing that they believe he or she is competent to represent criminal defendants charged with misdemeanors and felonies and that they recommend that he or she be included on the list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation.~~

~~(2) an attorney who has been licensed to practice law in North Carolina for not less than two years or who has been admitted to the North Carolina State Bar by comity may be included on the second list if the committee finds that~~

~~(A) the attorney has demonstrated proficiency in the field of criminal trial practice and has the ability to handle appellate matters;~~

~~(B) two attorneys who have engaged in the private practice of law in the ______ Judicial District for not less than four years preceding the committee's consideration, at least one of whom~~

~~included on one of the three lists, have stated in writing that they believe he or she is competent to represent criminal defendants charged with felonies and that they recommend that he or she be included on the list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation;~~

~~(C) the attorney is competent to represent criminal defendants charged with felonies.~~

~~(3) an attorney who has been licensed to practice law in North Carolina for not less than five years may be included on the third list if the committee finds that~~

~~(A) the attorney has demonstrated proficiency in the field of criminal trial practice and has the ability to handle appellate matters;~~

~~(B) two attorneys who have engaged in the private practice of law in the ______ Judicial District for not less than five years preceding the committee's consideration, at least one of whom included on one of the three lists, have stated in writing that they believe he or she is competent to represent defendants charged with capital crimes and that they recommend that he or she be included on the third list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation;~~

~~(C) the attorney has not less than five years experience in the general practice of law, provided that the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any district attorney's office;~~

~~(D) the attorney is competent to represent criminal defendants charged with capital crimes.~~

~~(g) The Committee on Indigent Appointments shall review the lists not less than once a year to ensure that the lists are current and that the attorneys whose names appear on the lists meet the qualifications set out herein.~~

~~.0504 Committee on Indigent Appointments~~

~~(a) A Committee on Indigent Appointments is hereby established to assist in the implementation of these regulations. The committee shall have authority to act when the regulations become effective.~~

~~(b) All members of the committee shall be attorneys who~~

~~(1) are included on one of the appointment lists;~~

~~(2) have practiced criminal law in the judicial district, whether as a prosecutor or defense counsel, for not less than five years;~~

~~(3) are knowledgeable about practicing attorneys in the ______ Judicial District.~~

~~(c) The committee shall consist of members appointed by the president of the judicial district bar. At least one member shall be appointed from each county in the district. Members of the committee shall be appointed for terms of two years, except that initially a minority of the members shall be designated to serve one year terms in order to stagger terms. The appointments shall be made by letter, a copy of which shall be maintained in the records of the committee. No member shall serve two consecutive terms, except that a person who has been appointed to replace a member who did not complete his or her term may be appointed to a full term following completion of the partial term. Any member who resigns or otherwise becomes ineligible to continue serving as a member shall be replaced as soon as practicable.~~

~~(d) The president of the judicial district bar shall appoint one of the members as chairperson of the committee, who shall serve at the pleasure of the president as shall all other members of the committee.~~

~~(e) The committee shall meet at the call of the chairperson upon reasonable notice. The first meeting shall be on ______________. Thereafter, the committee shall meet as often as is necessary to dispatch its business.~~

~~(f) The committee shall have complete authority to accomplish the following:~~

~~(1) supervise the administration of these regulations;~~

~~(2) review requests from attorneys concerning their placement on any list and obtain information pertaining to such placement;~~

~~(3) approve or disapprove an attorney's addition to or deletion from any list or the transfer of any attorney from one list to another, provided that an attorney's request to be deleted from a list or transferred to a lower numbered list shall not require committee approval;~~

~~(4) establish procedures with which to carry out its business;~~

~~(5) interview attorneys seeking placement on any list and witnesses for or against such placement.~~

~~(g) A majority of the committee must be present at any meeting in order to constitute a quorum. The committee may take no action unless a quorum is present. A majority vote in favor of a motion or any proposed action shall be required in order for the motion to pass or for the action to be taken.~~

~~(h) The committee shall meet in private, except it may invite persons to make limited appearances to be interviewed. Discussions of the committee, its records, and its actions shall be treated as confidentially as possible. The names of the members of the committee shall not be confidential.~~

~~.0505 Placement of Attorneys on List~~

~~(a) Any attorney who wishes to have his or her name added to or deleted from any list, or to have his or her name transferred from one list to another, shall file a written request with the administrator. The request shall include information that will facilitate the committee's determination whether the attorney meets the standards set forth in Rule .0503 above for placement on a certain list. The written statements of competency required by Rule .0503 above must be attached to the request.~~

~~(b) The administrator shall maintain records for the committee and shall advise each member of the committee of the name of the requesting attorney and the nature of this request before the committee meets to review the request. The administrator shall assure that all requests properly filed are brought to the committee's attention at the next meeting at which it is practicable for the committee to review the request.~~

~~(c) The administrator shall assure that all district court judges, resident superior court judges, any special superior court judge with a permanent office in the judicial district, and the district attorney for the ________ Judicial District, and the district's public defender, if any, are advised of any request concerning placement on any list so that such officials will have an opportunity to comment on the request to the committee.~~

~~(d) When the committee meets to review placement requests, it may require any requesting attorney to appear before it to be interviewed and may require information in addition to that submitted in the request. Any member of the committee may discuss requests with other members of the bar in a confidential manner and may~~

~~relate information obtained thereby to the other members. Rules of evidence do not apply with respect to the review of requests. The committee may hold a request in abeyance for a reasonable period of time while obtaining additional information.~~

~~(e) The committee shall determine whether an attorney requesting to be added to a list when he or she is not currently on any list or to be transferred from a lower numbered list to a higher numbered list (such as from the first list to the second list) meets all the applicable standards set out in Rule .0503 above. The request shall be granted or the addition or transfer allowed if the committee finds that he or she does meet all the standards. Conversely, the request shall be denied if the committee does not find that he or she meets all the standards. The findings shall be reduced to writing and kept in the regular records of the committee by the administrator. The committee shall assure that the requesting attorney is given prompt notice of the action taken with respect to his or her request and is advised of the basis for denial if the request is not granted.~~

~~(f) If at any time it reasonably appears to the committee that an attorney no longer meets a standard set forth in Rule .0503 above for the list on which he or she is placed or that he or she can no longer meet the responsibilities of representing indigent defendants with respect to such list, the committee shall direct the attorney to show cause why he or she should not be deleted from the list or transferred from a higher numbered list to a lower numbered list. If the attorney cannot show sufficient cause, the committee may take appropriate action, including suspending the attorney from receiving appointments in indigent cases for a definite or indefinite time, or deleting his or her name from the list he or she is on, or transferring him or her from a higher numbered list to a lower numbered list. Appropriate written findings shall be made by the committee in this regard, and the attorney shall be informed of the basis of any action taken.~~

~~(g) An attorney whose name is deleted from a list or who is transferred to another list by the committee may appeal the committee's action to the senior resident superior court judge of the _______ Judicial District. In such a case the resident superior court judge will make the final decision regarding the deletion or transferral of the attorney.~~

~~(h) Whenever an attorney who provides information to the committee, collectively or through any member, requests that his or her name not be used or that his or her information be treated con-~~

~~fidentially, his or her request shall be granted unless doing~~ so results in manifest unfairness.

~~**.0506 Appointment Procedure (Noncapital Cases)**~~

~~(a) The administrator shall provide the clerk in each courtroom in the district and superior criminal courts of the ______ Judicial District with current lists of attorneys subject to appointment in indigent cases. Attorneys shall be appointed only in accordance with the lists on which they appear and only in cases to be tried in counties in which they maintain offices unless they agree in advance to accept cases from other counties.~~

~~(b) Each courtroom clerk shall maintain a record of attorneys subject to appointment to represent indigents. Beside each attorney's name shall appear the number of any list he or she is on. The court shall proceed in alphabetical sequence in appointing attorneys. If an attorney's name is passed over because he or she is not on a list relating to a particular charge, the court shall return to his or her name for the next appointment consistent with his or her lists. The court may pass over the name of any attorney known not to be reasonably available because of vacation, illness, or other reasons.~~

~~(c) In its discretion, the court may appoint an attorney in any case without regard to sequence or an attorney not maintaining an office in the county where the case is to be tried.~~

~~(d) The clerk shall provide notice of the appointment to the attorney concerned as soon as possible. Further, the clerk shall advise the defendant of the name of his or her attorney.~~

~~(e) The court may appoint an attorney to represent more than one defendant in a single case.~~

~~(f) In those cases in which the public defender cannot serve, and is authorized to appoint a substitute member of the bar to represent an indigent defendant, the public defender shall consult the current lists of attorneys subject to appointment in indigent cases maintained by the court administrator and referred to in Rule .0503 above and shall appoint the next eligible attorney on the list. The public defender shall proceed in sequence in appointing attorneys but may pass over the name of any attorney known to be unavailable because of vacation, illness, or other reasons, or, in his or her discretion, where justice so requires.~~

~~(g) If a judge is not reasonably available to appoint counsel to represent an indigent defendant, the clerk of court shall appoint the~~

~~next eligible attorney on the list. Appointments of counsel by the clerk shall be subject to review and approval by the judge.~~

~~.0507 Appointments in Capital Cases~~

~~(a) In addition to the provisions of Rule .0506 above, the provisions of this rule shall apply to the appointment of counsel in capital cases.~~

~~(b) A counsel and an assistant counsel shall be appointed to represent an indigent defendant charged with murder, in cases in which the state is seeking the death penalty. The assistant counsel may be on the second list or the third list of attorneys.~~

~~(c) (1) No attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime~~

~~(A) who has less than five years experience in the general practice of law, provided that the court may, in its discretion, appoint as assistant counsel an attorney who has less experience; or~~

~~(B) who has not been found by the court appointing him or her to have a demonstrated proficiency in the field of criminal trial practice.~~

~~(2) For the purpose of this section, the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any district attorney's office.~~

~~.0508 Appellate Appointments~~

~~(a) If a criminal defendant who has given notice of appeal from a conviction is found to be eligible, because of indigency, for appointment of counsel at the appellate level, the attorney representing the defendant at the trial level may be appointed to represent the defendant at the appellate level. If the attorney representing the defendant at the trial level was retained, he may be appointed to represent the defendant at the appellate level even though he or she does not meet all the requirements of Rule .0503 above or the other pertinent provisions of these regulations. For good cause, the attorney at the trial level may be relieved of responsibility for the appeal. Whenever it is otherwise necessary to appoint an attorney to represent an indigent person at the appellate level, the attorney appointed shall be selected in a manner consistent with appointment of counsel at the trial level. If the trial attorney is not appointed, the appellate defender's office or any other qualified attorney may be appointed, in a manner con-~~

~~sistent with these rules, to represent the defendant at the appellate level.~~

~~(b) (1) No attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime~~

~~(A) who has less than five years of experience in the general practice of law, provided, however, that the court or, where authorized, the public defender, may, as a matter of discretion, appoint as assistant counsel an attorney who has less experience; or~~

~~(B) who has not been found by the court or the public defender to have a demonstrated proficiency in the field of appellate practice.~~

~~(2) For the purpose of this section, the term general practice of law shall be deemed to include service as a prosecuting attorney in any district attorney's office.~~

~~.0509 Administration~~

~~(a) The senior resident superior court judge for the judicial district shall designate a person to serve as administrator of these regulations.~~

~~(b) The administrator will perform the duties described previously and particularly shall~~

~~(1) maintain records relating to these regulations and to the actions of the Committee on Indigent Appointments;~~

~~(2) keep current the three lists of attorneys;~~

~~(3) assist the courtroom clerks and the clerk of superior court in carrying out these regulations;~~

~~(4) attend meetings of the committee as appropriate;~~

~~(5) inform the judges of the district and the district attorney and the members of the committee of requests by attorneys concerning placement on any lists;~~

~~(6) perform other administrative tasks necessary to the implementation of these regulations.~~

~~(c) The administrator shall have such office, supplies, and equipment as can be provided by the senior resident superior court judge or the committee.~~

~~(d) The clerk of superior court of each county in the judicial dis-~~

~~trict shall file and keep current these regulations for the assignment of counsel as certified to him or her by the secretary of the North Carolina State Bar.~~

~~(e) The clerk of superior court of each county in the _______ Judicial District shall keep a record of all counsel eligible for appointment under these regulations and a permanent record of all appointments made in his or her county.~~

~~.0510 Miscellaneous~~

~~(a) These regulations are issued pursuant to Rule .0404, Subchapter D, Chapter 1, Title 27 of the North Carolina Administrative Code in accordance with G.S. 7A-459. Nothing contained herein shall be construed or applied inconsistently with the regulations established by the North Carolina State Bar Council or with other provisions of state law.~~

~~(b) It is recognized that the court has the inherent discretionary power in any case to decline to appoint a particular attorney to represent an indigent person. It is also recognized that occasionally the court may determine that the interests of justice would be best served by appointing a particular lawyer to handle a particular case even though he or she is not next in sequence or does not maintain an office in the county where the case is to be tried.~~

~~(c) These regulations shall be construed liberally in order to carry out the purpose stated in Rule .0501 above.~~

~~(d) These regulations shall become effective on ________, and shall supersede any existing regulations or plan concerning the appointment of counsel in indigent cases.~~

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 23, 2004.

Given over my hand and the Seal of the North Carolina State Bar, this the 12th day of August, 2004.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments o the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 6th day of October, 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 6th day of October, 2004.

s/Brady, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE AUTHORIZED PRACTICE COMMITTEE

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 23, 2004.

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 Authorized Practice Committee, as particularly set forth in 27 N.C.A.C. 1D, Section .0200, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0200, Procedures for the Authorized Practice Committee

.0203 Definitions

Subject to additional definitions contained in other provisions of this subchapter, the following words and phrases, when used in this subchapter, have the meanings set forth in this rule, unless the context clearly indicates otherwise.

. . . .

~~(12) Letter of caution—a communication from the Authorized Practice Committee to any person stating that past conduct of the person, while not the basis for formal action, is questionable as relates to the practice of law or may be the basis for injunctive relief if continued or repealed.~~

(~~13~~ 12) Letter of notice—a communication to an accused individual or corporation setting forth the substance of alleged conduct involving unauthorized practice of law.

[renumbering intervening subparagraphs]

(~~19~~ 18) Probable Cause—a finding by the Authorized Practice Committee that there is reasonable cause to believe that a person or corporation ~~is guilty of~~ has engaged in the unauthorized practice of law justifying legal action against such person or corporation.

[renumbering remaining subparagraphs]

.0206 Authorized Practice Committee—Powers and Duties

The Authorized Practice Committee shall have the power and duty

(1) to direct the counsel to investigate any alleged unauthorized practice of law by any person, firm, or corporation in this State;

(2) to hold preliminary hearings, find probable cause, and recommend to the Executive Committee that ~~complaints be filed~~ a complaint for injunction be filed in the name of the State Bar against the respondent;

(3) to dismiss ~~complaints~~ allegations of the unauthorized practice of law upon a finding of no probable cause;

(4) to issue ~~a letter of caution to a respondent in cases wherein probable cause is not established but the activities of the respondent are deemed to be improper or may become the basis for injunctive relief if continued or repeated~~ letters of caution, which may include a demand to cease and desist, to respondents in cases where the Committee concludes either that:

a. there is probable cause established to believe respondent has engaged in the unauthorized practice of law in North Carolina, but

(i) respondent has agreed to refrain from engaging in the conduct in the future;

(ii) respondent is unlikely to engage in the conduct again; or

(iii) either referral to a district attorney or complaint for injunction is not warranted under the circumstances; or

b. there is no probable cause established to believe respondent has engaged in the unauthorized practice of law in North Carolina, but

(i) the conduct of the respondent may be improper and may become the basis for injunctive relief if continued or repeated; or

(ii) the Committee otherwise finds it appropriate to caution the respondent.

(5) to direct counsel to stop an investigation and take no action;

(6) to refer a matter to another agency, including the district attorney for criminal prosecution and to other committees of the North Carolina State Bar; and

(~~5~~ 7) to issue advisory opinions in accordance with procedures adopted by the council as to whether the actual or contemplated conduct of non-lawyers would constitute the unauthorized practice of law in North Carolina.

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 23, 2004.

Given over my hand and the Seal of the North Carolina State Bar, this the 12th day of August, 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 6th day of October, 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 6th day of October, 2004.

s/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 April 23, 2004.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning standards for certification in criminal law, 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) Licensure and Practice—An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of the application. During the period of certification an applicant shall continue to be licensed and in good standing to practice law in North Carolina.

(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.

(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.

~~(2) For the subspecialty of criminal appellate practice, 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. For the subspecialty of criminal appellate practice, substantial involvement shall mean~~

~~(A) the applicant must have been engaged in the active practice of law for at least five years prior to certification (unless excepted under Rule .2505(b)(2)(B)(ii) below). During the applicant's entire legal career, the applicant must have completed the requirements set forth in Rule .2505(b)(1)(A) above;~~

~~(B) during the applicant's entire legal career, the applicant must have also~~

~~(i) represented a party in at least 15 criminal appeals, 5 of which must have been within the two years preceding the application;~~

~~(ii) had substantial involvement in criminal appellate work, including brief writing, motion practice, oral arguments, and extraordinary writs. Sitting as an appellate court judge for at least one year of the three years preceding application will fulfill three years of the practice requirements.~~

(c) Continuing Legal Education

(1) In the specialty of criminal law, the state criminal law subspecialty, and the criminal appellate practice subspecialty, an applicant must have earned no less than 40 hours of accredited continuing legal education credits in criminal law during the three years preceding the application, which 40 hours must include the following:

(A) at least 34 hours in skills pertaining to criminal law, such as evidence, substantive criminal law, criminal procedure, criminal trial advocacy, criminal trial tactics, and appellate advocacy;

(B) at least 6 hours in the area of ethics and criminal law.

(2) In order to be certified as a specialist in both criminal law and the subspecialty of criminal appellate law, an applicant must have earned no less than 46 hours of accredited continu-

ing legal education credits in criminal law during the three years preceding application, which 46 hours must include the following:

(A) at least 40 hours in skills pertaining to criminal law, such as evidence, substantive criminal law, criminal procedure, criminal trial advocacy, criminal trial tactics, and appellate advocacy;

(B) at least 6 hours in the area of ethics and criminal law.

(d) Peer Review

(1) Each applicant for certification as a specialist in criminal law, the subspecialty of state criminal law, and the subspecialty of criminal appellate practice, must make a satisfactory showing of qualification through peer review.

(2) All references must be licensed and in good standing to practice in North Carolina and must be familiar with the competence and qualifications of the applicant in the specialty field. The applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualifications.

(3) Written peer reference forms will be sent by the board or the specialty committee to the references. Completed peer reference forms must be received from at least five of the references. The board or the specialty committee may contact in person or by telephone any reference listed by an applicant.

(4) Each applicant 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.

(5) 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) Examination—The applicant must pass a written examination designed to test the applicant's knowledge and ability.

(1) Terms—The examination(s) shall be in written form and shall be given at such times as the board deems appropriate.

The examination(s) shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter

(A) The examination shall cover the applicant's knowledge in the following topics in criminal law, in the subspecialty of state criminal law, and/or in the subspecialty of criminal appellate practice, as the applicant has elected:

(i) the North Carolina and Federal Rules of Evidence;

(ii) state and federal criminal procedure and state and federal laws affecting criminal procedure;

(iii) constitutional law;

(iv) appellate procedure and tactics;

(v) trial procedure and trial tactics;

(vi) criminal substantive law;

(vii) the North Carolina Rules of Appellate Procedure.

(B) An applicant for certification in the specialty of criminal law shall take part I (covering state law) and part II (covering federal law) of the criminal law examination. An applicant for certification in subspecialty of state criminal law shall take part I of the criminal law examination.

(3) Requirement of Criminal Law Examination for Criminal Appellate Practice—An applicant for certification in the subspecialty of criminal appellate practice must successfully pass the examination in criminal law. If an applicant for certification in criminal appellate practice is already certified as a specialist in the subspecialty of state criminal law, then the applicant must take part II (covering federal law) of the examination in criminal law as well as the criminal appellate practice examination.

.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.

(b) Continuing Legal Education—The specialist must have earned no less than 65 hours of accredited continuing legal education credits in criminal law with not less than 6 credits earned in any one year.

(c) Peer Review—The specialist must comply with the requirements of Rule .2505(d) of this subchapter.

(d) Time for Application—Application for continuing certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) Lapse of Certification—Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2505 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification—If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2505 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 April 23, 2004.

Given over my hand and the Seal of the North Carolina State Bar, this the 12th day of August, 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 6th day of October, 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 6th day of October, 2004.

s/Brady, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CERTIFICATION OF PARALEGALS

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 16, 2004.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar, as particularly set forth in 27 N.C.A.C. 1G, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Section .0100 The Plan for Certification of Paralegals

.0101 Purpose

The purpose of this plan for certification of paralegals (plan) is to assist in the delivery of legal services to the public by identifying individuals who are qualified by education and training and have demonstrated knowledge, skill, and proficiency to perform substantive legal work under the direction and supervision of a licensed lawyer, and including any individual who may be otherwise authorized by applicable state or federal law to provide legal services directly to the public; and to improve the competency of

those individuals by establishing mandatory continuing legal education and other requirements of certification.

.0102 Jurisdiction: Authority

The Council of the North Carolina State Bar (the council) with the approval of the Supreme Court of North Carolina hereby establishes the Board of Paralegal Certification (board), which board shall have jurisdiction over the certification of paralegals in North Carolina.

.0103 Operational Responsibility

The responsibility for operating the paralegal certification program rests with the board, subject to the statutes governing the practice of law, the authority of the council and the rules of governance of the board.

.0104 Size and Composition of Board

The board shall have nine members, five of whom must be lawyers in good standing and authorized to practice law in the state of North Carolina. One of the members who is a lawyer shall be a program director at a qualified paralegal studies program. Four members of the board shall be paralegals certified under the plan, provided, however, that the paralegals appointed to the inaugural board shall be exempt from this requirement during their initial and successive terms.

.0105 Appointment of Members; When; Removal

(a) Appointment. The council shall appoint the members of the board, provided, however, after the appointment of the initial members of the board, each paralegal member shall be selected by the council from two nominees determined by a vote by mail of all active certified paralegals in an election conducted by the board.

(b) Procedure for nomination by mail. At least 30 days prior to a meeting of the council at which one or more paralegal members of the board are subject to appointment for a full three year term, a notice shall be mailed to all active certified paralegals at each certified paralegal's address of record on file with the North Carolina State Bar. The notice shall state how many paralegal positions on the board are subject to appointment, state that nominees will be selected by means of written ballots distributed to and returned by certified paralegals by mail, and identify how, by when and to whom nominations

may be made. The board shall mail a ballot to each active certified paralegal at the certified paralegal's address of record on file with the North Carolina State Bar. The ballot shall be accompanied by written instructions and state when and where the ballot should be returned. Each ballot shall be sequentially numbered with a red identifying numeral in the upper right hand corner of the ballot. The board shall maintain appropriate records respecting how many ballots were mailed to prospective voters in each election as well as how many ballots are returned. Only original ballots will be accepted. The names of the two nominees receiving the most votes for each open paralegal position shall be forwarded to the council.

(c) Time of Appointment. The first members of the board shall be appointed as of the quarterly meeting of the council following the creation of the board. Thereafter, members shall be appointed annually at the quarterly meeting of the council occurring on the anniversary of the appointment of the initial board.

(d) Vacancies. Vacancies occurring by reason of death, resignation, or removal shall be filled by appointment of the council, subject to the requirements of Rule .0105(a)1, at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term.

(e) Removal. Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

.0106 Term of Office

Subject to Rule .0107 of this subchapter, each member of the board shall serve for a term of three years beginning as of the first day of the month following the date on which the council appoints the member.

.0107 Staggered Terms

The members of the board shall be appointed to staggered terms such that three members are appointed in each year. Of the initial board, three members (one lawyer and two paralegals) shall be appointed to terms of one year; three members (two lawyers and one paralegal) shall be appointed to terms of two years; and three members (two lawyers and one paralegal) shall be appointed to

terms of three years. Thereafter, three members (lawyers or paralegals as necessary to fill expired terms) shall be appointed in each year for full three year terms.

.0108 Succession

Each member of the board shall be entitled to serve for one full three-year term and to succeed himself or herself for one additional three-year term. Thereafter, no person may be reappointed without having been off of the board for at least three years.

.0109 Appointment of Chairperson

The council shall appoint the chairperson of the board from among the lawyer members of the board. The term of the chairperson shall be one year. The chairperson may be reappointed thereafter during his or her tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and generally shall represent the board in its dealings with the public.

.0110 Appointment of Vice-Chairperson

The council shall appoint the vice-chairperson of the board from among the members of the board. The term of the vice-chairperson shall be one year. The vice-chairperson may be reappointed thereafter during his or her tenure on the board. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board.

.0111 Source of Funds

Funding for the program carried out by the board shall come from such application fees, examination fees, annual fees or recertification fees as the board, with the approval of the council, may establish.

.0112 Fiscal Responsibility

All funds of the board shall be considered funds of the North Carolina State Bar and shall be administered and disbursed accordingly.

(a) Maintenance of Accounts: Audit—The North Carolina State Bar shall maintain a separate account for funds of the board such that such funds and expenditures there from can be readily identified. The accounts of the board shall be audited on an annual basis in connection with the audits of the North Carolina State Bar.

(b) Investment Criteria—The funds of the board shall be handled, invested and reinvested in accordance with investment policies adopted by the council for the handling of dues, rents and other revenues received by the North Carolina State Bar in carrying out its official duties.

(c) Disbursement—Disbursement of funds of the board shall be made by or under the direction of the secretary-treasurer of the North Carolina State Bar.

.0113 Meetings

The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson. Notice of meeting shall be given at least one day prior to the meeting by mail, electronic mail, telegram, facsimile transmission, or telephone. A quorum of the board for conducting its official business shall be five or more of the members serving at the time of the meeting.

.0114 Annual Report

The board shall prepare a report of its activities for the preceding year and shall present the same at the annual meeting of the council.

.0115 Powers and Duties of the Board

Subject to the general jurisdiction of the council and the North Carolina Supreme Court, the board shall have jurisdiction of all matters pertaining to certification of paralegals and shall have the power and duty

(1) to administer the plan of certification for paralegals;

(2) to appoint, supervise, act on the recommendations of, and consult with committees as appointed by the board or the chairperson;

(3) to certify paralegals or deny, suspend or revoke the certification of paralegals;

(4) to establish and publish procedures, rules, regulations, and bylaws to implement this plan;

(5) to propose and request the council to make amendments to this plan whenever appropriate;

(6) to cooperate with other boards or agencies in enforcing standards of professional conduct;

(7) to evaluate and approve continuing legal education courses for the purpose of meeting the continuing legal education requirements established by the board for the certification of paralegals; and

(8) to cooperate with other organizations, boards and agencies engaged in the recognition, education or regulation of paralegals.

.0116 Retained Jurisdiction of the Council

The council retains jurisdiction with respect to the following matters:

(1) amending this plan;

(2) hearing appeals taken from actions of the board;

(3) establishing or approving fees to be charged in connection with the plan;

(4) regulating the conduct of lawyers in the supervision of paralegals; and

(5) determining whether to pursue injunctive relief as authorized by G. S. 84-37 against persons acting in violation of this plan.

.0117 Privileges Conferred and Limitations Imposed

The board in the implementation of this plan shall not alter the following privileges and responsibilities of lawyers and their non-lawyer assistants.

(1) No rule shall be adopted which shall in any way limit the right of a lawyer to delegate tasks to a non-lawyer assistant or to employ any person to assist him or her in the practice of law.

(2) No person shall be required to be certified as a paralegal to be employed by a lawyer to assist the lawyer in the practice of law.

(3) All requirements for and all benefits to be derived from certification as a paralegal are individual and may not be fulfilled by nor attributed to the law firm or other organization or entity employing the paralegal.

(4) Any person certified as a paralegal under this plan shall be entitled to represent that he or she is a "North Carolina Certified Paralegal (NCCP)", a "North Carolina State Bar Certified Paralegal (NCSB/CP)" or a "Paralegal Certified by the North Carolina State Bar Board of Paralegal Certification."

.0118 Certification Committee

(a) The board shall establish a separate certification committee. The certification committee shall be composed of seven members appointed by the board, one of whom shall be designated annually by the chairperson of the board as chairperson of the certification committee. At least two members of the committee shall be lawyers, licensed and currently in good standing to practice law in this state, and two members of the committee shall be certified paralegals. The remaining members of the committee shall be either lawyers, licensed and currently in good standing to practice law in this state, or certified paralegals. The paralegals appointed to the inaugural committee shall be exempt from the certification requirement during their initial term.

(b) Members shall hold office for three years, except those members initially appointed who shall serve as hereinafter designated. Members shall be appointed by the board to staggered terms and the initial appointees shall serve as follows: two shall serve for one year after appointment; two shall serve for two years after appointment; and three shall serve for three years after appointment. Appointment by the board to a vacancy shall be for the remaining term of the member leaving the committee. All members shall be eligible for reappointment to not more than one additional three-year term after having served one full three-year term, provided, however, that the board may reappoint the chairperson of the committee to a third three-year term if the board determines that the reappointment is in the best interest of the program. Meetings of the certification committee shall be held at regular intervals at such times, places and upon such notices as the committee may from time to time prescribe or upon direction of the board.

(c) The committee shall advise and assist the board in carrying out the board's objectives and in the implementation and regulation of this plan by advising the board as to standards for certification of individuals as paralegals. The committee shall be charged with actively administering the plan as follows:

(1) make recommendations to the board for certification, continued certification, denial, suspension, or revocation of certification of paralegals and for procedures with respect thereto;

(2) administer procedures established by the board for evaluation of applications for certification and continued certification as a paralegal and for denial, suspension, or revocation of such certification;

(3) administer examinations and other testing procedures, if applicable, investigate references of applicants and, if deemed advisable, seek additional information regarding applicants for certification or continued certification as paralegals; and

(4) perform such other duties and make such other recommendations as may be delegated to or requested by the board.

.0119 Standards for Certification of Paralegals

(a) To qualify for certification as a paralegal, an applicant must pay any required fee, and comply with the following standards:

(1) Education. The applicant must have earned one of the following:

a. an associate's, bachelor's, or master's degree or post-baccalaureate certificate from a qualified paralegal studies program; or

b. an associate's or bachelor's degree in any discipline from any institution of post-secondary education that is accredited by an accrediting body recognized by the United States Department of Education; and successfully completed 18 or more semester credits at a qualified paralegal studies program, any portion of which credits may also satisfy the requirements for the associate's or bachelor's degree.

A qualified paralegal studies program is a program of paralegal or legal assistant studies that is approved by the House of Delegates of the American Bar Association, or that offers at least the equivalent 18 semester credits of coursework in paralegal studies as prescribed by the American Bar Association Guidelines for the Approval of Paralegal Education, and is an institutional member of the Southern Association of Colleges and Schools or other regional accrediting agency recognized by the United States Department of Education.

(2) Examination. The applicant must achieve a satisfactory score on a written examination designed to test the applicant's knowledge and ability. The board shall assure that the contents and grading of the examinations are designed to produce a uniform minimum level of competence among the certified paralegals.

(b) Alternative Qualification Period. For a period not to exceed two years after the date that applications for certification are first

accepted by the board, an applicant may qualify by satisfying one of the following:

(1) earned a high school diploma, or its equivalent, worked as a paralegal in North Carolina for not less than 5000 hours during the five years prior to application, and completed three hours of continuing legal education in professional responsibility, as approved by the board;

(2) obtained and maintained at all times prior to application the designation Certified Legal Assistant (CLA)/Certified Paralegal (CP), PACE-Registered Paralegal (RP), or other national paralegal credential approved by the board, and worked as a paralegal in North Carolina for not less than 2000 hours during the two years prior to application; or

(3) fulfilled the educational requirements set forth in Rule .0119(a)(1)a. or b. and worked as a paralegal in North Carolina for not less than 2000 hours during the two years prior to application.

(c) Notwithstanding an applicant's satisfaction of the standards set forth in Rule .0119(a) or (b), no individual may be certified as a paralegal if:

(1) the individual's certification or license as a paralegal in any state is under suspension or revocation;

(2) the individual's license to practice law in any state is under suspension or revocation;

(3) the individual has been convicted of a criminal act that reflects adversely on the individual's honesty, trustworthiness or fitness as a paralegal; or

(4) the individual is not a legal resident of the United States.

(d) All matters concerning the qualification of an applicant for certification, including, but not limited to, applications, examinations and examination scores, files, reports, investigations, hearings, findings, recommendations, and adverse determinations shall be confidential so far as is consistent with the effective administration of this plan, fairness to the applicant and due process of law.

.0120 Standards for Continued Certification of Paralegals

(a) The period of certification as a paralegal shall be one (1) year. During such period the board may require evidence from the para-

legal of his or her continued qualification for certification as a paralegal, and the paralegal must consent to inquiry by the board regarding the paralegal's continued competence and qualification to be certified. Application for and approval of continued certification shall be required annually prior to the end of each certification period. To qualify for continued certification as a paralegal, an applicant must demonstrate participation in not less than 6 hours of credit in board approved continuing legal education, or its equivalent, during the year within which the application for continued certification is made.

(b) Upon written request of the paralegal, the board may for good cause shown waive strict compliance by such paralegal with the criteria relating to continuing legal education, as those requirements are set forth in Rule .0120(a).

.0121 Lapse, Suspension or Revocation of Certification

(a) The board may revoke its certification of a paralegal, after hearing before the board on appropriate notice, upon a finding that

(1) the certification was made contrary to the rules and regulations of the board;

(2) the individual certified as a paralegal made a false representation, omission or misstatement of material fact to the board;

(3) the individual certified as a paralegal failed to abide by all rules and regulations promulgated by the board;

(4) the individual certified as a paralegal failed to pay the fees required;

(5) the individual certified as a paralegal no longer meets the standards established by the board for the certification of paralegals; or

(6) the individual is not eligible for certification on account of one or more of the grounds set forth in Rule .0019(c)

(b) An individual certified as a paralegal has a duty to inform the board promptly of any fact or circumstance described in Rule .0121(a).

(c) If an individual's certification lapses, or if the board revokes a certification, the individual cannot again be certified as a paralegal unless he or she so qualifies upon application made as if for initial certification and upon such other conditions as the board may

prescribe. If the board suspends certification of an individual as a paralegal, such certification cannot be reinstated except upon the individual's application and compliance with such conditions and requirements as the board may prescribe.

.0122 Right to Hearing and Appeal to Council

An individual who is denied certification or continued certification as a paralegal or whose certification is suspended or revoked shall have the right to a hearing before the board and, thereafter, the right to appeal the ruling made thereon by the board to the council under such rules and regulations as the board and council 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 July 16, 2004.

Given over my hand and the Seal of the North Carolina State Bar, this the 12th day of August, 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 6th day of October, 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 6th day of October, 2004.

s/Brady, J.
For the Court

AMENDMENT TO THE NORTH CAROLINA STATE BAR 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 July 16, 2004.

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 1.15-3, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rule 1.15-3

Rule 1.15-3, Safekeeping Property: Records and Accountings

(a) Minimum Records for Accounts at Banks. The minimum records required for general trust accounts, dedicated trust accounts and fiduciary accounts maintained at a bank shall consist of the following: . . . .

(b) Minimum Records for Accounts at Other Financial Institutions. The minimum records required for dedicated trust accounts and fiduciary accounts at financial institutions other than a bank shall consist of the following: . . . .

(c) Quarterly Reconciliations of General Trust Accounts. At least quarterly, the individual client balances shown on the ledger of a general trust account must be totaled and reconciled with the current bank balance for the trust account as a whole. The lawyer shall retain all records pertaining to the quarterly reconciliations of the general trust account for a period of six years.

(d) . . . .

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 of Professional Conduct was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 16, 2004.

Given over my hand and the Seal of the North Carolina State Bar, this the 12th day of August, 2004.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules of Professional Conduct as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of October, 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 of Professional Conduct be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 6th day of October, 2004.

s/Brady, J.
For the Court

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules of Professional Conduct were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 16, 2004.

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 7.3, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rule 7.3

Rule 7.3, Direct Contact with Potential ~~Prospective~~ Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a potential ~~prospective~~ client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a potential ~~prospective~~ client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the potential ~~prospective~~ client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress, harassment, compulsion, intimidation, or threats.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a potential ~~prospective~~ client known to be in need of legal services in a particular matter shall include the words "This is an advertisement for legal services" on the outside envelope, if a written communication sent by mail, and at the beginning of the body of the written or electronic communication in print as large or larger than the lawyer's or law firm's name, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) . . . .

<u>(e) For purposes of this rule, a potential client is a person with whom a lawyer would like to form a client-lawyer relationship.</u>

Comment

[1] . . . .

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of potential ~~prospective~~ clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a potential ~~prospective~~ client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the potential ~~prospective~~ client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to potential ~~prospective~~ client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the

information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a potential ~~prospective~~ client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

. . . .

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress, harassment, compulsion, intimidation, or threats within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a potential ~~prospective~~ client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become potential ~~prospective~~ clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[7] Paragraph (c) of this rule requires that all direct mail solicitations of potential ~~prospective~~ clients must be mailed in an envelope on which the statement, "This is an advertisement for legal services,"

appears. Postcards may not be used for direct mail solicitations. The advertising disclosure statement must also appear at the beginning of an enclosed letter or electronic communication in print at least as large as the print used for the lawyer's or law firm's name in the letterhead or masthead. The requirement that certain communications be marked, "This is an advertisement for legal services," does not apply to communications sent in response to requests of potential ~~prospective~~ clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

. . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules of Professional Conduct of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 16, 2004.

Given over my hand and the Seal of the North Carolina State Bar, this the 12th day of August, 2004.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules of Professional Conduct of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of October, 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 of Professional Conduct of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 6th day of October, 2004.

s/Brady, J.
For the Court

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules of Professional Conduct were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 23, 2004.

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 1.11, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rule 1.11

Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

~~(1) is subject to Rules 1.9(a) and (b), except that "matter" is defined as in paragraph (e) of this Rule;~~

~~(2)~~ (1) is subject to Rule 1.9(c); and

~~(3)~~ (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

. . . .

Comment

[1] . . . .

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client ~~under Rule 1.9~~. Rule 1.10, however, is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers

that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)~~(3)~~ (2) and (d)(2) impose additional obligations on a lawyer who has served or is currently serving as an officer or employee of the government. They apply in situations where a lawyer is not adverse to a former client and are designed to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1)~~, (a)(2)~~ and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) ~~(a)(1), (a)(3)~~ and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

. . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules of Professional Conduct were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 23, 2004.

Given over my hand and the Seal of the North Carolina State Bar, this the 12th day of August, 2004.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules of Professional Conduct as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of October, 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 of Professional Conduct of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 6th day of October, 2004.

s/Brady, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BOARD OF LAW EXAMINERS

The following amendment to the Rules and Regulations of the North Carolina Board of Law Examiners was duly adopted by the North Carolina Board of Law Examiners on June 10, 2004, and approved by the Council of the North Carolina State Bar at its quarterly meeting on July 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 Rule .0902 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):

Rule .0902 DATES

The written bar examinations shall be held in the City of Raleigh, Wake County or adjoining counties in the months of February and July on such dates as the Board may set from year to year.

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 Board of Law Examiners was duly approved by the Council of the North Carolina State Bar at a regularly called meeting on July 16, 2004.

Given over my hand and the Seal of the North Carolina State Bar, this the 12th day of August, 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 Bar Examiners as approved by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 6th day of October, 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 6th day of October, 2004.

s/Brady, J.
For the Court

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Preservation of issues—failure to object at trial—leg shackles—Although defendant contends his right to a fair trial in a capital first-degree murder case was violated when the trial court ordered that defendant be shackled

APPEAL AND ERROR—Continued

during jury selection and by failing to review the order during the trial, this assignment of error is dismissed because defendant failed to object at trial. **State v. Haselden, 1.**

Preservation of issues—failure to provide authority—Although defendant contends she received ineffective assistance of counsel in a case involving two first-degree murders and nine other felonies based on her counsel's failure to challenge three prospective jurors for cause or to assert an additional peremptory challenge, this assignment of error is overruled because defendant failed to provide any authority or support for this claim. **State v. Walters, 68.**

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Standing of employees association—A decision of the Court of Appeals that SEANC lacked standing to maintain a declaratory judgment action seeking to enjoin the State and certain of its officials from redirecting funds allocated to the State's retirement systems to attempt to balance the budget rather than to fund the retirement systems is reversed for the reason stated in the dissenting opinion that a threat of immediate injury to each and every individual member of an association is not required in order for the association to have standing. **State Employees Ass'n of N.C. v. State, 239.**

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Privileged communication—death of client—The attorney-client privilege survives the client's death. **In re Investigation of Death of Eric Miller, 316.**

Privileged communication—disclosure—conditions—A client's wish that a communication with an attorney remain confidential is premised upon the possibility that disclosure might result in criminal liability, that disclosure might subject the client (or the client's estate) to civil liability, or that disclosure might harm the client's loved ones or his reputation. The purpose for the privilege no longer exists if the communication would have no negative impact on the client's interests. **In re Investigation of Death of Eric Miller, 316.**

Privileged communication—in camera review appropriate—The attorney-client privilege does not apply to all communications between an attorney and client and the responsibility for determining whether the privilege applies belongs to the court rather than the attorney. An in camera review of the content of the communication may be necessary because it is often impossible for the court to make its determination without knowing the substance of that communication. **In re Investigation of Death of Eric Miller, 316.**

Privileged communication—in camera reviews—not fishing expeditions—The approval of in camera reviews of communications alleged to be within the attorney-client privilege in no way sanctions special proceedings or grand jury investigations as fishing expeditions. **In re Investigation of Death of Eric Miller, 316.**

Privileged communication—no balancing test for compelling disclosure—A proposed balancing test for compelling disclosure of communications between

ATTORNEYS—Continued

a client and an attorney was not appropriate. A balancing test would invite procedures and applications so lacking in standards, direction and scope that the privilege in practice would be lost to the exception. **In re Investigation of Death of Eric Miller, 316.**

Privileged communication—not absolute—The primary goal of our adversarial system of justice is to ascertain the truth. While the attorney-client privilege is an essential component of our system of justice, the privilege is not absolute. **In re Investigation of Death of Eric Miller, 316.**

Privileged communication—scope—Communications between attorney and client about the criminal activity of a third party which do not tend to harm the interests of the client are not privileged and may be disclosed. However, the circumstances surrounding the client at the time he communicated with counsel should be considered; in this case, the client presumably knew that he was a suspect in a murder investigation and statements in which he implicated himself as well as the third party were covered by the privilege. **In re Investigation of Death of Eric Miller, 316.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Custody—change of circumstances—best interest of child—The trial court did not err by deciding that a change of circumstances warranted a modification of a child custody order. Trial courts are encouraged to pay particular attention in their findings to explaining whether any change in circumstances can be deemed substantial, whether that change affected the welfare of the minor child, and why modification is in the child's best interests. **Shipman v. Shipman, 471.**

Custody—change of circumstances—conclusion supported by findings—A trial court's conclusion in a child custody order that a substantial change in circumstances affected the welfare of the child supported the findings. **Shipman v. Shipman, 471.**

Custody—change of circumstances—findings—The evidence in a child custody proceeding supported ten findings concerning substantial changes in circumstances affecting the welfare of the child. **Shipman v. Shipman, 471.**

Custody—claim by deceased parent's mother—unfitness of surviving parent—evidence insufficient—The trial court did not err by dissolving temporary child custody orders where plaintiff-maternal grandmother failed to carry her burden of demonstrating that defendant-father forfeited his constitutionally protected status as a parent, and the best interest of the child test was not implicated. **Owenby v. Young, 142.**

Custody—illegitimate child—common law presumption abrogated—The trial court did not err by awarding custody to plaintiff father based on the best interest of the child standard, because the common law rule that custody of an illegitimate child presumptively vests in the mother has been abrogated by changes in statutory law. **Rosero v. Blake, 193.**

CIVIL RIGHTS

Racial discrimination—retaliatory discharge—instructions—The decision of the Court of Appeals holding that there was reversible error in the trial court's

CIVIL RIGHTS—Continued

instructions in an action in which plaintiff alleged that defendant employer discriminated against him on the basis of race and as retaliation for filing a complaint with the EEOC is reversed for the reasons stated in the dissenting opinion that the trial court's instructions using the phrases "on account of" and "because of" when stating the law to be applied in a pretext case did not constitute reversible error. **Brewer v. Cabarrus Plastics, Inc., 149.**

CONSTITUTIONAL LAW

Confrontation Clause—capital sentencing—absent witness—transcript of prior trial—The trial court erred during a capital sentencing proceeding by admitting the trial transcript of the testimony of an out-of-state rape victim in support of the prior violent felony aggravating circumstance. The record does not reflect any attempt to locate and produce the witness, as required by the Confrontation Clause. **State v. Nobles, 433.**

Double jeopardy—current murder introduced at sentencing for prior murder—life sentence not acquittal—A sentence of life imprisonment for a prior murder did not amount to an "acquittal" for this murder even though evidence of this murder was introduced at the capital sentencing hearing to support the course of conduct aggravating circumstance. Neither defendant's guilt nor the appropriate sentence in the present case were fully litigated in the prior trial, and defendant was convicted and sentenced in this case for offenses quite distinct from the offenses in the prior trial. **State v. Carter, 345.**

Effective assistance of counsel—failure to move for dismissal of charges—A defendant in a first-degree murder case was not deprived of the effective assistance of counsel even though his counsel failed to move for dismissal of the charges based on lack of jurisdiction. **State v. Smith, 604.**

Effective assistance of counsel—failure to present mitigating evidence—waiver—A first-degree murder defendant's ineffective assistance of counsel claim based on defense counsel's failure to present any mitigating evidence during the capital sentencing phase has not been waived by his failure to raise the issue before the Supreme Court on direct appeal. **State v. Watts, 366.**

Effective assistance of counsel—motion to dismiss counsel—The trial court did not abuse its discretion in a double first-degree murder, robbery with a dangerous weapon, and felonious breaking or entering case by denying defendant's numerous pretrial motions to dismiss counsel based on an alleged breakdown in communication including failure to return defendant's phone calls and failure to visit defendant in almost ten months. **State v. Jones, 409.**

Effective assistance of counsel—objective standard of reasonableness—A defendant in a capital first-degree murder trial was not denied effective assistance of counsel based on his counsel's alleged failure to object or preserve error, failure to provide prior evaluations to the defense expert, failure to provide a prior witness statement to the defense expert, and failure to elicit a favorable element of diagnosis from the defense expert. **State v. Miller, 583.**

North Carolina—local act—anti-discrimination ordinance—The employment discrimination provision of an Orange County anti-discrimination ordinance and its enabling legislation constituted local acts within the meaning of Article II, Section 24 of the North Carolina Constitution because, using the reasonable clas-

CONSTITUTIONAL LAW—Continued

sification test, it could not be concluded that conditions in Orange County are suspect to such an extent that the legislature could legally create a separate classification to address employment discrimination in that county only. **Williams v. Blue Cross Blue Shield of N.C., 170.**

North Carolina—local act—permissive—invalid—Legislation enabling an Orange County anti-discrimination ordinance was invalid (as applied to employment) as a prohibited local act regardless of whether Orange County chose to act on the legislation. A statute's validity is judged by what is possible rather than by what has been done. **Williams v. Blue Cross Blue Shield of N.C., 170.**

North Carolina—local act prohibition—labor and trade—The employment discrimination provisions of an Orange County anti-discrimination ordinance and its enabling legislation regulated labor and trade and violated the local act provisions of the North Carolina Constitution because the effect was to govern labor practices even though the intent was to prohibit discrimination. **Williams v. Blue Cross Blue Shield of N.C., 170.**

Right to testify—trial court inquiry—The trial court did not err by failing to inquire whether defendant wished to testify at his capital sentencing proceeding. **State v. Smith, 604.**

Right to testify—trial court's failure to inquire sua sponte—The trial court did not abuse its discretion in a double first-degree murder, robbery with a dangerous weapon, and felonious breaking or entering case by failing to inquire sua sponte whether defendant wanted to testify on his own behalf. **State v. Jones, 409.**

Speedy trial—Barker factors balanced—no violation—A first-degree murder defendant's right to a speedy trial was not violated by a delay of four and one-half years after his arrest when the *Barker v. Wingo* factors were balanced. The delay is long enough to trigger examination of the other factors; the delay was caused by neutral factors, including the number of pending first-degree murder cases; defendant failed to carry his burden of showing neglect or willfulness the State; defendant's assertion of the right to a speedy trial does not alone entitle him to relief, even assuming that his pro se speedy trial request while he was represented by counsel was proper; and defendant did not show that his defense was impaired by the delay. He ultimately pled guilty to second-degree murder rather than risk rejection of his self-defense contention and face the death penalty. **State v. Spivey, 114.**

COUNTIES

Delegation of power from state—ordinance exceeding state and federal standards—employment discrimination—Orange County did not possess the inherent authority to pass an employment discrimination ordinance under N.C.G.S. § 153A-121(a), which gives counties the power to enact ordinances protecting the health and welfare of its citizens and the peace and dignity of the county, and N.C.G.S. § 160A-174, which provides that state and federal law making an act unlawful do not preclude city ordinances requiring a higher standard of conduct. The ordinance in this case goes beyond requiring a higher standard of conduct and creates a new and independent framework for litigation which substantially exceeds the leeway permitted by these statutes. **Williams v. Blue Cross Blue Shield of N.C., 170.**

CRIMINAL LAW

Closing argument—coparticipant's fellow inmate did not come to testify voluntarily—The trial court did not abuse its discretion in a capital first-degree murder, felonious breaking and entering, and robbery with a dangerous weapon case by concluding that defense counsel's closing argument, that the coparticipant's fellow inmate did not come back to North Carolina voluntarily to testify and that he was ordered to do so by a judge, was improper. **State v. Watts, 366.**

Joinder of offenses—motion for severance—The trial court did not err in a case involving two first-degree murders and nine other felonies by granting the prosecutor's motion for joinder of the murders and related charges regarding the three victims, because defendant failed to make a motion for severance at any time before, during, or after the trial. **State v. Walters, 68.**

Prosecutor's argument—capital sentencing—Biblical reference—The trial court did not err in a capital sentencing proceeding by failing to intervene ex mero motu during the State's closing argument involving a Biblical reference, because: (1) the prosecutor did not argue that the Bible commanded that defendant be put to death, but instead used the statement in question to respond to defendant's testimony that she did not want her children in the Davis Street environment; and (2) the prosecutor used this colloquy to amplify defendant's bad parenting and to attempt to eliminate any sympathy the defense might try to invoke with the jury based on the fact that defendant had children. **State v. Walters, 68.**

Prosecutor's argument—capital sentencing—Biblical references—The prosecutor's use of Biblical references in arguing to the jury in a capital sentencing proceeding that the Bible does not prohibit the death penalty was not so grossly improper that the trial court erred by failing to intervene ex mero motu where the prosecutor was anticipating that defense counsel might offer religious sentiment during closing argument; the prosecutor did not suggest that the Bible mandates a death sentence for murder but instead told the jury that the Bible verses he was citing were "not a mandate ... but [were] the [Biblical] authority for those of you who worry about that"; the prosecutor told the jury that its sentencing decision should be based on the law and the evidence; and the trial court instructed the jury to follow the law as provided to it. **State v. Haselden, 1.**

Prosecutor's argument—capital sentencing—consideration of victim's life—The prosecutor's argument in a capital sentencing proceeding that "If you let this murderer walk out of this courtroom with his life then you are saying that his life is worth more that [the victim's] life" simply reminded the jury that, in addition to considering defendant's life, it should also consider the life of the victim and was a proper extension of the prosecutor's earlier argument concerning victim impact evidence. **State v. Haselden, 1.**

Prosecutor's argument—capital sentencing—death penalty deserved—The prosecutor did not improperly inject his personal beliefs or opinions into his jury argument in a capital sentencing proceeding by his remarks to the effect that defendant deserved to die; rather the prosecutor permissibly argued that the characteristics of the murder for which defendant was convicted were such that a death sentence was deserved. **State v. Haselden, 1.**

Prosecutor's argument—capital sentencing—mitigating circumstances—The prosecutor's arguments in a capital sentencing proceeding that the victim did not have the benefit of any mitigating circumstances and that mitigating circum-

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stances do not have to be found unanimously or beyond a reasonable doubt were not improper. **State v. Haselden, 1.**

Prosecutor's argument—capital sentencing—mitigating circumstances—age of defendant and victim—victim's mother—victim impact evidence— The prosecutor's argument in a capital sentencing proceeding in which he compared the mitigating circumstance of age of the defendant to the age of the victim and the age of the victim's daughter and contrasted the mitigating circumstance that defendant was considerate and loving to his mother by referencing the victim's mother in the courtroom were proper statements of victim impact evidence which the jury could consider. **State v. Haselden, 1.**

Prosecutor's argument—comparing defendant and gang members to Adolph Hitler—The trial court did not abuse its discretion in a case involving two capital first-degree murders and nine other felony convictions by failing to sustain defendant's objection to the State's improper closing argument comparing defendant and her fellow gang members to Adolph Hitler, because this argument which came after two proper arguments by the district attorney and an assistant district attorney most likely had little, if any, impact on the jurors' decision on the issue of guilt or innocence. **State v. Walters, 68.**

Prosecutor's argument—crime scene—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 closing argument regarding the crime scene because the prosecutor's scenario of the crime is reasonably inferable from the evidence. **State v. Smith, 604.**

Prosecutor's argument—defendant brought electric tape and racquetball to crime scene—The trial court did not err during a capital sentencing proceeding by failing to intervene ex mero motu when the prosecutor stated during his cross-examination of defendant's expert that defendant brought a knapsack containing electric tape and a racquetball to the robbery because this was a reasonable inference from the evidence. **State v. Miller, 583.**

Prosecutor's argument—defendant's failure to show remorse—not comment on failure to testify—The trial court did not err in a capital sentencing proceeding by failing to intervene ex mero motu during the State's closing argument allegedly commenting on defendant's failure to testify because the prosecutor was commenting on defendant's demeanor and not on his failure to testify. **State v. Smith, 604.**

Prosecutor's argument—defendant's versions of facts not in evidence—not comment on failure to testify—The trial court did not err during a capital sentencing proceeding by failing to intervene ex mero motu during the prosecutor's closing argument that defendant's version of the facts is not in evidence because this argument was not an improper comment on defendant's failure to testify. **State v. Miller, 583.**

Prosecutor's argument—failure to call witnesses—The trial court did not err in a case involving two first-degree murders and nine other felonies by failing to intervene ex mero motu during the State's closing argument that defendant failed to call various witnesses to the stand. **State v. Walters, 68.**

Prosecutor's argument—personal attack—name-calling—Although one of the State's closing arguments in a case involving two capital first-degree murders

CRIMINAL LAW—Continued

and nine other felony convictions that consisted of a rambling disjointed personal attack on defendant filled with irrelevant historical references and name-calling was close to mandating reversal, our Supreme Court was constrained by the lack of objections by the defense counsel, the lack of intervention by the trial judge, the limited number of questions presented on appeal, and defendant's failure to properly assign error. **State v. Walters, 68.**

Prosecutor's argument—request to do justice—hypothetical reference to encountering victims hereafter— reference to God—The trial court did not err in a capital sentencing proceeding by failing to intervene ex mero motu during the State's closing argument that allegedly referred to the jury's solemn duty to the victims to do justice and that referred to the jurors confronting the victims in the hereafter, because: (1) the prosecutor did not imply that the jury's duty was to sentence defendant to death under God's law; (2) the remarks were not a biblical argument, nor were they based improperly on religion; and (3) in making references to God, the prosecutor challenged defendant's direct testimony in the guilt phase that she had found God and a social worker's testimony in the sentencing phase. **State v. Walters, 68.**

Prosecutor's argument—weight of mitigating circumstances—The trial court did not err in a capital sentencing proceeding by failing to intervene ex mero motu during the State's closing argument that defendant's mitigating circumstances were excuses for the murders committed because the prosecutor simply contended that the jury should not give weight to defendant's mitigating circumstances. **State v. Walters, 68.**

Self-defense—instructions—The trial court did not err in a first-degree murder prosecution by instructing the jury that defendant's conduct could be excused if it appeared necessary to the defendant and he believed it to be necessary that he kill the victim to save himself from death or great bodily harm. Although defendant argued that this instruction deprived defendant of self-defense even if the jury found that the victim suffered injuries greater than defendant had intended, an instruction identical in all relevant respects was approved in *State v. Richardson*, 341 N.C. 585. **State v. Carter, 345.**

DECLARATORY JUDGMENTS

Standing of employees association—A decision of the Court of Appeals that SEANC lacked standing to maintain a declaratory judgment action seeking to enjoin the State and certain of its officials from redirecting funds allocated to the State's retirement systems to attempt to balance the budget rather than to fund the retirement systems is reversed for the reason stated in the dissenting opinion that a threat of immediate injury to each and every individual member of an association is not required in order for the association to have standing. **State Employees Ass'n of N.C. v. State, 239.**

DEEDS

Restrictive covenants—planned community—declaratory judgment—A fine levied by defendant homeowners association, created prior to 1999, against plaintiff homeowners under N.C.G.S. § 47F-3-102(12) for violation of architectural standards in a planned community arising out of the construction of a retaining wall for a swimming pool was ultra vires and void. **Wise v. Harrington Grove Cmty. Ass'n, 396.**

DISCOVERY

Deadline—extension after expiration—excusable neglect required—A judge may allow enlargement of time after the expiration of a court-ordered deadline only upon a showing of excusable neglect. Plaintiff's motion to extend the time for filing a discovery document related that a new attorney in the firm had taken over the case but cited neither rule nor statute and was properly denied. **Summey v. Barker, 492.**

First-degree murder—failure to disclose witness statements—motion to dismiss—motion for mistrial—The trial court did not err in a capital first-degree murder case by denying defendant's motion to dismiss and/or motion for a mistrial based on the State's failure to disclose exculpatory evidence including prior statements to law enforcement officers by various State witnesses and failure to turn over court documents filed in the child custody litigation between the victim and her estranged husband. **State v. Haselden, 1.**

Motion for protective order—psychological test data—The trial court did not err during a capital sentencing proceeding by denying defendant's motion for a protective order requiring raw psychological test data pertaining to defendant to be released only to qualified professionals retained by the State. **State v. Miller, 583.**

DIVORCE

Separation agreement—duress—acceptance of benefits—ratification—The decision of the Court of Appeals that the trial court erred by granting summary judgment for defendant as to plaintiff's ratification of a separation agreement is reversed for the reasons stated in the dissenting opinion that plaintiff was not under duress at the time she accepted all the benefits under the agreement and thus ratified the agreement and cannot now challenge its validity. **Goodwin v. Webb, 40.**

ELECTIONS

Legislative redistricting plans—failure to strictly comply with criteria—The trial court did not err by determining that the General Assembly's 2002 revised redistricting plans are unconstitutional. **Stephenson v. Bartlett, 301.**

EMPLOYER AND EMPLOYEE

Racial discrimination—retaliatory discharge—instructions—The decision of the Court of Appeals holding that there was reversible error in the trial court's instructions in an action in which plaintiff alleged that defendant employer discriminated against him on the basis of race and as retaliation for filing a complaint with the EEOC is reversed for the reasons stated in the dissenting opinion that the trial court's instructions using the phrases "on account of" and "because of" when stating the law to be applied in a pretext case did not constitute reversible error. **Brewer v. Cabarrus Plastics, Inc., 149.**

Termination of deputy sheriff—at-will employee—public policy violation—breach of contract—The decision of the Court of Appeals in this case is reversed for the reason stated in the dissenting opinion that an at-will employee (a deputy sheriff) who alleges wrongful discharge by his employer (the sheriff) for reasons that violate public policy does not have a claim for breach of contract

EMPLOYER AND EMPLOYEE—Continued

against the employer on that basis. The deputy sheriff may only maintain a tort claim against the sheriff limited to the amount of the sheriff's bond. **Hill v. Medford, 650.**

***Woodson* exception—intentional misconduct**—The trial court did not err in a negligence case arising out of an employee maintenance worker's death while collecting garbage by granting summary judgment in favor of defendants based on the fact that plaintiffs failed to raise a genuine issue of material fact as to defendants' civil liability under the *Woodson* exception to the general exclusivity provisions of the North Carolina Workers' Compensation Act. **Whitaker v. Town of Scotland Neck, 552.**

ENVIRONMENTAL LAW

Contested case—standing—person aggrieved—stormwater general permit—wood chip industry—The trial court did not err by holding that the N.C. Forestry Association (NCFA) was a person aggrieved under the North Carolina Administrative Procedure Act and therefore had standing to commence a contested case proceeding to challenge respondent EMC's denial of a stormwater general permit for the wood chip industry. **N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res., 640.**

ESTATES

Attorney-client privilege—not waivable by executrix—N.C.G.S. § 32-27 does not empower an executor or executrix to waive a decedent's attorney-client privilege. **In re Investigation of Death of Eric Miller, 316.**

Attorney-client privilege—power to waive—not granted by will—An executrix did not have the power to waive the deceased's attorney-client privilege where the will did not expressly grant her that power or any similar power. **In re Investigation of Death of Eric Miller, 316.**

Defense of estate—no claim by or against estate—waiver of attorney client privilege—The statute allowing an executrix to defend an estate, N.C.G.S. § 32-27(23), was not applicable where there was no claim by or against the estate, although the executrix submitted an affidavit purporting to waive the attorney-client privilege for the estate in a murder investigation. **In re Investigation of Death of Eric Miller, 316.**

EVIDENCE

Attorney-client privilege—death of client—The attorney-client privilege survives the client's death. **In re Investigation of Death of Eric Miller, 316.**

Attorney-client privilege—not waivable by executrix—N.C.G.S. § 32-27 does not empower an executor or executrix to waive a decedent's attorney-client privilege. **In re Investigation of Death of Eric Miller, 316.**

Attorney-client privilege—power to waive—not granted by will—An executrix did not have the power to waive the deceased's attorney-client privilege where the will did not expressly grant her that power or any similar power. **In re Investigation of Death of Eric Miller, 316.**

EVIDENCE—Continued

Defendant shot the victim—opening the door—The trial court did not err in a case involving two first-degree murders and nine other felonies by overruling defendant's objection to the prosecutor's cross-examination of defendant about a statement made by defendant to a detective that she shot one of the victims, because: (1) defendant testified during her own defense that she gave two statements to two different detectives regarding the shooting of the victim, in the second statement defendant said that she did not shoot the victim, and defendant then testified on direct examination by her own attorney that the second statement was false; and (2) defendant opened the door to this testimony. **State v. Walters, 68.**

Hearsay—coconspirator exception—The trial court did not err in a first-degree murder and discharging a firearm into occupied property case by admitting into evidence hearsay statements made by defendant's brother to a witness under the coconspirator exception of N.C.G.S. § 8C-1, Rule 801(d)(E). **State v. Valentine, 512.**

Hearsay—911 tape—witness statement—prior consistent statement exception—corroboration—The trial court did not err in a case involving two first-degree murders and nine other felonies by overruling defendant's objection to the admission of a portion of a prior statement by a witness made to a detective and portions of the witness's telephone call to a 911 operator, because: (1) the 911 tape and the statement were admissible for the purpose of corroborating the witness's earlier testimony at trial, and any variation goes to the witness's credibility; and (2) defendant was tried alone and not jointly, the witness took the stand and was available for a full and effective cross-examination, and thus the rule in *Bruton*, 391 U.S. 123, has no applicability to the facts of this case. **State v. Walters, 68.**

Hearsay—state of mind exception—The trial court did not err in a capital first-degree murder prosecution by admitting a hearsay statement of the victim at trial regarding a blue van under the N.C.G.S. § 8C-1, Rule 803(3) state of mind exception. **State v. Smith, 604.**

Hearsay—state of mind exception—unavailable declarant exception—residual exception—The trial court did not err in a first-degree murder and discharging a firearm into occupied property case by allowing the victim's hearsay statements into evidence under the state of mind exception of N.C.G.S. § 8C-1, Rule 803(3) and the residual exceptions stated in N.C.G.S. § 8C-1, Rule 803(3) and (24). **State v. Valentine, 512.**

Nonexpert testimony—effects of Valium—The trial court did not err in a capital first-degree murder prosecution by allowing the testimony of a nurse regarding the effects of ten milligrams of Valium because the testimony was admissible under Rule 701 as a nonexpert's opinion based on reasonable perceptions while working as a nurse. **State v. Smith, 604.**

Photographs—area victim's body found—The trial court did not commit plain error in a capital first-degree murder case by admitting two photographs of the area where the victim's body was found even though defendant contends they depict a cross and memorial flowers which do not accurately reflect the scene at the time the body was discovered. **State v. Haselden, 1.**

Photographs—motion to exclude—The trial court did not abuse its discretion in a prosecution for two first-degree murders by denying defendant's motion to

EVIDENCE—Continued

exclude two photographs of the victims, because: (1) the first photograph of one victim was used to identify that victim, and the presence of a fly on the victim's eyelid was not so gruesome as to require its inadmissibility; and (2) the second photograph showing the bodies of both victims lying in a field offered a different perspective than that shown on another photographic exhibit. **State v. Walters, 68.**

Photographs—victim's body—The trial court did not abuse its discretion in a capital first-degree murder case by admitting three photographs of the victim's body even though defendant stipulated that he caused the victim's death with the infliction of multiple gunshot wounds. **State v. Haselden, 1.**

Prior crimes or bad acts—cross-examination—The trial court did not err in a case involving two first-degree murders and nine other felonies by denying defendant's motion for disclosure of N.C.G.S. § 8C-1, Rule 404(b) evidence to be introduced by the State and by allowing cross-examination of defendant about certain prior bad acts, because: (1) there is no requirement that the State must provide a defendant with Rule 404(b) evidence that it intends to use at trial; and (2) the State cross-examined defendant about the acts and did not directly introduce or use evidence of prior crimes or bad acts committed by defendant. **State v. Walters, 68.**

Prior crimes or bad acts—malicious wounding—impeachment—The trial court did not err in a double first-degree murder case by denying defendant's motion in limine seeking to prevent the State from using his 1986 Virginia conviction for malicious wounding to impeach him during cross-examination even though defendant contends under N.C.G.S. § 8C-1, Rule 403 that the probative value of the conviction was substantially outweighed by the danger of unfair prejudice to him, because admission of the conviction was mandatory under Rule 609. **State v. Brown, 382.**

Psychological test data—discovery—cross-examination—The trial court did not commit plain error during a capital sentencing proceeding by failing to intervene ex mero motu to prevent alleged misuse of raw psychological test data pertaining to defendant during the State's cross-examination of defendant's expert, because: (1) an expert may be required to disclose the underlying facts or data on cross-examination; and (2) if an expert obtained any information from a psychological test administered to a defendant which related to the expert's testimony, then the test is both discoverable and within the proper scope of cross-examination. **State v. Miller, 583.**

Psychological test results—nontestifying psychologist—A decision by the Court of Appeals finding error in the trial of an action to recover for injuries sustained by plaintiff when he tripped on an electrical cord at a buffet table is reversed for the reasons stated in the dissenting opinion in the Court of Appeals that (1) the trial court's refusal to give plaintiff's requested instruction on diverted attention was not error because it was not a proper statement of the law and was not supported by the evidence, and (2) the results of a psychological test administered to plaintiff by a psychologist who did not testify were properly admitted into evidence under Rule of Evidence 803(6). **Barringer v. Mid Pines Dev. Grp., L.L.C., 451.**

Rebuttal—impeachment testimony—The trial court did not err in a first-degree felony murder and felonious child abuse case by admitting in rebuttal as

EVIDENCE—Continued

impeachment testimony defendant's statement to an officer about defendant's treatment of a minor child on the night of the minor child's death, made approximately nineteen hours after defendant was given his Miranda rights. **State v. Stokes, 220.**

Testimony—defendant carried pocketknife—The trial court did not commit prejudicial error in a capital first-degree murder prosecution by admitting testimony that defendant sometimes carried a pocketknife. **State v. Smith, 604.**

Testimony—someone other than defendant committed crime—The trial court did not err in a capital first-degree murder, felonious breaking and entering, and robbery with a dangerous weapon case by excluding the testimony of a defense witness who testified during voir dire that she overheard defendant's coparticipant threaten the victim's life. **State v. Watts, 366.**

Victim impact—emotional outbursts of family—no plain error—The trial court did not commit plain error in a capital first-degree murder case by admitting victim-impact evidence and allegedly failing to control emotional outbursts by the victim's family. **State v. Haselden, 1.**

HOMICIDE

Felony murder—sale of cocaine—motion to dismiss—sufficiency of evidence—The trial court did not err in a double first-degree murder case by denying defendant's motions to dismiss related to the sale of cocaine as an underlying felony to support the felony murder of one of the victims where the evidence was sufficient to show an attempted sale. **State v. Squires, 529.**

First-degree murder—motion to dismiss—The trial court did not err by denying defendant's motion to dismiss the charges of robbery with a dangerous weapon and first-degree murder. **State v. Haselden, 1.**

First-degree murder—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of first-degree premeditated murder where defendant confessed to killing the victim by stabbing her repeatedly, and the victim telling the defendant to stay was not sufficient provocation to compel a killing. **State v. Smith, 604.**

First-degree murder—short-form indictment—constitutionality—The short-form murder indictment used to charge defendant with first-degree murder was constitutional. **State v. Walters, 68; State v. Squires, 529; State v. Smith, 604.**

First-degree murder—short-form indictment—failure to allege aggravating circumstances—The short-form murder indictment is both statutorily and constitutionally sufficient without the inclusion of the N.C.G.S. § 15A-2000(e) aggravating circumstances. **State v. Carter, 345; State v. Watts, 366; State v. Brown, 382; State v. Valentine, 512; State v. Squires, 529; State v. Smith, 604.**

First-degree murder—short-form indictment—failure to allege aggravating circumstances—constitutionality—Short-form murder indictments used to charge defendant with two counts of capital first-degree murder and two counts of conspiracy to commit murder were not rendered unconstitutional by

HOMICIDE—Continued

the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556 (2002), based on the fact that the aggravating circumstances relied upon by the State at trial were not alleged in petitioner's indictments. **State v. Hunt, 257.**

First-degree murder—short-form indictment—failure to allege elements—Although defendant contends his rights under the Eighth and Fourteenth Amendments were violated by the trial court's entry of a death sentence under an indictment failing to allege all of the elements of capital murder, our Supreme Court has already concluded that the crime of first-degree murder and the accompanying maximum penalty of death are encompassed within the language of the short-form murder indictment. **State v. Squires, 529.**

First-degree murder—sufficiency of indictment—The trial court did not err by entering judgment upon defendant's convictions for first-degree murder based on indictments purportedly alleging only second-degree murder because the indictments were sufficient to allege first-degree murder. **State v. Squires, 529.**

IMMUNITY

Sovereign—insurance—exclusion—acts of EMTs—Sovereign immunity did not provide a defense to a county for a wrongful death action rising from the actions of its emergency medical technicians (EMTs) and summary judgment should not have been granted for the county. Although defendant argued that a provision in the county's insurance policy exempting EMTs from an exclusion should be read as applying to EMTs in their individual capacity, that contention is not supported by the plain language of the policy. **Dawes v. Nash Cty., 442.**

INDIGENT DEFENDANTS

Motion for state-funded expert assistance—substance induced mood disorder—The trial court did not abuse its discretion in a double first-degree murder case by denying defendant's ex parte motion for an additional expert on substance induced mood disorder. **State v. Brown, 382.**

INTESTATE SUCCESSION

Bar to parents abandoning children—abandonment—definition and evidence—A father abandoned his child within the meaning of N.C.G.S. § 31A-2 (which bars intestate succession by parents who abandon their children) where the father did not make support payments from the time his son was four until he was eighteen; defendant states that he was unemployed or in prison for a significant part of that time but he did not attempt to modify the support order; defendant did not see his son once in fifteen years; and he had no communication with his son, even though he was allowed to write letters from prison. **McKinney v. Richitelli, 483.**

Bar to parents abandoning children—applies after child reaches majority—The statute barring the intestate succession rights of parents who wilfully abandon their children, N.C.G.S. § 31A-2, applies to any abandoned child dying intestate regardless of the child's age at death. **McKinney v. Richitelli, 483.**

INTESTATE SUCCESSION—Continued

Bar to parents abandoning children—exception—resuming care and support—A defendant who had abandoned his child and who did not reestablish contact until his son was almost twenty years old could not benefit from N.C.G.S. § 31A-2(1), which contains an exception to the intestate succession bar for parents who resume care and maintenance of an abandoned child for a year before the child's death. While care pertains to love and concern for the child, maintenance refers to the financial support of a child during minority and must be renewed at least one year before the child reaches eighteen. **McKinney v. Richitelli, 483.**

JUDGES

Censure of superior court judge—A superior court judge is censured by the Supreme Court for conduct prejudicial to the administration of justice that brings the judicial office into disrepute based upon her improper remarks to an attorney and her improper conduct toward a deputy sheriff. **In re Hill, 559.**

Leaving bench during recess—failure to show prejudice—The trial court did not err in a case involving two first-degree murders and nine other felonies by leaving the bench during a recess in jury selection proceedings even though a member of the media allegedly spoke with a prospective juror during this time, because: (1) defendant failed to cite any authority that would lead to the conclusion that the trial court erred in leaving the bench; and (2) even assuming *arguendo* that it was error, defendant has failed to show prejudice as required by N.C.G.S. § 15A-1443(a). **State v. Walters, 68.**

Mootness—recusal of judge who subsequently retired—An order entered by one district court judge that required the recusal of a trial judge and ordered a new hearing in a custody modification proceeding was not rendered moot by the recused judge's retirement and the case is remanded to the Court of Appeals for a determination of the appeal on the merits and in accordance with this opinion because the trial judge's retirement after he announced his decision but before he signed the final order triggered the "substituted judge" provisions of N.C.G.S. § 1A-1, Rule 63. **Lange v. Lange, 645.**

Superior court judge reconsidering order by another superior court judge—motion to suppress heroin—The trial court erred in a maintaining a dwelling for keeping or selling controlled substances, trafficking in heroin by possession, trafficking in heroin by manufacturing, and conspiracy to traffic heroin by possession case when one superior court judge reconsidered an order by another superior court judge that originally granted defendant's motion to suppress the heroin and upon reconsideration denied defendant's motion to suppress. **State v. Woolridge, 544.**

JURISDICTION

Personal—minimum contacts—The decision of the Court of Appeals that the nonresident defendants had insufficient contacts with this state to give the courts of this state personal jurisdiction over them in an action by plaintiff law firm to recover for legal services purportedly performed for them is reversed for the reason stated in the dissenting opinion that defendants had sufficient contacts by their business activities, including retaining two other law firms in this

JURISDICTION—Continued

state to represent them on the underlying matters giving rise to this action. **Adams Kleemeier Hagan Hannah & Fouts, PLLC v. Jacobs, 651.**

Petition in the nature of special proceeding—review of communications with attorney—The trial court had jurisdiction to hear a "Petition in the Nature of a Special Proceeding" filed by the State seeking review of communications between an attorney and his now-deceased client relevant to the criminal investigation of a third party. Jurisdiction presupposes the existence of a court with control over a subject matter and the superior courts routinely address matters of privilege and protected information. Although this proceeding was not initiated in strict accord with statutory procedures, common law flexibility permits the superior court to assume jurisdiction in proceedings of an extraordinary nature that do not fit neatly within statutory parameters. **In re Investigation of Death of Eric Miller, 316.**

JURY

Capital trial—selection—voir dire—questions concerning parole and parole eligibility—The trial court did not err in a capital first-degree murder case by denying defendant's request to voir dire jurors regarding their opinions and beliefs concerning parole and parole eligibility. **State v. Haselden, 1.**

Challenge for cause—failure to exhaust peremptory challenges—Although defendant contends the trial court erred in a case involving two capital first-degree murders and nine other felonies by denying defendant's challenge for cause of a prospective juror, thereby causing defendant to exercise a peremptory challenge, defendant failed to preserve this issue for appellate review because defendant did not exhaust all of her peremptory challenges and acknowledges that she did not seek additional peremptory challenges. **State v. Walters, 68.**

Special venire—pretrial publicity—The trial court did not abuse its discretion in a case involving two first-degree murders and nine other felonies by failing to order ex mero motu a special venire based on pretrial publicity because each juror about whom defendant complains indicated that he or she would be fair and impartial and decide the case on the evidence that was presented. **State v. Walters, 68.**

JUVENILES

Delinquency—affray—public place—terror—The trial court erred by adjudicating a juvenile delinquent based on its determination that the juvenile had committed the offense of common law affray arising out of an altercation between two juvenile residents at a group home, because: (1) the evidence failed to establish that an altercation in which the juvenile participated occurred in a location that satisfies the requisite "public place" element; (2) there were no individuals passing by the property who were within view or earshot of the altercation; and (3) the four witnesses, two who were there by virtue of their employment and the other two by virtue of having been assigned to live there, did not qualify as persons who might transform the facility from a private place into a public place since such altercations do not cause "terror to the people" when their presence is akin to that of family members who bear witness to a fight between siblings on the grounds of the family residence. **In re May, 423.**

JUVENILES—Continued

Dependent child—custody—failure to serve summons on father—A decision of the Court of Appeals that the trial court lacked jurisdiction to enter an order adjudicating a child to be a dependent juvenile and awarding custody to her aunt and uncle when only the mother and not the father was served with a summons is reversed for the reasons stated in the dissenting opinion that the requirements set forth in the UCCJEA do not divest a court of jurisdiction where no other court has any claim to jurisdiction over the action; the instant action was brought under the Juvenile Code and not the UCCJEA; under the UCCJEA, the trial court need not have personal jurisdiction over a party in order to make a child custody determination; and the lack of notice did not unreasonably deprive the father of his due process rights. **In re Poole, 151.**

LACHES

Constitutionality of statute—runs from enforcement—A counterclaim challenging the constitutionality of an Orange County anti-discrimination ordinance was not barred by laches, even though it was filed five and one-half years after the ordinance was adopted and eight and one-half years after the enabling legislation and Orange County had expended large amounts of money, time, and administrative effort in the creation and enforcement of the legislation and the ordinance, because this suit and a companion case were the first two suits brought pursuant to the ordinance and BCBSNC moved expeditiously once the suits were filed. **Williams v. Blue Cross Blue Shield of N.C., 170.**

MEDICAL MALPRACTICE

Expert testimony excluded—summary judgment—Summary judgment was properly granted in a medical negligence and medical malpractice action where plaintiff's expert testimony was excluded. **Summey v. Barker, 492.**

NEGLIGENCE

Diverted attention—requested instruction improper—A decision by the Court of Appeals finding error in the trial of an action to recover for injuries sustained by plaintiff when he tripped on an electrical cord at a buffet table is reversed for the reasons stated in the dissenting opinion in the Court of Appeals that (1) the trial court's refusal to give plaintiff's requested instruction on diverted attention was not error because it was not a proper statement of the law and was not supported by the evidence, and (2) the results of a psychological test administered to plaintiff by a psychologist who did not testify were properly admitted into evidence under Rule of Evidence (803(6). **Barringer v. Mid Pines Dev. Grp., L.L.C., 451.**

Last clear chance—hunter struck while standing in roadway—The decision of the Court of Appeals that the trial court erred by instructing on last clear chance in an action to recover for injuries sustained by plaintiff when he was struck by defendant's vehicle while standing in the roadway in an attempt to protect hunting dogs crossing the roadway is reversed for the reasons stated in the dissenting opinion that plaintiff had a reasonable expectation that defendant, in maintaining a proper lookout, would see him, slow down and prepare to stop; that plaintiff was in a helpless peril from which he could not escape by the exer-

NEGLIGENCE—Continued

cise of reasonable care immediately prior to being struck by defendant's vehicle; and that the evidence supports a reasonable inference that defendant had the time and means to avoid the accident by the exercise of reasonable care after he discovered, or should have discovered, plaintiff's helpless peril. **Overton v. Purvis, 497.**

PARENT AND CHILD

Juvenile neglect—obstruction of investigation—The trial court's order based upon a petition filed by the Department of Social Services (DSS) under N.C.G.S. § 7B-303 charging the parents with interference with or obstruction of an investigation is reversed because the investigative mandate of N.C.G.S. § 7B-302 regarding the abuse, neglect, or dependency of a juvenile was not properly invoked by a single report of an anonymous caller of an unsupervised, naked two-year-old child in the driveway of a house. **In re Stumbo, 279.**

PHYSICAL THERAPY

Suspension of license—hugs, kisses, sex with patient—inadequate evidence and findings—The decision of the Court of Appeals upholding an order of the Board of Physical Therapy Examiners suspending the license of a physical therapist who hugged and kissed a patient and engaged in sexual intercourse with another patient is reversed for the reasons stated in the dissenting opinion that the evidence and the Board's findings were inadequate to support the Board's conclusions that the therapist's conduct amounted to incompetence in violation of N.C.G.S. § 90-270.36(9). **Sibley v. N.C. Bd. of Therapy Exam'rs, 42.**

PUBLIC OFFICERS AND EMPLOYEES

Health care technician—termination for unacceptable personal conduct—insufficient evidence—A decision of the Court of Appeals upholding the termination of a health care technician at a State facility for unacceptable personal conduct is reversed for the reason stated in the dissenting opinion that the evidence supported the findings and conclusion of the Administrative Law Judge that the technician should be given only a written warning for unsatisfactory performance. **Pittman v. N.C. Dep't of Health & Human Servs., 241.**

REFERENCES AND REFEREES

Compulsory reference—abuse of discretion standard—The trial court did not abuse its discretion in an adverse possession case by ordering a compulsory reference under N.C.G.S. § 1A-1, Rule 53(a)(2)(c). **Dockery v. Hocutt, 210.**

Compulsory reference—demand for jury trial—order of confirmation—The trial court did not err in an adverse possession case by denying plaintiff's demand for a jury trial following a compulsory reference because plaintiff failed to adduce evidence before the referee demonstrating known and visible lines and boundaries on the ground and the existence of these boundaries for the requisite twenty-year period. **Dockery v. Hocutt, 210.**

ROBBERY

Dangerous weapon—motion to dismiss—The trial court did not err by denying defendant's motion to dismiss the charges of robbery with a dangerous weapon and first-degree murder. **State v. Haselden, 1.**

Ownership of stolen property—no variance between evidence and indictment—In a felony murder prosecution in which armed robbery was the underlying felony, there was no variance between the evidence and the robbery indictment as to ownership of the stolen property, even though the indictment alleged that defendant took a briefcase and money "from the presence, person place of business and residence of" the murder victim and the State elicited evidence of property stolen from the victim's son, where the jury could infer that the stolen briefcase belonged to the victim from testimony by the victim's wife that the briefcase contained "their personal papers," including a marriage certificate and a marriage license. **State v. Jones, 409.**

SENTENCING

Aggravating factor—abused position of trust or confidence—consolidation of convictions for multiple offenses—The trial court did not err by aggravating defendant's sentence in two judgments that consolidated convictions for multiple offenses of statutory sexual offense of a person 13, 14, or 15, indecent liberties, and sexual offense by a person in a parental role based on defendant's abuse of his position of trust or confidence, because: (1) the trial judge is required by the Structured Sentencing Act to enter judgment on a sentence for the most serious offense in a consolidated judgment, and aggravating factors applied to the sentence for a consolidated judgment will apply only to the most serious offense in that judgment; (2) statutory sexual offense of a person aged 13, 14 or 15 is the most serious offense in each of the judgments; and (3) the aggravating factor of abusing a position of trust or confidence thus did not apply to the crime of sexual offense by a person in a parental role but applied only to the most serious crime of sexual offense of a person aged 13, 14, or 15. N.C.G.S. § 15A-1340.15(b). **State v. Tucker, 633.**

Capital—acting in concert—*Enmund/Tison* instruction—defendant's intent to kill—The trial court did not abuse its discretion in a capital sentencing proceeding by failing to give the jury an *Enmund/Tison* instruction, even though the jury was given an acting in concert instruction, where the court's instruction prevented the jury from concluding that defendant alone or acting with another committed premeditated murder without finding that defendant intended to kill the victim. **State v. Watts, 366.**

Capital—aggravating circumstance—especially heinous, atrocious, or cruel murder—The trial court did not err in a 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. Haselden, 1.**

Capital—aggravating circumstances—especially heinous, atrocious, or cruel murder—The evidence in a capital first-degree murder case supported the jury's finding of the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel where the victim was stabbed sixty times and it took ten minutes for her to die. **State v. Smith, 604.**

SENTENCING—Continued

Capital—aggravating circumstances—especially heinous, atrocious, or cruel murder—The trial court did not err in a case involving two capital first-degree murders by submitting the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murders were especially heinous, atrocious, or cruel, because the victims were subjected to at least an hour and a half of psychological torture by being trapped in the trunk of a car while pleading for their lives. **State v. Walters, 68.**

Capital—aggravating circumstances—felony involving use or threat of violence—The trial court did not err in a double first-degree murder case by submitting 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 because there is no requirement that the conviction for the prior felony precede the occurrence of the capital murder. **State v. Squires, 529.**

Capital—aggravating circumstances—felony involving use or threat of violence to person—right to rebut evidence—The trial court erred during the sentencing phase of a first-degree murder and discharging a firearm into occupied property case by limiting defendant's right to cross-examine the witness whose testimony supported 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, and defendant is entitled to a new capital sentencing proceeding. **State v. Valentine, 512.**

Capital—aggravating circumstances—murder committed in commission of kidnapping—especially heinous, atrocious, or cruel—not double counting—The trial court in a capital sentencing proceeding did not allow double counting of elements and evidence between two statutory aggravating circumstances and thus did not commit plain or harmless error by instructing on the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the murder was committed in commission of a kidnapping and the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the capital felony was especially heinous, atrocious, or cruel, because: (1) evidence exists separate from the kidnapping showing the murder was especially heinous, atrocious, or cruel, including that defendant made the victim take off his clothes, put a ball into the victim's mouth, put electrical tape around the victim's head to secure the ball which cut off the victim's oxygen supply, and defendant stabbed the victim ten to thirty times while the victim was alive; and (2) the trial court instructed the jury not to use the same evidence as a basis for finding more than one aggravating circumstance, and it is presumed that the jury follows the trial court's instructions. **State v. Miller, 583.**

Capital—aggravating circumstances—murder committed in commission of kidnapping—pecuniary gain—not double counting—The trial court in a capital sentencing proceeding did not allow double counting of elements and evidence between two statutory aggravating circumstances and thus did not commit plain or harmless error by instructing on the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the murder was committed in commission of a kidnapping and the N.C.G.S. § 15A-2000(e)(6) aggravating circumstance that the murder was committed for pecuniary gain, because: (1) the circumstance of committing the murder while in commission of a kidnapping directs the jury's attention to the factual circumstances of defendant's crimes while the circumstance of committing the murder for pecuniary gain requires the jury to consider not defendant's

SENTENCING—Continued

actions but his motive for killing the victim; and (2) both circumstances were supported by sufficient, independent evidence apart from that which overlapped. **State v. Miller, 583.**

Capital—aggravating circumstances—murder part of course of conduct— The trial court did not err in a capital sentencing proceeding following defendant's conviction of one of two first-degree murders solely on the basis of the felony murder rule by submitting the N.C.G.S. § 15A-2000(e)(11) aggravating circumstance that the murder was part of a course of conduct including crimes of violence against others based on defendant's murder of a second victim where the evidence supported a finding of felony murder based on the attempted sale of cocaine. **State v. Squires, 529.**

Capital—aggravating circumstances—pecuniary gain—The trial court committed plain error in a double first-degree murder case by its instruction to the jury on the pecuniary gain aggravating circumstance under N.C.G.S. § 15A-2000(e)(6) and defendant is entitled to a new capital sentencing proceeding because the court's instruction improperly directed the jury to find the pecuniary gain aggravating circumstance based on its determination that defendant committed armed robbery. **State v. Jones, 409.**

Capital—aggravating circumstances—robbery with a dangerous weapon—The trial court did not err in a first-degree murder sentencing proceeding by submitting robbery with a dangerous weapon as an aggravating circumstance under N.C.G.S. § 15A-2000(e)(5). **State v. Haselden, 1.**

Capital—death penalty—proportionate—Sentences of death imposed upon defendant for two first-degree murders were not disproportionate, because: (1) defendant was convicted of both counts of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule with the two underlying felonies of kidnapping and robbery with a firearm; (2) the jury found the existence of four aggravating circumstances; and (3) the two murder victims and a surviving victim all endured an extended period of terror. **State v. Walters, 68.**

Capital—death penalty—proportionate—A death sentence was proportionate where defendant was convicted of first-degree murder based on premeditation and deliberation, defendant was found guilty of two counts of murder, defendant had been convicted of a prior violent felony, the jury found the course of conduct aggravating circumstance, and the jury expressly refused to find the statutory mitigating circumstances of mental or emotional disturbance or age. **State v. Carter, 345.**

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 and another stabbed the victim in her own home during a robbery. **State v. Watts, 366.**

Capital—death penalty—proportionate—The trial court did not err in a first-degree murder case by sentencing defendant to the death penalty for the murder of a small child. **State v. Brown, 382.**

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) defendant was found guilty on the basis of premeditation and deliberation; (2) the

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victim was murdered in her own home, a factor which shocks the conscience; and (3) the jury found the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel. **State v. Smith, 604.**

Capital—death penalty—proportionate—The trial court did not err in a first-degree murder trial by sentencing defendant to the death penalty, because: (1) defendant was found guilty on the basis of premeditation and deliberation and under the felony murder rule; (2) the jury found three aggravating circumstances under N.C.G.S. § 15A-2000(e)(5) that the murder was committed in commission of a kidnapping, under N.C.G.S. § 15A-2000(e)(9) that the murder was especially heinous, atrocious, or cruel, and under N.C.G.S. § 15A-2000(e)(6) that the murder was committed for pecuniary gain; and (3) defendant presented no evidence showing that he exhibited concern for the victim after stabbing the victim numerous times. **State v. Miller, 583.**

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 took the victim to an insolated spot in the woods, made the victim get on her knees while she pled for her life, and shot the victim and thereafter returned to shoot the victim again. **State v. Haselden, 1.**

Capital—death penalty—proportionate—The trial court did not err in a double first-degree murder case by sentencing defendant to the death penalty for one of the murders. **State v. Squires, 529.**

Capital—mitigating circumstances—accomplice or accessory—minor participation—The trial court did not err in a capital sentencing proceeding by failing to submit the N.C.G.S. § 15A-2000(f)(4) mitigator that defendant was an accomplice in or accessory to the capital felony committed by another person and that his participation was relatively minor. **State v. Watts, 366.**

Capital—mitigating circumstances—instructions—There is no need for the trial court to specifically state the distinction between statutory and nonstatutory mitigating circumstances with respect to value, and the trial court does not need to instruct the jury on how to weigh statutory mitigating circumstances versus nonstatutory mitigating circumstances when all mitigating circumstances are weighed against all aggravating circumstances. **State v. Walters, 68.**

Capital—nonstatutory mitigating circumstance—defendant's prison sentence for another crime—The trial court did not err in a double first-degree murder case by failing to submit the nonstatutory mitigating circumstance that defendant had been sentenced to 105 years' imprisonment in the state of Georgia for his convictions of crimes that he committed there. **State v. Squires, 529.**

Capital—nonstatutory mitigating circumstances—kicked drug habit—did not intend injury or harm to victim—The trial court did not err in a double first-degree murder case by failing to peremptorily instruct the jury on two nonstatutory mitigating circumstances including that defendant successfully kicked his drug habit and that defendant did not intend any injury or harm to the victim toddler. **State v. Brown, 382.**

Capital—prior inconsistent statement about another crime—extrinsic evidence excluded—The trial court did not err in a capital sentencing hearing

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by refusing to admit a signed police report about another crime as extrinsic evidence of a witness's prior inconsistent statement. The point in contention was a collateral matter only tenuously relevant, and the court exercised its discretion properly to prevent this sentencing proceeding from becoming a second trial for the prior crime. **State v. Carter, 345.**

Capital—prior life sentence excluded—There was no prejudicial error in a capital sentencing proceeding in the court's granting of the State's motion in limine to exclude defendant's life sentence in another case where the clerk of court testified about the earlier sentence without objection. Moreover, the sentence imposed for the prior murder was irrelevant to the sentencing recommendation in this case. **State v. Carter, 345.**

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